CR 2020 002066

Neutral Citation Number [2025] EWHC 476 (Ch)
IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (CHD)
IN THE MATTER OF D.W.B. WASTE MANAGEMENT LIMITED (IN LIQUIDATION)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Royal Courts of Justice
7 The Rolls Building
Fetter Lane
London EC4A 1NL

Date: 3 March 2025

Before :

ICC JUDGE BARBER

- -

Between :

LOUISE MARY BRITTAIN
(IN HER CAPACITY AS LIQUIDATOR OF D.W.B. WASTE MANAGEMENT LIMITED (IN LIQUIDATION)

Applicant

- and –

MR DAVID JOHN CHOPPEN

Respondent

- -

Ms Hannah Fry (instructed by **Wedlake Bell LLP)** appeared for the **Applicant**
Ms Kate Gardiner (instructed through the **Advocate** scheme) appeared for the **Respondent**

Hearing date: 4 February 2025

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Approved Judgment

This judgment was handed down remotely by email and MS Teams. It will also be sent to The National Archives for publication. The date and time for hand-down is 9.30 a.m. on 3 March 2025.

ICC Judge Barber

1. On 4 February 2025, I ordered that the trial of this matter be adjourned with written reasons to follow. This judgment sets out my reasons for that order.

The Application

2. By the Application, Ms Brittain in her capacity as liquidator of D.W.B. Waste Management Limited ('the Company') seeks against the Respondent as sole director of the Company the following relief:

> Under-declaration of VAT
>
> A declaration that the Company's under-declaration of VAT in sums totalling £251,437 plus a penalty of £118,195 and interest of £17,277.09 pursuant to HMRC's assessment was the result of a breach of the Respondent's duties to the Company under the Companies Act 2006 ('CA 2006');
>
> An order pursuant to s212(3) Insolvency Act 1986 ('IA 1986') that the Respondent repay such sums to the Company together with interest;
>
> Unlawful payments to the Respondent
>
> A declaration that the Respondent is in breach of his CA 2006 duties to the Company by causing the Company to make payment to himself of £69,000 (whether as unlawful dividends or otherwise) and/or that by receiving such sums the Respondent has misapplied and/or become accountable for money of the Company and/or that such payments amounted to transactions at an undervalue pursuant to s 238 IA 1986;
>
> An order for repayment of the sum of £69,000 together with interest;
>
> Unlawful cash withdrawals
>
> A declaration that in causing the Company to make cash withdrawals totalling £286,180 the Respondent was in breach of his CA 2006 duties and/or that by making the withdrawals the Respondent has misapplied and/or become accountable for money of the Company and/or that such withdrawals amounted to transactions at an undervalue pursuant to section 238 IA 1986;
>
> An order pursuant to s 212(3) and/or 238 IA 1986 that the Respondent repay the sum of £286,180 to the Company together with interest.

The Company

3. The Company was incorporated on 2 October 2014 and traded in recycled waste for energy purposes. It was registered for VAT at all material times.

4. Mr Ashok Kumar Bhardwaj was the sole director upon incorporation but resigned on the same day. On 2 October 2014, Mr Kelly Russell Bond was appointed as a director and remained a director until his resignation on 10 February 2016.

5. On 20 January 2016, the Respondent was appointed as a director of the Company and was the sole director of the Company from 10 February 2016. On 8 February 2016, the Respondent became a 50% shareholder. The remaining shares were transferred to the Respondent on 7 June 2017.

6. The Company had two bank accounts with Barclays. On becoming a director, the Respondent was named as an authorised signatory of the accounts. The other authorised signatory was his predecessor, Mr Kelly Bond.

7. On 27 June 2017, the Company entered into creditor's voluntary liquidation with Mr Alan Clark of Carter Clark appointed as liquidator. On 8 January 2019, the Company was dissolved.

8. On 31 March 2020, HMRC presented a petition for the Company to be restored to the Register of Companies and be then wound up by the Court. On 1 July 2020, the Company was restored to the Register of Companies and wound up.

9. The Applicant Ms Louise Mary Brittain was appointed as liquidator with effect from 17 September 2020.

The Respondent

10. The Respondent has mild cognitive impairment ('MCI'). He has struggled to read and write since school and is dependent on others to assist him with these tasks. He left school without any qualifications and started working as a driver, ultimately qualifying to drive HGVs.

11. From shortly after incorporation of the Company in October 2014 until early 2016, the Respondent simply worked for the Company as an HGV driver on a monthly salary. Kelly Bond was sole director and shareholder of the Company at that stage. In late 2024/early 2015, a friend and business partner of Kelly Bond known as Steve Rozario started to assist Kelly in running the Company. Steve Rozario had recently been released from prison following a conviction for firearms offences. From that stage the Respondent says that he took instructions variously from Kelly and Steve as to where given loads of waste should be picked up and dropped off.

12. In early 2016, Kelly Bond was convicted of possession of a firearm and sentenced to 5 years' imprisonment. The Respondent's case is that at around this time, Steve Rozario told him that they (Steve and Kelly) needed to put the Company in his name. The Respondent says that he felt under considerable pressure to agree. He knew by this stage that Steve Rozario and Kelly Bond 'carried guns and were potentially dangerous' and says that he was 'afraid of [their] reaction if [he] refused.'

13. The Respondent's case is that he was a director of the Company in name only. He says that notwithstanding his appointment as a director in the Company and the transfer of shares to him, he always considered it to be 'Steve and Kelly's' company. He maintains that his role did not change much on a day-to-day basis following his appointment; he still worked as an HGV driver, for which he was paid the appropriate salary. He does accept however that in his capacity as director of the Company, he signed various documents relating to the Company on instruction from Mr Rozario, who would bring documents around to his house for signature, often on little or no notice. In his witness evidence he states that any paperwork he signed 'would have been handed to me by Steve and I would have signed it based on what he explained to me about it', adding 'I would not have been able to understand any paperwork given to me'.

