Neutral Citation Number: [2023] EWCA Civ 325

Case No: CA-2022-001503

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON SECOND APPEAL FROM the County Court at Cardiff
His Honour Judge Jarman KC
G01CF238

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 March 2023

Before:

LORD JUSTICE BAKER
LADY JUSTICE ELISABETH LAING
and
LORD JUSTICE EDIS

- -

Between:

OWEN	**Appellant**
- and -	
BLACK HORSE LIMITED	**Respondent**

- -
- -

Jonathan Butters (instructed by **HD Law Limited**) for the **Appellant**
Stephen Neville (instructed by **Eversheds Sutherland**) for the **Respondent**

Hearing date: 31 January 2023

- -

Approved Judgment

This judgment was handed down remotely at 11.00am on Friday 24 March 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

Lady Justice Elisabeth Laing:

Introduction

1. Part 27.9 of the Civil Procedure Rules ('the CPR') deals with small claims. It contains the phrase 'if a claimant does not attend the hearing'. What does the phrase mean? That is the question raised by this appeal. A subsidiary question is whether the meaning of the phrase is different in the small claims provisions of the CPR and in the provisions which apply to more valuable claims.

2. This is an appeal from HHJ Jarman KC ('the Judge'), who dismissed an appeal from DDJ Sandercock '(the District Judge'). The Judge and the District Judge both held, in the context of the small claim in this case, that the phrase meant 'if the claimant is not present at the hearing, even if he is represented by his solicitor'.

3. On this appeal, Mr Butters represented Mr Owen, who was the claimant before the District Judge and the appellant before the Judge. I will refer to Mr Owen as 'A'. Mr Neville represented the defendant before the District Judge, and the respondent before the judge, Black Horse Limited. I will refer to Black Horse Limited as 'R'. I thank counsel for their written and oral submissions. They both appeared before the Judge, but only Mr Neville appeared before the District Judge.

4. Paragraph references are to the judgments of the Judge or of the District Judge, as the case may be, or, if I am considering an authority, to that authority.

The facts

5. A's particulars of claim were signed by his solicitor and dated 31 July 2020. R's pleaded case was that they were not served until 7 September 2020.

6. According to the particulars of claim, R was a creditor under section 189(1) of the Consumer Credit Act 1974 ('the Act'). A negotiated a loan agreement with R ('the loan agreement'). A payment protection policy ('the policy') with an insurer was linked to the loan agreement. A alleged that R retained or received some payment from the insurer in connection with the policy. A further alleged that R failed to tell him about those payments and/or deliberately hid them. He claimed that if he had known about the payments, he would not have taken out the policy. A said that he had repeatedly asked R for information about the payments, but that R had not answered his questions.

7. R eventually paid A £359.24 pursuant to the handbook of the Financial Conduct Authority ('the FCA'). A's case was that he accepted that payment on an interim basis.

8. A also claimed the relationship created by the loan agreement was unfair to him, because of the payments made to R by the insurer. He claimed repayments of capital and interest in respect of the loan for the policy and/or the commission. Any compromise (which was denied) was 'related' to the loan agreement for the purposes of section 140C(4)(b) of the Act. Paragraph 19 of the particulars of claim listed the orders which A sought under section 140B of the Act.

9. A gave no details, such as dates, in the particulars of claim. The only identifying detail was the account number of the loan (particulars of claim, paragraph 2).

10. R pleaded that the claim was statute-barred by Limitation Act 1980 either totally, or in part. Further, any relevant relationship between debtor and creditor ended on or about 31 July 2020 and the claim was issued on 7 September 2020 so that claims under sections 140A and 140B were statute-barred, at the latest, six years after 31 July 2020.

11. R also asked for the claim to be struck out on the grounds that it was poorly particularised and/or failed to disclose a reasonable prospect of success. R required A to prove paragraphs 2-21 of the particulars of claim. R accepted, nevertheless, that it had made a loan agreement with A on or around 22 July 2010, which was 'completed' on 31 July 2013. R denied that there had been any negotiations. R accepted that A had agreed to the policy, which was optional, on 22 July 2010 and that the policy, too, had been 'completed' on 31 July 2013.

