Neutral Citation Number: [2024] EWHC 2972 (KB)

Appeal No: KA-2023-000182

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

ON APPEAL FROM THE COUNTY COURT AT CENTRAL LONDON
Order of HHJ Saggerson dated 11 August 2023
County Court Case No. G53YJ129

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/11/2024

Before :

MRS JUSTICE HILL

- -

Between :

Kamran Attaei	**Appellant / Claimant**
- and -	
(1) Nahid Alsharif **(2) Ahmed Alsharif** **(3) Frances Patricia Alsharif**	**Respondents / Defendants**

- -
- -

Timothy Deal (Counsel, Direct Access) for the **Appellant**
All Respondents appeared in person (by MS Teams)

Hearing date: 13 November 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 21 November 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE HILL

Mrs Justice Hill:

Introduction

1. This is an appeal against the order of His Honour Judge Saggerson ("the Judge") dated 11 August 2023, brought with permission granted by Sir Stephen Stewart on 25 June 2024.

2. The Appellant was the Claimant in breach of contract proceedings against the Defendants / Respondents in the County Court. His claim had been listed for a pre-trial review ("PTR") on 11 August 2023. The Appellant did not attend that hearing nor was he represented at it.

3. By the 11 August 2023 order, the Judge refused the Appellant's application to vacate the PTR and the upcoming trial listed for September 2023; struck out the Appellant's claim; entered judgment for the Defendants; and ordered the Appellant to pay the Respondents' costs of the claim to be subject to detailed assessment if not agreed.

4. The Appellant represented himself for almost all of the appeal proceedings including drafting his grounds of appeal and skeleton argument and preparing the bundle. Mr Deal represented him at the hearing of the appeal on 13 November 2024, on a pro bono basis, having been involved in some of the earlier stages of the litigation. I was greatly assisted by his submissions.

5. The Respondents represented themselves throughout the appeal, having indicated to me that they were unable to afford the cost of representation. They had not filed any Respondent's Notice or skeleton argument. They were asked the day before the hearing to set out what their position was on the appeal. They stated that it was that the claim was totally unfounded as the Appellant had been paid in full by them. They joined the hearing by MS Teams from Bahrain. They indicated that it was only having heard Mr Deal's submissions that they understood the purpose and scope of the appeal process. In oral submissions they confirmed that they opposed the appeal. They invited me to uphold the Judge's order as they considered that it had been correctly made.

The factual background

6. The Appellant is 78 years old. His claim, issued on 22 July 2020, related to work he had done to refurbish and provide two wet rooms and a new kitchen at 26 Bilton Towers, London W1H 7LD many years before. By his Amended Particulars of Claim he relied on a written contract dated 19 September 2012 and oral agreements dated 9 November 2012, 12 December 2012 and 8 September 2013. His case was that on the last of these dates, the Respondents had agreed to pay the outstanding amount of £32,305 once the property was sold, but had failed to do so, despite the property selling for £1,650,000 in February 2019. He brought the claim shortly after he became aware of the property sale in February 2020.

7. By their Amended Defence the Respondents contended that the various agreements had not been sufficiently particularised, in breach of CPR PD16, paragraphs 7.3-7.5. They disputed the claim in full, in summary, on the basis that (i) the parties had agreed that the work carried out by the Appellant in addition to certain specified works was to be carried out free of charge as a favour; (ii) certain additional works he relied on had not

been agreed to at all; (iii) if there had been any agreement this had not been by the Respondents in their personal capacities but as the personal representatives of Mr Mohammed Mehdi Alsharif (the father of the First and Second Respondents and father-in-law of the Third Respondent), who had passed away; and (iv) the alleged compromise agreement reached on 8 September 2013 was not enforceable.

The procedural history

The pre-trial stages

8. The claim was issued in the Wandsworth County Court. By order dated 17 October 2020 it was transferred to the County Court at Central London. Further orders were made allocating the claim to the multi-track and making provision for a Costs and Case Management Conference ("CCMC") to be held.

9. The Respondents applied to strike out the claim under CPR 3.4(2). There was no paperwork available about this application, but Mr Deal confirmed that it had been advanced on the basis of 3.4(2)(a), namely that the statement of case disclosed no reasonable grounds for bringing or defending the claim: see [70] below. By order dated 9 April 2021 His Honour Judge Saggerson dismissed the application.

10. On 3 September 2021 a CCMC took place. A series of directions were made to bring the matter on for trial.

The first trial listing, 27 January 2022

11. The trial was listed before HHJ Lochran, with a time estimate of 1 day. The trial was not effective and the hearing was converted into one for directions. The order is silent as to why the trial did not go ahead. HHJ Lochran ordered that the trial be re-listed with a revised time estimate of 2½ days.

The second trial listing, 16 January 2023

12. The trial was listed before HHJ Roberts. The Appellant was not in attendance. In fact, he was at the Chelsea and Westminster Hospital awaiting medical treatment.

13. That morning, the Appellant filed medical evidence with the court in the form of two letters from Dr James Jensen-Martin, General Practitioner and Clinical Senior Lecturer, dated 19 December 2022 and 12 January 2023. HHJ Roberts recorded that the evidence was to the effect that the Appellant had "multiple" health problems; was "currently medically unfit to attend court"; and that this was "due to ongoing acute treatment for a renal calculus [a kidney stone] and the worsening of his existing medical conditions due to the lithotripsy treatment [treatment for kidney stones]".

