Neutral Citation Number: [2023] EWHC 1358 (KB)

Case No: QA-2022-000167

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/06/2023

Before :

THE HONOURABLE MR JUSTICE MARTIN SPENCER

- -

Between:

BENJAMIN KOFI ACKAH BREM	**Appellant**
- and -	
(1) DOMINIC IVER CLARK	**First Respondent**
- and –	
(2) RUDD SOLICITORS	**Second Respondent**

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Mr David Peachey (instructed by **Chipatiso Associates Ltd**) for the **Appellant**
Mr Rowan Clapp (instructed by **BTMK Todmans Solicitors**) for the **First Respondent**
Ms Clare Elliott (instructed by **Browne Jacobson**) for the **Second Respondent**

Hearing date: 2nd May 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on Friday, 16th June by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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THE HONOURABLE MR JUSTICE MARTIN SPENCER

The Honourable Mr Justice Martin Spencer:

Introduction

1. Pursuant to permission granted by Ritchie J on 31 January 2023, the appellant (claimant) appeals against the decision and judgment of His Honour Judge Saunders dated 27 July 2022, whereby he struck out the claim against both Respondents (defendants) and ordered the claimant to pay the defendants' costs on an indemnity basis, which he summarily assessed at £16,577 in the case of the first defendant and £17,225 in the case of the second defendant. In the course of the hearing, the learned judge also refused an application on the part of the claimant for the hearing to be adjourned because his counsel had fallen ill.

The Factual Background

2. The claim arises out of the claimant's purchase from the first defendant of premises at 61 Kings Road, Basildon, Essex, SS15 4AQ ("the property") for £325,000 on 29 September 2018. The second defendant acted as the claimant's solicitor on the purchase. The claimant had originally moved into the property as a tenant of the first defendant on 29 September 2017 and in the Spring/Summer of 2018 they started the process of purchase. The claimant negotiated a mortgage of the property in the sum of £275,000 from Santander plc and Santander obtained a valuation of the property by E.Surv on 4 July 2018, which gave a valuation of the market value of the property for mortgage purposes of £325,000. Paragraph 11 of the valuation stated:

> "**Repairs/reports recommended as a condition of mortgage -** This information is for our guidance in assessing the mortgage advance. It will be used in making a lending decision. It is not a detailed statement of the extent and cost of any work involved and is not an exhaustive list of defects that there may be in a property."

There were, however, no repairs recommended as a condition of the mortgage.

3. At the heart of the claim is an issue relating to the back garden. It is the claimant's case that, whilst a tenant, he had enjoyed the use of the whole of the back garden area and that he understood that it was all to be part of the property conveyed to him. However, it is the defendants' case that the area of garden to be purchased and conveyed was truncated, with a fence demarcating the area being purchased by the claimant. It is the claimant's case that the value of the property as actually conveyed, with the truncated garden, was £307,000, £18,000 less than the amount he paid and this is the sum he claims against the second defendant. In addition, there are other claims against the first defendant: reinstatement of the full garden; £6,000 paid for access which was not granted; £2,000 paid for money expended by the claimant in clearing the garden and £8,000 being the cost of repairs to the house, a total of £16,000 of asserted losses which were not connected with the claim in respect of the value of the house.

4. It is to be noted that there is, in the bundle, a letter dated 10 August 2018 from the second defendant to the claimant stating:

> "Further in this matter, I confirm that I have received the initial draft paperwork from the solicitors and I enclose for your attention: 1. A copy of the file plan to the property – please confirm this correctly identifies the extent of the property to be purchased by you."

This was accompanied by a plan showing the truncated garden. It is the claimant's case that he never received this letter.

Procedural Background

5. Post-completion, there was some correspondence between the second defendant (still acting for the claimant) and Marcus Baum (the first defendant's solicitor) about the garden dispute. On 2 January 2019, in response to an email which is not included in the bundle, Marcus Baum wrote:

> "With regard to the garden boundary, our client informs us that your client had seen the rear garden fence in position and it was also in position when your client's mortgage surveyor inspected the property.
>
> We understand that our client allowed your client to use an extra area of the garden behind the fence as a goodwill gesture and removed one of the fence panels to allow this. However, we are advised that your client subsequently removed a further fence panel which our client had not agreed to, so he reinstated the fence."