14. The Respondent also accepts that as an authorised signatory on the Company's bank accounts (the only other signatory being Kelly Bond, who was in prison), he made banking transfers and cash withdrawals from the Company's accounts from time to time. His case is that he took instructions from Steve Rozario as to which banking transfers and cash withdrawals to make. He has produced in evidence screenshots from his mobile phone of texted instructions on cash withdrawals, which he says he received from Mr Rozario. The timing of some of those instructions tallies with certain of the cash withdrawals in issue in these proceedings. He says that he would give any cash withdrawals to Steve Rozario. The cash withdrawals were often in significant sums, running to thousands of pounds. The Respondent says that whilst he cannot recall what he was told 'about each payment and each withdrawal', at the time he understood these to be 'for company expenses'.

Kelly Bond

15. Kelly Bond is currently serving a further period of imprisonment (of 16 years) following a conviction in 2022 for drug trafficking and firearms offences.

Steve Rozario

16. According to Companies House filings, Steve Rozario has been a director of 11 companies, many of which have since been liquidated and/or dissolved.

17. One of those companies is Active Management Facilities Limited ('Active Management'). Mr Rozario was sole director of Active Management. The Applicant is liquidator of that company. She submitted a D2 report in respect of Mr Rozario's conduct. Mr Rozario was later disqualified as a director for 7 years from 2 February 2024 as a result of his conduct as de jure director of Active Management. The admitted facts for the purposes of Mr Rozario's 7 year disqualification undertaking were that he failed to maintain and/or preserve and/or deliver up to the liquidator adequate accounting records and that, as a result:

> 'it has not been possible to determine: The circumstances [in] which and the reasons for the cash withdrawals totalling £377,500 between March 2019 and 10 October 2019 and payments totalling £513,500 (net) made to [Mr Rozario] between 23 April 2019 and 11 October 2019…'

18. The progress reports filed at Companies House in respect of the Active Management liquidation confirm that the Applicant has now authorised solicitors to bring proceedings against Mr Rozario in the event that no settlement can be reached with him.

19. AA Reclaim Limited ('AA Reclaim') is another company with apparent connections to Mr Rozario. The Applicant is liquidator of AA Reclaim as well. The Respondent maintains that the sole director of AA Reclaim, Mr Aaron Archer, has confirmed that he was in a similar position to the Respondent as regards Mr Rozario (i.e. taking instructions from him behind the scenes) and that Mr Archer has raised concerns with the Applicant (as liquidator of that company) about Mr Rozario. The annual progress report for AA Reclaim for the year ending 15 March 2024 lends mild support to this, stating that 'following bank analysis and from the information provided by the director in an interview held on the 3 July 2023', 'third parties' have been identified and written to. As at the date of that progress report, such investigations were said to be continuing.

20. AA Reclaim also appears to have had links with the Company. Listed in a letter from the Applicants' solicitors dated 4 December 2020 to the Respondent regarding transactions said to require an explanation at the time were payments made by the Company to AA Reclaim totalling £196,567.50.

The Application: procedural history

21. The Application was issued on 22 September 2022. The first directions hearing took place on 2 November 2022. The Applicant appeared by Counsel and the Respondent appeared in person. At the hearing, the Respondent mentioned various physical and mental health conditions. Accordingly, in addition to directing the Applicant to file and serve Points of Claim, the court directed the Respondent to file and serve a witness statement exhibiting any medical evidence upon which he may wish to rely on the issue whether any reasonable adjustments should be made for the purposes of his defence of and participation in the proceedings. A further one-hour directions hearing was also listed, for the purpose of considering (among other things) any medical evidence filed.

22. Pursuant to the order of 2 November 2022, the Applicant filed and served Points of Claim.

23. With some assistance from the Citizens Advice Bureau, the Respondent prepared and filed a witness statement dated 12 December 2022. The witness statement exhibited medical evidence but did not suggest any reasonable adjustments that the Respondent might require. In summary the medical evidence stated:

    (1) The Respondent was diagnosed with severe depression and generalised anxiety disorder in 2020. He had started on antidepressants (Setraline) at that time and the dose had gradually increased, with Mirtazapine added.

    (2) In 2020, the Respondent was also diagnosed with Mild Cognitive Impairment. This causes him to lose his train of thought and difficulty in remembering things.

(3) The Respondent had presented worsening headaches in 2021. He was investigated but no underlying cause of concern had been identified. He was on medication to try to reduce headache severity and intensity.

24. A second directions hearing took place remotely on 6 March 2023. The Respondent appeared in person. No reasonable adjustments were sought or granted. Directions were given through to trial. The directions included the usual provision for cross-examination of all witnesses.

25. On 25 April 2023, with the assistance of his partner and/or family members, the Respondent filed his points of defence. These barely covered half a page and provided as follows:

> 'I David Choppen was made director of DWB Waste Management LTD, after Mr Kelly Bond former owner and director of said company, was incarcerated for five years for having an illegal firearm.
>
> I was ask for the company to be put in my name, by Mr Stephen Anthony Rozario Mr Bonds silent partner. I was told he could not have it in his name as he had just been released from prison for a similar offence.
>
> My roll in the company as head driver was to drive lorries and to organize the other drivers as per Mr Rozario's instructions.
>
> I had no experience or knowledge of running a company, this was all done by Mr Rizario. Finding the work, Invoicing, Banking and general running of the company.
>
> I was just a director on paper only.'