14. HHJ Roberts spoke directly to the Appellant at the hospital by telephone. The order records that the Appellant informed the judge that his brother had taken his own life on 15 January 2023 and he was suffering mental distress as a consequence.

15. The Judge's order indicates that he spoke to the Second Respondent and indicated that if the Respondents wished to join the trial by video link from Bahrain and Scotland they needed to make an application for this.

16. HHJ Roberts adjourned the trial.

The third trial listing, 9 May 2023

17. By an order dated 10 March 2023 the trial was re-listed for 9 May 2023.

18. On 28 April 2023 the Appellant applied to adjourn the trial. He provided the court with a letter from his GP, Dr Christina Avgerinou, dated 27 April 2023. Dr Avgerinou explained that (i) the Appellant had a history of "nephrostomy (that needs to be unclamped as the kidney gets blocked) and kidney stones that have moved distally", for which he was awaiting surgery; (ii) although the Appellant's operation was urgent, it had already been postponed by the hospital; (iii) his urinary symptoms were getting worse; and (iv) his urgent operation had been rescheduled for the same day as the trial, namely 9 May 2023. By an order made on 5 May 2023 HHJ Lethem vacated the trial.

19. On 24 May 2023 the Respondents emailed the court. They raised the issue of the trial being conducted by video link if the parties were not in London. They also said the following:

> "We…are aware of the [Appellant's] illnesses, but we find it hard to accept, as the [Appellant] is constantly travelling, if the [Appellant] had seriously huge illnesses, surely travel would be impossible. We the [Respondents] are finding these constant adjourements [sic] very unfair and a waste of our, the court and the judge's time, as we would like this issue resolved as fast as possible. And we are the innocent parties…
>
> The [Appellant] seems to want to dictate how this hearing is conducted and when. The [Appellant]'s English is good, body language and all other things concerning this case can easily and comfortably be conducted by video link."

The fourth trial listing, 4 September 2023

20. By an order dated 31 May 2023 a Telephone Listings Appointment ("TLA") was arranged for 20 September 2023, for the purpose of re-listing the trial.

21. The Appellant's surgery had not gone ahead on 9 May 2023. This was due to the strikes by junior doctors, consultants and nurses and the fact that the specialist doctor undertaking the surgery, Mr Hama Attar, had himself been in hospital and had to postpone all his operations for two months.

22. In early July the Appellant went to Bahrain for a period of recuperation and holiday. He did not intend to stay longer than 28 days.

23. On 10 July 2023, of its own motion the court re-listed the trial for 4 September 2023. This effectively vacated the TLA listed for 20 September 2023, albeit that the order listing the trial did not specify that.

24. On 12 July 2023 Chelsea and Westminster Hospital wrote to the Appellant confirming that his surgery had also been arranged for 4 September 2023. It is a matter of sheer coincidence that this was the second time the Appellant's surgery had been arranged for the very same day as his trial. According to the County Court records, the

Respondents emailed the court on 12 July 2023 asking if they could join the trial remotely.

25. At around this time, the Appellant had become unwell in Bahrain. Medical evidence shows that radiology investigations of his kidneys and bladder were carried out at the Ibn Al-Nafees Hospital in Mamma, Bahrain on 13 and 16 July 2023.

26. The Appellant had limited access to email in Bahrain but in due course became aware of the court's 10 July 2023 order.

The Appellant's letter to the court dated 27 July 2023

27. On 27 July 2023 the Appellant wrote a detailed letter to the court. He expressed concern that the TLA had been vacated and that the trial had been listed for 4 September 2023. He wrote:

> "Everything I have planned for the upcoming trial for my claim was based on the fact that it would be scheduled some time after the TLA on 20 September. This includes preparation, the availability of witnesses et [sic] but most importantly, I have previously informed the court and judge about my ongoing serious health issues and upcoming surgery which has already been postponed several times.
>
> Unfortunately, the new date for my operation is once again scheduled for exactly the same date as the new trial on 4 September and I have consented not least because at this time I did not believe the trial would be until after the 20 September but anyway, this date has been proscribed to me by the NHS and [is] out of my hands. Please find letter attached".

28. He provided a copy of the 12 July 2023 letter from the Chelsea and Westminster Hospital confirming that his surgery had been booked for 4 September 2023; and explained why the surgery had been postponed from May.

29. The Appellant's letter continued:

> "I am currently in Bahrain and receiving medical attention. Please find attached close to half a dozen documents relating to my treatment here including reports from doctors, consultants, X-ray etc".

30. I assume this was a reference to some or all of the twelve pages of documents with which I was provided, showing the results of and invoices for the investigations carried out at the Ibn Al-Nafees Hospital in Bahrain on 13 and 16 July 2023.

31. In response to the Respondent's email querying how he could travel to Bahrain if he was sick (see [19] above), the Appellant wrote: "The answer is simple, thanks to my daughter and family covering my travel costs I have been able to get specialist and more focused medical help in Bahrain".

32. He referred to his age and said that he believed he would find a video hearing difficult and would prefer to attend for trial in person, so that he could understand everything. He said that while he could carry out minimal daily tasks such as shopping and travelling, he had recently collapsed twice in the Post Office. He said that in light of his

current condition, he considered that a three day court hearing would be impossible; he said he felt sure that he would not be able to handle the stress and demands of such a trial.