6. On 6 December 2019, Chipatiso Associates LLP ("Chipatiso"), the claimant's new solicitors, wrote a Letter of Claim to the second defendant alleging fraud on the part of the solicitor at Rudd's with conduct of the matter on behalf of the claimant alleging collusion between that solicitor and the first defendant, and also negligence. This was met by a Letter of Response from Browne Jacobson dated 16 March 2020, refuting the allegations and denying any liability on the part of the second defendant.

7. On 12 December 2019, Chipatiso wrote to E.Surv seeking clarification of their mortgage valuation and on 10 January 2020 E.Surv replied confirming that their valuation of £325,000 related to the property with the truncated rear garden, the boundary being clearly defined with a fence at the time of the surveyor's inspection: this clearly did not support the Claimant's case.

8. On 4 July 2020, the claimant obtained a retrospective valuation of the property from an alternative chartered surveyor, Mr Orah, who stated his conclusion as follows:

> "Based on the assumption that the property was sold with the understanding that the full length of the garden belongs to the property, I am of the opinion that the Market Value of the freehold interest in the property with the full length of the

> garden, with the benefit of vacant possession, is £325,000 and the value with part of the garden is £307,000."

It is this report which provides the foundation for the claim for £18,000 against the second defendant.

9. On 30 September 2020, Chipatiso wrote a second Letter of Claim against the second defendant, making certain assertions, including that the claimant never received the letter of 10 August 2018. Importantly, the allegation of fraud was withdrawn, the letter stating:

> "We confirm that our client is not now seeking to allege fraud against your client in relation to the conveyancing transaction."

The claim against the second defendant was confirmed to be in the sum of £18,000 in respect of the second defendant's alleged breach of contract and/or negligence.

10. The proceedings were issued on 5 February 2021, accompanied by Particulars of Claim. It must be said that the Particulars of Claim are somewhat eccentrically drawn with the Particulars of Claim against the First Defendant, including the "Prayer" at paragraphs 16 to 65, followed by the Particulars of Claim against the second defendant at paragraphs 66 to 115. Furthermore, worryingly, in the section dealing with the claim against the second defendant, there remain allegations of collusion, despite the second Letter of Claim withdrawing any allegation of fraud. Thus, it is pleaded that the solicitor at Rudd's "deliberately delayed matters as per the claimant's instruction" (by which it is clear is meant "contrary to the claimant's instruction") and that such deliberate delay was "to give the first defendant sufficient time to register the sub-titles of the separated land as is now shown on the letter from the Land Registry dated 17 January 2020."

Furthermore, in the claim against the second defendant, it is pleaded (at paragraph 95) that the claimant:

> "is content [sic] to believe that the second defendant was complicit with the first defendant knowingly that the claimant will suffer loss of property.
>
> 96. Email communications from [the solicitor] to the claimant clearly shows that there were intentions to mislead."

In the Prayer, it is stated:

> "AND the claimant claims:
>
> (a) Declaration that an agent of the second defendant was complicit with the first defendant."

11. The report from Mr Orah that the value of the house with the truncated garden was £18,000 less than the sum paid of £325,000 is clearly pleaded at paragraph 110.

12. On 29 March 2021, Browne Jacobson wrote to Chipatiso attaching a detailed draft application notice for an application to strike out the claim, alternatively for summary judgment with a draft consent order inviting the claimant to agree to a consent order

which would provide for the claimant to provide further and better particulars of claim within fourteen days, followed by a further twenty-eight days for the defence to be filed and stating that in the absence of that agreement, the second defendant would apply for strike out/summary judgment. On 1 April 2021 the claimant's solicitors refused to amend the Particulars of Claim and the second defendant made its application for strike out/summary judgment on 6 April 2021 supported by a statement from Lorraine Longmore of Browne Jacobson. On 28 April 2021, the court sent to the parties a notice of hearing for 18 June 2021.

13. Four days before the hearing, the claimant made an application to the court to amend the Particulars of Claim and draft amended Particulars of Claim were served. The matter came before His Honour Judge Saunders on 18 June 2021, who considered that the late application to amend could not properly be considered within the time available for the hearing of the strike out/summary judgment application on 18 June and adjourned the matter, ordering the claimant to pay the costs thrown away as a result of the adjournment assessed at £600 in the case of the first defendant and £2,700 in the case of the second defendant.

