

Case No: D94YJ101

IN THE COUNTY COURT AT MANCHESTER

Manchester Civil Justice Centre

1 Bridge Street West

Manchester

M60 9DJ

Date: 14/01/2021

**Before**:

DISTRICT JUDGE OBODAI

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**Between:**

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|  | **Mr Mark Walker (1)**  **Mrs Deborah Walker (2)** | Claimants |
|  | **- and -** |  |
|  | **TUI UK Limited**  **-and-**  **Dr Timothy Rupert Leigh** | Defendant  Proposed  Additional Party |
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**Mr Sebastian Clegg** (instructed by **Kennedys**) for the **Defendant**

**Mr Colm Nugent** (instructed by **Reynolds Porter Chamberlain LLP**) for the **Proposed Additional Party**

Hearing dates: 26th and 27th October 2020

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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.

**Covid-19 Protocol:  This judgment was handed down by the judge remotely by circulation to the parties’ representatives by email.  The date and time for hand-down is deemed to be 12.30pm on Thursday 14th January 2021**

**Procedural Background**

1. The Defendant made an application dated 15th April 2019 (“the application”) to join Dr Leigh, the single joint expert (“SJE”) in two holiday sickness claims into proceedings as Defendant for the purposes of costs pursuant to CPR 46.2.
2. The Claimants, Mr and Mrs Walker, issued two sets of proceedings claiming damages for gastric illness which they said they suffered on a package holiday. Both sets of proceedings were issued in this Court on 20th June 2016, Mr Walker’s under case number D94YJ101 and Mrs Walker’s under case number D94YJ111. Defences were filed which put the Claimants to proof in relation to food consumed by them during their holiday. The Defendant did not admit that all the food or drink was provided by the hotel. The Claimants were also put to proof to show that food and drink provided pursuant to the holiday contract was not of satisfactory quality and that any contamination caused the Claimants’ alleged illness.
3. The Claimants had initially relied on and annexed to their respective particulars of claim medical reports of Dr Andrew Thornber, both dated 12th October 2016. His opinion and prognosis was that on the balance of probabilities, the Claimants’ gastroenteritis was as a consequence of food poisoning and a direct consequence of inadequate hygiene standards, food preparation and handling procedures at the hotel in which they had stayed in Turkey.
4. On 7th September 2018 District Judge Hassall made a directions order by consent which included a direction that the Claimants had permission to rely on the reports of Dr Thornber and the parties had permission to rely upon the joint medical evidence from a single joint consultant gastroenterologist (“SJE”) whose identity had to be agreed by 28th September 2018 and the report served by 26th October 2018. Permission was also given for questions to be put to the SJE by 9th November 2018 and answered by 30th November 2018.
5. It is common ground that the Claimants proposed Dr Timothy Rupert Leigh as a SJE and that the Defendant accepted him as such. The single joint letter of instruction dated 16th October 2018 was addressed to Dr Leigh at Med Chambers Limited in Leicester. It is perhaps somewhat surprising that the Defendant agreed to Dr Leigh being the SJE given what Ms Southgate, the solicitor at Kennedys who has conduct of this matter on behalf of the Defendant, said at paragraph 7 in her statement dated 18th April 2019 in support of the application. She said:

*“The Claimants proposed Dr Timothy Leigh as a suitable single joint expert in this case. Dr Leigh is a Gastroenterologist, and the Defendant was aware from other cases of alleged holiday sickness that he had prepared numerous reports for Claimants in these matters. Nevertheless, Dr Leigh holds himself out as expert in these matters, and the Court order required agreement of an expert to opine in this case”.*

1. Dr Leigh produced a joint report dated 22nd October 2018, answers to Part 35 questions on 26th November 2018 and further answers to further Part 35 questions dated 28th November 2018. His opinion was that the Claimants’ symptoms were as a result of food and drink consumed at the hotel.
2. The matter came on for trial on 25th February 2019 before me. At the start of that trial Counsel for the Defendant, Mr Boyle, made an application, dated 29th January 2019 (“the January application”), which had been issued, for Dr Leigh to be cross-examined. I am grateful to the parties for having obtained a transcript of the trial. In support of that application Mr Boyle said this:

*“It is a very simple application; the Defendants do not accept [his report] and do not accept his reasoning and made an application to cross-examine him ... and we are in the hands of the court as to whether the court will permit oral cross-examination of – ...”*

1. The January application was not in the hearing bundle but was on the court file. Towards the end of the hearing on day two, I had cause to look for it, for reasons that I will deal with later in this judgment. Part 3 of the January application notice said this:

*“Permission for Dr Leigh to attend a trial on 25th February 2019 in support of his single joint expert report dated 22nd October 2018 and his responses to Part 35 questions dated 28th November 2018”.*

The witness statement in support by Ms Southgate, dated 30th January 2019, set out the position in relation to expert evidence. She said that Dr Thornber, who had previously opined, had been unable to take the matter further because he was on long term sick leave. She then referred to inconsistencies noted in Dr Leigh’s Part 35 responses and the report and said at paragraph 7:

*“The Defendant does not consider that the report or Part 35 responses are adequate and/or likely to assist the court and all the parties in reaching a conclusion in this matter. The Defendant has significant concerns that Dr Leigh’s report and responses do not address the causation issues appropriately”.*

She went on to set out the request for Dr Leigh to attend the trial and give oral evidence in support of his report and Part 35 responses to assist the court in reaching a conclusion in the claim. At paragraph 11, she said that the Defendant would be prejudiced if the case proceeded to trial without the opportunity to cross-examine the SJE, particularly given the fundamental causation issues to be decided by the trial judge.

1. I gave permission at the start of the trial for Dr Leigh to be cross-examined. He was already at court in any event having agreed to attend provided his fees/costs of £4,000 plus VAT were paid. At the date of the hearing of the Defendant’s application in October 2020, I was told by Mr Nugent that those fees have not yet been paid.
2. The matter was listed for a day as a Fast Track trial but the evidence took up most of the day. As a result, I asked for written submissions on the basis that I would hand down a written judgment, which was handed down on 4th April 2019.
3. The evidence given at trial by Dr Leigh during cross examination was that Mr Walker’s gastroenteritis could, on the balance of probabilities, have been caused either by food and drink consumed at the hotel or from having close contact with Mrs Walker, who it was said, was ill first. His claim therefore failed. I also found, having heard Mrs Walker’s oral evidence, that I did not accept that on the balance of probabilities, she fell ill as alleged.
4. However, notwithstanding that, I went on to consider the medical evidence provided by Dr Leigh. I criticised parts his report in my judgment and made other findings which are set out therein.
5. I recall that when I handed down judgment, I was asked to accede to an application made in the face of the court by Mr Boyle, the then Counsel for the Defendant, to join Dr Leigh as a party for the purposes of costs. I declined so to do and said that any such application ought to be made on notice to Dr Leigh to allow him the opportunity to seek legal advice. The Defendant made the application, supported by the witness statement of Ms Southgate. It has taken some time, for reasons which I need not go into, for that application to be heard.
6. Prior to the hearing, I asked the parties to provide a joint list of issues for determination.