26. On 9 June 2023, the trial was listed on 21 and 22 May 2024.

27. On 25 September 2023, the Respondent sent the Applicant two documents by email. The first document was his previously provided points of defence (as quoted at [25] above), re-dated to 25 September 2023. The second was a document headed 'Ref: Witness statement' prepared by the Respondent's partner, signed by the Respondent and dated 25 September 2023, which provided as follows:

> 'I am writing this on behalf of David Choppen and I am his partner. Unfortunately as David has MCI [mild cognitive impairment] as previously stated his memory has declined to the extent that he can not remember the past and as the situation with DWB [the Company] was quite a few years ago this falls into this category. He has also been diagnosed with Osteoarthritis of the spine and owing to being in a lot of pain his mental health has declined also. As previously stated Steven Anthony Rozario ran the company so he would no a lot of the questions that need answering as David has no recall'

28. On 26 March 2024, the Applicant filed and served her second witness statement. On the issue of Mr Rozario, this stated simply at [18]:

> 'As regards Mr Rozario's involvement, since my appointment as liquidator and in the carrying out of my duties, I have not come across any reference to Mr Rozario being involved, let alone being in day-to-day charge of the Company.'

29. By application issued on 8 April 2024, the Applicant sought an order that she be excused from attending trial for cross-examination and that her two witness statements be read by the trial judge as her evidence. The reason for the application was that the Applicant had a diary clash; she was due to attend (and sit on a panel as a UK insolvency expert) at an Insol Conference due to take place in San Diego at the time of the trial ('the Insol application').

30. The Insol application was listed for hearing on 22 April 2024. By the time of that hearing, the Respondent had managed to secure the assistance of a barrister called Adam Smith-Roberts through Advocate. Mr Smith-Roberts filed a skeleton argument objecting to the Insol application, listing a number of matters in the Applicant's witness statements likely to be challenged by the Respondent at trial, including the Applicant's 'factual evidence about the involvement or not of Mr Rozario in the Company' (a reference to paragraph 18 of the Applicant's second witness statement).

31. At the hearing on 22 April 2024, at which the Respondent was represented by Mr Smith-Roberts, ICC Judge Greenwood did not excuse the Applicant from attending trial for cross-examination, but instead vacated the trial. The judge also granted the Respondent permission to file amended points of defence, the Applicant permission to file points of reply and gave directions for supplemental witness statements. The order provided for the trial to be re-listed on the first available date after 12 July 2023.

32. By listing order dated 7 May 2024, the trial was relisted to commence on 4 February 2025.

33. With the assistance of Mr Smith-Roberts, the Respondent filed amended points of defence on 8 May 2024. These made clear (among other things) that the Respondent struggles to read and write and is dependent on others to assist him with these tasks. The amended points of defence also addressed more fully the role of Mr Rozario and gave the name and address of the Company's bookkeeper. Points of reply were filed on 31 May 2024.

34. With the assistance of Mr Smith-Roberts, the Respondent also filed a second witness statement dated 28 August 2024. This again made clear that the Respondent struggles to read and write. It addressed Mr Rozario's role within the Company. It also gave further evidence about the Company's bookkeeper, stating that the bookkeeper had told the Respondent that she still works for Mr Rozario and that she had handed over any documents relating to the Company in her possession to him. The Applicant has not filed any further witness statement in reply.

35. Mr Smith-Roberts had initially confirmed to Advocate in June 2024 that he would continue with the case through to trial. At a later stage however he found that he was unable to do so. After some delays, in or by November 2024, Mr Smith-Roberts

returned the case to Advocate, (1) for another barrister to be allocated; and (2) for advice on a contribution claim against Mr Rozario to be authorised.

36. The Respondent did not learn that Mr Smith-Roberts was no longer able to represent him until November 2024. When he discovered this, the Respondent (with his brother's assistance) wrote to Advocate by email on several occasions in November and December, pressing for a replacement barrister.

37. Regrettably there were a series of delays in the allocation of a replacement and (until very recently) Mr Smith-Roberts' recommendation that advice on a contribution claim be authorised was not actioned. This is not a criticism of Advocate, which as a small charity reliant on volunteers does much highly regarded and valuable work with extremely limited resources. Reading through the correspondence, however, there do appear to have been several factors which contributed to the delays encountered at this stage. These included the fact that the Respondent's allocated Advocate caseworker, Emily, stepped down and was replaced by a new caseworker, Andrew. This caused some delay as Andrew got up to speed with the casework transferred to him. A further factor was a misdirection of emails, compounded by Advocate's offices being closed over Christmas. Andrew sent an email dated 16 December 2024 to the Respondent requesting further information, but his email went through to spam on the Respondent's email account. By the time that the Respondent realised this, on or about 23 December 2024, he sent a further email with the assistance of his brother on the same day but received an out of office automated response from Advocate. The Respondent's further attempts to reach Advocate by email over the Christmas period simply prompted auto replies, as Advocate's offices were closed for the Christmas break.

38. In the meantime, the Respondent alerted the Applicant's solicitors to his predicament. By email dated 13 December 2024, he informed them:

> 'to let you no adam Smith Robert's how was representing me can no longer represent me due too other commitments and there I am waiting for Advocate to appoint another barrister'.

39. The Applicant's solicitors replied the same day, thanking the Respondent for letting them know about Mr Smith-Roberts and asking him whether a draft bundle index was agreed. After several chasing emails regarding bundles, the Respondent (with the assistance of his partner) by email dated 4 January 2025 replied:

> 'As Mr Smith Roberts is no longer available to represent me I am waiting for Advocate to allocate a new barrister as I do not no what to do as I don't know what I am serpost to agree or not .. Advocate are not back to work till the 6th so I am hoping they can sort it asap as I have sent them a email and marked it urgent'.

40. On 10 January 2025, the Respondent telephoned the Applicant's solicitors and asked if the Applicant would agree to an adjournment of the trial, explaining that his previous barrister was not available and that Advocate had told him that it could take another two weeks to arrange a replacement.