12. R admitted receiving a commission from the insurer. Its case was that there was nothing in its records which suggested that A was vulnerable or unsophisticated, and that he knew or ought to have known that a commission might be paid or received. R denied that it was obliged to tell A about the commission. A received a benefit from the policy as it gave him peace of mind for the period of the loan agreement. A asked no questions about commission which suggested that if he had known about it, it would not have affected his decision to make the loan agreement.

13. R admitted paying £359.24 to A in response to a complaint by him. Its response to the complaint gave details of the commission R had received. R claimed that A had been given monthly statements about the payments he had made towards the policy.

14. R did not rely on A's acceptance of its payment as a compromise of A's claim (defence, paragraph 18.1). R had made the payment because it was required to by the FCA's 'Dispute Resolution: Complaints' rules ('the DISP'). The making of the payment was not an admission of liability, or of any of the issues in the claim. It was for A to prove the facts underlying his claim that the relationship was 'unfair' for the purposes of the Act. The presumptions in the DISP did not apply. R denied that the relationship was unfair.

15. In his reply, A dealt only with limitation. A claimed that the claim was within the limitation period of six years from the date of the end of the relationship. A referred to two authorities. A asserted that R deliberately concealed facts from A and that postponed the running of the limitation period. Like the particulars of claim, the reply had no identifying details. Both pleadings referred to A, throughout, as 'they'.

16. On 5 March 2021, District Judge Andrews allocated the claim to the small claims track. The notice of allocation referred the parties to 'Part 27 of the Civil Procedure Rules 1998 and to the Practice Direction for that Part for guidance as to how the hearing will be conducted'. The notice also told the parties about a hearing date on

3pm on 13 July 2021 when a District Judge would review the file. No 'attendance [was] required by any party or advocate on their behalf'.

17. The text in a box at the foot of the notice of allocation told the parties that if they could not, or chose not, to attend the hearing, they must write and tell the court at least 7 days before the hearing. A District Judge would hear the case in their absence but would take account of their statement of case and any other documents they had filed. If they did not attend and did not give notice, the DJ might strike out their claim, defence or counterclaim. Leaflets with more explanations were available at the court office or on-line. The notice gave detailed case management directions and a timetable.

18. In a notice dated 16 July 2021 the claim was listed for trial 'by way of CVP' at 9 am on 9 December 2021 with a time estimate of three hours. A did not attend that hearing, but his solicitor, Mr Durkin, did. The District Judge struck out the claim.

The relevant provisions of the CPR and of the Practice Directions

19. CPR rule 26.6(1)-(3) provides that the small claims track is the normal track for the types of claim which it describes. £10,000 is the general limit on the value of any such claim, but there are exceptions to that general limit. The fast track is the normal track for claims of (in short) intermediate value, but only if the court considers that the criteria listed in CPR rule 26.6(5) are met (CPR rule 26.6(4)). The multi-track is the normal track for any claim for which the small claims track of the fast track is not the normal track (CPR rule 26.6(6)).

20. Practice Direction 26PD.8 explains that the small claims track is intended to be a proportionate procedure by which most 'straightforward' claims with a value of less than £10,000 can be decided, without substantial preparation and without the formalities of a traditional trial, and without large costs. The scheme is designed so that a litigant in person can represent himself, if he wishes. Consumer disputes are generally suitable for the small claims track. Directions for case management are generally given when the case is allocated to small claims track.

21. Part 27 deals with the small claims track. Rule 27.1 is headed 'Scope of this Part'. Rule 27.1(1) explains that Part 27 sets out the procedure for claims which have been allocated to the small claims track under Part 26, and limits the costs which can be recovered for such a claim. Rule 27.2 is headed 'Extent to which other Parts apply'. It lists several provisions of the CPR which do not apply to small claims. These include 'Part 32 (evidence), except rule 32.1 (power of court to control evidence)'; Part 33 (miscellaneous rules about evidence)'; and 'Part 39 (hearings), except rule 39.2 (general rule - hearing to be in public); rule 39.8 (communications with the court) and rule 39.9 (recording and transcription of proceedings)' (rule 27.2(1)(c), (d) and (h)). The other Parts of the CPR apply to small claims unless a rule or Practice Direction under Part 27 limits such application (rule 27.2(2)).