**Joint List of Issues**

1. They were set out in a joint document headed, ‘Agreed list of issues as between Counsel for TUI and Dr Leigh’ as follows:

*1.* ***Primary issues for the determination of TUI’s application by notice dated 15.4.19 (‘the TUI’s application’)***

* 1. *Should Dr Leigh be joined into these proceedings pursuant to CPR 46.2?*
  2. *Should an order be made requiring Dr Leigh to pay TUI’s costs of defending the main action from the date upon which he accepted instructions?*
  3. *If not, should Dr Leigh be ordered to pay some lesser part of TUI’s costs and, if so, what part?*
  4. *The assessment of any costs Dr Leigh is ordered to pay to TUI (can this be done by summary assessment or is a detailed/another assessment process required).*

***2. Preliminary issues***

*2.1 In the absence of any application by formal notice, should the claimants be entitled to seek any relief from the court during the process currently before the court, namely the determination of TUI’s application?*

1. *If so, what relief are the claimants entitled to seek?*
2. *If not, do the claimants have any locus at the hearing and, if so, to what extent are they permitted to take part in the hearing?*

*2.2 Should Dr Leigh be able to rely upon the report of Dr Przemiolso, Consultant Gastroenterologist and Hepatologist, dated 20 June 2020 (served with Dr Leigh’s skeleton argument)?*

1. *What is the current status of Dr Przemiolso’s report within these proceedings? Does Dr Leigh require permission from the court to rely upon Dr Przemiolso’s report?*
2. *The report was served with Dr Leigh’s skeleton and there is no formal written application to rely upon it. Are these matters which are relevant to its admission or exclusion?*
3. *In what field is Dr Przemiolso purporting to offer expertise and what are the relevant issues which his expert evidence addresses?*
4. *Is the report compliant with CPR Part 35?*
5. *If Dr Przemiolso’s report is to be admitted by the court, what (if any) consequential directions are required?*

***3. The parameters for determining the matters before the court***

*3.1 Is the procedure adopted by TUI with regard to their application;*

*(a) unfair to Dr Leigh, and/or;*

*(b) contrary to the Overriding Objective and/or;*

*(c) in accordance with the principles and precedents in the relevant authorities, and/or;*

*(d) in contravention of Dr Leigh’s Article 6 rights and,*

*if so, what are the consequences?*

1. *Does the procedure contravene Dr Leigh’s right to a fair hearing?*
2. *Was Dr Leigh given adequate forewarning of TUI’s application in accordance with the principles and precedent in the relevant authorities?* 
   1. *If not, to what extent has it rendered this procedure unfair?*
3. *Should Dr Leigh have been joined into these proceedings before judgment was handed down, and has the fact that Dr Leigh was not so joined rendered this procedure unfair and, if so, what are the consequences?*
4. *Is this procedure rendered unfair by reason of the manner in which Dr Leigh came to be cross-examined at trial and/or his lack of notice of the questions or topics upon which he was to be cross-examined and, if so, what are the consequences?*
5. *Should Dr Leigh have been served with a copy of TUI’s written submissions following the evidence at trial and been given the opportunity to respond including by way of making submissions?* 
   1. *Has the fact that Dr Leigh was not provided with that opportunity rendered this procedure unfair and, if so, what are the consequences?*
6. *Is it relevant to consider upon TUI’s application whether submissions from Dr Leigh may have affected the conclusions the court reached at trial as regards his evidence/expertise?*

*3.3 Can Dr Leigh ask the court to review its adoption of parts of TUI’s written closing submissions and, if so, to what extent?*

***4. The determination of the matters before the court***

*4.1 See paragraphs 1.1 to 1.3 above.*

1. *What is the test to be applied and/or in what circumstances may an expert in a case be ordered to pay costs in the litigation in which she/he is applying her/his expertise?*
2. *To what extent is it helpful or appropriate to consider the court’s jurisdiction to make Wasted Costs Orders against legal advisers/representatives?*
3. *Do the circumstances apply here and/or is the test satisfied with regard to Dr Leigh’s conduct as an expert and, if so, should the court exercise its material discretion to make an order against Dr Leigh and join him to these proceedings for that purpose?*
4. *Ought Dr Leigh to have accepted instructions in this matter, in accordance with the letter of instructions?*
5. *Did Dr Leigh breach his duties to the court and, if so, how and/or to what extent did he breach them?*
6. *Other than the matter in (b) above, are there other matters relevant to the issues in this application, concerning Dr Leigh’s evidence at trial?*
7. *On the basis of the evidence submitted, has TUI demonstrated that Dr Leigh’s relevant conduct has occasioned the expenditure by them of costs which would otherwise not have been incurred and, if so, in what amount?*

*4.2 The determination of any application for relief that the claimant is permitted to make.*

***5. The costs of the process currently before the court***

*5.1 The costs of and occasioned by TUI’s application.*

*5.2 Are there any other matters in respect of which the court should make a discrete costs order and, if so, what are those other matters and what order should the court make?*

1. Mr Clegg told me at the hearing that the list of issues had been prepared on the basis that if either party wanted an issue listed it was listed even if the other party did not agree that it was an issue. For example, the Defendant did not accept that the wasted costs jurisdiction was of any relevance to this application.
2. I made a finding on the first preliminary issue, having heard from Mr Wright, the Claimants’ Counsel, that the Claimants had no locus to take part in the application but he could remain in court as it was a public hearing.
3. The second preliminary issue was whether Dr Leigh ought to be able to rely upon the report of Dr Przemiolso. Mr Nugent said that he was not inviting the court to treat that report as evidence and was not now asking the court to decide whether that report was a report pursuant to CPR Part 35; nor was he seeking to introduce it as expert evidence pursuant to CPR Part 35. He said it was simply a part of his submissions attached to his skeleton argument. It struck me that that submission rendered the report as neither *“fish nor fowl”* and I will deal with in later in this judgment.
4. He went on to submit that the court needed to hear all submissions in relation to all the issues rather than deal with Dr Przemiolso’s report as a preliminary issue.
5. The application to join in Dr Leigh as a party for the purposes of making him liable to pay costs will only succeed if I decide he should pay the Defendant’s costs. If I decide that he should not pay the Defendant’s costs there is no point joining him in. In order therefore to determine whether he should be joined, I must determine the threshold test for joinder.