41. The Applicant refused to agree an adjournment. By letter dated 13 January 2025, the Applicant's solicitors wrote:

> 'I refer to our telephone conversation of Friday 10 January 2025 in which you asked for an adjournment of the trial. This as you know is to take place from 4 February 2025. The basis for the adjournment is that you advise that your chosen counsel is not available who you had obtained via the Advocate system and they have told you that it could take another two weeks to know if they will allocate another to you.
>
> Our client will not agree to the adjournment and you will need to apply to court to seek such an order. Our client does not consider that the failure to obtain counsel in the circumstances you outline is a sufficient reason for an adjournment. If it were adjourned then it is likely that the case would not be heard until the end of 2025 at the earliest.
>
> We also remind you that you [sic] cases are often heard with litigants acting in person and there is no reason of which our client is aware why you could not act in person in any event. The courts are highly experienced in dealing with litigants in person.'

42. Pausing there, the suggestion that there was 'no reason of which [the Applicant was] aware why [the Respondent] could not act in person in any event' is not quite right; by that stage it was known that the Respondent suffered from mild cognitive impairment and struggled to read and write, requiring assistance with these tasks.

43. In light of the Applicant's refusal to consent to an adjournment, on 16 January 2025, with assistance from his brother, the Respondent attempted to file an application notice seeking an adjournment. The application notice dated 16 January 2025 gave the reasons for the requested adjournment as:

> 'Need time for a new barrister to be assigned from Advocate as I suffer from MCI as well as Anxiety and depression so I cannot represent myself.
>
> Supply evidence as to my state of mental health'

44. Attached to the application notice dated 16 January 2025 was a document headed 'Debt and Mental Health Evidence Form' completed by a social worker called Christopher Woollard and dated 29 November 2021. This stated that the Respondent had:

> 'Memory and concentration difficulties, he can struggle to think conceptually with numbers and can often lose his train of thought. David is supported by his partner with activities of daily living…

> Memory and concentration difficulties impacts on his communications abilities. Anxiety and depression can cause avoidance..
>
> Ongoing reviews with the Memory Assessment Service (David is high risk of conversion). David has had talking therapies, however there was little progress in symptom improvement, due to cognitive impairment. Due to start second lot of therapy. David is also on maximum dose of anti-depressants, with little improvement and awaiting medication advice from psychiatrist.'

45. The Respondent's first attempt to email his application notice and the attachments to the ICC issue team at the Rolls on 16 January 2025 was unsuccessful due to a misspelling of the issue team's email address. This does not appear to have been noticed until 24 January, when the email was resent to the correct address marked 'urgent'. The issue team then experienced difficulties in opening the attachments to the Respondent's email and so by email dated 24 January asked him to resend the attachments in pdf or word format.

46. The Respondent resent the documents on the same day (24 January) by email. These were referred to an ICC judge on 27 January, who on 28 January replied in conventional terms, stating that a witness statement in support of the adjournment application notice should be filed (1) summarising attempts to arrange representation through Advocate and stating when a barrister was likely to be available and (2) exhibiting a letter from a doctor or other suitably qualified medical professional ('the doctor') which stated (a) how long the doctor has treated him (b) when the doctor last examined him (c) whether in the doctor's opinion the Respondent is currently suffering from any conditions which prevent him from participating in and giving evidence at a 2 day trial the following week and if so what those conditions are (d) whether there are any reasonable adjustments which would enable the Respondent to participate and give evidence at a trial the following week (e) if there were no reasonable adjustments that would enable him to do so, when, in the doctor's opinion, would the Respondent be likely to be fit for trial.

47. By email dated 29 January 2025 headed 'Re Judges request', the Respondent then sent to the ICC issue team (copying in the Applicant's solicitors) a copy of the 'Debt and Mental Health' form dated 29 November 2021 referred to at [44] above, together with a letter dated 29 January 2025 from an NHS doctor called Dr Asif Iqbal. Dr Iqbal's letter of 29 January 2025 stated that the Respondent was 'experiencing a poor state of physical and mental health including depressive disorder and anxiety' and was currently receiving medical attention under the GP practice's care. The letter listed medical problems and the date of diagnosis, including mild cognitive impairment, severe depression and generalised anxiety disorder. The medical problems listed were largely the same as those listed at [23] above, save for the addition of 'chronic pain' diagnosed in October 2023 (which is presumably the result of the spinal osteoarthritis referred to by the Respondent's partner in earlier correspondence). The letter next listed the medication that the Respondent is taking, which include Sertraline at maximum dose and Amitriptyline for his anxiety and depression. It also confirmed that his anxiety and depression scores are classified as 'severe' (PHQ 9 score and GAD 7 score).

48. Attempts also appear to have been made at this stage to file some recent email correspondence exchanged between Advocate and the Respondent. Although this does not appear to have been uploaded onto ce file by the court staff, the Applicant's solicitors (who were copied in) confirmed receipt of it in their letter of 30 January referred to at [50] below.

49. It was not until 29 January 2025 that Advocate were able to confirm that their reviewer had recommended the Respondent for representation at the trial commencing 4 February. The recommendation at that stage only extended to representation at trial and not to advice on the contribution claim; and at this stage Advocate had yet to find a barrister willing to take on the case.

50. By letter dated 30 January 2025, the Applicant's solicitors wrote to the court opposing the adjournment application.

51. On Friday 31 January 2025, Ms Gardiner of Counsel was instructed to represent the Respondent at trial. As Ms Gardiner was in court that day, she was only able to look at the papers over the weekend. The possibility of a contribution claim was immediately noted, as was the fact that it had been flagged by the previous barrister as a matter that required authorisation.

52. At 9.30am on Monday 3 February, Ms Gardiner called Advocate to say that she would be prepared to provide advice on the contribution claim. At 11.14 on 3 February, Advocate confirmed to Ms Gardiner that she had authority to provide advice to the Respondent regarding a contribution claim.

