Neutral Citation Number: [2021] EWCA Civ 1102

Case No: A3/2020/1648

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN WALES
The Honourable Mr Justice Marcus Smith
CF095/2019/CA

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/07/2021

Before :

LORD JUSTICE LEWISON
LORD JUSTICE MOYLAN
and
LORD JUSTICE COULSON

- -

Between :

J (by his litigation friend THE OFFICIAL SOLICITOR TO THE SENIOR COURTS)	**Respondent**
- and -	
A SOUTH WALES LOCAL AUTHORITY	**Appellant**

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- -

MR PHILIP HAVERS QC & MR JUSTIN LEVINSON (instructed by **Hugh James Solicitors**) for the **Respondent**
MR STEVEN FORD QC & MS HELEN ROBERTS (instructed by **Dolmans Solicitors**) for the **Appellant**

Hearing date : 13th July 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10am on Tuesday 20th July 2021.

Lord Justice Lewison:

Introduction

1. J is a young man who was born in 2000. He has had a troubled childhood. In August 2012, acting by a litigation friend, he began proceedings against the local authority. His central allegation was that, in breach of statutory duty and a common law duty of care, the local authority had failed to remove J from the care of his mother in the first month of his life, and place him for adoption. Even before proceedings began, the local authority admitted liability; and also admitted that, but for the breach of duty, J would have been removed from the care of his mother and placed for adoption in the first month of his life. That admission was maintained in the local authority's pleaded Defence, served in December 2012.

2. But on 9 July 2019 the local authority applied to the court for permission to withdraw that admission. HHJ Howells, sitting in the county court at Cardiff, granted that application. Her decision, however, was reversed on appeal by Marcus Smith J. His judgment is at [2020] EWHC 2362 (Admin), [2021] 1 FLR 1203.

Procedural background

3. The local authority had been concerned about the behaviour of J's mother, even before his birth. She was referred for an assessment of her parenting in August 2001. The Particulars of Claim set out a number of steps that the local authority took. In the summer of 2004, J came to the attention of the local authority; and a strategy meeting was held. Over the next year he exhibited behavioural problems. In March 2006 an initial child protection case conference was held; but J was not placed on the child protection register. In May 2006 the local authority initiated care proceedings; which culminated in the making of a care order on 22 November 2007. The making of that order necessarily entailed a court finding that J was suffering, or was likely to suffer, significant harm: Children Act 1989 section 31 (2). One effect of the care order is that under section 33 (3) (a) of the Children Act 1989 the local authority had parental responsibility for J.

4. The current claim was intimated in the spring of 2012. On 5 April 2012 the local authority's solicitors wrote to say that liability was admitted; but no admissions were made as to loss and damage. The admission was repeated in the following month when they wrote that:

> "… 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 breach of duty [J] would have been removed in the first month of life and placed for adoption."

5. Paragraphs 2 and 3 of the Particulars of Claim pleaded both statutory duties and common law duties of care. Paragraph 4 of the Defence admitted those duties. Paragraphs 4 to 52 pleaded the facts relied on and the detailed allegations of breach of

duty. The admissions were pleaded in paragraphs 53 and 54 of the Particulars of Claim. Paragraph 5 (4) of the Defence pleaded 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].
>
> (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 admissions are made."

6. Paragraphs 55 to 57 of the Particulars of Claim pleaded the allegations of injury and loss. Paragraph 6 of the Defence responded:

> "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 [a judge] 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 r 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 in accordance with the [local authority's] continuing duty to [J] pursuant to s 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 [the judge] in the family proceedings [a reference is given] pursuant to s 8(1) of the Children Act 1989.

(i) Further, or alternatively, the claim should be stayed until [J] reaches the age of 16 ([in] 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."

7. In the light of the local authority's approach to the progress of the case, stays were imposed on 14 March 2013, 25 September 2013, 11 March 2014, 26 August 2016, and 3 January 2017. A further stay was imposed on 14 August 2018 pending the decision in a case called *N v Poole BC*. I will need to return to that case later.

8. The Supreme Court gave judgment in that case on 6 June 2019. The local authority asserts that it was that decision that prompted it to ask permission to withdraw its admissions.

