Neutral Citation Number: [2022] EWHC 2288 (Ch)

Case No: PT-2021-BRS-000049

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURT IN BRISTOL
PROPERTY TRUSTS AND PROBATE LIST (ChD)

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR
Date: 6 September 2022

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

- -

IN THE ESTATE OF CLIVE MCDONALD (DECEASED)

AND IN THE MATTER OF S116 SENIOR COURTS ACT 1981 AND S50 ADMINISTRATION OF JUSTICE ACT 1985

BETWEEN:-

(1) KAREN PEGLER
(2) TAMARA SARAH STRINGER
(3) SERENA JULIET GAHAGAN HULME
(4) JEREMY EDWIN STANLEY GAHAGAN

Claimants

-and-

(1) TIMOTHY BRUCE MCDONALD
(2) HUGH JAMES TRUST CORPORATION LIMITED

Defendants

- -

Ashfords LLP, solicitors for the **Claimants**
The First Defendant in person
The Second Defendant took no part in the applications
Applications decided on paper

- -

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.

.....

This judgment will be handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 am on Tuesday 6 September 2022.

HHJ Paul Matthews :

Introduction

1. On 1 August 2022, I handed down my judgment on two applications by the first defendant in this claim: see [2022] EWHC 2069 (Ch). The claim itself is for the removal of the first defendant as an executor of his late brother's will, by beneficiaries under that will. One application was for an adjournment of the trial fixed for 14 September 2022. The other was for a *Beddoe* order. Both applications were dismissed, for the reasons given. In addition, I imposed an extended civil restraint order ("ECRO") on the first defendant for two years. So far as I am aware, no application has been made for permission to appeal my decisions. Certainly, none has been made to me.

2. However, on 30 August 2022, the first defendant wrote to the court office by email, making an informal application for three alternative orders. The first was in effect for an order dismissing the claim. If the first were not granted, the second was for me to recuse myself from presiding at the trial. If the second were not granted, then the third was for the time of the trial on 14 September to be changed from 10:30 am to 2 pm. The second defendant is not concerned in this application, and has played no part in it. For ease of reference, in the rest of this judgment I refer to the first defendant as simply "the defendant".

3. I note that the defendant has not applied in the proper form (N244). Nor has he paid the prescribed fee. Moreover, it did not appear from his email that the defendant had copied it to the other parties, as required by CPR rule 39.8. I therefore caused court staff to make that enquiry of the defendant, and it was sent to him by email on 1 September 2022. By close of business on 5 September there had been no reply from the defendant.

4. More significantly, the defendant does not appear to have complied with the procedural requirements of the ECRO to which he is subject, and in particular paragraphs 3-4-3-6 of CPR Practice Direction 3C. (I referred to this procedure expressly in paragraph 41 of my earlier judgment, so that he should be aware of it.) Accordingly, by virtue of paragraph 3.3, his informal application stands automatically dismissed.

5. Each of those three matters taken separately would be a good reason for stopping this ruling here. However, and exceptionally, given the proximity of the trial, the defendant's evident distrust of the English legal system, and of the judiciary in particular, and the need for the parties to know where there are in advance, I am going to put those matters on one side for now. I will deal with the substance of the three parts of the defendant's application in the same order as set out above, and explain why, in any event, I would *not* have given permission to the defendant to make his application.

Application for summary dismissal of the claim

Basis of application

6. In support of his application for the summary dismissal of the claim, the defendant has supplied a copy of my judgment of 1 August 2022, which he has heavily annotated with his comments, interleaved into the text. The scale of his annotations can be shown by the fact that, whereas my judgment as handed down comprised 27,500 characters, over 13 pages, the annotated version runs to 91,176 characters, over 37 pages. I do not set the annotations out here, for reasons of space. But I have read and taken account of all of them.