33. The Appellant explained that two important witnesses of his had returned to Iran on the understanding that the trial hearing would be after 20 September 2023. He said that a connection by video would be very difficult for them due to the current political situation in Iran; and that they would need time to travel to the UK. Mr Deal told me that the two witnesses were Mr Hamidi and Mr Abteahag, and that they had both provided witness statement in the claim.

34. The Appellant asked that the trial be re-listed sometime after 20 September 2023 as originally planned, preferably three to four months after that date, at the end of 2023 or early in 2024. He wrote "I hope and expect that at that time my treatment would have finished and I would be well on the road to recovery. I am sorry for all the inconvenience this has caused but these circumstances are really beyond my control".

The listing of the PTR

35. In light of the parties' recent communications with the court, HHJ Dight ordered that a PTR was required. By an order dated 1 August 2023 the PTR was listed for 11 August 2023, to take place remotely by MS Teams, with a time estimate of one hour.

36. The email circulating the order stated that "any request to adjourn the trial should be made via an Application Notice on Form N244 supported by medical evidence together, with the appropriate fee".

The Appellant's correspondence with the court about "Help with Fees" ("HWF")

37. The Appellant had previously made applications for HWF and there had never been any difficulty with them being approved. He was conscious that the order dated 10 July 2023 listing the trial had made clear that if he did not pay the court trial fee of £1,175 he had to file an application for HWF by 4 pm on 7 August 2023, in the absence of which his claim would be struck out without further order. There is correspondence suggesting that on 20 July 2023 the Appellant emailed the court with an application for HWF, but had not had a response to this.

38. Accordingly, on Friday 4 August 2023 at 12.06 pm the Appellant emailed the court about the HWF issue. He explained that given the lack of response to his 20 July 2023 communication he had completed a fresh application for HWF, which he attached to the email. The Appellant informed that this application had also been submitted online; and that a copy had been delivered directly to the court "to be sure". The Appellant's email asked for confirmation that all the required information had been provided on the form before the Monday deadline. I have seen nothing to indicate that the court wrote to the Appellant to indicate that his application was, or was not, adequate.

The Appellant's 8 August 2023 letter

39. On Tuesday 8 August 2023 the Appellant wrote a letter to the court indicating that he wished to give "everyone" notice of the fact that he was in the process of making a formal application to postpone the trial, because this would affect the PTR listed for the

Friday of that week. He indicated that his application would be filed by Friday. He repeated that the basis of the application was that the new date for his surgery was exactly the same date as the trial, namely 4 September 2023.

40. In his letter the Appellant said that he was also not in a position to participate in the PTR. He reiterated that he had had to extend his stay in Bahrain due to multiple complications regarding his health conditions, resulting in hospital admissions and treatment. He said that as well as the problems with his nephrostomy he was now suffering from double vision. He said he still had a plan of care for the month of August in Bahrain and would return to the UK for his operation on 4 September 2023.

The Appellant's 8 August 2023 application to adjourn the PTR and the trial

41. On 8 August 2023 the Appellant completed and signed an application notice seeking "rescheduling of trial and pre-trial review until after 4 November 2023 due to ill health and scheduled surgery and recovery, and witnesses not available". The version I have seen has not been sealed by the court, but it had been delivered to the court in hard copy and the judge had clearly seen it before the PTR.

42. Box 10 of the application notice indicated that (i) the Appellant had surgery scheduled for the day of trial, namely 4 September 2023; (ii) he needed a recuperation and recovery period of at least 60 days; and (iii) his witnesses had returned to their home country of Iran as they had understood that the trial was due to take place on 20 September 2023, said to be the original date (but really the TLA date), and there were difficulties in arranging a video link from Iran due to the political situation there.

43. The Appellant provided the following evidence to support his application: (i) the letter from Dr Christina Avgerinou, his GP, dated 27 April 2023 referred to at [18] above; (ii) the letter from the Chelsea and Westminster Hospital dated 12 July 2023 referred to at [24] above, confirming 4 September 2023 as the date of the surgery; (iii) his own letter dated 27 July 2023 referred to at [27]-[34] above; (iv) the twelve pages of medical documents from the Ibn Al-Nafees Hospital, referred to at [30] above; and (v) his further letter dated 8 August 2023 referred to at [39]-[40] above.

44. The Appellant also provided a letter from Dr Essa Amin, Consultant Uro-Surgeon at the Ibn Al-Nafees Hospital in Mamma, Bahrain dated 5 August 2023, which said as follows.

> "We have been seeing Mr. Kamram Attaei as a patient as he was suffering complications from his medical issues while here in Bahrain.
>
> We have been treating him and he has had admissions to the hospital relating to his nephrostomy, kidney, diabetes and other issues.
>
> We are not sure when he will be well enough to return to the UK but then he will have to transfer to his doctors in London…He has informed us that he has no [which I assume should be "an"] operation scheduled for September 4 2023 in London.
>
> Taking all this into consideration, Mr Attaei will certainly not be able to participate in anything during August and with the operation in

> September, if everything remains on schedule [I/we] would expect him to…resume activities in October at the earliest but this will be up to his medical team in London".

Further communications with the court from 9-10 August 2023

45. At 6.00 pm on Thursday 10 August 2023, a member of staff at the court, Mohammed Bentounes, circulated the MS Teams link for the PTR.