14. On 30 July 2021, the court sent to the parties notice of the new date for the hearing of the applications, being 4 February 2022, thus giving the parties a full six months' notice. However, on 10 January 2022, Chipatiso wrote to the court seeking a further adjournment of the hearing on the basis that:

> "counsel assigned to represent the claimant at the hearing has informed us that they are unable to attend the hearing on the day, due to personal reasons."

Perhaps generously, the first and second defendants agreed to the adjournment and a draft consent order was signed on 24 January 2022. This came before His Honour Judge Dight who vacated the hearing and relisted it to the first available date. This was 27 July 2022.

15. The claimant's instructed counsel was Mrs Thilagamal Srindran and on or about 11 July 2022, Chipatiso became aware that Mrs Srindran was unwell, having contracted coronavirus. Chipatiso have asserted that emails were sent to various chambers seeking availability of alternative counsel for the hearing on 27 July, without positive response. It is the defendants' case that competent solicitors would have telephoned chambers to seek alternative counsel. The defendants were not informed of the problem but, on 25 July 2022 (two days before the hearing), Chipatiso wrote to the court requesting a further adjournment due to the unavailability of counsel: no formal application was made. On 26 July 2022, the claimant made a formal application for an adjournment but did not pay the usual court fee. The second defendant made further enquiries with the claimant as to the reasons for the adjournment and, ultimately, an agreement was reached and documented in a consent order that the adjournment would be agreed on the basis that the claimant pay the second defendant's wasted costs of both the hearing on 27 July and the previous adjourned hearing from 4 February. The first defendant appears not to have been involved. However, at 5:47pm on 26 July, the claimant then reneged on that agreement and confirmed that they would be attending the hearing. It would appear that this was on the basis that Mrs Srindran now believed she was sufficiently recovered from the attack of coronavirus to represent the claimant after all (see paragraph 16 below).

16. The matter came back before His Honour Judge Saunders on 27 July 2022, but there was no Mrs Srindran in attendance. In a witness statement dated 14 November 2022, Mrs Srindran explains her absence as follows:

> "I contracted Covid for the second time in early July 2022. Despite taking the necessary vaccinations and booster, I became ill and was tested positive. The second round of Covid was a hard one to deal with where I suffered numerous health issues. Whilst for the first two weeks I suffered terribly with sore throat, fever and headache, these symptoms subsided but replaced with dizziness and fainting spells. It has been unfortunate, however, that the claimant was once again informed of my predicament and advised to seek alternative representative. I was informed that Chipatiso had been attempting to secure alternative counsel, however, had been unsuccessful.
>
> On 26 July, I was informed that no counsel was secured and was asked if I could attend court. I was still very unwell but reluctantly agreed so that the claimant could have representation at the hearing.
>
> Unfortunately, on the morning of the hearing, I fainted in the bathroom whilst getting ready. I was in no state to get out of the house in my condition as I will be putting myself at risk. Hence I informed my instructing solicitors of the situation and requested them to ask for an adjournment. I understood that the claimant had attended court."

The Hearing on 27 July 2022 and Judgment of HHJ Saunders

17. In the light of the above, appearing at the hearing before Judge Saunders on 27 July 2022, were: the claimant in person (unrepresented), Mr Rowan Clapp of counsel on behalf of the first defendant, and Ms Clare Elliott, of counsel on behalf of the second defendant. The judge had, in effect, four matters before him, which he needed to decide:

i) whether to grant the claimant an adjournment because of the illness of his counsel;

ii) if not, the claimant's application for permission to amend the particulars of claim;

iii) the application for strike out/summary judgment by the second defendant;

iv) costs.

In advance of the hearing, a skeleton argument dated February 2022 had been filed on behalf of the Second Defendant (but not the claimant or the First Defendant) and this is referred to by the learned judge in his judgment.

18. What actually happened at the hearing is slightly difficult to discern: there is no transcript of the entire proceedings, only of the judgment, and there is no witness statement from the claimant in relation to what happened at the hearing. Logically, one would have expected the learned judge to deal with the application to adjourn first, to have given a ruling on that, and then, if the application was unsuccessful, to have proceeded to deal with the second, third and fourth issues, giving the claimant an opportunity to respond to the defendants' submissions. Mr Peachey, for the claimant on this appeal, is in a difficult position because he was not present at the hearing. He referred to the transcript of the judgment, whereby the learned judge spent nine paragraphs deciding the question of adjournment and then proceeded straight to strike out at paragraphs 10 and 11. On that basis, he submits that the learned judge failed to hear submissions from the claimant on the merits.