22. Rule 27.4 makes provision about preparation for a hearing. Rule 27.4(1) lists the options which the court has after allocation. The court will give the parties at least 21

days' notice of the date fixed for the final hearing, unless the parties agree otherwise (rule 27.4(2)). Experts may not give evidence without the court's permission (rule 27.5). Rule 27.6(1) gives the court power to hold a preliminary hearing, but only if one of the criteria listed in rule 27.6 is met. Cost is a relevant consideration when that power is exercised (rule 27.6(2)). The court may treat a preliminary hearing as a final hearing if the parties agree (rule 27.6(4)).

23. Rule 27.8 is headed 'Conduct of the hearing'. The court may 'adopt any method of proceeding that it considers to be fair' (rule 27.8(1)). Rule 27.8(2) provides that hearings will be informal, the strict rules of evidence do not apply, the court need not take evidence on oath, the court may limit cross-examination and the court must give reasons for its decision.

24. Rule 27.9 is headed 'Non-attendance of the parties at a final hearing'.

> *'(1) If a party who does not attend a final hearing—*
>
> *(a) has given written notice to the court and the other party at least 7 days before the hearing date that he will not attend;*
>
> *(b) has served on the other party at least 7 days before the hearing date any other documents which he has filed with the court; and*
>
> *(c) has, in his written notice, requested the court to decide the claim in his absence and has confirmed his compliance with paragraphs (a) and (b) above,*
>
> *the court will take into account that party's statement of case and any other documents he has filed and served when it decides the claim.*
>
> *(2) If a claimant does not–*
>
> *(a) attend the hearing; and*
>
> *(b) give the notice referred to in paragraph (1)*
>
> *the court may strike out the claim.*
>
> *(3) If–*
>
> *(a) a defendant does not*
>
> *(i) attend the hearing; or*
>
> *(ii) give the notice referred to in paragraph (1); and*
>
> *(b) the claimant either–*
>
> *(i) does attend the hearing; or*
>
> *(ii) gives the notice referred to in paragraph (1),*
>
> *the court may decide the claim on the basis of the evidence of the claimant alone.*

> *(4) If neither party attends or gives the notice referred to in paragraph (1), the court may strike out the claim and any defence and counterclaim.'*

25. Rule 27.10 gives the court power, if the parties agree, to deal with a claim without a hearing. Rule 27.11 gives a party who 'was neither present nor represented at the hearing of the claim' and who has not given written notice to the court under rule 27.9(1) a right to apply to the court for an order that a judgment be set aside and the claim re-heard. That party must make the application within 14 days of service of the judgment (rule 27.11(2)). The court may only grant the application if the applicant 'had a good reason for not attending or being represented at the hearing or giving written notice to the court under rule 27.9(1)' and has a reasonable prospect of success at the hearing (rule 27.11(3)). A party may not make an application under rule 27.11 if the court dealt with the claim without a hearing by consent under rule 27.10 (rule 27.11(5)).

26. Rule 27.14 deals with costs. The costs which can be recovered in a small claim are limited to the costs which are listed in rule 27.14(2)(a)-(i).

27. The relevant Practice Direction is Practice Direction 27A. PD27A.1 provides that small claims will generally be dealt with by District Judges but may also be dealt with by Circuit Judges. PD27A2.5 provides that, in deciding whether to make an order for the exchange of witness statements, the court will take into account, among other things, whether 'either or both of the parties are represented'.

28. PD27A.3 is headed 'Representation at a hearing'. Paragraph 3.1 provides that, in that paragraph, 'a lawyer' means 'a barrister, solicitor or legal executive employed by a solicitor or any other person' who is suitably authorised. A 'lay representative means any other person'. A party can present his own case at a hearing, or a lawyer or lay representative may present it for him (paragraph 3.2(1)). Paragraph 3.2(2) summarises the effect of the restrictions in the Lay Representatives (Right of Audience) Order 1999 ('the Order'). Paragraph 3.2(3) provides, nevertheless, that the court has a general discretion to hear anybody, even in the circumstances excluded by the Order. By paragraph 3.2(4), any of its officers or employees may represent a company.

29. Paragraph 4.3 specifies various things which the court may at the hearing do in the exercise of the power conferred by rule 27.8 (see paragraph 23, above).