7. The defendant then says:

> "The reasons for this [*ie* the application to dismiss the claim] are spread throughout the attachment. Basically, I am the most qualified, honest and effective executor this estate could possibly have. The proof is that all my contacts except lawyers and Gahagans/Peglers are very happy with my efforts and this estate has been ready for probate for a year now, despite other executors' paranoid harassment and bullying. And so there is no call or room for yet another duplicative PR, particularly given that two of the Warwick Barker partners are still executors.
>
> The only reason the Claimants want to remove me, despite my successes, is to hijack control of the Estate so they can deny me my patrimony claim. This Pegler claim is thereby effectively trying to pull off a scam."

Applicable law

8. I can take the applicable law relating to the summary dismissal of claims from a recent judgment of my own, in *Burford v AA Developments Ltd* [2022] EWHC 368 (Ch):

> "17. I turn now to consider the law. First of all, the relevant rules of procedure are CPR rule 3.4(2) and CPR rule 24.2. The former rule provides:
>
> > '(2) The court may strike out a statement of case if it appears to the court—
> >
> > > (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;
> > >
> > > (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or
> > >
> > > (c) that there has been a failure to comply with a rule, practice direction or court order.'
>
> 18. In addition, CPR Practice Direction 3A relevantly provides:
>
> > '1.4 The following are examples of cases where the court may conclude that particulars of claim (whether contained in a claim form or filed separately) fall within rule 3.4(2)(a):

> (1) those which set out no facts indicating what the claim is about, for example "Money owed £5,000",
>
> (2) those which are incoherent and make no sense,
>
> (3) those which contain a coherent set of facts but those facts, even if true, do not disclose any legally recognisable claim against the defendant.
>
> 1.5 A claim may fall within rule 3.4(2)(b) where it is vexatious, scurrilous or obviously ill-founded.'

19. The latter rule provides:

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

On an application for summary judgment, the burden of proof rests on the applicant: *ED&F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472, [9].

20. These two methods of summarily disposing of a claim without a trial are frequently combined in the same application … . But it is clear that an application under rule 3.4 is not one for summary judgment: see *eg Dellal v Dellal* [2015] EWHC 907 (Fam). It is generally concerned with matters of law or practice, rather than with the strength or weakness of the evidence. So on an application to strike out, the court usually approaches the question on the assumption (but it *is* only an assumption, for the sake of the argument) that the respondent will be able at the trial in due course to prove its factual allegations. On the other hand, on an application for summary judgment, the court is concerned to assess the strength of the case put forward: does the respondent's case get over the (low) threshold of 'real prospect of success'? If it does not, then, unless there is some other compelling reason for a trial, the court will give summary judgment for the applicant. … "

9. In that judgment, I also set out a passage from the recent judgment of Coulson LJ on these two means of summary disposal (with which Bean and Males LJJ agreed) in *Begum v Maran (UK) Ltd* [2021] EWCA Civ 326, and I repeat that here:

"20. The Appellant's application before the judge sought an order pursuant to r.3.4(2)(a) that the particulars of claim disclosed 'no reasonable grounds' for bringing the claim and should be struck out and, in the alternative, a claim for summary judgment pursuant to r.24.2(a)(i) that the Respondent had no real prospect of succeeding on the claim. There can sometimes be procedural consequences if applications are made under the 'wrong' rule (which do not arise here) but, in a case like this (where the striking-out is based on the nature of the pleading, not a failure to comply with an order), there is no difference between the tests to be applied by the court under the two rules.

21. Accordingly, I do not agree with the judge's observation at [4] that somehow the test under r.24.2 is 'less onerous from a defendant's perspective'. In a case of this kind, the rules should be taken together, and a common test applied. If a defendant is entitled to summary judgment because the claimant has no realistic prospect of success, then the statement of claim discloses no reasonable grounds for bringing the claim and should be struck out: see *Global Asset Capital Inc* v *Aabar Block SARL* [2017] EWCA Civ 37; [2017] 4 WLR 16 at [27].