46. At 8.27 pm that evening an email was sent from the Appellant's email address to Mr Bentounes to the following effect:

> "Dear Mr Betoumes [sic]. I am a friend of Mr. Attaei [the Appellant] and spoke to him on the phone this evening. He says he has given notice to the court and copied the judges assistant on Wednesday, that he was making the formal application to postpone the trial and pre-trial hearing on health grounds and is out of the country receiving treatment at the moment and would be unable to participate in any pre-trial hearing tomorrow.
>
> Further, all the necessary forms were filed at the court today along with medical evidence".

47. The person who wrote this email did not give their name or "sign off" the email. The Appellant indicated in his grounds of appeal that the person who sent the email was his friend Andrew Winters, who has no legal training or background, but helps him with correspondence in English. Mr Winters attended the appeal hearing with the Appellant.

48. At 8.40 pm a further email was sent from the Appellant's email address to Mr Bentounes, copied to the generic court email address, as follows:

> "Dear sir / madam
>
> Regarding Teams meeting
>
> This is Kamran Attaei's daughter and was able to speak to him in Bahrain today and am replying on his behalf.
>
> He gave notice on Wednesday to the court and judges assistant that because of his ongoing health issues for which he is now being treated while in Bahrain, he is unable to participate in the Teams meeting tomorrow
>
> Further, a fully completed application was submitted in hard copy to the court today, to postpone the trial an pre-trial hearing.
>
> Hopefully this will be helpful and the judge will have access to the application and medical evidence tomorrow."

49. Again, the writer of the email did not give their name. Although the Appellant's daughter, Galine, was copied into the email by the "bcc" function I suspect that this would not have been visible on the court's version of the email. The Appellant indicated

in his grounds that his daughter lives in London and that he had allowed both her and Mr Winters access to his email account to assist him in preparing the application to have the PTR and trial postponed.

50. There is no suggestion on the face of these emails that they were copied to the Respondents. Indeed they told me during the appeal hearing that they had not seen the Appellant's letters of 27 July 2023 or 8 August 2023 nor his application notice. Mr Deal informed me that he was instructed that the Appellant did, as a matter of course, copy the Respondents in to correspondence. I was not able to resolve which of these accounts was correct, nor was it necessary for me to do so, not least as it was clear that the Judge had seen the key material. There was also evidence of the Respondents communicating with the court without copying in the Appellant: see [63] below.

The hearing before the Judge

51. The 11 August 2023 PTR took place via MS Teams. The Appellant did not attend, nor was he represented. The Respondents attended remotely from respectively, Bahrain, England and Scotland. The Respondents' recollection of the hearing was partly set out in an email sent to the court on 14 July 2024 to this effect:

> "…the hearing lasted less than 30 minutes…we stated our names. The judge informed us that the Claimant is not available to attend the hearing and that he was in Bahrain receiving private medical treatment and he recommended a friend to attend the hearing on his behalf which declined by the judge as unacceptable. His Honour Judge Saggerson made his Direction and Judgment to strike out and dismissed the claimants claim as mentioned in the…Order".

52. During the appeal hearing the Respondents told me that the Judge indicated at the outset of the hearing that the Appellant was not in attendance and that he was going to strike out the claim; and did not hear any detailed submissions from them.

53. They indicated that after the Judge gave his decision, they told him that they welcomed the decision to strike the claim out. They told me that they informed the Judge that the Appellant has a Persian rug business in Bahrain from which he generates an income. The implication was that the Appellant had not been entirely transparent about his income with the court. After some initial doubt the Respondents confirmed that this information was given to the Judge after the decision had been made, and so does not appear to have been taken into account by him.

54. These accounts of the hearing have not been verified by the Judge because of the delay by the Respondents in putting them forward: see [58]-[63] below.

The Judge's order and summary reasons

55. The Judge recorded at the outset of the order from the PTR that he had considered the court file, the bundles submitted by the Appellant and the "further documentation about the [Appellant's] treatment in Bahrain". He noted that he had heard from the three Respondents; and that the Appellant had not attended or been represented (but had applied to vacate the PTR and the trial date).

56. The Judge made the following order:

> "1. This action be struck out and the Claimant's claim is dismissed.
>
> 2. There be Judgment for the Defendants.
>
> 3. The trial date of 4 September is vacated.
>
> 4. The Claimant do pay the Defendants' costs of the action to be subject to detailed assessment if not agreed.
>
> 5. No Order on the Defendants' application for the trial to be heard by Teams it being noted that despite the Defendants' implying that they now all live in Bahrain it appears that some of them were in the United Kingdom.
>
> 6. The Claimant's application to vacate this hearing and the trial date is refused."

57. The Judge set out his summary reasons for making the order in the recital to it, as follows:

> "AND considering emails purporting to come from the Claimant and a "friend" regarding the Claimant's absence from the country and ill health and noting the number of occasions on which this matter has been previously listed, including listing for trial, but ineffective.
>
> AND there being no sufficient information concerning the Claimant's future intentions or capabilities and his condition and his prognosis with regard to relisting this matter again.
>
> AND further noting that the trial fee in respect of this action should have been paid by 4.00pm on 7 August 2023 or a properly completed application for help with fees submitted by that date otherwise the claim would stand struck out without further Order.
>
> AND the Claimant not having paid the trial fee by the due date but having submitted an application for help with fees on 3 August 2023 which is inadequate in that the Claimant purports to have zero income and is in receipt of qualifying benefits despite being out of the country on a long-term basis receiving private medical care.
>
> AND considering the Overriding Objective, the interests of justice and the interests of the administration of justice".