The rules about admissions

9. Admissions are dealt with by Part 14 of the CPR. CPR Part 14.1 deals with admissions made after the start of proceedings; and CPR Part 14.1A deals with admissions made before an action is begun. CPR Parts 14.1 (5) and 14.1A (3) provide for the withdrawal of admissions with the permission of the court.

10. These rules are supplemented by paragraph 7 of PD 14 which provides:

> "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—
>
> (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."

The importance of admissions

11. Professor Zuckerman sets out clearly the importance of admissions. In Civil Procedure (4th ed para 6.10) he writes:

> "It is important to be clear at the outset about the purpose of CPR 14 admissions. The rule is designed to enable the party in receipt of an admission to proceed safe in the belief that the litigation is effectively over in respect of the subject matter of the admission, thereby relieving them of the need to invest any further effort and expense in preparation for a contest on the admitted case. Reasonable confidence that an admission has brought an end to the contest over the admitted case is therefore essential. If a CPR 14 admission did not provide such security, the recipient of an admission would be unable to confidently rely on it, would have to continue their preparations to prove their case in respect of it and no savings would be achieved; thereby defeating the purpose of the admission procedure."

12. On the question of withdrawing admissions he writes in the next paragraph:

> "The rationale of the admission rule does not, however, require the admission to be irrevocable for all time because, like all obligations, the admission must be capable of being amended or revoked in certain circumstances. Accordingly, as already noted, CPR 14 confers on the court a jurisdiction to permit withdrawal of an admission. But the jurisdiction to permit withdrawal must not undermine the security that claimants may obtain from admissions. Otherwise admissions would be incapable of inspiring sufficient confidence to deliver the advantage that the admission rule is intended to produce. In sum, the purpose of the admission procedure is to provide closure subject to the availability of withdrawal on strictly limited grounds."

13. Nugee J said much the same thing in *Lufthansa Technik AG v Astronics Advanced Electronic Systems* [2020] EWHC 83 (Pat), [2020] FSR 18:

> "[22] … I agree with Mr Cuddigan that the purpose of what the CPR says about admissions is that, if an admission is made, the opponent can proceed on the basis that that will not be something in issue. Whether it is an admission of fact or an admission of law, it will not be necessary to devote any resources or energy or thoughts to that part of a case, because it is not one of the matters that will be in issue. That, of course, is subject to the powers of the court to allow the admission to be withdrawn in rule 14.1(5), and everybody who faces an admission knows that there is always a possibility that an admission may be withdrawn.
>
> [23] However, I agree with Mr Cuddigan that litigation should be capable of being conducted on the basis that admissions mean what they say and that, if a party whose case has been admitted by the other side is facing an application to withdraw the admission, it is relevant to consider whether they will now be put in a worse position—not in a worse position than they would

> have been had the admission not been made in the first place, but in a worse position than they are with the admission."

14. There is one potentially significant procedural difference between a pre-action admission and one which is made in the pleadings. CPR 14.1A (4) provides:

> "(4) After commencement of proceedings–
>
> (a) any party may apply for judgment on the pre-action admission; and
>
> (b) the party who made the pre-action admission may apply to withdraw it."

15. That rule envisages an application to the court for the entry of judgment and (perhaps) a simultaneous application to withdraw the admission. The position in relation to admissions made in the pleadings is different. CPR 14.6 provides for an admission of liability where the only claim is for an unspecified amount of money (e.g. for unliquidated damages). CPR 14.1 (3) cross-refers to that rule. CPR 14.1 (4) then provides:

> "(4) Where the defendant makes an admission as mentioned in paragraph (3), the claimant has a right to enter judgment except where–
>
> (a) the defendant is a child or protected party; or
>
> (b) the claimant is a child or protected party and the admission is made under rule 14.5 or 14.7."

16. Accordingly, whereas a claimant has the ability to *apply* to the court for judgment on a pre-action admission of liability, he has a *right* to enter judgment on an admission of liability made in the Defence. Entry of judgment in such circumstances is a purely administrative act, requiring no judicial input. It follows, in my judgment, that in considering whether an admission may be withdrawn, greater weight must be given to an admission made in a formal pleading than one made before an action has begun. That is not quite this case, however, because although the local authority admitted the breach of duty, and that but for the breach J would have been placed for adoption, paragraph 6 (j) of the Defence made no admission about causation of loss. Without an admission of causation of loss, the cause of action is not complete.