22. As to the applicable test itself:

> (a) The court must consider whether the claimant has a 'realistic' as opposed to a 'fanciful' prospect of success: *Swain v Hillman* [2001] 1 All ER 91. A realistic claim is one that carries some degree of conviction: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472. But that should not be carried too far: in essence, the court is determining whether or not the claim is 'bound to fail': *Altimo Holdings v Kyrgyz Mobil Tel Ltd* [2012] 1WLR 1804 at [80] and [82].
>
> (b) The court must not conduct a mini-trial: *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1, in particular paragraph 95. Although the court should not automatically accept what the claimant says at face value, it will ordinarily do so unless its factual assertions are demonstrably unsupportable: *ED & F Man Liquid Products v Patel; Okpabi and others v Royal Dutch Shell Plc and another* [2021] UKSC 3, at paragraph 110. The court should also allow for the possibility that further facts may emerge on discovery or at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550; *Sutradhar v Natural Environmental Research Council* [2006] 4 All ER 490 at [6]; and *Okpabi* at paragraphs 127-128.

23. The other principle relevant to the present appeal is that it is not generally appropriate to strike out a claim on assumed facts in an area of developing jurisprudence. Decisions as to novel points of law should be based on actual findings of fact: see *Farah v British Airways* (The Times 26 January 2000, CA). In that case, the Court of Appeal referred back to

the decision of the House of Lords in *Barrett v Enfield DC* [2001] 2 AC 550 where Lord Browne-Wilkinson said at 557e-g:

> 'In my speech in the *Bedfordshire* case [1995] 2 AC 633, 740 – 741 with which the other members of House agreed, I pointed out that unless it was possible to give a certain answer to the question whether the plaintiff's claim would succeed, the case was inappropriate for striking out. I further said that in an area of the law which was uncertain and developing (such as the circumstances in which a person can be held liable in negligence for the exercise of a statutory duty or power) it is not normally appropriate to strike out. In my judgment it is of great importance that such developments should be on the basis of actual facts found at trial not on hypothetical facts assumed (possibly wrongly) to be true for the purposes of the strike out'.

I note that the judge cited this passage and relied on it at [64].

24. The same point arose more recently in *Vedanta Resources PLC & Another v Lungowe &* Others [2019] UKSC 20. That was a case where the underlying duty of care was alleged against a parent company, rather than the company involved in the day–to–day running of the mine said to have caused the pollution. Lord Briggs said:

> '48. It might be thought that an assertion that the claim against Vedanta raised a novel and controversial issue in the common law of negligence made it inherently unsuitable for summary determination. It is well settled that difficult issues of law of that kind are best resolved once all the facts have been ascertained at a trial, rather than upon the necessarily abbreviated and hypothetical basis of pleadings or assumed facts'."

No reasonable grounds?

10. In my judgment the claim form sets out a cause of action known to the law and arising under section 50 of the Administration of Justice Act 1985. The evidence filed in support gives particulars of the alleged conduct said to constitute grounds for the court exercising its statutory powers under that section. The defendant opposes the claim, and has filed evidence, which will need to be considered. The court cannot resolve this dispute without a hearing. Accordingly, there is no basis here for striking out the claim under CPR rule 3.4(2)(a).

Abuse of the process?

11. The defendant makes serious allegations against the claimants and their lawyers, which he may argue amount to an abuse of the process. However, the rule allows the court to strike out a statement of case only if that statement of case is *itself* an abuse of the process. That usually refers to cases such as where the claim has been lost and is then brought a second time, or something of that kind. That is not this case. The statement if case is quite regular and, so far as I

can see, not made in breach of any rules. Therefore, there is no basis here for striking out the claim under CPR rule 3.4(2)(b).

Failure to comply with a rule, practice direction or court order?