19. For the second defendant, Ms Elliott indicated that, at the hearing, the claimant had declined a hard copy of the skeleton argument and she conceded that:

> "he was not equipped to engage in a complicated double application."

She indicated that there was significant discussion on the question of costs.

For the first defendant, Mr Clapp submitted that, in the absence of a transcript or witness statement from the claimant, there was no evidence upon which the court could proceed that the claimant was deprived of an opportunity to make submissions.

20. It seems to me that it is right to assume that although there was substantial argument over the question of adjournment, there is likely to have been little or no argument on the merits of issues (ii) and (iii) (see paragraph 17 above), and this is reflected in the way in which the judgment of Judge Saunders is constructed. It is appropriate, at this stage, to set out that judgment in full.

> “1. This is quite difficult. I say that because I have been quite generous so far in giving time to the claimant to bring this matter properly forward. And of course, today it is no fault of the claimant personally, but there are substantial difficulties with regard to the way in which the claimant’s solicitors have conducted themselves.
>
> 2. Because of the fact that it seems that the counsel who was appointed, it was known that she was unwell on 11th July which is over two weeks prior to the hearing, in my view that would give ample time to find a replacement counsel, and that should have taken place. I have seen correspondence which suggests that there has been email contact with a number of chambers. Of course, those are a selection of chambers in the first place. Secondly, it seems to me that any solicitor - whether they are in the immigration field or whether they are dealing with civil litigation or family cases - who is instructing counsel will know that the best way to obtain counsel as a matter of urgency is simply to pick up the telephone and ring the counsel’s clerk and ask who is available. There are numerous chambers both in

London and outside London, of course, who I would have suspected could have dealt with it, particularly with two weeks' notice.

3. What appears to have happened is because the application for an adjournment, which was made very late (I think about 3 o'clock yesterday afternoon) without the payment of a fee - which means in effect it is not a formal application - suggests that the matter should be adjourned on the basis of counsel's unavailability. I now see correspondence that the original counsel instructed, having discovered what had happened, tried her best to arrive here this morning in support of the application to adjourn but, sadly, has been taken ill (the reason that she could not attend in the first place) and has been was unable to attend. The claimant is, therefore, unrepresented.

4. There are two difficult points. First of all, this does not appear to be Mr Brem's fault. This is something that was outside his control. He instructs solicitors to deal with the matter properly on his behalf, and I fear they have failed him in regard to this by failing to instruct alternative counsel. Those solicitors are not in court. Secondly, of course, the second defendant has reached - at least on the face of it - an agreement by way of a consent order that the hearing today be adjourned upon the basis that the claimant do pay the first and second defendants' costs. The first defendant says that they are not happy with this and do not give their consent. They say - and I understand entirely the force of this argument - that this is not the first time that this matter has had to be adjourned and, on this occasion, there is no good reason.

5. In case managing these proceedings, I have bent over backwards to try and ensure that the case is properly dealt with by giving opportunities to the claimant to deal with this matter properly. But here I am faced with a situation where there is no-one on the record appearing for the claimant. There is no adequate explanation for their lack of attendance, apart from the fact that Mr Brem understands that the solicitor dealing with the matter is away on holiday. This application has been listed for some considerable period with three hours set aside for it, and yet no one (apart from the lay client) has attended for the claimant. At the same time, the first and second defendants have invested a considerable amount of time and expense in attending this hearing, and they have both, quite properly, instructed counsel.

6. So this leaves various questions of what do I do with today's hearing? Do I adjourn it and give the claimant a further opportunity, or do I agree to Mr Clapp's submission that I proceed?

7. It is my view that the compromise which was reached between some of the parties last night was not a compromise because there is subsequent correspondence from the claimant's solicitors indicating that the terms of the consent order were not in fact agreed in that form. That, coupled with the fact that the application for an adjournment has not been supported by a fee, means that there is no formal application in front of me. Moreover, the first defendant simply does not give their consent

8. I must apply these matters in terms of case management properly, and that is to consider the overriding objective set out in CPR 1.1 which I must (under CPR 1.2 consider). One of those considerations is dealing with the case at proportionate cost. I am also aware of the need to deal with such proceedings expeditiously and fairly – requiring enforcement of the rules, practice directions and orders (CPR 1.1 (2)(f).