**The threshold test for joinder**

1. Mr Clegg submitted that the threshold test was that set out in **Centrehigh Ltd v Amen and Others [2013] 4 Costs LO 556 (“Centrehigh”)**. That case involved an application by Claimants to join in the fourth and fifth Defendants for the purpose of seeking a third party costs order against them pursuant to s51 of the Senior Courts Act 1981 and Rule 46.2 of the Civil Procedure Rules. Judgment had been entered in the Claimants’ favour against the third Defendant for £6,549,786 and costs had been ordered to be paid on an indemnity basis. At the point at which this happened the third Defendant had already entered a creditor’s voluntary liquidation. It was ordered to pay £250,000 on account of costs. None of those sums were paid by the third Defendant.
2. The application by the Claimants was made approximately six years after the final order entering judgment against the third Defendant. The Claimants alleged that the fourth and fifth Defendants directed the acts giving rise to the litigation, had funded the litigation, had conducted and controlled the litigation, had acted improperly in the way they had done so and caused or procured assets to be removed improperly from the third Defendant by way of dividends and a sale to a separate company.
3. The Defence of the fourth and fifth Defendants was that the third Defendant had at all material times autonomy and was part of a group of companies and they were all in that group but were separate entities. The Claimants submitted that, in dealing with the application, they wished to cross-examine the eight witnesses who had produced evidence on behalf of the fourth and fifth Defendants.
4. The fourth and fifth Defendants opposed the order for cross-examination and leading Counsel instructed by them reminded the court that cross-examination was most unusual in applications under s51. Morgan J considered several of the authorities which deal with the principles applicable to applications under s51. He referred to those principles, as summarised by Lord Brown at paragraph 25, in **Dymocks Franchise Systems v Todd [2004] 1 WLR 2807** where he said:

*“Although costs orders against non-parties are to be regarded as ‘exceptional’, exceptional in this context means no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense. The ultimate question in any such ‘exceptional’ case is whether in all the circumstances it is just to make the order. It must be recognised that this is inevitably to some extent a fact-specific jurisdiction and that there will often be a number of different considerations in play, some militating in favour of an order, some against”.*

1. Morgan J also referred to the decision of the Court of Appeal in **Symphony Group Plc v Hodgson (1993) Costs LR (Core) 319; [1993] 4 All ER 143 (“Symphony”)** and the judgment of Lord Justice Balcombe who at paragraphs 152 to 153 drew together a number of considerations applicable and in his sixth consideration is cited below in paragraph 36.
2. Mr Clegg also relied on paragraphs 34, 35, 36, 39, 41 and 42 of the decision of Morgan J in **Centrehigh**. I do not intend to repeat all those paragraphs in this judgment but have set out paragraphs 41 and 42 because Morgan J’s conclusions are summarised therein:

*“41. Normally, an applicant for an order under s 51 is not entitled to have a full trial with pleadings, disclosure, cross-examination of witnesses on every matter of fact which is potentially material to the outcome of the s 51 application. Normally, the court attempts to do justice by having regard to the material before it, having regard to the documents which have been made available, and having regard to witness statements which, in some cases, will be in conflict. The court does the best it can in an attempt to be fair to both parties and achieve a just result.*

*42. It must be recognised that an attempt to do justice in that way will often fall short of the very high standards which are conventionally applied where there is a full trial preceded by pre-trial procedures, and involving cross-examination of witnesses. The question can, therefore, be asked, why should not an applicant for a s 51 order have just the same entitlement to full pre-trial and trial procedures as any other applicant to the court for relief? In my judgment, the approach adopted in the cases to which I have referred appear to have taken the line, as a matter of policy, that s 51 applications are to be kept within proper bounds, and the court is to do the best it can without in every case having the full procedures pre-trial and at the trial”.*

1. Mr Clegg submitted, relying on **Centrehigh**, that the test was that the conduct had to be out of the ordinary.
2. He also relied on the case of **Deutsche Bank AG v Sebastian Holdings Inc and another [2016] EWCA Civ 23 (“Deutsch Bank”)**. This was a case where a Claimant Bank succeeded in its claim against the first Defendant company to recover $250,000,000 in the main action and the judge ordered the company to pay the Claimant 85% of its costs on an indemnity basis and made an order for an interim payment of £34,000,000. Payment was not made and the Claimant successfully applied without notice to join the second Defendant as a party to the proceedings for the purposes of costs only on the basis that he was the sole shareholding director of the company at the relevant time. The court found that the second Defendant had controlled and funded the litigation on behalf of the company and an order was made under s 51 that he pay the Claimant £36,000,000 on account of costs of the proceedings against the company.
3. The second Defendant appealed. In dismissing the appeal, the Court of Appeal held that where the court was exercising its discretion under s 51, including where it was considering making an order against a person who was not a party to the main proceedings, the court was not concerned with the application of the rules of evidence which would apply to an independent claim against an unrelated third party consequent upon the outcome of the trial; that, rather, the procedure to be adopted should be summary in nature with the judge making an order based on the evidence given and the facts found at trial, together with his assessment of the behaviour of those involved in the proceedings.
4. When dealing with whether a warning should have been given, the Court of Appeal held that a failure on the part of the applicant for costs to warn a non-party that an application for costs might be made against him was no more than a factor to be taken into account by the court when considering costs, the significance of which would vary from case to case. In **Deutsche Bank** the Court of Appeal held that the Claimant’s failure to give a warning at an earlier stage would have made no difference to the conduct of the proceedings and therefore the Claimant’s failure to give such a warning was of very little weight. Mr Clegg submitted that, in this case, it was quite clear that Dr Leigh should not have been given a warning before giving his evidence.
5. Mr Nugent submitted that Mr Clegg was wrong about the test. He said that the test is set out in the case of **Phillips and others v Symes and others (No 2) [2004] EWHC 2330 (Ch) (“Phillips v Symes”)** because it is the only decision that joins a party in relation to costs arising out of their evidence.
6. In **Phillips v Symes** the Claimants applied for costs against a Defendant’s expert medical witness for alleged breach of his duties to the court. The judge ordered the expert to be joined as a party. The expert applied to set aside the joinder and for the costs application to be dismissed. His application was dismissed on the basis that as an expert witness he was not immune from the sanction of compensating those who had suffered by evidence given recklessly in flagrant disregard of his duties to the court. The court also held that the proceedings were not flawed because the expert had been given no explicit warning that his evidence might found the basis for claim. I shall deal with the submissions of both Counsel on the issue of warnings later in this judgment.
7. In **Phillips v Symes** the only issue before the court was whether the expert should be joined. No determination was ever made that he was in fact required to pay the costs. The expert, a psychiatrist, made a diagnosis that the Claimant had not had capacity for twenty years and refused to consider any evidence to the contrary that he was wrong. He stood by his report and then resiled from the position at trial. Peter Smith J considered whether expert witnesses needed immunity from a costs application against them as a furtherance of the administration of justice and agreed with the Court of Appeal in the case of **Stanton v Callaghan,** who rejected the submission that experts would be deterred from giving proper reports because of a potential action against them. He went on to say at paragraph 95:

*“It seems to me that in the administration of justice, especially, in the light of the clearly defined duties now enshrined in CPR Pt 35 and the practice direction supplementing Part 35, it would be quite wrong of the court to remove from itself the power to make a costs order in appropriate circumstances against an expert who, by his evidence, causes significant expense to be incurred, and does so in flagrant reckless disregard of his duties to the court”.*

1. Mr Nugent submitted that this was the test the court should adopt in this case. Mr Clegg, he said, had relied on **Deutsche Bank** but that was a case that concerned a certain set of circumstances and concerned the more standard s 51 applications. He went on to say that, in any event, the evidential burden would be on the Defendant throughout whether this was a summary process or otherwise. Further, the fact that there were five pages of lists of issues and this matter had taken up court time over two days was proof positive that this was not a case for summary process.
2. Both Counsel relied on **Symphony** where guidance had been given about non-party costs orders by Balcombe LJ, with whom Staughton and Waite LJJ agreed. The criteria are set out in the notes to 4.2.2 in Volume 1 of the 2020 White Book and at paragraph 2.2 in Mr Clegg’s skeleton argument.
3. The guidance states that the material considerations to be taken into account are these:

*(1) An order for payment of costs by a non-party will always be exceptional ... the judge should treat any application for such an order with considerable caution.*

*(2) It will be even more exceptional for an order for the payment of costs to be made against a non-party, where the applicant has a cause of action against the non-party and could have joined him as a party to the original proceedings. Joinder as a party to the proceedings gives the person concerned all the protection conferred by the rules, as to e.g. the framing of the issues by pleadings; discovery of documents and the opportunity to pay into court or to make a Calderbank offer and the knowledge of what the issues are before giving evidence.*

*(3) Even if the applicant can provide a good reason for not joining the non-party against whom he has a valid cause of action, he should warn the non-party at the earliest opportunity of the possibility that he may seek to apply for costs against him. At the very least this will give the non-party an opportunity to apply to be joined as a party to the action under Ord. 15 r 6(2)(b)(i) or (ii). Principles (2) and (3) require no further justification on my part; they are an obvious application of the basic principles of natural justice.*

*(4) An application for payment of costs by a non-party should normally be determined by the trial judge.*

*(5) The fact that the trial judge may in the course of his judgment in the action have expressed views on the conduct of the non-party constitutes neither bias nor the appearance of bias. Bias is the antithesis of the proper exercise of a judicial function.*

*(6) The procedure for the determination of costs is a summary procedure, not necessarily subject to all the rules that would apply in an action. Thus, subject to any relevant statutory exceptions, judicial findings are inadmissible as evidence of the facts upon which they were based in proceedings between one of the parties to the original proceedings and a stranger ... Yet in the summary procedure for the determination of the liability of a solicitor to pay the costs of an action to which he was not a party, the judge’s findings of fact may be admissible ... This departure from basic principles can only be justified if the connection of the non-party with the original proceedings was so close that he will not suffer any injustice by allowing this exception to the general rule.*

*(7) Again, the normal rule is that witnesses in either civil or criminal proceedings enjoy immunity from any form of civil action in respect of evidence given during the proceedings. One reason for this immunity is so that witnesses may give their evidence fearlessly ... In so far as the evidence of a witness in proceedings may lead to an application for the costs of those proceedings against him or his company, it introduces yet another exception to a valuable general principle.*

*(8) ...*

*(9) The judge should be alert to the possibility that an application against a non-party is motivated by resentment of an inability to obtain an effective order for costs against a legally aided litigant. ...”*

1. The Defendant alleges that the evidence Dr Leigh gave as an expert caused the Defendant to incur costs it would not have incurred and seeks costs from the date Dr Leigh accepted the instructions.
2. As an expert, Dr Leigh owes a duty to the court under Part 35 of the Civil Procedure Rules. That is not in issue and in fact Mr Clegg addressed the court at length in relation to Dr Leigh’s obligations under Part 35 as well as in his skeleton argument.
3. Both Counsel referred to a number of other cases. Mr Clegg in his skeleton argument, referred to cases where the court had ordered experts to pay costs, for example **Thimmaya v Lancashire NHS Foundation Trust & Jamil (2020) CC 30.1.20 (“Thimmaya”)**. In that case the expert comprehensively failed in his duties to the court and so he was ordered to pay the costs. The cases concerning experts’ costs are limited in number and I have considered them to determine the threshold test. They all turn on their own facts.
4. In **Thimmaya** it was clear that the expert should not have continued to act as an expert witness in a clinical negligence matter because he was suffering from psychiatric and cognitive problems such that he was unable to concentrate and engage properly with cross-examination. His various mental health problems had caused him to take sick leave from his clinical practice and it was said that he should have taken leave from his medicolegal practice at the same time. He agreed to pay some costs in principle and so the issue of the threshold criteria was not considered or determined, nor was there any reference made to **Phillips v Symes**.
5. HHJ Evans said in her judgment, when setting out the failings of the expert that, *“those are all significant failings which amount in my judgment to improper, unreasonable, or negligent conduct, such that the jurisdiction to make a costs order against Mr Jamil (which is, both parties agree, essentially to be exercised on the same basis as a wasted costs order) is engaged.”*
6. She went on to say that, *“there are plenty of cases where an expert gives an opinion where they are not particularly experienced in the operation concerned. Not all of those experts find themselves liable to pay wasted costs. The jurisdiction to make wasted costs orders is one to be exercised exceptionally. I cannot find a failing sufficiently exceptional on Mr Jamil’s part before November 2017.”*
7. HHJ Evans was reminded that the jurisdiction to make a wasted costs order was not intended as a punitive jurisdiction. She went on to find that the expert owed important and significant duties to the court and had failed comprehensively in those duties from November 2017 onwards and ordered him to pay the Defendants’ costs from that date and the costs of the application. I shall consider the wasted costs jurisdiction later in this judgment and whether it forms the basis for the threshold test.
8. In **Symphony** the application for costs was adjourned so that the new party could seek representation and a direction was made by the court that the applicant serve a notice setting out the basis for the application; the schedule attached to the notice ran to about six and a half pages. What is clear in all these cases is that the basis for the application and the evidence is key. Ms Southgate’s statement runs to five and a bit pages, the content of which I consider below.
9. In **LVI v Zafar & Ors [2018] EWHC 2581**, there were several findings of dishonesty made against a doctor who the court found had, in the production of a revised medical report, given no thought to whether the amendments were clinically justified, nor whether they were true or false and therefore, the court was misled as a result. The facts of this case and the findings of dishonesty made do not assist me in determining the threshold test in this case.
10. **Kennedy v Cordia (Services) LLP [2016] 1 WLR 597** is a familiar case which is often cited as authority for the proposition that when an expert gives an opinion he or she needs to give a reason for that opinion. It also deals with what is required for an opinion to be expert. That case does not assist me in determining the threshold test.
11. In **Pool v GMC [2014] EWHC 3791 (Admin)** a complaint was upheld against a medical expert because he had strayed outside his expertise when he accepted instructions because whilst he was a qualified expert he was not an expert in the field of general adult psychiatry. The decision in that case turned on its own facts and the court agrees with Mr Nugent that it is a decision akin to that in **Thimmaya** because of those particular facts.
12. In **Liverpool Victoria Insurance Company Limited v Khan & Ors [2019] 1 WLR 3833**, the expert had amended his report to assist the Claimant because he had been requested so to do by the Claimant’s solicitor who had inadvertently sent the unamended report to the Defendant’s solicitor. The Court of Appeal in that case considered that the suspended prison sentence handed down to the expert in the contempt of proceedings that followed was too lenient. Whilst that case demonstrates the serious consequences that can follow if experts breach their duty to the court, it does not assist with determination of the threshold test.
13. Having considered the case law and Counsels’ submissions, both written and oral, I have concluded that the threshold test is the test set out in **Phillips v Symes** for which Mr Nugent contends because I agree with him that it, *“remains the only authoritative guidance concerning the expert’s conduct in the giving of evidence and the potential consequential cost consequences”*.
14. In **Phillips v Symes** the conduct of the expert was, as Mr Nugent put it in his skeleton argument, *“as outrageous as could be imagined”*. It was not a case I was referred to by Mr Boyle, when he made his application. The decision is a clear, concise decision by Peter Smith J of what the test should be, not least because it relates to an expert who gave evidence.
15. The **Centrehigh** case on which Mr Clegg relied involved a claim against two Defendants on the basis that not only had they funded the litigation for another Defendant, but had controlled that litigation. There were arguments raised about cross-examination of witnesses in that case and the court determined that the summary procedure (as they described in that case) was the way to proceed.
16. Mr Clegg submitted that, whilst cost orders against non-parties are regarded as exceptional, exceptional means no more than outside the ordinary run of cases - and that is the test. I do not agree with him. Each case turns on its own facts and the facts of **Centrehigh** are completely different to this case where the application for joinder is made against the expert – I pause here to say the SJE.
17. Peter Smith J in **Phillips v Symes** set the threshold test for an applicant to surmount as a high one and said that a high level of proof would be needed to establish gross dereliction of duty or recklessness. I agree with him. Experts can sometimes breach their duties to the court and can also be criticised by the court. but if every time either occurred, the test was*,” no more than outside the ordinary run of cases*” then that has the potential to lead to satellite litigation and perhaps a plethora of applications for joinder for s51 costs. That cannot, in my opinion, be right or what was intended by the use of the word, “*exceptiona*l”.
18. The notes in the White Book to CPR 46.2.2 refer to **Phillips v Symes** and say repeat what Peter Smith J said in paragraph 33 above that:

*“It would be wrong of the court to remove from itself the power to make a costs order in appropriate circumstances against an expert who,* *by their evidence,* ***caused significant expense to be incurred and did so in flagrant reckless disregard of their duties to the court****”. [my emphasis]*

1. In **Symphony** the Court set out the normal rule which is that a witness in civil (or criminal) proceedings enjoys immunity from any form of civil action, so that witnesses may give their evidence fearlessly. The Court also said, that an order for payment of costs by a non-party will always be exceptional and the judge should treat any application for such an order with considerable caution. Therefore, I repeat my opinion that the word ‘exceptional’ must mean something more than just, “*no more than outside the ordinary run of cases”.*
2. I turn to consider whether the Defendant has provided the evidence to meet the threshold test that Dr Leigh caused significant expense to be incurred and did so in flagrant reckless disregard of his duties to the court. As Peter Smith J said, a high level of proof is needed to establish gross dereliction of duty or recklessness.
3. Before I do so, I shall deal with the wasted costs jurisdiction and its applicability or otherwise to this case and the test.
4. One of the reasons for my decision in relation to the threshold test is that there must be a difference when considering s51 costs against a Part 35 expert as against, for example, a funder or someone else who stands to gain from proceedings. In **Thammiya** the legal representatives considered that this was akin to the wasted costs jurisdiction and a wasted costs order.
5. When a wasted costs order is sought, the court must be satisfied it has before it evidence or other material which, if unanswered would be likely to lead to a wasted costs order being made, and that the proceedings are justified notwithstanding the likely costs involved. Generally, the wasted costs jurisdiction is also designed to be summary in nature and ought to be requested only in the clearest cases. For example, in **Wall v Lefever [1998] 1 FCR 605** it was held that the wasted costs jurisdiction was a summary remedy only to be used where clearly improper, unreasonable or negligent conduct on the part of professional advisors could readily be established.
6. The threshold test set out in **Philips v Symes** is set at a higher level because an expert is also in a very different position to a legal advisor. I agree with Mr Nugent when he says in his skeleton argument that *“legal advisors advance the case on behalf of a client and have the ability to take tactical decisions in furtherance of their objective”*
7. I criticised Dr Leigh’s report because he asked and answered 15 ‘*Claimant type*’ questions. However, notwithstanding, I agree with Mr Nugent that Dr Leigh was not in a position to determine how the Claimants or Defendant advanced their respective cases. He is, as an expert (SJE) in a different position to a legal advisor and that being the case, the threshold must be higher than that for a wasted costs order. Therefore, I do not consider the wasted costs jurisdiction is applicable in this case.
8. Even if the test was akin to that of the wasted costs jurisdiction, the Defendant would have to establish, improper, unreasonable or negligent conduct on Dr Leigh’s part. The Court of Appeal considered the meaning of those words in **Ridehalgh v Horsefield and Another [1994] Ch 205**. Mr Nugent set out in his skeleton argument that part of the MR’s judgment which deals with the meaning of those words and I do not intend to repeat it here. A finding of negligence was not made in respect of Dr Leigh’s evidence or conduct. Nor could his conduct be described as, *“vexatious, designed to harass the other side rather than advance the resolution of the case”*.
9. Was Dr Leigh’s professional conduct improper? No evidence has been provided by the Defendant to satisfy me that it was. Ms Southgate’s witness statement does not provide such detail. She sets out the provisions of PD35 and says that Dr Leigh should not have accepted instructions to opine on causation of holiday sickness in this case; that by failing to declare his lack of expertise, he breached parts of the PD and the Guidance for the Instruction of Experts to Give Evidence in Civil Claims 2014’ (“the Guidance”); that he held himself out as an expert when he was not.
10. The Defendant agreed with the suggestion from the Claimants that Dr Leigh should be the SJE notwithstanding, as Ms Southgate said, he had prepared numerous reports for Claimants in these matters
11. The parties’ respective solicitors must have had and read Dr Leigh’s curriculum vitae before agreeing to instruct him as a SJE. He makes the point at paragraph 15 of his statement that, *“both sides in the dispute, if acting bona fide, would have been satisfied that I had the appropriate expertise and experience for the particular instruction*”.
12. His curriculum vitae set out on the face of it that he is a consultant Gastroenterologist and that he had acquired extensive experience in all forms of General Gastroenterology and in particular all forms of interventional endoscopy and colonoscopy as well as ERCP.
13. The judgment has been handed down and I am functus officio. Dr Leigh therefore must deal with findings made in that judgment and make his submissions accordingly. He served a witness statement dated 20th January 2020 in opposition to the application wherein he deals with those findings. It is perfectly true that I made a number of substantial criticisms of him as a witness in my judgment, but having read his witness statement, I see no basis for making a further and more serious finding that his professional conduct was improper, and nothing less would do for any wasted costs jurisdiction that might apply.
14. I turn now to consider whether the evidence served by the Defendant meets the **Philips v Symes** threshold test.