12. Thirdly, from what I can see, the defendant does not seek to argue that the court should strike out the claim for failure to comply with some rule, practice direction or court order. Instead, he seeks the dismissal of the claim because he is "the most qualified, honest and effective executor this estate could possibly have" and therefore should *not* be removed. He attributes a base motive to the claimants for bringing their claim. He says they want "to hijack control of the Estate so they can deny me my patrimony claim." However, that is not a basis for striking out the claim summarily under CPR rule 3.4(2)(c).

No real prospect of success?

13. As it seems to me, therefore, the thrust of the defendant's arguments for summary dismissal of the claim are directed to the jurisdiction conferred by CPR rule 24.2, which I set out above. The burden is on the defendant to show that the claimants have "no real prospect" of succeeding on the claim. In this context, "no real prospect" means that any such prospect is *unreal*, or *fanciful*. It is an *absence* of reality. The defendant as applicant has accordingly a high threshold to get over, in order to persuade the court to deal with the claim without a trial. Moreover, the court in considering the claim must not attempt to conduct any kind of "mini-trial".

14. Although the defendant in his email to the court and in his annotations to my judgment makes a considerable number of assertions, they do not persuade me, individually or cumulatively, that the claimants have no real prospect of success on their claim. There is simply not enough here to justify my "driving the claimants from the judgment seat". This claim must be tried in the usual way. As I have said, that trial is fixed for 14 September 2022, now just over a week away.

Application for recusal

Relevant law

15. I turn therefore to the question of my self-recusal. Again, I can take the relevant law from an earlier decision, *Kimyani v Sandhu* [2017] EWHC 151 (Ch):

> "46. So far as relevant to this case, there are two important and related rules in the administration of justice. One is that no-one should be a judge in his or her own cause: *Dimes v Grand Union Canal* (1852) 3 HLC 759, 793. The other is, as Lord Hewart CJ once famously remarked,
>
> > 'that justice should not only be done, but also must be manifestly and undoubtedly be seen to be done': *R v Sussex Justices, ex p McCarthy* [1934] 1 KB 256, 258.

The two rules overlap. It is obvious that, if a person judges his or her own cause, justice will not be done, or at any rate will not be seen to be done. Where a judge has a pecuniary or other significant personal interest in the outcome of the case, such as the promotion of a cause, the judge is automatically disqualified: *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 2)* [2000] 1 AC 119, HL. It does not matter whether the judge knew or not of the interest.

47. But the second rule goes wider. It extends beyond cases where the judge has a personal interest to cases of bias. As the Court of Appeal once put it,

> 'Bias is an attitude of mind that prevents the judge from making an objective determination of the issues that he [or she] has to resolve': *Re Medicaments and Related Classes of Goods (No 2)* [2001] ICR 564, [37].

The law distinguishes actual bias from apparent bias. The former is subjective, and deals with the judge's state of mind, while the latter is objective, and deals with the judge's conduct and the surrounding circumstances. Where a judge is *actually* biased in a decision, then justice has not been done. Where a decision is tainted by *apparent* bias, then justice is not seen to be done. Cases holding that there has been *actual* bias employed by a judge are rare. Most cases dealing with bias are argued and decided on the basis of *apparent* bias.

48. As to the law in relation to recusal by judges for bias, the claimants cited *Howell v Lees-Millais* [2007] EWCA Civ 720 (referring to *Porter v Magill* [2002] 2 AC 357, *Lawal v Northern Spirit* [2003] ICR 856, HL, and *AWG Group v Morison* [2006] 1 WLR 1163, CA). The general principle is not in any doubt. In *Porter v Magill* [2002] 2 AC 357, the House of Lords endorsed the approach taken by Lord Phillips MR in *Re Medicaments and Related Classes of Goods (No 2)* [2001] ICR 564, as follows:

> '[85] … The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased.'

It should also be noted that the mere fact that a judge has been guilty of shocking, even deplorable behaviour, is not enough: *Harb v HRH Prince Abdul Aziz bin Fahd bin Abdul Aziz* [2016] EWCA Civ 556, [68].