The absence of further reasons for the Judge's order

Correspondence prior to the appeal hearing

58. Unfortunately no transcript of the hearing or judgment, or record of any further reasons given by the Judge for the order, is available. This is through no fault of the Appellant.

59. The Appellant had liaised extensively with the County Court but was eventually informed on 19 February 2024 that no recording was available and that it had not been possible to establish why this was.

60. PD52B paragraph 6.2(c) provides that where there is no transcript or written judgment, the parties should agree a note that can be submitted to the judge for approval or amendment. The Appellant could not provide or contribute to such a note, having not been present at the 11 August 2023 hearing. On 11 March 2024 Sir Stephen Stewart ordered him to use his best endeavours to comply with paragraph 6.2(c) by communicating with the Respondents.

61. The Appellant did so. On 15 March 2024 he wrote to the Respondents saying "please let me and the court know what was said and happened in the hearing. As much as you remember"; and on 20 March 2024 he asked them to confirm by return that they did not "take any notes or have any recollection of what took place during the hearing on 11 August 2023", also saying "…if you have remembered anything please let me know". The Respondents replied to both communications saying that they had no notes or recordings of the hearing, which they said lasted less than 30 minutes.

62. On 25 June 2024 Sir Stephen Stewart granted the Appellant permission to appeal, noting the summary reasons in the Judge's order and directing that no further papers needed to be filed for the purposes of the hearing.

63. During the appeal hearing it became apparent that the Respondents did have some recollection of what had happened at the 11 August 2023 hearing; and after the hearing they sent me a copy of their 14 July 2024 email setting out some of it: see [51]–[53] above. It was regrettable that the Respondents had not responded to the Appellant with their recollection of the hearing when he specifically asked for it; and that they did not copy him in to their 14 July 2024 email. That said, I appreciate that they are not legally represented. They informed me that they thought that their response to him confirming that they had no notes or recordings was sufficient. In any event, in accordance with Sir Stephen Stewart's 25 June 2024 order the Judge's summary reasons are sufficient for me to determine the appeal.

The legal framework

The power to adjourn a hearing

64. The court's power to adjourn a hearing is set out in CPR 3.1(2)(b), as one of the court's general powers of case management.

65. In *Fitzroy Robinson Ltd v Mentmore Towers Ltd* [2009] EWHC 3070 (TCC), Coulson J (as he then was) held that when considering an application to adjourn:

> "8…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 court's 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."

66. In *Bilta (UK) Ltd (in liquidation) v Tradition Financial Services Ltd* [2021] EWCA Civ 221, at [30] Nugee LJ held that:

> "The guiding principle in an application to adjourn is whether progressing with the trial will be fair in all the circumstances, that the assessment of what is fair is a fact-sensitive one and not one to be judged by the mechanistic application of any particular checklist."

Adjournments on medical grounds

67. When faced with an application to adjourn on medical grounds the court must carefully scrutinise the medical evidence in support of the application. In *Levy v Ellis-Carr* [2012] EWHC 63 (Ch) at [36], Norris J held that:

> "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)."

68. This approach was approved by the Court of Appeal in *Forrester Ketley v Brent* [2012] EWCA Civ 324 at [26].

69. The White Book 2024 at paragraph 3.1.3 provides as follows:

> "Given ECHR art.6 [the right to a fair trial], a litigant whose presence is needed for the fair trial of a case, but who is unable to be present through no fault of their own, will usually have to be granted an adjournment, however inconvenient it may be to the tribunal or court and to the other parties. But the tribunal or court is entitled to be satisfied that the inability of the litigant to be present is genuine, and the onus is on the applicant for an adjournment to prove the need for such an adjournment."

The power to strike out a claim

70. CPR 3.4(2) provides that the court may strike out a statement of claim if it appears to the court (a) that it discloses no reasonable grounds for bringing or defending the claim; (b) that it is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or (c) that there has been a failure to comply with a rule, practice direction or court order. The White Book 2024 at paragraph 3.4.17 reiterates that strike out is a draconian sanction of last report.

The appeal court's powers

71. Under CPR 52.21(3), the appeal court will allow an appeal where the decision of the lower court was "(a) wrong; or (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court".

72. The White Book 2024 at paragraph 52.21.5 explains that "wrong" in CPR 52.21(3)(a) means that the court below (i) erred in law or (ii) erred in fact or (iii) erred (to the appropriate extent) in the exercise of its discretion.

73. CPR 52.21(2) provides that every appeal is limited to a review of the decision of the lower court unless (a) a practice direction makes different provision for a particular category of appeal; or (b) the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing.

74. The decision under appeal in this case was a discretionary case management one. The Court of Appeal has emphasised that appellate courts will not lightly interfere with case management decisions. Moreover

> "[t]he fact that different judges might give different weight to the various factors does not make the decision one which can be overturned. There must be something in the nature of an error of principle or something wholly omitted or wrongly taken into account or a balancing of factors which is obviously untenable": *Clearway Drainage Systems Ltd v Miles Smith Ltd* [2016] EWCA Civ 1258 at [68].

The Appellant's grounds

75. The Appellant set out his position in some detail in his grounds of appeal and skeleton argument. He did not identify specific grounds of appeal but his grounds made it clear that he took issue with all four of the summary reasons given by the Judge in the recital to the order.