**The evidence against Dr Leigh**

1. The starting point in respect of this application is Ms Southgate’s witness statement. She said that the Claimants originally obtained reports from Dr Thornber and that the Defendant took issue with that evidence but was not given permission to obtain its own medical evidence. Dr Thornber was not able to answer Part 35 questions because he had effectively retired from medicolegal practice and so, once again, the Defendant made an application for its own evidence but the court ordered a SJE consultant gastroenterologist.
2. Ms Southgate then went on to refer in paragraph 8 of her statement, to Dr Leigh’s report dated 22nd October 2018 and the Part 35 questions that were asked by the Defendant to which a response was received on 28th November 2018. At paragraph 9, she referred to the evidence Dr Leigh had given during cross-examination. I will come back to deal with that evidence now that I have had the benefit of reading the trial transcript.
3. At paragraph 10, Ms Southgate set out that the claims failed both on the factual evidence the Claimants gave and the medical evidence of Dr Leigh; that this is a QOCS case and so, the Defendant’s costs were unenforceable pursuant to CPR 44.13. She went on to say that, but for the written evidence of Dr Leigh, the claims would not have proceeded to trial at all and therefore, the Defendant seeks an order that his costs be disallowed and he pay the Defendant’s costs from the date on which he accepted instructions.
4. She, as Mr Clegg did in his skeleton argument, set out the salient provisions of CPR Part 35 and its Practice Direction and the Guidance. The nub of her evidence was that Dr Leigh provided an opinion outside his area of expertise.
5. The criticisms that I made of Dr Leigh where I incorporated part of Mr Boyle’s submissions into my judgment were criticisms in relation to his report, as opposed to any of the other matters referred to in that part of Mr Boyle’s submissions. Judges do sometimes criticise experts in their judgments so I do not accept Mr Nugent’s suggestion that Dr Leigh should have been given an opportunity once the submissions were received, by the court, to *“intervene”* at that stage before judgment was handed down. This was a Fast Track trial and as such would normally have lasted a day with oral submissions and an extempore judgment all made in a day.
6. Be that as it may, when applying the **Philips v Symes** test, whilst criticism may have been made of Dr Leigh in my judgment I cannot see, based on the evidence the Defendant has produced in support of its application, that what Dr Leigh did by giving his evidence caused significant expense to be incurred in flagrant disregard of his duties to the court.
7. This is a case, as Ms Southgate accepts, where I made factual findings in respect of both Claimants’ cases and that is primarily why both claims were dismissed. It transpired from the evidence that there was a possibility that Mr Walker could have picked up his illness from Mrs Walker; and I did not accept Mrs Walker’s evidence that she had fallen ill as she alleged.
8. In my judgment (paragraph 32) I found that Mr Walker’s claim failed on his own evidence and was dismissed. At paragraph 35 of my judgment, I said that my impression of Mrs Walker was that she did not make a very good witness in support of her own case and that her written evidence unravelled as her oral evidence unfolded. I therefore found on the balance of probabilities that she did not fall ill as she alleged.
9. Mr Nugent said that three elements go to the final outcome of this type of case – the credibility of the Claimants, the opinion of the expert and documents such as medical records and hygiene standards which some experts mention some and some do not. The Defendant, in making its application, sought to rely only on Dr Leigh’s opinion and his failure to consider the medical records.
10. When Mr Boyle made the application to cross-examine Dr Leigh I was not made aware of the guidance from the Court of Appeal in **Popek v NatWest Bank Plc [2002] CPLR 370** and the observations made by Dyson LJ at paragraph 49 that:

*“It is obviously sensible that if a single joint expert is (unusually) to be subject to cross-examination, then he or she should know in advance what topics are to be covered, and where fresh material is to be adduced for his or her consideration, and this should be done in advance of the hearing”.*

1. Mr Clegg argued (by reference to paragraphs 66 and 67 of **Philips v Symes** that there was no reason to warn Dr Leigh before trial. That is not the point because the warning should have been given by the Defendant as set out in **Symphony** when it thought it might seek an order for costs against him. Why no such warning was given is a question that has not been answered by the Defendant. It was not addressed in Ms Southgate’s evidence or by Mr Clegg in his skeleton and/or submissions.
2. I have considered the correspondence that I asked to be produced during the hearing of this application, between Dr Leigh and Ms Southgate and I find from reading it that it was clear that he had not been made aware at all that he was to be cross-examined or on which topics.
3. The impression I gained from that correspondence, despite Mr Clegg’s valiant attempts to say otherwise, was that Dr Leigh most likely assumed that he was simply attending the trial to assist the court by clarifying matters in his single joint expert’s report rather than to be extensively cross-examined on it.
4. My impression is confirmed by Dr Leigh at paragraph 5 of his witness statement where he said that*,” [solicitors acting for TUI] did not explicitly say that they wished to cross-examine me, nor identify the topics or studies on which they wished to ask me questions.”*
5. Mr Nugent in his submissions said that Dr Leigh should at least have been warned, if he was not joined in, that the Defendant might seek an order for costs against him. The correspondence from Ms Southgate did not ask him to bring with him the research that had gone into his report. Mr Clegg said that if he did not recall his research he should have brought it to court. Now that I have seen the correspondence from Ms Southgate to Dr Leigh I disagree with Mr Clegg. There was no indication at all in the correspondence from Ms Southgate that he would be required to deal with and recall his research.
6. In the hearing bundle (page 57 of 288), Ms Southgate wrote to Dr Leigh on 22nd January 2019 and said this:

*“Dear Dr Leigh*

*I confirm that we shall expect you to attend the trial for the above named case as we have previously discussed on 25 February 2019 at 10am in Manchester County Court. The trial has been listed for one day. Please confirm by return email that you will attend Court as agreed”.*

1. Dr Leigh confirmed his attendance and asked whether Driscoll Kingston would be liable for his fees. That correspondence caused me to call for the file note of 25th February 2019 during the hearing. That was produced and it said this:

*“Telephone call out to Dr Leigh [phone number provided]*

*FXS calling Dr Leigh in relation to his single joint expert report prepared on behalf of the Defendant and Claimants. FXS enquiring whether Dr Leigh will be available to attend trial on 25th February 2019 at Manchester County Court and his fees, etc.*

*Dr Leigh confirming that he is [sic] done these court cases before and he will check his availability. He considers that the fee would be approximately £4-5,000. He would need to travel up to Manchester the day before trial, stay overnight and incur a fee for a whole day.*

*FXS noted the position. FXS stated she will send Dr Leigh an email enquiring as to his availability and would be grateful if Dr Leigh could review his calendar and revert back to FXS as soon as possible and in addition provide FXS with his terms and conditions as on occasion the court can decide to relist the trial date at the last minute. FXS will then review Dr Leigh’s fee note and update her client accordingly. When she has authority, if she gets authority from her client she will revert back to Dr Leigh to firm up the appointment at this stage FXS is seeking Dr Leigh’s availability for that date. Dr Leigh confirmed FXS can contact him on his email address at the top of his report [email provided]. FXS thanked Dr Leigh for his time”.*

1. There was another email that was produced at my request from Ms Southgate to Dr Leigh sent on 3rd December 2018 at 14.43 p.m. when she wrote:

*“Dear Dr Leigh*

*Thank you for your single joint expert report (on behalf of the Claimants and Defendant) and the Part 35 replies; much appreciated! Please confirm your availability to attend the trial for the above named case on 25th February 2019 at 10 a.m. in Manchester County Court. The trial has been listed for one day. In addition, please can you provide your fee for attendance and terms and conditions, as the court may decide to relist the trial date closer to the time. Although it is unlikely, it is still a possibility. I look forward to hearing from you. Kind regards”.*