53. The trial was set to start on 4 February.

Adjournment: principles

54. Under CPR rule 3.1(2)(b), the court has a discretion to adjourn a hearing. This discretion must be exercised in accordance with the overriding objective in CPR rule 1.1 of dealing with a case justly and at proportionate cost. This includes, so far as is practicable: (a) ensuring that parties are on an equal footing and can participate in proceedings, and that parties and witnesses can give their best evidence, (b) saving expense, (c) dealing with the case in ways which are proportionate to the amount of money involved, the importance of the case, the complexity of the issues and the financial position of each party, (d) ensuring that it is dealt with expeditiously and fairly, (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases, (f) promoting or using alternative dispute resolution, and (g) enforcing compliance with rules, practice directions and orders.

55. Ms Gardiner relied upon the guidance given in the case of Fitzroy Robinson Ltd v Mentmore Towers Ltd [2009] EWHC 3070 (TCC) at [8]-[9]

> '[8] …. It seems to me that the starting point is the overriding objective (CPR Part 1.1), the notes in the White Book at paragraph 3.1.3, and the decision of the Court of Appeal in

> Boyd and Hutchinson (A Firm) v Foenander [2003] EWCA Civ 1516. Thus, the court must ensure that the parties are on an equal footing; that the case - in particular, here, the quantum trial - is dealt with proportionately, expeditiously and fairly; and that an appropriate share of the courts resources is allotted, taking into account the need to allot resources to other cases.
>
> [9] More particularly, as it seems to me, a court when considering a contested application at the 11th hour to adjourn the trial, should have specific regard to:
>
> a) The parties' conduct and the reason for the delays;
>
> b) The extent to which the consequences of the delays can be overcome before the trial;
>
> c) The extent to which a fair trial may have been jeopardised by the delays;
>
> d) Specific matters affecting the trial, such as illness of a critical witness and the like;
>
> e) The consequences of an adjournment for the claimant, the defendant, and the court.'

56. I was also referred to Bilta (UK) Ltd (In Liquidation) v Tradition Financial Services Ltd [2021] EWCA Civ 221. Ms Gardiner relied in particular on the following guidance drawn from Bilta per Nugee LJ:

    56.1 The test is essentially whether a refusal of an adjournment will lead to an unfair trial [49(1)];

    56.2 'Fairness involves fairness to both parties. But inconvenience to the other party (or other court users) is not a relevant countervailing factor and is usually not a reason to refuse an adjournment': [49(4)];

    56.3 '[W]hat fairness requires will depend on all the circumstances of the case': [52].

57. On the issue of adjournments on medical grounds, reference was made to the well-known case of Levy v Ellis-Carr [2012] EWHC 63 (Ch), in which Mr Justice Norris gave the following guidance:

> '[32] …The decision whether to grant or to refuse an adjournment is a case management decision. It is to be exercised having regard to the "overriding objective" in CPR 1….each case must turn on its own facts (and in particular upon how late the application is made).
>
> [33] Registrars, Masters and district judges are daily faced with cases coming on for hearing in which one party either writes to the court asking for an adjournment and then (without waiting for a reply) does not attend the hearing, or writes to the court simply to state that they will not be attending. Not infrequently "medical" grounds are

advanced, often connected with the stress of litigation. Parties who think that they thereby compel the Court not to proceed with the hearing or that their non-attendance somehow strengthens the application for an adjournment are deeply mistaken. The decision whether or not to adjourn remains one for the judge. The decision must of course be a principled one. The Judge will want to have in mind CPR 1 and (to the degree appropriate) any relevant judicial guidance (such as that of Coulson J in Fitzroy or Neuberger in Fox v Graham ("Times" 3 Aug 2001 and Lexis). But the party who fails to attend either in person or through a representative to assist the judge in making that principled decision cannot complain too loudly if, in the exercise of the discretion, some factor might have been given greater weight.

…

[36]…[referring to the medical evidence required to demonstrate that the party is unable to attend a hearing and participate in the trial] … Such evidence should identify the medical attendant and give details of his familiarity with the party's medical condition (detailing all recent consultations), should identify with particularity what the patient's medical condition is and the features of that condition which (in the medical attendant's opinion) prevent participation in the trial process, should provide a reasoned prognosis and should give the court some confidence that what is being expressed is an independent opinion after a proper examination. It is being tendered as expert evidence. The court can then consider what weight to attach to that opinion, and what arrangements might be made (short of an adjournment) to accommodate a party's difficulties. No judge is bound to accept expert evidence: even a proper medical report falls to be considered simply as part of the material as a whole (including the previous conduct of the case).'

58. Ms Fry also referred me to FCA v Avacade Limited [2020] EWHC 26 (Ch) per Adam Johnson QC (as he then was, sitting as a Judge of the Chancery Division) referring at [59] to the guidance of Norris J in Levy v Ellis Carr already referred to and at [60] to a number of authorities including Forresters Ketley v Brent [2012] EWCA (Civ) 324 at [26] per Lewison LJ and GMC v Hayat [2018] EWCA (Civ) 2796 at [48] in which the Levy guidance has since been approved.

59. Ms Fry also relied upon a passage in the Forresters case at [25] per Lewison LJ:

> 'Judges are often faced with late applications for adjournments by litigants in person on medical grounds. An adjournment is not simply there for the asking. While the court must recognise that litigants in person are not as used to the stresses of appearing in court as professional advocates, nevertheless something more than stress occasioned by the litigation will be needed to support an application for an adjournment. In cases where the applicant complains of stress-related illness, an adjournment is unlikely to serve any useful purpose because the stress will simply recur on an adjourned hearing.'

60. Reference was also made to GMC v Hayat at [57], in which Coulson LJ observed:

> 'Any adjournment causes extensive disruption and inconvenience and wastes huge amounts of costs'.