17. Nevertheless, given the admission of (a) the existence of the duty (b) breach of duty and (c) the consequence of breach (i.e. that J would have been placed for adoption), J would have been in a strong position to have applied for summary judgment for damages to be assessed. Once summary judgment had been entered, J would also have been in a position to seek an interim payment on account of damages.

N v Poole BC

18. In *X v Bedfordshire CC* [1995] 2 AC 633 the House of Lords held that no cause of action arose out of allegations that a local authority had carelessly failed to exercise its powers under the Children Act 1989. The statute did not create such a cause of action;

and the common law would not do so either. That case therefore established that decisions by local authorities whether or not to take a child into care with all the difficult aspects that involves and all the disruption which may come about were not ones which the courts would review by way of a claim for damages in negligence. *X v Bedfordshire* was distinguished in *Barrett v Enfield LBC* [2001] 2 AC 550. The critical ground of distinction was that whereas in *X* the children had not been taken into care, in *Barrett* they had been. The decision of this court in *D v East Berkshire Community Health NHS Trust* [2004] QB 558 threw doubt on that approach. Having referred extensively to Strasbourg jurisprudence under the ECHR the court said at [84]:

> "… it will no longer be legitimate to rule that, as a matter of law, no common law duty of care is owed to a child in relation to the investigation of suspected child abuse and the initiation and pursuit of care proceedings. It is possible that there will be factual situations where it is not fair, just or reasonable to impose a duty of care, but each case will fall to be determined on its individual facts."

19. That, however, was a case in which the local authority *had* removed the children; not a case in which it was alleged that they had negligently *failed* to do so. On appeal to the House of Lords ([2005] 2 AC 373) Lord Nicholls said at [82]:

> "Local authorities may owe common law duties to children in the exercise of their child protection duties."

20. Subsequent cases at first instance took that decision to mean that there was, as a matter of law, a common law duty of care placed upon local authorities in the exercise of their responsibilities under the Children Act 1989, whether or not children had been removed. In *S v Camden LBC* [2009] EWHC 1786 (QB), [2010] 1 FLR 100, for example, Swift J said at [6]:

> "Since the decision of the Court of Appeal in [*D v East Berkshire NHS Trust*], it has been well established that a local authority which carries out investigations into suspected child abuse owes a duty of care to a child who is potentially at risk. In this case, it is accepted that the defendant owed a duty of care to the claimant, which included a duty to take reasonable steps to avoid or prevent her from suffering personal injury."

21. *N v Poole BC* [2019] UKSC 25, [2020] AC 780 was a claim by two children against a local authority. One of the children was a child in need within section 17 of the Children Act 1989. In exercise of its powers as housing authority, the local authority placed them in property owned by a third party. They alleged that they had been subjected to persistent anti-social behaviour. They brought proceedings against the local authority for damages in negligence, alleging that they had suffered physical and psychological damage as a result of the breaches of the local authority's common law duty of care to protect them from harassment and abuse by the neighbouring family. Although their claim was not one of breach of statutory duty, they asserted that a common law duty of care derived from the authority's duty under section 17 of the 1989 Act to safeguard and promote the welfare of children within its area who were in need and its duty under section 47 to inquire as to whether action should be taken if it had reasonable cause to

suspect that a child was suffering, or likely to suffer, significant harm. They alleged that if it had carried out its duties under the 1989 Act competently the authority would either have moved the family as a whole or moved the claimants out of the home.

22. The Supreme Court held that no duty arose out of the facts alleged in the Particulars of Claim. At [28] Lord Reed drew:

> "a distinction between causing harm (making things worse) and failing to confer a benefit (not making things better), rather than the more traditional distinction between acts and omissions, partly because the former language better conveys the rationale of the distinction drawn in the authorities, and partly because the distinction between acts and omissions seems to be found difficult to apply."