1. Mr Clegg said in submissions that it would be extremely naïve for Dr Leigh to think he was coming to court to be congratulated on his report and that he should have been aware that he was there to be cross-examined. I disagree. I accept Dr Leigh’s evidence that he did not know he was going to be cross-examined. None of the correspondence set out above would, in my opinion, have given Dr Leigh any inkling that he was going to be cross-examined in the manner he was.
2. In **Philips vSymes** Smith J referred to the **Symphony** case where the court had emphasised the need for a warning. Smith J went on to say that giving a warning was not an absolute requirement but one that ought to be considered on a case by case basis. I have concluded that on the facts of this case, particularly as he was a SJE, Dr Leigh should have been warned and the court should have been made aware of the proper procedure at the time when Mr Boyle sought an order to join Dr Leigh in following the handing down of judgment.
3. Whilst I criticised Dr Leigh in my judgment for not dealing with the Claimants’ medical records, this does not of itself make him liable to pay the Defendant’s costs. Medical reports are prepared by experts who have not had access to medical records. Dr Leigh has dealt with this issue in his statement and having considered that statement, no further findings need to be made by me on this issue. It is also noteworthy that Dr Thornber who had provided the initial reports did not have access to the Claimants’ medical records.
4. Mr Clegg submitted that Dr Leigh interviewed Mr and Mrs Walker and should have obtained the information which led to the eventual dismissal of Mr Walker’s claim. I asked him how far he said that Dr Leigh should have gone with his interrogation when he spoke to them on the telephone? Mr Clegg replied that he did not rely on the fact that Dr Leigh should have interrogated them. He said he should have considered the medical records, dealt with causation and not answered the fifteen questions he was not asked.
5. During cross examination, Dr Leigh confirmed that he was left with the Claimants’ history as the sole source of input in terms of evidence. At paragraph 12 of his statement, he said that the accounts given by them were not necessarily the same as the accounts given under his questioning; that having heard that evidence he accepted that it was also possible that Mr Walker may have acquired his infection from Mrs Walker.
6. I do not accept that any of the Defendant’s submissions or evidence is sufficient to meet the threshold test. A Claimant can provide one version of events to a medical expert, which version when tested during cross examination does not stand up to scrutiny. I do not see it as the role of the expert to interrogate a Claimant at length. An expert takes the medical history described by a Claimant in good faith, unless there are serious discrepancies and then, I would expect an expert to comment on those. In this case, the Claimants ‘stuck to’ their version of events till they were cross examined. They lost primarily because I did not accept their evidence. I fail to see how that can be laid at the door of the evidence provided by Dr Leigh such that it could be said that it caused significant expense to be incurred in flagrant disregard of his duties to the court.
7. Nor do I consider my criticism of Dr Leigh for dealing with 15, “*Claimant type”* questions he was not asked, sufficient to meet the test. No evidence has been provided by the Defendant in support of this submission.
8. Mr Clegg dealt in submissions with what the Defendant alleged, was a failure by Dr Leigh of his Part 35 duties. That may be the case but he did not then address how that met the threshold test, nor did Ms Southgate provide any evidence.
9. As I said above, it was rather a curious decision for the Defendant, knowing as it did that Dr Leigh had prepared numerous reports for Claimants in these types of cases, to agree that he should be instructed as a SJE. There has been no proper and/or satisfactory explanation from the Defendant. That being the case, the court is entitled to form and does form the view that the Defendant did so to have an opportunity, to make such an application against him. I refer to paragraph 17 of Ms Southgate’s witness statement where she said:

*“The Defendant’s position is simple. Dr Leigh is not, it transpires, an expert. He has produced, on his own evidence, more than a hundred reports (mostly on a unilateral instruction from Claimants) which are then used to support claims against the Defendant and other tour operators (noting that the Defendant is the single biggest tour operator in the UK) in cases where, because of the operation of QOCS, the Defendant is obliged either to pay compensation and costs, or incur the cost of defending the action at trial. Dr Leigh’s willingness to accept instructions in these cases has facilitated not just this case (where the Defendant’s costs to trial are some £13,256.62 together with Dr Leigh’s fees) but apparently over a hundred other cases, and he is not an expert”.*

1. The footnote to that paragraph sets out that Dr Leigh conceded that in all but a few cases, he has concluded that *“the sickness was a result of food or drink consumption”*.
2. If the Defendant had thought Dr Leigh was not an expert I fail to understand why it would agree to him being instructed as a SJE. I would expect any prudent lawyer, when provided with the curriculum vitae of a proposed SJE, to make their own enquiries as to his/her expertise before agreeing to accept said expert. I find that the Defendant was provided with Dr Leigh’s curriculum vitae. I therefore, fail to understand the Defendant’s position that Dr Leigh is not an expert. Ms Southgate does not deal with any of this in her witness statement; simply reiterating the point as she does, does not take the Defendant or its evidence any further.
3. The Defendant has not produced the evidence required to meet the threshold test. In **Symphony** there were six and a half pages of matters on which the Claimant relied. The other matter Ms Southgate failed to deal with is what precisely did Dr Leigh do to incur the costs it seeks from the date he accepted instructions on 18th October 2018? She simply says at paragraph 20 of her witness statement that:

*“(a) Had he possessed his professed expertise and had been neutral in his approach, he would have acknowledged and set out the problems with the Claimants’ cases which led, ultimately, to their dismissal. Indeed, had he volunteered in writing that evidence which he gave orally at trial as to the First Claimant’s case, the First Claimant’s case could not reasonably have reached court.*

*(b) Had he accepted his lack of expertise openly, he would not have been instructed at all, and the costs thrown away on his invoices, and by the lawyers in dealing with his evidence, would have been saved.”*

1. The problem with that evidence is twofold, firstly Dr Thornber provided the same opinion as Dr Leigh as to the cause of the Claimants’ alleged illnesses when he completed his medical reports. Secondly, she made no reference to Dr Leigh’s curriculum vitae - which as I have found above, the Defendant’s lawyers must have had before they agreed that he should be the SJE - to demonstrate to the court the said lack of expertise.
2. My findings in relation to Mrs Walker were predominantly factual. I did not accept her oral evidence at trial. Even if Mr Walker’s case had been abandoned earlier there was still Mrs Walker’s case to pursue based on her written evidence. No evidence was provided by the Defendant as to what it would have done had Mrs Walker been the sole Claimant proceeding with her claim.

**Decision**

1. My decision therefore, is that Dr Leigh will not be joined pursuant to CPR 46.2 for the purposes of a costs order being made against him. The Defendant has simply not met the threshold test set out in **Philips v Symes** for the reasons set out above. It has provided no evidence that, but for the evidence of Dr Leigh, the claims would not have proceeded to trial at all; no evidence that his conduct has led to it incurring significant expense from the date of accepting instruction; failed to identify the expertise it says he did not have, particularly given it agreed to his instruction as a SJE.

**Conclusion**

1. In answer therefore to the *“agreed”* list of issues I find as follows:

**1. Primary issues**

* 1. Should Dr Leigh be joined into these proceedings pursuant to CPR 46.2?

**Answer** – No, for the reasons stated in the judgment above.

* 1. Should an order be made requiring Dr Leigh to pay TUI’s costs of defending the main action from the date upon which he accepted instructions?

**Answer** – No, because the Defendant has failed to meet the **Philips v Symes** threshold test. It has also not provided the detail in relation to costs thrown away which it seeks Dr Leigh pay.

* 1. If not, should Dr Leigh be ordered to pay some lesser part of TUI’s cost and, if so, what part?

**Answer** – No. See above

* 1. The assessment of any costs Dr Leigh is ordered to pay TUI (can this be done by summary assessment or is a detailed/another assessment process required)?

Answer – Not applicable considering the decisions above.