The Respondent's submissions

61. Ms Gardiner invited the court to adjourn the trial to allow her a fair opportunity to prepare with the Respondent for a complex trial involving claims of in excess of £500,000. The Respondent, she argued, deserved representation of a quality proportionate to the sums at stake. She had only been instructed on Friday, 31 January 2025 and was in court that day, which meant that she could not start looking at the papers until the weekend, very shortly before trial. There was a lot of material to digest; the core bundle was 80 pages, the exhibits bundle was over 500 pages, the Applicant's skeleton ran to 38 pages and the authorities bundle to over 900 pages. Ms Gardiner argued that it would not be fair to proceed with the trial in the current circumstances. The Respondent should not be prejudiced by the fact that his representation has only been secured at the last minute. The parties were not on an equal footing.

62. Looking to the first Fitzroy factor (the parties' conduct and the reason for the delays), Ms Gardiner argued that the Respondent could not be said to have been at fault. By early 2024, he had very properly taken steps to seek the assistance of Advocate and to secure representation by counsel for the trial. Until November 2024 he reasonably thought that all appropriate arrangements for his representation at trial were in place.

63. Once he discovered in November 2024 that Mr Smith-Roberts could no longer represent him at trial, with the assistance of his brother, the Respondent had done his best to chase Advocate throughout November, December and January for a replacement barrister.

64. Ms Gardiner argued that it was not the Respondent's fault that it took until 29 January 2025 for Advocate to authorise a replacement for Mr Smith-Roberts and that it took until 31 January 2025 for a replacement to be found.

65. Ms Gardiner also reminded the court that this was not a case of a last-minute adjournment request; the Respondent had sought the Applicant's agreement to an adjournment on 10 January 2025, over 3 weeks before trial, having alerted the Applicant to his difficulties securing replacement Counsel before Christmas. The Applicant had refused to agree to an adjournment, despite being aware of all the material facts.

66. When the Applicant refused to consent to an adjournment, the Respondent had not left matters there; he had then attempted to file an application notice with the court on 16 January 2025, over 2 weeks prior to trial, explaining in the body of the application notice that he needed time for a new barrister to be assigned from Advocate as he suffered from mild cognitive impairment as well as anxiety and depression and so could not represent himself. The fact that his initial filing attempts were unsuccessful, Ms Gardiner argued, had to be seen in the context of his cognitive impairment and difficulties reading and writing.

67. Ms Gardiner also referred to the correspondence from various medical professionals who have been treating the Respondent. That correspondence confirmed that he was on the maximum dose of antidepressant. Dr Iqbal's letter dated 29 January 2025

evidenced a poor state of physical and mental health, including express references to depressive disorder and anxiety. Anxiety and depression were each classified as 'severe'.

68. Ms Gardiner reminded the court that it should ensure so far as practicable that the parties were on an equal footing and able to give their best evidence. She also submitted that CPR 1A PD was engaged and that the Respondent should be treated as a vulnerable party. Paragraph 3 of CPR 1A PD made clear that a party should be considered as vulnerable if a factor, personal or situational, permanent or temporary, may adversely affect their participation in proceedings or the giving of evidence. By Paragraph 4, relevant factors include but are not limited to (a) age or lack of understanding, (b) communication or language difficulties (including literacy), (c) physical disability or impairment, or health condition, and (d) mental health condition or significant impairment of any aspect of their intelligence or social functioning (including learning difficulties). A number of these factors, she argued, were present in the case of the Respondent; including (b), (c) and (d). As matters stood, there were no arrangements or adjustments in place to cater for these factors (including but not limited to literacy).

69. An adjournment, Ms Gardiner argued, would not jeopardise a fair trial but rather would ensure a fair trial. Not only would it ensure that she as the Respondent's barrister had a fair opportunity properly to prepare for a trial of a complex claim involving a vulnerable party, it would also allow her an opportunity to advise the Respondent on a contribution claim against Mr Rozario and if appropriate to apply for his joinder to the proceedings.

70. In this regard Ms Gardiner reminded the court that the Respondent was only very recently in a position to seek and receive advice regarding the potential contribution claim against Mr Rozario. Whilst it was recommended by Mr Smith Roberts in 2024, it was not authorised by Advocate until 3 February 2025.

71. Ms Gardiner maintained that the briefest of reviews of the amended points of defence and the Respondent's witness evidence was sufficient to show the potential significance of Mr Rozario in these proceedings as a shadow director. Mr Rozario had a proven history of poor conduct as a director. His disqualification for 7 years in 2024 on grounds involving significant unexplained cash withdrawals from his company's bank account, Ms Gardiner argued, was particularly important, as a large part of the Applicant's case in these proceedings rested on inference from cash withdrawals, inviting the conclusion that cash withdrawn by the Respondent from the Company's bank accounts (on his case on Mr Rozario's instruction and paid over to Mr Rozario) was simply kept by the Respondent for his own use.

72. Ms Gardiner asked the court to consider what would happen to the Respondent if the trial proceeded on 4 February 2025 and the court was invited simply to base its conclusions as regards the (substantial) cash withdrawals on inference, compared to what would happen to the Respondent if the trial was adjourned and he received favourable advice leading to a successful contribution claim. The difference in outcome, she argued, would materially change the consequences of the proceedings from the Respondent's perspective.

73. Ms Gardiner concluded by submitting that, whilst an adjournment may cause financial frustrations for the Applicant and whilst time will have been spent by the parties and by the court in preparing for trial, to proceed to trial on 4 February 2025 in all the circumstances of this case would be unjust.