23. But he acknowledged that a duty arising out of a failure to confer a benefit might arise where a public authority had assumed responsibility to protect the claimant from harm. At [36] and following he referred to the decision of the House of Lords in *X v Bedfordshire CC* in which it was held that a local authority owed no duty of care as a result of failing to exercise statutory powers under the Children Act 1989 to take children into care. At [40] he said that in *Bedfordshire*:

> "Lord Browne-Wilkinson convincingly rejected the contention that the statutory provisions created a cause of action for breach of statutory duty."

24. At [41] he noted that Lord Browne-Wilkinson had also rejected the imposition of a common law duty of care. *Bedfordshire* was distinguished in *Barrett v Enfield LBC* [2001] 2 AC 550, where the allegations related to a period *after* a child had been taken into care. At [52] he turned to consider *D v East Berkshire*. At [56] he said:

> "The Court of Appeal's reasoning effectively knocked away the public policy objection to liability. It did not, however, undermine some other aspects of the reasoning in *X (Minors) v Bedfordshire*. It remained the position that, where a decision under challenge was taken in the exercise of a statutory discretion, it was necessary to establish that the decision fell outside the ambit of the discretion and was not, therefore, authorised by Parliament. It also remained necessary, in circumstances where a duty of care depended on an assumption of responsibility, to establish that there had been such an assumption of responsibility, and that the duty contended for fell within its scope."

25. Having surveyed further authority, Lord Reed concluded at [65]:

> "It follows (1) that public authorities may owe a duty of care in circumstances where the principles applicable to private individuals would impose such a duty, unless such a duty would be inconsistent with, and is therefore excluded by, the legislation from which their powers or duties are derived; (2) that public

> authorities do not owe a duty of care at common law merely because they have statutory powers or duties, even if, by exercising their statutory functions, they could prevent a person from suffering harm; and (3) that public authorities can come under a common law duty to protect from harm in circumstances where the principles applicable to private individuals or bodies would impose such a duty, as for example where the authority has created the source of danger or has assumed a responsibility to protect the claimant from harm, unless the imposition of such a duty would be inconsistent with the relevant legislation."

26. He then turned to consider the question of an assumption of responsibility. He referred to earlier cases (*Rowley v Secretary of State for Work and Pensions* [2007] 1 WLR 2861 and *X v Hounslow LBC* [2009] PTSR 1158) in which this court had held that a public authority would not be held to have assumed a common law duty merely by doing what the statute requires or what it has power to do under a statute. At [72] Lord Reed commented:

> "The correctness of these decisions is not in question, but the dicta should not be understood as meaning that an assumption of responsibility can never arise out of the performance of statutory functions."

27. At [81] he said that:

> "… the council's investigating and monitoring the claimants' position did not involve the provision of a service to them on which they or their mother could be expected to rely. It may have been reasonably foreseeable that their mother would be anxious that the council should act so as to protect the family from their neighbours, in particular by rehousing them, but anxiety does not amount to reliance. Nor could it be said that the claimants and their mother had entrusted their safety to the council, or that the council had accepted that responsibility. Nor had the council taken the claimants into its care, and thereby assumed responsibility for their welfare. The position is not, therefore, the same as in *Barrett v Enfield* [2001] 2 AC 550. In short, the nature of the statutory functions relied on in the particulars of claim did not in itself entail that the council assumed or undertook a responsibility towards the claimants to perform those functions with reasonable care."

28. He continued at [82]:

> "It is of course possible, even where no such assumption can be inferred from the nature of the function itself, that it can nevertheless be inferred from the manner in which the public authority has behaved towards the claimant in a particular case. Since such an inference depends on the facts of the individual case, there may well be cases in which the existence or absence of an assumption of responsibility cannot be determined on a

> strike-out application. Nevertheless, the particulars of claim must provide some basis for the leading of evidence at trial from which an assumption of responsibility could be inferred."

29. Importantly, he pointed out at [90] that the harm which the claimants were alleged to have suffered was harm caused by neighbours; rather than a lack of reasonable parental care.

HH Judge Howells' judgment

30. The judge began by noting that before *N v Poole* "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". *N v Poole* had reframed and shifted the legal ground. She then referred to paragraph 7.2 of PD 14 and went through the listed considerations one by one.