76. At the outset of the hearing Mr Deal agreed that the Appellant's arguments could properly be distilled into three distinct, but slightly overlapping, grounds:

> **Ground (1)**: The Judge erred in his characterisation of the two emails sent to the court on 10 August 2023 from the Appellant's email account, referred to at [46] and [48] above, and was wrong to take these into account (**"the emails ground"**);
>
> **Ground (2)**: The Judge was wrong in all the circumstances to refuse to adjourn the PTR or the trial, in particular in concluding that there was insufficient medical evidence before the court about the Appellant's intentions and prognosis (**"the adjournments / medical evidence ground"**); and
>
> **Ground (3)**: The Judge erred in striking out the claim on the basis of the HWF issue (**"the strike out / HWF ground"**).

Ground (1): The emails ground

77. Although the Respondents' recollection of the hearing is that the Judge suggested that an Appellant had recommended a friend to attend on his behalf, a request which the Judge had declined (see [51] above), I have seen no evidence that the Appellant made this request, or that the Judge refused to allow it.

78. This recollection may reflect some observations that the Judge made about the 10 August 2023 emails. The Judge was plainly sceptical about the genesis of these emails, in that he described them as "purporting to come from the [Appellant] and a "friend"". The emails came from the Appellant's email account, but neither purported to come from him. To that extent, the first part of the Judge's description of them was inaccurate.

79. It is correct that the two apparent senders of the emails – a friend of the Appellant's and his daughter – did not sign the emails. However given that the Appellant was overseas, and in poor health, it is perhaps understandable that they contacted the court on the Appellant's behalf in this way.

80. In any event, the consistent content of both emails was merely to "signpost" the Judge to the detailed information that was already before the court in the form of the Appellant's 27 July 2023 letter and his 8 August 2023 application. To that extent, they were simply trying to assist and ensure that the Judge had all the relevant information available. I accept Mr Deal's submission that these emails added nothing of substance to the information that the Appellant had provided; nor did they detract from it or contradict it.

81. In all of these circumstances, with all due respect to the Judge, it is hard to see how it was justified to draw an adverse inference against the Appellant from these emails. More fundamentally given the content of the emails I do not accept that any such inference could properly be a material consideration in the decisions as to whether to adjourn the PTR or the trial, or to strike out the claim. This appears to have been the case, given that the Judge explicitly referred to the emails in his summary reasons.

82. I therefore uphold Ground (1) under CPR 52.21(3)(a).

Ground (2): The adjournments / medical evidence ground

The refusal to adjourn the PTR

83. The refusal to adjourn the PTR was a case management decision, with which an appellate judge should not lightly interfere: see [74] above.

84. The Judge was entitled to take into account, as he explicitly did, "the number of occasions on which this matter has been previously listed, including listing for trial, but ineffective". This factor was relevant to the overriding objective, the interests of justice and the interests of the administration of justice. Moreover the Judge was entitled to conclude, assuming he did, that there was insufficient evidence to justify adjourning the PTR due to the Appellant's absence from it.

85. The expert medical evidence did not suggest that the Appellant was so unwell he could not join a one hour video hearing. He had been able to send emails while in Bahrain and lodge comprehensive documents with the court in the days leading up to the PTR (albeit with some assistance in London). His own evidence to the effect that for medical and / or technical reasons he did not consider that he could cope with a video hearing was really focused on his ability to do so with respect to a three day trial rather than a one hour PTR: see [32] above. There was nothing in the medical evidence to support his evidence about double vision at [40] above. The Judge was aware that one of the Respondents was joining from Bahrain without apparent difficulty. The Judge may well also have seen the communication from the Respondents dated 24 May 2023 suggesting that the opponent would have been capable of joining a hearing by video: see [24] above.

86. Accordingly I consider that the Judge was justified in refusing to adjourn the PTR. However this issue became academic because the Judge did not in fact continue with a substantive PTR, but proceeded to strike the claim out, making such a hearing unnecessary. This much is clear from the fact that he made no order on the Respondents' application to join the trial by video: see [56] above.

The refusal to adjourn the trial

(i): The medical evidence

87. The medical evidence was key to the question of whether to adjourn the trial. The Judge's conclusion on the medical evidence was that there was "no sufficient information concerning the Claimant's future intentions or capabilities and his condition and his prognosis with regard to relisting this matter again."

88. The Appellant's central submission on this aspect of the appeal was that the Judge's conclusion was unsupported by the evidence. In my judgment that submission is sound.

89. The Appellant had, at very short notice, collated and provided to the court detailed information relating to his condition, prognosis and treatment plan. The evidence came from both relevant hospitals in Bahrain and England as well as his GP and himself. The evidence was entirely consistent in showing that his surgery was due to take place on 4 September 2023, just over 3 weeks after the PTR; that he was returning to England for it; and that there was a reasonable prospect that the Appellant would be well enough to

attend a re-listed trial in late 2023 or early 2024 as he asked. I have in mind, in particular, Dr Amin's evidence that if everything remained on schedule he would have expected the Appellant to "resume activities in October at the earliest at [44] above". In my judgment the combined effect of this evidence plainly satisfied the *Levy* test: see [67] above.

90. The Judge's unsupported conclusion about the medical evidence was something "wrongly taken into account" for the purposes of the *Clearway* test at [74] above. It was central to his decision to refuse to adjourn the trial and in my judgment vitiated it.