49. In her skeleton argument, the defendant cited only *Porter v Magill*. That is a case about apparent bias. But she is not a lawyer, and although in section 3 of the application notice she seeks my recusal expressly on the grounds of 'real danger of bias' (see also the evidence at section 10 of the notice), it does appear that she is also making allegations against me of actual bias. I will consider this in more detail shortly.

50. So far as concerns the 'informed and fair-minded observer', in *Harb v HRH Prince Abdul Aziz bin Fahd bin Abdul Aziz* [2016] EWCA Civ 556, the Court of Appeal said:

> '[69] … We would however, emphasise two important points. First, the opinion of the notional informed and fair-minded observer is not to be confused with the opinion of the litigant. The "real possibility" test is an objective test. It ensures that there is a measure of detachment in the assessment of whether there is a real possibility of bias… [T]he litigant is not the fair-minded observer. He lacks the objectivity which is the hallmark of the fair-minded observer. He is far from dispassionate. Litigation is a stressful and expensive business. Most litigants are likely to oppose anything that they perceive might imperil their prospects of success, even if, when viewed objectively, their perception is not well-founded.
>
> […]
>
> [72] Secondly, the informed and fair-minded observer is to be treated as knowing all the relevant circumstances, and it is for the court to make an assessment of these… It was held in *Virdi v Law Society* [2010] EWCA Civ 100 that the hypothetical fair-minded observer is to be treated as if in possession of all the relevant facts and not only those that are publicly available…'

51. So the hypothetical informed and fair-minded observer knows all the relevant facts, whether publicly available or not, and has a perception of the case which is *not* that of the litigant, but is instead more objective and dispassionate. That is the standard to be applied.

52. But the court must apply these rules not only for the protection of the litigant against whom bias or apparent bias may operate, but also for the benefit of the other litigants involved, and indeed the wider public. This is because in our system litigants are not permitted to choose their judges. As Chadwick LJ once said:

> 'But it is important for a judge to resist the temptation to recuse himself simply because it would be more comfortable to do so. The reason is this. If judges were to recuse themselves whenever a litigant -- whether it be a represented litigant or a litigant in person -- criticised them (which sometimes happens not infrequently) we would soon reach the position in which litigants were able to select judges to hear their cases simply by criticising all the judges that they did not want to hear their cases. It would be easy for a litigant to produce a situation in which a judge felt obliged to recuse himself simply because he had been criticised -- whether that criticism was justified or not': *Dobbs v Tridos Bank NV* [2005] EWCA 468; see also *Re JRL, ex parte CJL* (1986) 161 CLR 342, 352, per Mason J.

So the judge asked to recuse him or herself should only do so where the case is properly made out. Another way of putting this point is that the

> rule is a rule of law, and confers no discretion on the judge. If the case crosses the line, the judge must not hear the case. If it does not do so, the judge cannot decline to do so."

Basis of application

16. In the present case, the defendant has in his annotations to my judgment referred to a number of points as evidence of bias on my part. For the sake of not lengthening this already long ruling unnecessarily, I do not set them out in detail, but refer to them in summary form as follows:

(1) Dealing with the defendant's *Beddoe* application only at the "last minute";

(2) Refusing that application;

(3) Stating in paragraph 4 of my judgment that "the first defendant entered a caveat, which he has refused to remove", which the defendant says is untrue, on the basis that he has never been asked to remove it;

(4) The reference in the same paragraph to the original second defendant's being "a professional executor", which he says implies a bias against him as a lay executor;

(5) Reciting that the second defendant did not wish to be involved in the estate and making a witness statement in support of the claim, which he says amount to "talking up" the professional executor;

(6) Referring in paragraph 8 to the defendant's lodging a notice of appeal against part of the order of 1 October 2021, on the basis that "the emphasis is in the wrong place";

(7) Stating in paragraph 18 that it is not the function of court staff to give litigants advice;