30. Paragraph 5 makes detailed provision for recording evidence and giving reasons. A party can obtain a transcript of a recording of a hearing on paying the costs of transcription (paragraph 5.1). The judge 'may give reasons of his judgment as briefly and simply as the nature of the case allows' (paragraph 5.3(1)). He may do so orally at the hearing, or later (orally or in writing) (paragraph 5.3(2)). Paragraph 5.4 provides that 'Where the judge decides the case without a hearing under rule 27.10 or a party who has given notice under rule 27.9(1) does not attend the hearing, the judge will prepare a note of his reasons and the court will send a copy to each party'.

31. Paragraph 6 is headed 'Non-attendance of a Party at a Hearing'. Paragraph 6.1 summarises the effect of rule 27.9. Paragraph 6.2 provides that 'Nothing in those

provisions affects the general power of the court to adjourn a hearing, for example, where a party who wishes to attend a hearing on the date fixed cannot do so for good reason'.

32. CPR rule 39.1(1) defines 'hearing' as 'the making of any interim or final decision by a judge at which a person is, or has a right to be, heard…' Rule 39.2 is a general rule that a hearing is to be in public, with exceptions as provided for in rule 39.2.

33. Rule 39.3 is headed 'Failure to attend the trial'. The court may hold a trial 'in the absence of a party'. If 'no party attends the trial, it may strike out the whole of proceedings'. If the claimant 'does not attend, it may strike out his claim and any defence to counterclaim' and if a defendant 'does not attend, it may strike out his defence or counterclaim or both' (rule 39.3(1)(a), (b), and (c)). If the court strikes out proceedings under rule 39.3, it may later restore them (rule 39.3(2)).

34. Rule 39.3(3) provides that 'Where a party does not attend and the court gives judgment or makes an order against him, the party who failed to attend may apply for the judgment or order to be set aside'. Rule 39.3(5) gives the court power to grant an application 'by a party who failed to attend the trial' if three conditions are met. Those conditions are similar, but not identical, to the conditions in rules 27.11(2) and (3) (see paragraph 25, above).

35. Rule 39.6 enables a company or other corporation to be appear at trial by an employee if that employee has been 'authorised by the company or corporation to appear at trial on its behalf and if the court gives permission'.

36. Rule 39.8 deals with communications between the parties and the court. Subject to exceptions listed in rule 39.8, any such communication must be disclosed and copied to the other party or parties or to their representatives (rule 39.8(1)), unless the communication is 'purely routine, uncontentious and administrative' (rule 39.8(2)), or unless there is a compelling reason to the contrary (rule 39.8(3)).

37. Rule 39.9 deals with the recording and transcription of proceedings. Any hearing will be recorded unless the judge directs otherwise (rule 39.9(1)). Any party or person may require a transcript to be supplied if they pay the relevant charges (rule 39.93).

Cases in which the relevant provisions of the Civil Procedure Rules have been considered

38. There is no authority at this level on the interpretation of rule 27.9, or deciding, or commenting on, the meaning of the phrase 'a party' (or 'claimant', or 'defendant') 'does not attend' the trial in rule 39.3. There is, however, one case in which Gross J (as he then was) made a decision about rule 39.3, and one in which Nugee J (as he then was) commented on rule 39.3. They are *Rouse v Freeman* (The Times, 8 January 2002) and *Falmouth House Limited v Abou-Hamdan* [2017] EWHC 779 (Ch), respectively. There is also a decision of this Court on the meaning of O 37 r 2(1) of the County Court Rules.

Kirton v Augustus Limited

39. *Kirton v Augustus Limited* [1996] PIQR 388 concerned the meaning of O 37 r 2(1) of the County Court Rules. That provided 'Any judgment or order obtained against a party in his absence at the hearing may be set aside by the court on application by that party on notice'. The appellant (the claimant below) appealed against decisions in the county court to set aside an order made at a hearing at which the defendant's legal representative, who had a right of audience, was present but, on the basis, agreed with the judge, that he would take no part in the hearing.

40. The question on that appeal was whether, those circumstances, the defendant company was absent for the purposes of that rule. This Court rejected an argument that the representative lacked authority to represent the company. The purpose of the rule was to enable the court to correct an injustice if, for some unavoidable reason, a party had not been present at a hearing. Peter Gibson LJ (with whose judgment the other members of this Court agreed) said, at pp 392-3, 'When a party deliberately chooses either to be in court but not to make representations at the hearing, or to depart from court so as to avoid being there when the order is made, I cannot see how that party can bring himself within the purpose of the rule'. This Court allowed the appeal.