(ii): Other factors pertinent to the adjournment of the trial

91. There were other powerful factors which, taken with a fair reading of the medical evidence, rendered the balancing of factors by the Judge untenable.

92. The letter from the Chelsea and Westminster Hospital about the surgery on 4 September 2023 made clear that the Appellant had to attend the hospital at 7.30 am for a 12.00 noon procedure. It was inconceivable that the Appellant could attend both the surgery and the trial.

93. The refusal to adjourn the trial placed the Appellant in the unenviable position of having to choose between pursuing his claim in the County Court or attending for the surgery he needed, which had already been postponed more than once through no fault of his own.

94. It was clear that the Appellant was representing himself and there was no suggestion that the position was going to change. Accordingly if the Appellant chose to have the surgery, there would be no one to pursue his claim for him at trial. This put the Appellant's ECHR art.6 rights in jeopardy, pointing in favour of an adjournment: see the White Book commentary at [69] above. There was a significant risk that the Appellant's claim would have been struck out at trial for want of him being present to pursue it. By contrast, the impact on the Respondents and the court of a relatively modest delay in the trial being listed would have been much more limited. The consequences of an adjournment were therefore much more adverse for the Appellant than for the Respondents and the court. *Fitzroy* factor e) (see [65] above) applied in the Appellant's favour.

95. The fact that the trial had been adjourned on three earlier occasions was, as I have said, relevant to the overriding objective, the interests of justice and the interests of the administration of justice. However it is not clear that the first adjournment had been necessitated by anything to do with the Appellant's ill-health; and the other two adjournments had been granted on the basis of medical evidence confirming that the Appellant was not well enough to attend court on the relevant dates or would be in surgery at the time.

96. The trial had been listed at relatively short notice without consultation with the parties and on a date several weeks before the TLA was due to take place. It was therefore entirely understandable that the Appellant was taken by surprise when the trial was listed. Had the TLA listed for 20 September 2023 taken place, it is likely the trial would have been listed in late 2023 or early 2024. Accordingly even if the trial had been adjourned to a date in late 2023 or early 2024 as the Appellant had asked, this was

probably no different a timescale than the one the court itself would have proposed had the TLA taken place.

97. This was not an "eleventh hour" application for an adjournment. The Appellant had begun the process of alerting the Respondents and the court to the difficulties he was in on 27 July 2023, just over 2 weeks after the trial listing was sent out. At the time of the PTR, the trial was still several weeks away.

98. While this was an "old" claim in that it required consideration of events in 2012/2013, there had been no suggestion from the Respondents that the claim could not be fairly tried due to a loss of evidence, diminution of memory or matters of that nature, let alone any suggestion that a few months' further delay was relevant to these sort of issues. Accordingly the extent to which a fair trial may have been jeopardised by a further adjournment (*Fitzroy* factor c)) was very limited.

99. The inability of the Appellant to ensure his witnesses attended from Iran on 4 September 2023 was a further reason against refusing to adjourn the trial. This was an additional "[s]pecific matter…affecting the trial" (*Fitzroy* factor d)).

100. For all these reasons, applying the fact-sensitive approach required by *Bilta*, refusing to adjourn the trial was not, in my judgment, fair in all the circumstances.

101. Accordingly I uphold Ground (2) under CPR 52.21(3)(a) insofar as it relates to the refusal to adjourn the trial.

Ground (3): The strike out / HWF ground

102. As noted at [70] above the court's power to strike out a statement of case under CPR 3.4(2) is limited to three situations.

103. The Judge had already dismissed the Respondents' application to strike out the claim on the basis of CPR 3.4(2)(a): see [9] above. The Judge did not suggest in the 11 August 2023 order that he considered the Appellant's claim to be an abuse of the court's process or such that it was otherwise likely to obstruct the just disposal of the proceedings, such as might engage CPR 3.4(2)(b). It therefore appears that the Judge struck the claim out under CPR 3.4(2)(c), on the basis that there had been a failure by the Appellant to comply with a rule, practice direction or court order.

104. There was no suggestion in the Judge's order that the failure in question related to the medical evidence. Rather it appeared to relate solely to the Appellant's actions with respect to his application for HWF, which the Judge considered constituted a breach of the 10 July 2023 order: see [37] above. Mr Deal agreed in the appeal hearing that this was the appropriate interpretation of the Judge's order.

105. The Judge concluded that the Appellant's application for HWF was "inadequate in that the Claimant purports to have zero income and is in receipt of qualifying benefits despite being out of the country on a long-term basis receiving private medical care". This led to the decision to strike out the claim.

106. Again I am mindful that this was a case management decision, with which an appellate court should not lightly interfere. However I consider that the Judge did err in some of

the ways set out in *Clearway* (see [74] above). I have concluded that he wrongly took into account his conclusion that the application for HWF was inadequate and erred in principle in using this as a basis for striking out the Appellant's claim, for these reasons.

Was the application for HWF inadequate on its face?

107. The Judge correctly identified that question 12 on the application for HWF form showed the Appellant's previous month's income as "£0.00" ("zero"). However the Appellant was not required to answer question 12. He had answered question 9 ("Do you receive any of the benefits listed below?") by ticking the "yes" box (because he was in receipt of Pension Credit) and the form then directed him to "go to question 13" which he had done. On that basis, the form was not inadequate on its face, but properly completed.