(8) Citing (in paragraph 22) from the defendant's email to Zacaroli J of 1 July 2022, in which the defendant complains about the judge's decision to refuse the defendant permission to appeal against the order of 1 October 2021, and also my referring to his email as "very long";

(9) Declining in paragraph 31 to adjourn the trial date on medical grounds;

(10) In the defendant's words, "the tone and ill will displayed toward me for persisting with my very few efforts at redress of unsound judgments and my gentle follow-up on the court's tardiness and dysfunction";

(11) Following my citation from paragraph 40 of the judgment of Leggatt J in *Nowak v The Nursing and Midwifery Council* [2013] EWHC 1932 (QB), my commenting at paragraph 41 that "Although not everything that Mr Justice Leggatt said there applies to the case of the first defendant, much of it does. I have no doubt that the first defendant sincerely believes in the rightness of his cause … ";

(12) My comment in paragraph 41 of the defendant that "The problem is that he does not take No for an answer";

(13) Again in the defendant's words, my "groundless and superfluous issuance of a punitive civil restraint order against" him.

Assessment

17. I remind myself that the test which I must apply is whether all the circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the tribunal was biased. For this purpose the relevant circumstances include those which may not be publicly known. And, as the *Harb* case makes clear, "[T]he litigant is not the fair-minded observer. He lacks the objectivity which is the hallmark of the fair-minded observer. He is far from dispassionate."

18. As I said in paragraph 41, "I have no doubt that the first defendant sincerely believes in the rightness of his cause". I note that the defendant annotated that comment by adding (emphasis in original):

> "Because it is self-evident that my cause is right. I am a Chartered Accountant with an Institute law prize and lots of forensic auditor experience. I do know what is going on here. The Claimants are working on a scam. And the judges so far have only myopic vision. They haven't noticed the game plan. At the moment we just have lawyers – at all levels – helping lawyers".

19. Again, in paragraph 42 of my judgment, I stated that "The first defendant has persistently issued claims or made applications which are totally without merit … " The defendant's annotation to this reads:

> "As proven above, this is totally untrue. They all have very significant merit. It is those reading them who are apparently challenged and have shaky merit and wear blinkers."

20. On a number of occasions in his written communications the defendant has indicated that his knowledge and experience make him both an appropriate person to act as his brother's executor, and also able to recognise incipient fraud by lawyers. Indeed, his "sign-off" at the end of his email to the court reads:

> "Tim McDonald LSE B.Sc (Econ), De Facto C.A. with Law Prize
> Retired Publishing CFO, VP & Secretary Treasurer.
> Retired KPMG, E&Y Forensic Auditor
> Proponent of civis Romanus sum".

21. Whether or not these experiences make him a good personal representative, unfortunately they do not make him objective, and able to accept that he might be wrong, in a case where he is personally involved. Unlike him, I have no connection with this litigation or the parties involved in it, other than being assigned to deal with this aspect of it. Unlike him, I have no interest whatever

in the outcome, except to ensure, so far as I can, that it is in accordance with the relevant law.

22. I have read and reread the various accusations of bias made against me by the defendant in his email to the court and his annotations of my judgment. I am entirely satisfied that any fair-minded and informed observer knowing all the relevant circumstances would not conclude that there was a real possibility of my being biased. Accordingly, and in accordance with the binary nature of the rule, I cannot recuse myself.

23. As a footnote, I should perhaps additionally point out to the defendant that it really does not assist his case to send with his email and other attachments colour photographs of what he calls his "referees", including the past and present Premiers of Ontario, the mayor of East York, the Lieutenant Governor of Ontario, past and present mayors of Township Muskoka Lakes, and the Archbishop of Canterbury (to whom the defendant is related by marriage). These distinguished people may know him, but they have no relevant evidence to give in this case.