9. It seems to me that by adjourning this case further, it will simply incur greater (and dare I say, needless costs), and that is simply unacceptable. They will be disproportionate to the claim. I say that against the background that, having considered the claimant's claim - and I accept that I not heard submissions as to this yet - it does seem to me on the face of it that there are considerable practical difficulties with regard to the claimant proving his loss.

10. First, there appears to be a claim for distress and inconvenience which is going to be difficult to argue bearing in mind that this head of damages is relatively small in practice and should largely be confined to matters of, for example, holiday cases and so on and so forth, where there is plenty of authority. So, I think that is highly unlikely to succeed. But moreover, going back to the facts that the claimant is seeking to prove, that his own expert valuation evidence from e.Surv with the truncated garden is given at £325,000, and that in fact is what the property was sold for. So I am struggling in the absence of I think it is Mr Aura's report to understand exactly where there is any loss. Mr Aura's report has a number of significant deficiencies in it, and they are outlined in Miss Elliott's skeleton argument, and I refer in particular to those matters which she has set out at paragraph 31 of her skeleton which I adopt for the purpose of this short judgment.

11. This really places this claim into context. In those circumstances, and applying the appropriate requirements of the CPR, it is my view that applying it on a case management basis this is a case which simply should not go further forward. And upon that basis, I strike out the claim in its entirety and order that the claimant do pay the first and second defendants' costs of the action."

The Submissions on behalf of the Claimant/Appellant

21. For the appellant, Mr Peachey submitted that the decision of Judge Saunders was both wrong and unjust because of serious procedural or other irregularity. He submitted that the decision was unjust because the hearing was not properly conducted, the learned judge failed to apply the proper test, he failed to hear submissions from the claimant and he struck out the claim against the first defendant when no application to that effect had been made. He submitted that the learned judge should have adjourned the hearing but, if that was wrong, the hearing itself was wrong and unjust.

22. Referring to the judgment of Judge Saunders, Mr Peachey pointed out that, having considered the application for an adjournment down to paragraph 9, the learned judge then proceeded directly to strike out without hearing further submissions. Relying on *Drysdale v the Department of Transport [2014] EWCA Civ 1083*, he submitted that the judge should have at least assisted the claimant to the extent of making it clear to him the test which needed to be satisfied for the claims for strike out and summary judgment to be satisfied, and he should have invited submissions from the claimant on each test. He submitted that if the strength of the case against the defendants was relevant to the balancing exercise as to whether or not to adjourn, the learned judge should either have heard submissions on the strength of the case first or should have assumed that there was a triable issue which had merit before deciding whether to adjourn: effectively, Mr Peachey submitted that the learned judge had put the cart before the horse. The situation was aggravated by the fact that the learned judge had before him, and referred his judgment to, the skeleton argument on behalf of the second defendant but heard no submissions from the claimant: in effect Mr Peachey submitted that the learned judge heard from one side only.

23. Turning to the strike-out against the first defendant, Mr Peachey challenged the basis upon which the claim could properly have been struck out where there was no application by the first defendant and where there were claims totalling £16,000 for losses unconnected to the claim in respect of the value of the property, none of which are referred to in the judgment.

24. In relation to the strike-out claim by the second defendant, Mr Peachey submitted that the learned judge had erroneously referred to the report from E.Surv when it was clear from the Particulars of Claim that the claimant was relying on the report of Mr Orah for the purposes of his claim for £18,000 diminution in value. He submitted that the claim clearly did disclose a cause of action and what the learned judge has effectively done is grant summary judgment in the guise of strike-out. This has had two consequences: first, it has resulted in serious procedural irregularity because the claimant should have been taken through the test for summary judgment by the learned judge and invited to make submissions thereon. Secondly, the learned judge has effectively conducted a mini-trial where this was inappropriate: there was an inadequate basis for the learned judge to dismiss Mr Orah's evidence completely, which is in effect what he did.

25. In his submissions, Mr Peachey dealt with two further matters: first, the second defendant's Respondent's Notice which was served shortly after Ritchie J had granted permission to appeal. Secondly, costs: submitting that an indemnity costs order had been wrong in principle.