31. In relation to paragraph (a) she regarded the significant change in the legal framework as weighing heavily in her judgment. In relation to paragraph (b) she regarded the parties' conduct as neutral. She pointed out that a claimant is always prejudiced by the withdrawal of an admission but that in itself is not sufficient. She moved on to consider what evidence J might wish to adduce; and said that she had taken into account the effect of delay on the evidence of potential witnesses whom J might wish to call. But she balanced that against the existence of the records of the local authority. She was assured by leading counsel for the authority, on instruction, that there was no indication of any difficulty with records. She also noted that the admission was itself made some six or seven years after the care proceedings. She concluded on this point:

> "Therefore while it is said that the passage of time will inevitably have had some effect upon the cogency of evidence, I note that the passage of time in any event had occurred by the time that the admission was made. Of course time will impact upon witness evidence, but that goes into the balance overall."

32. She then moved on to consider the prejudice to the local authority if the application were refused. The principal point under this head was that J might have a judgment to which he was not entitled in law. J was not shut out from pursing a viable claim in the future; he would simply have to prove it. That, she said was a "strong and pertinent point". She then considered the prospects of success and, without conducting a mini-trial, thought that the local authority had a strong argument on the merits.

33. The final matter for consideration was the administration of justice. The judge recognised that there were real reasons why admissions should be held to; and that parties were entitled to finality. But she said that finality, clarity and certainty did not trump all matters. She said that if she refused the application the local authority would be left with a judgment "in a case which is untenable on the law as it is now understood". That, she concluded, would have a real risk of undermining public confidence in the system of administration of justice.

The admissions in this case

34. I confess that I do not entirely understand why *N v Poole* is said to have caused a sea change in the understanding of what (if any) duties a local authority owes a particular child under the Children Act 1989 or at common law, in circumstances where that child has *not* been taken into care. Put another way, it is not obvious (to me at least) why the local authority in the present case felt obliged to admit the existence of the alleged duty. As Lambert J put it in *DFX v Coventry City Council* [2021] EWHC 1382 (QB) at [169] Lord Reed "applied the orthodox common law approach and the established principles of law". The admissions were not casually made. They were made in the form of two solicitors' letters and in a Defence settled by counsel.

35. Be that as it may, as Marcus Smith J pointed out, even if *N v Poole* was the trigger for the withdrawal of the admission of the existence of a duty, the withdrawal went far beyond that. Not only did the local authority apply to withdraw the legal admission, it also applied to withdraw the admission that if, contrary to its case, there was a duty, it had breached that duty and that the consequence of the breach was that J was not placed for adoption when he should have been. The local authority has still not pleaded to the facts alleged in the Particulars of Claim.

36. I cannot see that HHJ Howells ever considered the extent of the admissions sought to be withdrawn. Even if *N v Poole* had changed the legal landscape, it had not changed the facts. It is, with respect, not easy to see why the judge was satisfied with an assurance that there was no indication of any difficulty with records, given that an investigation of the records was made unnecessary by the admission. There was no evidence before the judge of what investigations were made in order to enable counsel to give the judge that assurance. In fact, as Mr Ford QC clarified in the course of the hearing before us, his assurance was intended only to cover the records of children's social services. Whether those files related to J alone or to J's mother as well we do not know. There are potentially other records, such as those relating to the care proceedings; and, since J's mother was affected by an adult placement, adult social services' records too. Mr Havers QC told us that the records of the care proceedings are incomplete. In particular there is a judgment of the court (which is likely to have contained the judge's crucial findings of fact leading to the making of the care order) which is missing. Nor, we were told, was there any witness statement, CAFCASS report or the like. But even on the assumption that the local authority's records were intact, the judge did not take into account that the potential scale of the factual dispute had itself undergone a sea change. HHJ Howells expressed the view that the eventual trial would turn on the records. But the *DFX* case shows, not only that records may be voluminous, but also that oral evidence on the facts and expert evidence on the standard of care will be required. None of that would be necessary if the admissions were maintained.

37. In addition, I do not detect that HHJ Howells ever considered the potential conflict of interest that the local authority faced. Marcus Smith J described it well. Referring to paragraph 6 of the Defence he said:

> "[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, with an obligation to act in J's best interests.
>
> [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."