**2. Preliminary issues**

2.1 In the absence of any application by formal notice, should the Claimants be entitled to seek any relief from the court during the process currently before the court, namely the determination of TUI’s application?

(a) If so, what relief are the Claimants entitled to seek?

(b) If not, do the Claimants have any locus at the hearing and, if so, to what extent are they permitted to take part in the hearing?

**Answer** – No to all the above. At the start of the hearing I declared that the Claimants had no locus at the hearing.

2.2 Should Dr Leigh be able to rely upon the report of Dr Przemiolso, consultant gastroenterologist and hepatologist, dated 20th June 2020 (served with Dr Leigh’s skeleton argument)?

**Answer** – In light of Mr Nugent’s submissions on the report set out above, I have not treated it as an expert report and I have not relied on any part of it in my judgment.

(a) What is the current status of Dr Przemiolso’s report within these proceedings? Does Dr Leigh require permission from the court to rely upon Dr Przemiolso’s report?

**Answer** – See the answer to 2.2 above.

(b) The report was served with Dr Leigh’s skeleton and there is no formal written application to rely upon it. Are these matters which are relevant to its admission or exclusion?

**Answer** – See the answer to 2.2 above.

(c) In what field is Dr Przemiolso purporting to offer expertise and what are the relevant issues which his expert evidence addresses?

**Answer** – See the answer to 2.2 above.

(d) Is the report compliant with CPR Part 35?

**Answer** – See the answer to 2.2 above.

(e) If Dr Przemiolso’s report is to be admitted by the court, what (if any) consequential directions are required?

**Answer** – See the answer to 2.2 above.

**3. The parameters for determining the matters before the court**

3.1 Is the procedure adopted by TUI with regard to their application:

(a) Unfair to Dr Leigh?

**Answer** – Yes for the reasons given in the judgment above.

(b) Contrary to the Overriding Objective?

**Answer** – Yes, for the reasons given in the judgment above.

(c) In accordance with the principles and precedents in the relevant authorities?

**Answer** – See the discussion in the judgment above.

(d) In contravention of Dr Leigh’s Article 6 rights?

**Answer** – I have not found it necessary to make a determination of this point in light of the matters I have set out in my judgment above.

And if so, what are the consequences?

(i) Does the procedure contravene Dr Leigh’s right to a fair hearing?

**Answer** – See the answer to 3.1(d) above.

(ii) Was Dr Leigh given adequate forewarning of TUI’s application in accordance with the principles and precedent in the relevant authorities?

**Answer** – No.

(a) If not, to what extent has it rendered this procedure unfair?

**Answer** – Dr Leigh has been successful in persuading the court not to join him into the proceedings, which I believe deals with any perceived procedural unfairness.

(iii) Should Dr Leigh have been joined into these proceedings before judgment was handed down, and has the fact that Dr Leigh was not so joined rendered this procedure unfair and, if so, what are the consequences?

**Answer** – No. Experts are sometimes criticised in judgments. Had this been a typical Fast Track case, oral submissions would have been heard and judgment handed down the same day. Dr Leigh has now had the opportunity, because I refused to join him into the proceedings following an application made in the face of the court by the Defendant at the handing down of judgment to have an opportunity to oppose the application for joinder and he has been successful.

(iv) Is this procedure rendered unfair by reason of the manner in which Dr Leigh came to be cross-examined at trial and/or his lack of notice of the questions or topics upon which he was to be cross-examined and, if so, what are the consequences?

**Answer** – Dr Leigh should have been warned about what he was to be cross-examined on at trial and given notice of the questions or topics upon which he was to be cross-examined. That the Defendant did not do so and follow the principles and procedures set out in case law was unfair to Dr Leigh.

(v) Should Dr Leigh have been served with a copy of TUI’s written submissions following the evidence at trial and been given the opportunity to respond including by way of making submissions?

**Answer** – No. See the answer to (iii) above.

(a) Has the fact that Dr Leigh was not provided with that opportunity rendered this procedure unfair and, if so, what are the consequences? **Answer** – any perceived unfairness has been dealt with by the procedure adopted to deal with this application, which allowed Dr Leigh, following the judgment, and before joinder to take advice and successfully resist the application for joinder

(vi) Is it relevant to consider upon TUI’s application whether submissions from Dr Leigh may have affected the conclusions the court reached at trial as regards his evidence/expertise?

**Answer** – No, given the findings made above as to the threshold test.

3.3 Can Dr Leigh ask the court to review its adoption of parts of TUI’s written closing submissions and, if so, to what extent?

**Answer** – No. The criticisms of Dr Leigh were in respect of his report. The judgment stands.

**4. The determination of the matters before the court**

4.1 See paragraphs 1.1 to 1.3 above.

(i) What is the test to be applied and/or in what circumstances may an expert in a case be ordered to pay costs in the litigation in which she/he is applying her/his expertise?

**Answer** – See the judgment above.

(ii) To what extent is it helpful or appropriate to consider the court’s jurisdiction to make Wasted Costs Orders against legal advisers/representatives?

**Answer** – See the judgment above.

(iii) Do the circumstances apply here and/or is the test satisfied with regard to Dr Leigh’s conduct as an expert and, if so, should the court exercise its material discretion to make an order against Dr Leigh and join him to these proceedings for that purpose?

**Answer** – See the judgment above.

(a) Ought Dr Leigh to have accepted instructions in this matter, in accordance with the letter of instructions?

**Answer** – The parties, having seen Dr Leigh’s curriculum vitae agreed that Dr Leigh should be the SJE and he accepted instructions on that basis. See my findings above.

(b) Did Dr Leigh breach his duties to the court and, if so, how and/or to what extent did he breach them?

**Answer** – the question should be whether any alleged breaches were sufficient to persuade the court to join him in for the purposes of costs as the threshold test? They were not.

(c) Other than the matter in (b) above, are there other matters relevant to the issues in this application, concerning Dr Leigh’s evidence at trial?

**Answer** – See the judgment above.

(iv) On the basis of the evidence submitted, has TUI demonstrated that Dr Leigh’s relevant conduct has occasioned the expenditure by them of costs which would otherwise not have been incurred and, if so, in what amount?

**Answer** – No.

4.2 The determination of any application for relief that the claimant is permitted to make.

**Answer** – None made.

**5. The costs of the process currently before the court**

5.1 The costs of and occasioned by TUI’s application.

**Answer** – To be the subject of further submissions unless costs can be agreed by the parties.

5.2 Are there any other matters in respect of which the court should make a discrete costs order and, if so, what are those other matters and what order should the court make?

**Answer** – None of which the court is currently aware.

1. Those are the reasons for my decision which will be handed down on Thursday 14th January 2021 at 12.30 pm remotely by BT Meet Me.
2. The final point that remains to be dealt with is Mr Nugent’s request during his closing submissions that, in the event Dr Leigh was successful in resisting the application, a recording should be added to my order to the effect that, my judgment and in particular, the section concerning Dr Leigh should be treated as fact specific and not treated as being material to the consideration of his evidence in any other matter in which he may be involved as an Expert.
3. I decline that request as I see no necessity for the recording but l add for the avoidance of doubt that my judgment was and is indeed fact specific.

Dated this 14th day of January 2021

DISTRICT JUDGE OBODAI