The Applicant's submissions

74. On behalf of the Applicant, Ms Fry opposed the adjournment application.

75. Ms Fry reminded the court that as long ago as 2 November 2022, directions had been given for the Respondent to file and serve a witness statement exhibiting any medical evidence upon which he wished to rely on the issue whether any reasonable adjustments should be made for the purposes of his defence of and participation in these proceedings. The witness statement lodged by the Respondent in response, in December 2022, had exhibited medical evidence (summarised at [23] above) but had not sought any reasonable adjustments.

76. Whilst the Respondent was not represented at the next directions hearing, listed on 6 March 2023, at which no reasonable adjustments had been sought or given, he had been represented at the hearing of the Insol application on 22 April 2024. Counsel appearing for the Respondent on 22 April 2024, Mr Smith-Roberts, had not sought any reasonable adjustments on his behalf.

77. The outcome of the hearing on 22 April 2024 was that the matter was listed for trial on 4 February 2025. The Respondent was also permitted by the order of 22 April 2024 to file and serve amended points of defence and did so, with the assistance of Mr Smith-Roberts, his Advocate barrister at the time. Ms Fry contended that two points arose from that. Firstly, the Respondent has had since May 2024 (the date of the listing order confirming trial dates) to make arrangements for representation at trial. Secondly, the Respondent has already filed amended points of defence, prepared with the assistance of counsel. A contribution claim could have been included in the amended points of defence but was not. The time has been and gone, she argued, for consideration of a contribution claim. It would not be fair, she submitted, to allow the Respondent a second bite of the cherry.

78. Ms Fry also observed that what was proposed at this stage was only a possible contribution claim, with no mention of prospects; the advice on the merits of any such claim had yet to be given. Even if that advice was positive, she argued, the Respondent could pursue it at a later date by separate action.

79. In relation to CPR PD1A, Ms Fry noted the examples of adjustments that could be made, including allowing a party to give evidence remotely and dispensing with wigs and gowns, but reiterated that the opportunity to request these has been there since 2022 and that no such request has been made.

80. This, Ms Fry submitted, was particularly important when considering the first Fitzroy factor: the party's conduct and the reason for delay.

81. Ms Fry accepted that the Respondent had on 10 January 2025 spoken to the Applicant's solicitors and asked for an adjournment. She referred the court to the Applicant's response by email dated 13 January 2025, quoted at [41] above and argued that the Applicant's refusal to agree an adjournment had been reasonable in the circumstances.

82. The application notice filed by the Respondent in January 2025 had stated simply that he needed time for a new barrister to be assigned from Advocate as he suffered from MCI as well as anxiety and depression so could not represent himself.

83. Notwithstanding the court's clear directions on 28 January 2025, the Respondent had not filed a witness statement in support of his application notice. The Applicant had not even received a copy of the Respondent's application notice until 29 January 2025.

84. The most recent doctor's letter dated 29th January 2025, lodged by the Respondent in the run-up to trial, Ms Fry argued, did not take matters any further than the evidence lodged in December 2022. The Respondent's diagnosis of mild cognitive impairment was already known, as were his diagnoses of depression and anxiety. Even putting to one side the fact that Dr Iqbal's letter dated 29 January 2025 was not exhibited to a witness statement, it did not meet the threshold requirements of medical evidence in support of an adjournment, as summarised in Levy and FCA v Avacade. The letter did not state when the doctor had last examined the Respondent. It did not state that by reason of any given physical or mental health condition, the Respondent is unable to participate or give evidence in legal proceedings at present or suggest any reasonable adjustments.

85. Ms Fry argued that something more than litigation stress was required to warrant an adjournment; otherwise, the Respondent would simply face the same problem at the adjourned hearing; i.e. the stress would recur: Forrester.

86. Ms Fry submitted that an adjournment would cause significant prejudice to the Applicant and that a huge amount of costs would be wasted.

87. She argued that as the Respondent now had the benefit of representation by counsel who had prepared a skeleton argument, it would be better to press on, reminding the court of the need for finality in litigation. If the trial was adjourned, there was no guarantee that a barrister from Advocate would be available for the adjourned hearing. Adjournment of a trial should be a matter of last resort.

The Respondent's reply submissions

88. Ms Gardiner confirmed that if the trial was adjourned she could commit to attending the adjourned hearing subject to the clearance of Advocate. (I should add that since the hearing Ms Gardiner has confirmed that she has clearance from Advocate to attend both a directions hearing ahead of trial and the adjourned trial itself).

Discussion and conclusions

89. I accept that the threshold requirements for an adjournment on medical grounds summarised in Levy v Ellis-Carr [2012] EWHC 63 (Ch) are not met in this case. The medical reports produced do not state that by reason of any given physical or mental health condition, the Respondent is unable to participate or give evidence in legal proceedings at present. The evidence before this court would not warrant an adjournment on medical grounds.

90. I also accept that Advocate's late authorisation of advice on a contribution claim would not, of itself, warrant an adjournment at this late stage.

91. In my judgment, however, an adjournment should be granted, in order to allow Ms Gardiner a proper opportunity to prepare for trial with the Respondent. Given the timing of Ms Gardiner's instructions, the volume of material involved and the complexity of the issues raised in these proceedings, it would not be fair to proceed with the trial at this stage. Applying the guidance given in Bilta, in my judgment a refusal of an adjournment would lead to an unfair trial in this case. The Respondent should not be prejudiced by the fact that his representation has only been secured at the last minute. The parties are not on an equal footing.

92. In reaching this conclusion I take into account the fact that the Respondent was not responsible for the delay in securing representation for trial. Until November 2024, he reasonably thought that arrangements were in place for Mr Smith-Roberts, an Advocate barrister, to represent him at trial. It is clear from the correspondence before me that, once the Respondent discovered in November 2024 that that was not the case, with the assistance of his brother he chased Advocate throughout November, December and January for a replacement barrister. It was not the Respondent's fault that it took until 29 January 2025 for Advocate to authorise a replacement for Mr Smith-Roberts and that it took until 31 January 2025 for a replacement to be found.