108. Indeed, I was told that the "£0.00" answer to question 12 was not something the Appellant had inputted on to the form: rather, it was an automatic entry created by the system, because of the answer the Appellant had given to question 9. In any event, the structure of the form rendered the answer to question 12 irrelevant, once the Appellant had answered question 9 positively.

109. The Appellant's grounds also made the procedurally correct point that ultimately, a court officer not a Judge would decide whether his application for HWF was adequate or not, and no such decision had yet been made.

Was the application for HWF inadequate in substance?

110. The Judge's words suggest that he also considered that the application was inadequate in substance, because the Appellant was not being fully transparent about his finances: the words suggest that the Judge had identified a tension between the Appellant being in receipt of benefits in England but being "out of the country on a long-term basis receiving private medical care".

111. However, the evidence did not justify such a conclusion.

112. There was no evidence that the Appellant had deliberately gone abroad to receive private medical care, as perhaps implied by the Judge's words. Rather, his unchallenged evidence was that he gone to Bahrain in early July, had become unwell shortly thereafter, and had had to extend his stay. His account was corroborated by the Bahraini medial documents, showing him having investigative tests on 13 and 16 July 2023; and by Dr Amin's report confirming he was at that time (5 August 2023) too unwell to return to London, but intended to do so, for his surgery.

113. There was no evidence that the Ibn Al-Nafees Hospital is a private hospital (and the parties disagreed about its status). The only information before the Judge as to the costs of the Appellant's medical treatment were the three invoices he had provided to the court reflecting costs of, respectively, 30, 10 and 9 Bahraini Dinars. This equates to a total of less than £100. An ability to pay that figure is not inconsistent with also being in receipt of qualifying benefits.

Was strike out an appropriate sanction in any event?

114. Even if the Judge was justified in being suspicious about the Appellant's statements about his finances, given the draconian and last resort nature of the strike out sanction (see [70] above), I accept Mr Deal's submission that fairness required that the Appellant be given the chance to explain the position before the sanction was imposed. The Judge having refused to adjourn the trial, there was a period of around 3 weeks before the trial was due to take place, when this process could have taken place.

115. Had the Appellant been given such an opportunity to explain, he would no doubt have underscored the matters set out at [107]-[113] above; highlighted that his previous applications for HWF had been granted without difficulty (see [37] above); and emphasised his repeated efforts to lodge the application for HWF before the court deadline. He might also have explained, as his grounds advanced, that he was not paying for accommodation in Bahrain but was staying with someone he knew as a guest; and that while there had been one admission to hospital reflecting further costs of around £500 being incurred, his son had paid for that.

116. There is a very realistic possibility that a judge receiving that information would have concluded that the Appellant had not breached any court order; and that his application for HWF would ultimately have been granted by court staff.

117. For these reasons I uphold Ground (3) under both CPR 52.21(3)(a) and CPR 52.21(3)(b).

Conclusion, costs and next steps

118. Accordingly, the Appellant's appeal is allowed. The Judge's 11 August 2023 order is quashed.

119. In terms of costs, in the draft judgment I indicated that my provisional view was that the general rule with respect to costs set out in CPR 44.2(2)(a) should apply, such that the Respondents should be ordered to pay the Appellant's costs as he has been the successful party on the appeal.

120. The Respondents argued that such a course would be unfair in that the need for the appeal only came about because the Appellant failed to attend any of the hearings. A party's conduct can, in principle be relevant to the costs discretion under CPR 44.4(3)(a). However the decisions taken at the hearings before 11 August 2023 were not the subject of the appeal. For the reasons given in this judgment the Appellant was right to bring his appeal against the 11 August 2023 order. The Respondents chose to contest the appeal. I appreciate that the Respondents may be in financial difficulties, as they told me. That may be relevant to the enforcement of any costs order, but it does not, in my judgment, justify a decision to depart from the general rule and deprive the successful Appellant of his costs. Nor do the various submissions the Respondents made about the merits of their defence to the underlying claim.

121. I therefore order that the Respondents pay the Appellant's costs of the appeal on the standard basis. These include (a) the Appellant's costs as a litigant in person, to be paid to him, under CPR 46.5; and (b) a figure to reflect Mr Deal's pro bono representation of the Appellant, to be paid to the Access to Justice Foundation, under CPR 46.7.

122. These costs are capable of summary determination. The amounts sought by the Appellant are £709.20 for (a) and £1,750 for (b). The Respondents made no submissions on the amounts claimed. I consider that they are reasonable. I therefore make the costs orders referred to [120] in those sums.

123. The case will now be remitted to the County Court to conduct a fresh PTR, if the same is considered appropriate, and to re-list it for trial.

124. At the end of the hearing and in the embargo at the top of the draft judgment, the Respondents were informed that the purpose of circulating a draft judgment was for them to provide suggested typographical amendments only. The vast majority of the points that they made in writing to me after sight of the draft judgment were not of that kind, but were rather queries or observations of substance. It was not possible or appropriate for me to respond to these or take these into account. Insofar as the points they made to me are relevant to the merits of the Appellant's underlying claim, they will need to be made to the trial judge.

125. In light of the issues highlighted at [50] and [63] above, the parties are reminded of CPR 39.8(1) and (2), the effect of which is that generally any communication with the court which involves "a matter of substance or procedure" should be copied to the other party or parties.

126. Happily the Appellant's skeleton argument made clear that he had his operation in November 2023 and that many of the issues relating to it have now receded. On that basis there should be no difficulty with the County Court listing the trial as soon as it can accommodate.