The Submissions on behalf of the Second Defendant

26. By agreement between the Defendants, Ms Elliott for the Second Defendant made her oral submissions first. I also had the advantage of a written skeleton argument from her. Ms Elliott submitted that the judge had been entitled to refuse the application for an adjournment in the light of the history of the litigation and that he conducted a proper balancing exercise of the relevant factors. This was a legitimate exercise of the judge's case management powers and/or discretion and was therefore a decision with which an appellate court should be slow to reverse or interfere with, not being:

> "plainly wrong in the sense of being outside the generous ambit where reasonable decision-makers may disagree": *Global Torch Ltd v Apex Global Management Ltd [2014] UKSC 64 at [13]."*

Ms Elliott submitted that, far from being wrong, the decision not to adjourn was in fact right. There had been late notification of the application to adjourn to the defendants and this was characteristic of how the litigation had been conducted by the claimant before then. She supported the learned judge's conclusion that the efforts by the claimant's solicitors to instruct alternative counsel had been inadequate. She submitted that the judge was right to conclude that yet another adjournment where there had been two previous adjournments would be disproportionate.

27. In relation to the application for strike-out, whilst accepting that the judgment on strike-out is "concise", Ms Elliott pointed to the learned judge's reference to her skeleton argument and the submissions made therein which the judge incorporated within his reasoning. She submitted that the Particulars of Claim were fatally flawed in that they continued to rely upon the valuation of the property from E.Surv, valuing the property at £325,000 with the truncated garden, i.e. the actual price paid so that there was no loss to the claimant. The Amended Particulars of Claim did not remedy the position. Although the claimant had obtained a further report from Mr Orah, his continued reliance upon the report from E.Surv rendered his pleaded case incoherent. She further relied on, and pointed to, certain obvious errors or weaknesses in Mr Orah's report. Ms Elliott characterised the report as one which was so flawed as to have no merit, this being fatal to the claim given that the report formed the entire basis for the value of the claim.

28. In addition, Ms Elliott referred to the fact that, despite the second Letter of Claim, allegations of fraud continued to be made in both the Particulars of Claim and the draft Amended Particulars of Claim and, as such, amounted to an abuse of the court. She submitted that for the judge to have struck out the claim was:

> "a proportionate response to the various deficiencies and fell within the generous ambit of the judge's case management powers."

Although the learned judge did not refer to consideration of a lesser sanction in the judgment, this had been addressed fully in the skeleton argument which was before him and Ms Elliott submitted that her arguments in relation thereto could be incorporated by implication into the judgment.

29. Finally, Ms Elliott submitted that, by the time the matter came before Judge Saunders, the incidence of costs had become a relevant matter to be taken into account: by now, the costs exceeded the value of the claim by a significant margin, with irrecoverable costs orders having been made against the claimant, and to have allowed the matter to be pursued in the way that it had and on the basis of the state of the pleadings as they existed would not have been in accordance with the overriding objective. She submitted that the indemnity costs order made by the learned judge was well within his discretion.

The Submissions on behalf of the First Defendant

30. On behalf of the First Defendant, Mr Clapp adopted Ms Elliott's submissions. He characterised this appeal as an attempt to interfere with what was, in essence, an exercise of judicial discretion and to persuade the appellate court to exercise that discretion differently. He submitted that the approach of the appellant was unduly benevolent, and overlooked the procedural history and the claimant's many errors.

31. He sought to uphold the decision of the court to strike out the claim against both defendants, including the first defendant although there had been no application, submitting that the court has a power to strike out without application and the key material error by the claimant was common to both defendants, namely that no loss had been properly pleaded. He submitted that it would have been wrong to strike out against one defendant and not the other. The point that no loss had been properly pleaded was not, he submitted, a new one at the hearing on 27 July that had been raised by the defendant early on and he supported the decision of the learned judge on the basis that there was little that anyone could have said or done to avoid the claim being struck out on the pleadings.

32. So far as the conduct of the hearing was concerned, Mr Clapp submitted that the judge had clearly been keen to be fair to the claimant as shown by the transcript of the judgment. There were three relevant strands operative in the judge's mind: first, the claimant's conduct of the claim to date; secondly, the present state of the claim and pleadings; thirdly the judge's impression that the claim was going nowhere. Mr Clapp was critical of the claimant's solicitors who, he submitted, had clearly assumed that the court would be forced to adjourn in circumstances where the claimant was left without representation. No skeleton argument had even been filed with the court in advance of the hearing. He submitted that the learned judge was entitled to deal with the claim against both defendants holistically and was not required to go through each and every claim individually. In relation to the allegations of disrepair, there should have been a schedule and report attached to the particulars of claim and the learned judge had been entitled to assume that the claimant would not have addressed those matters.