93. I also take into account the attempts of the Respondent to secure the Applicant's agreement to an adjournment on 10 January 2025, over 3 weeks before trial, having already alerted the Applicant to his difficulties securing replacement counsel before Christmas.

94. In addition I take into account the Respondent's actions when the Applicant refused consent to an adjournment. As rightly observed by Mr Gardiner, the Respondent did not leave matters there, but instead attempted to file an application notice with the court on 16 January 2025, over 2 weeks prior to trial, explaining (with the assistance of his brother) in the body of the application notice that he needed time for a new barrister to be assigned from Advocate as he suffered from mild cognitive impairment as well as anxiety and depression and so could not represent himself. The fact that the Respondent's initial filing attempts were unsuccessful should in my judgment be considered in the context of his cognitive impairment and difficulties reading and writing.

95. On the evidence before me CPR 1A PD is engaged in this case and the Respondent should be treated as a vulnerable party. There are several relevant factors which may adversely affect his participation in these proceedings and the giving of evidence. These include CPR 1A PD para 4 (b) (literacy) and (d) (mild cognitive impairment, severe anxiety disorder and severe depression). These factors make it all the more

important, in my judgment, that the barrister representing him has adequate time in which to prepare with him for trial.

96. When considering whether to adjourn a trial, the court will naturally have regard to the likely impact of any delay on the memories of witnesses. In the present case however the Applicant as an office-holder cannot give direct evidence of the events forming the subject matter of these proceedings and the Respondent has already made clear that he has mild cognitive impairment and remembers little of the detail in any event. It follows that the delay resulting from an adjournment will have minimal impact in this case, as far as the memories of witnesses are concerned.

97. In my judgment Ms Gardiner is right in submitting that an adjournment will not jeopardise a fair trial but rather will ensure a fair trial. She has confirmed that if the trial is adjourned she will commit to attending the adjourned hearing subject to the clearance of Advocate (which since the hearing has been given). An adjournment will ensure that Ms Gardiner as the Respondent's barrister has a fair opportunity properly to prepare for a trial of a complex claim involving significant sums and a vulnerable party of limited means.

98. I also consider the other consequences of an adjournment for each of the parties and the court.

99. Whilst the possibility of a contribution claim is not, in this case, a reason for an adjournment in its own right, an adjournment for the reasons that I have summarised above will have the added benefit of allowing Ms Gardiner time to advise the Respondent on a contribution claim against Mr Rozario and if appropriate to apply for his joinder to the proceedings. In this regard I accept that Mr Rozario's role is potentially highly significant. The Applicant does not appear to have investigated Mr Rozario's role in the Company, simply putting the Respondent to proof. A large part of the Applicant's case rests on inference from cash withdrawals and invites the conclusion that cash withdrawn by the Respondent from the Company's bank accounts (on his case on Mr Rozario's instruction and paid over to Mr Rozario for what the Respondent understood to be company expenses) was simply kept by the Respondent for his own use. A successful contribution claim could materially change the consequences of the proceedings from the Respondent's perspective. Not only would it provide the Respondent with a potential right of recourse against Mr Rozario in respect of given sums that he may be ordered to pay on the Applicant's claim, it may also 'shift the dial' from breach of fiduciary duty (s.172 CA 2006) to negligence/abdication of responsibilities (s174 CA 2006). This in turn may engage the counterfactual (see Cohen v Selby [2002] BCC 82 at [24] and [32]); and, in considering what should have occurred had the Respondent not paid over such cash withdrawals to Mr Rozario, the court may well conclude that such sums should have been applied in payment of any VAT due, revealing (potentially) a significant degree of 'double-counting' in the various claims forming the subject matter of the Application: see [2] above.

100. An adjournment will also have the added benefit of allowing time for appropriate arrangements to be put in place at trial to cater for the Respondent's difficulties concentrating and reading. He may need specialist equipment or software which allows documents to be read out to him during cross-examination, for example. He may also need a higher frequency of breaks factored in to cater for his concentration

difficulties, which are a feature of his cognitive impairment. This in turn may impact on the time estimate for trial. All such matters can be addressed at a directions hearing in good time before the next trial date.

101. Whilst I accept, as Ms Fry rightly observed, that the Respondent has already been given an opportunity to identify and seek any reasonable adjustments that he may require, the responsibility to ensure that appropriate reasonable adjustments are put in place in situations such as this is not that of the Respondent alone; under CPR 1.3, all parties are under a duty to assist the court in furthering the overriding objective, including, but not limited to, ensuring that so far as practicable the parties are on an equal footing and are able to give their best evidence. The Respondent's literacy issues, for example, have been known for some time, having been flagged in the amended points of defence and the Respondent's second witness statement, prepared with the assistance of counsel; quite how the Applicant's legal team planned to conduct a cross-examination of the Respondent, with the Respondent being invited to turn to given documents in the trial bundles and answer questions on them unaided, was entirely unclear; that aspect had not been thought through at all. An adjournment will have the added benefit of allowing the parties an opportunity to address this.

102. Looking next to the consequences of an adjournment for the court; the court time allocated to the trial listed on 4 February 2025 can readily be allocated elsewhere for the benefit of other court users on this occasion.

103. Turning next to the consequences of an adjournment for the Applicant: I appreciate that an adjournment will come as a disappointment and inconvenience to the Applicant and will result in some costs being wasted. In this regard however I remind myself of the guidance given by Nugee LJ in Bilta at 49(4). Fairness involves fairness to both parties, but mere inconvenience to the other party (or other court users) is not usually of itself an adequate reason to refuse an adjournment. I also note that the Applicant was invited to consent to an adjournment over 3 weeks prior to the trial date and declined to do so.

104. For all these reasons, I ordered that the trial be adjourned.

ICC Judge Barber