Timing of the trial/adjournment

24. The third aspect of the defendant's informal application relates to the timing of the trial on 14 September 2022. The defendant is 86 years old, with some recent ill-health (though there is no satisfactory evidence of exactly what or how much), who lives in Canada. I agreed to hold the trial remotely, because it is a Part 8 claim and the written evidence has all been filed. (I note in his annotations to my earlier judgment that the defendant says he intends to adduce further written evidence. As to that, the date by which such evidence was to be filed and served has long since passed, so that he will need to seek relief from sanction before any further evidence can be admitted.)

25. According to the order of Zacaroli J of 4 June 2022, the trial was to be held on the first available date after 22 July 2022, with a time estimate of one day, and two hours' judicial pre-reading. On 15 July, the claimants emailed saying that they wanted the trial in August. On the same day, the defendant also emailed, saying that he wanted it in September. (Indeed, he also added "I must say that if this hearing does actually happen, I am delighted it will be before HHJ Matthews.".) As it happens, I decided that it would be better in September, and fixed it for 14 September at 10:30 am.

26. The date *and time* of the trial were communicated to the parties on 22 July 2022. On the same day the defendant wrote to the court acknowledging the notice and accepting the hearing. Only now, more than a month later, with only a fortnight to go, has the defendant applied for the trial start time to be put back so that he will not have to get up very early in the morning to join the hearing at 10:30 am. He asks for a start time of 2 pm, and says that the hearing will not be very long. In his email to the court, he says, "There cannot, after all, be any true supporting evidence – only contrived suppositions – to support [the claim]".

27. Having reviewed the court file, and having now dealt at some length with the submissions of the defendant, I have acquired some preliminary knowledge of this matter. I am quite satisfied that a whole day is likely to be needed for it. I quite understand that the defendant is unhappy at the notion of rising very early to join this hearing remotely, but he did agree to the hearing being on this date, and Zacaroli J considered (as now do I) that a whole day should be set aside. In any event, I have another matter to deal with in court on the following day, and so it is not possible simply to run over from the 14 to the 15 September.

28. What this means is that, if there is to be a trial beginning at 2 pm on that day, there will need to be an adjournment of the trial date. As I have already said earlier in this ruling, on 1 August 2022 I refused an application made by the defendant by email on 27 July for an adjournment of the trial from 14 September, and I referred the relevant law on that occasion; see in particular at [25]-[28]. So, I do not need to set it out again. Moreover, before a litigant may make a second application for the same interlocutory relief (here in effect an adjournment) there usually needs to be material new facts or a change of circumstances: *cf Chanel Ltd v FW Woolworth & Co Ltd* [1981] 1 WLR 485, 492-93, CA. I can see neither in this case.

29. Even putting that problem on one side, the question for me is whether the trial will be fair if it goes ahead on 14 September, starting at 10:30 am. I bear in mind the defendant's age and recent ill-health. But there is no evidence to suggest any medical difficulty in his taking part in this trial if he wishes to. The only difficulties are that he evidently does not wish to come to England for the trial (although there is still time for him to do so if he wished), and is unwilling to rise early in the morning to participate remotely.

30. The solution of course is for him to instruct a lawyer in England to represent him at the trial. It is clear from the material which he has submitted that he has been actively considering this possibility, but has – so far, at least – decided against doing so. That is his choice. But his choice, especially at this late stage when all other arrangements have been made, and there is only his own convenience in favour of an adjournment, cannot justify my vacating the hearing on 14 September and relisting it on some later date. So, for these reasons, I would have rejected the application to change the trial start time or indeed for an adjournment.

Conclusion

31. As a result, even if the defendant had (i) properly communicated his email application to the other side, as required by CPR rule 39.8, (ii) followed the procedure for seeking permission to make his application under CPR Practice Direction 3C, and (iii) applied in form N244 and paid the appropriate fee, his application would still have failed on the merits. For the avoidance of doubt, I make clear that, if the defendant wishes to make any further applications in this litigation, he must follow the relevant procedural rules in all respects. No similar indulgence will be given on a future occasion.