33. Mr Clapp supported the learned judge's decision that no lesser sanction was appropriate. The judge had found that this was "a case which simply should not go further ahead", the claimant continuing to place a fundamentally erroneous reliance on the report from E.Surv. The claimant had been given ample opportunity by the court to plead a coherent case which, as Mr Clapp submitted, he had failed to do and it was well within the judge's case management discretion to take the view that no further opportunity should be afforded to the claimant or would be productive having regard to the "substantial difficulties with regard to the way in which the claimant's solicitors have conducted themselves" and having regard to the overriding objective.

34. Mr Clapp also submitted that the decision of the learned judge to award costs on an indemnity basis was, in the circumstances, wholly justified.

Discussion and Decision

35. As recognised by all the parties, in order for the claimant to succeed on this appeal, he must meet the test set out by r.52.21(3) and show that the decision of the lower court was either wrong or unjust because of a serious procedural or other irregularities in the proceedings in the lower court. Where the decision was a case management decision, the appellate court should not reverse or interfere with the order of the lower court unless that order was:

> "plainly wrong in the sense of being outside the generous and it where reasonable decision-makers may disagree"

see *Global Torch Ltd v Apex Global Management Ltd (No 2) [2014] UKSC 64*.

In *Hadmor Productions Ltd v Hamilton [1983] 1 AC 191*, Lord Diplock observed that an appellate court should:

> "defer to the judge's exercise of his discretion and must not interfere with it merely upon the ground that the members of the appellate court would have exercised the discretion differently."

36. So far as the decision of the learned judge not to grant the claimant's application for a further adjournment, this was plainly a case management decision falling squarely within the guidance set out in the above cases. The fact that Judge Saunders agonised over the decision whether or not to adjourn the hearing is reflected in his judgment and it is abundantly clear that he was acutely aware of the difficulty which the claimant, Mr Brem, found himself in through no fault of his own. However, as the courts have continuously recognised, the court's resources are precious and continuous adjournments are highly undesirable, not least because of the knock-on effect on other cases. This was, in effect, the claimant's third bite at the cherry and the learned judge was entitled to come to the conclusion that enough was enough and the case should proceed. This was a decision well within the ambit of his discretion and I cannot possibly say that the decision was wrong, even if I would have exercised my discretion differently.

37. As to the decision to strike out the claim, this was clearly influenced by the somewhat pitiful state of the pleaded case and the fact that, despite having been given ample opportunity to do so, the pleadings remained incoherent with matters of fraud remaining pleaded despite the second Letter of Claim eschewing any intention to rely on fraud or collusion. I have found this a difficult case to decide because, on the basis of Mr Peachey's able and persuasive submissions, I have a lurking suspicion that, having decided not to adjourn the hearing, the claimant was left at sea and unable to deal with the issues that needed to be addressed. I suspect that Mr Peachey is right that greater care should have been taken to explain to the claimant the issues arising from the applications for strike-out and summary judgment and he should have been given clearer opportunity to make submissions on the substantive points. However, as Ms

Elliott pointed out, the claimant was ill-equipped to deal with the substantive matters and even if he had been given greater opportunity, it is highly doubtful that this would have made any difference.

38. In the end, it seems to me clear that the learned judge was entitled to take the view that this litigation was going nowhere. Given the incompetent way that the litigation had been conducted to date, he saw little prospect of the matter being put into a state whereby it was fit to be tried without further wasted costs. In particular, he was entitled to take a view about the value of the claim (which was modest), the overall merits and the costs that had been incurred to date which the claimant would have to pay in any event (which were substantial). He was entitled to take into account the criticisms of the report of Mr Orah set out in Ms Elliott's skeleton argument in considering the prospects of success, particularly in the light of the report and subsequent letter from E.Surv and the continuing reliance on that report by the claimant. He was entitled to take the view that enough of the court's resources had been expended on this litigation and enough leeway had been afforded to the claimant's advisers to enable them to get their "ducks in a row", to no avail. Whilst I agree that the learned judge should have taken greater care in setting out his reasons for granting the applications for strike-out/summary judgment which, as Ms Elliott pointed out, were "concise" and in particular there was some elision between these two separate grounds which have different tests and considerations applicable to them, I do not consider that this failure has in fact resulted in injustice to the Claimant.

39. In all the circumstances, and despite my own considerable sympathy for the Claimant at the situation he has found himself in, this appeal is dismissed.