Rouse v Freeman

41. *Rouse v Freeman* was an ex tempore judgment. The appellant (the claimant below) appealed against a decision to strike out his claim pursuant to CPR 39.3(1)(b). He did not attend the trial but his solicitor and counsel did. Counsel told the judge that the appellant had been told the date and time of the trial. He could not explain why the claimant had not come, and applied for an adjournment. The judge refused that application. The judge accepted an argument that it would be best to strike out the claim under rule 39.3, so that the appellant could apply to reinstate his claim if he could, promptly, show a good reason for not attending the trial (paragraph 2).

42. Gross J said that the appeal raised a short point about the construction of rule 39.3. (paragraph 3). Given the presence of his legal representatives, could it be said that the appellant 'did not attend' the trial? According to counsel, there was no authority on the point. Counsel for the appellant referred to *Kirton v Augustus Limited* (see paragraphs 39-40, above). Counsel for the respondent submitted that that authority could be distinguished because it was a decision on the old County Court Rules, and that provision covered trials and interim hearings, whereas rule 39.3 applies only to trials (paragraphs 6-9).

43. Gross J recorded the respondent's argument that if rule 39.3 was to be read as the appellant suggested, it was inconsistent with rule 27.9 and 27.11. A party could apply for relief under rule 27.11 if it was 'neither present nor represented'. The draftsman could differentiate between being present and being represented (paragraph 10). Rule 39.3 did not refer to being represented. 'Attend' in rule 27.9 must therefore include a situation when a party is not present but his legal representative is present (paragraph 11).

44. Gross J did not accept the respondent's arguments. Giving the words their 'natural meaning' he could not agree that a party 'does not attend' when his legal

representatives are present at trial. A party was present 'by or through his legal representatives'. That initial impression was reinforced by the context. The fact that rule 39.3 applies to trials made 'it less likely...that it will focus on personal non-attendance of a party' (paragraph 15). There were many situations in which personal attendance of a party is 'irrelevant or most unlikely'. It was only likely to matter (apart from the giving of instructions) if the party was to give evidence. The remedy of strike out seemed inappropriate. If a party who was an important witness did not attend, the claim 'will not, at least ordinarily, be struck out, it will fail and be dismissed' (paragraph 16). The mischief addressed by rule 39.3 was where a party did not attend and was not represented.

45. He approached *Kirton v Augustus* with appropriate caution, as it was a case on the old rule, and the rule applied to applications and to trials. It nevertheless gave persuasive support to his provisional view about the right construction of rule 39.3.

46. The court had ample other powers to deal with a case in which an important witness was absent. The court could exercise or refuse to exercise its power to adjourn the hearing, or could stay the claim. If the court refused an adjournment, it could give judgment. Considerations of practicality did not, therefore displace his initial view about the right construction of rule 39.3 (paragraphs 20 and 21).

47. Gross J was not 'minded to express any concluded view' about rules 27.9 and 27.11. He recorded that counsel disagreed about how those provisions should be construed. He was prepared to assume that if counsel for respondent was right, his own construction of rule 39.3 would be inconsistent with the construction of rules 27.9 and 27.11 for which counsel for the respondent contended. Even if that was the case, he was not dissuaded from his conclusion about rule 39.3(1) (paragraph 22). It followed that the county court had not had power to strike out the appellant's claim.

Falmouth House Limited v Abou-Hamdan

48. In *Falmouth House* the defendant appealed a number of decisions made in the county court. Nugee J had given a short oral judgment after the hearing, but had given the parties the option, which they had taken, of asking for a fuller written judgment (paragraph 1). The underlying dispute was about service charges. The claimant was the freehold owner of a building and the defendant was a lessee of a flat in that building (paragraph 2).

49. The appeal concerned three procedural orders which Nugee J summarised (paragraph 3). Only two are relevant to this case.
    i. HHJ Mitchell listed the trial for the first convenient date after 13 August 2015. His order provided that if the defendant did not attend the trial in person, his defence and counterclaim would be struck out and judgment entered for the claimant ('order 1').
    ii. On 14 December, the defendant did not attend in person, but he was represented by counsel, who applied for relief from sanctions. That application was refused, with the consequence that his defence was struck out (he had already dropped his counterclaim) ('order 2').