38. This was, in my judgment, highly relevant to the question of conduct. One of the reasons why the claim had not proceeded to a conclusion was because of the local authority's view (in its capacity as the body with parental responsibility for J under section 33 (3) (a) of the Children Act 1989) that it was not in J's best interests to proceed.

39. There is, therefore, in my judgment, considerable force in Mr Havers' submission on behalf of J that had the parties been proceeding in a more adversarial manner, J would have been obliged to safeguard his position by entering judgment for damages to be assessed and driving the litigation forward to a conclusion. But in reliance on the local authority's quasi-parental position, he did not do so. In my judgment, therefore, HHJ Howells' description of conduct as "neutral" failed to take into account the special position of the local authority exercising parental responsibility for J. The withdrawal of the admission has undoubtedly put J in a worse position than he was with the admission.

40. Coupled with this point is the point that HHJ Howells does not appear to have factored in, namely that the admission had stood for over seven years by the time that it came to be withdrawn. For the whole of that time, J's perception would have been that there was no substantial impediment to his eventual receipt of compensatory damages. As a result of the admission having been withdrawn, that expectation will have been completely falsified.

41. A further flaw in the judge's judgment was her appreciation that J would be left with a judgment to which he was not entitled; and that the local authority had a strong case on

the merits. *N v Poole* expressly recognised that a duty might arise out of an assumption of responsibility. The flaw in this reasoning is that the judge appears to have assumed that no duty could arise. But J had not pleaded the facts alleged to give rise to an assumption of responsibility. That is hardly surprising: since both the duty and the breach of duty were admitted before the proceedings began, there was no need to do so.

42. In short, in my judgment, although HHJ Howells conscientiously went through each of the sub-paragraphs in paragraph 7.2 of the Practice Direction, she did not stand back and consider "all the circumstances of the case".

43. Accordingly, in my judgment, Marcus Smith J was entitled to conclude that the judge's exercise of her case management discretion was liable to be set aside; and that he was entitled to exercise that discretion afresh. There is no independent criticism of the way in which he exercised his own discretion and, speaking for myself, I would have exercised the discretion in the same way.

Result

44. I would dismiss the appeal.

Lord Justice Moylan:

45. I agree.

Lord Justice Coulson:

46. I agree that, for the reasons given by my Lord, Lord Justice Lewison, this appeal should be dismissed. I would wish to add just one point about paragraph 7.2 of Practice Direction 14.

47. There is no doubt that the checklist at paragraph 7.2 is a useful tool for any judge faced with an application to withdraw admissions. I consider that it worked well in this case: both judges used it fully, and nobody suggested that the checklist omitted anything important. But working through the list does not replace the need for the judge to stand back and consider the application in the round, as paragraph 7.2 expressly requires, "hav[ing] regard to all the circumstances of the case".

48. Here, it seems clear to me that, had such an exercise been done, the following headline points would have been relevant. The only thing in favour of allowing the local authority to withdraw the admissions was the fact that *N v Poole* had developed the law in this area and justified at least a reappraisal of its position (although the Supreme Court had stressed that the outcome of claims like these is always fact-sensitive).

49. On the other hand, there were a number of factors in favour of refusing permission to withdraw, including:

a) the wide-ranging admissions as to duty, breach and consequence of breach, made carefully and deliberately by the local authority in their pleaded Defence as long ago as 2012;

b) the clear and obvious prejudice to J if the local authority was allowed to resile from those admissions so late in the day, giving rise to the need to obtain evidence about

events going back over 20 years and completely changing the nature of this litigation; and

c) the fact that, as a result of the non-adversarial approach evidenced by the long-standing admissions, J and his advisors repeatedly agreed that the proceedings should be stayed, and had not sought judgment or any interim payments, and had not even begun preparations for a trial. In more obviously adversarial litigation, some or all of those steps would probably have been taken.

50. Having been through the checklist, HHJ Howells did not undertake this overall consideration of the circumstances of the case. In my view, had she done so, she would have concluded that, in this particular case and on these specific facts, the local authority had not established that it was fair, just and appropriate to allow it to resile from its admissions.