50. In paragraph 4, Nugee J commented that this 'seems on the face of it to be a somewhat surprising state of affairs'. He would have thought, first, that it was 'well established and uncontroversial' that a person who is a party to litigation has a right to appear in person and to represent himself, but also has a right to appear by counsel. He was not aware of 'any principle which would prevent a litigant from appearing by counsel', or of any 'general requirement for a litigant who appears by counsel himself to be physically present in court…'

51. A second feature of civil litigation is that, in general, a party 'is entitled to form his own view whether to give evidence or not'. A defendant may be able to prove his case without giving evidence. If he has decided not to give evidence he can still undermine the claimant's case by cross-examining the claimant's witnesses. He may choose to make a submission of no case to answer at the end of the claimant's evidence.

52. It followed from those two features of civil litigation that there is 'nothing on the face of it irregular, contrary to the rules, improper, or even very exceptional about a defendant who (i) instructs counsel to appear at the trial on his behalf and (ii) does not himself propose to give or call evidence', although, in practice, that would necessarily constrain the scope of his defence. There was no reason why he should not choose to; and if he did, 'there would equally seem on the face of it no reason why the defendant should have to attend court in person'. There was no obvious reason why he should be required to attend personally 'in order to sit at the back of the court' (paragraph 6).

53. That was the defendant's position on the date fixed for trial. Yet judgment was given for the claimant for the full amount of the claim, and indemnity costs, and the defendant was not able to contest the claim on its merits. That was 'a surprising result, and one whose justice is not immediately apparent'. Nugee J contrasted this with paragraph 16 of the judgment in *Rouse v Freeman* (paragraph 7).

54. Nugee J explained why order 1 must be understood as requiring the defendant to attend the trial in person, and not by his representatives (paragraphs 32-45). In paragraph 41, he contrasted that with the position under rule 39.3. He quoted the words of rule 39.3 and said 'For these purposes a party "attends" a trial if he is represented by solicitors and counsel, even if the party him or herself is not present at court', and referred again to *Rouse v Freeman*, citing paragraph 15. Nugee J had 'no hesitation in agreeing that' that was the correct view of rule 39.3.

55. In the event, Nugee J allowed the appeal against order 2. He considered that, as counsel was present and ready to defend the case on the defendant's behalf, the defendant's absence from the trial, which meant that he had not complied with order 1, made absolutely no difference to the court or to the claimant (paragraph 51). When measured against the purpose of order 1, which was to ensure that there was no further adjournment of the trial, the breach of order 1 was not a serious or significant one (paragraphs 56 and 61).

The judgment of the District Judge

56. The District Judge started his ex tempore judgment by saying that he was going to strike out the claim because A was not there to be cross-examined 'and that is a matter

of justice and pursuing the overriding objective'. He noted that A relied on rule 27.9 'as enabling him to, as it were, self-excuse his attendance' (paragraph 1). That gave rise to a question: 'what does "If a party who does not attend" actually mean?" The alternatives were the claimant himself, or 'the claimant's side of the case'. The District Judge thought it meant 'the person who is actually bringing the claim' (paragraph 2).

57. The second element was 'attending'. The word 'appear' is not used. A party might 'attend' by his advocate, but that was not the point. 'Attend' means 'actively join in the process of the final hearing'. It was not the same as the party attending by his advocate (paragraph 3).

58. The District Judge referred to the notice requirement imposed by rule 27.9(1)(a) on a party who does not want 'to attend' the hearing. The language supported the view that what is at issue is personal attendance by the claimant and not by his advocate (paragraph 6).

59. A notice had been given in this case, 'just in time', by an email addressed to the court and to a case handler at R's solicitors (paragraphs 7 and 8). What the notice said was important. It said that the claimant would 'personally…not be in attendance at the hearing. The claimant will attend by his legal representative' (paragraph 8).

60. There is no rule of procedure or practice that someone can 'attend' by their legal representative. They can 'appear' by their legal representative. Attendance involves 'the actual engagement of the claimant', as the District Judge read it. Indeed that was the approach in the email (paragraph 9).

61. The email did not comply with all the requirements of paragraph 27.9(1)(c). It did not say that A wanted the claim to be decided in his absence, and did not confirm, as required by paragraph 27.9(1)(c), that he had complied with paragraphs 27.9(1)(a) and (b). Nor did it say that he had served documents. The notice should have said so (paragraphs 10-12).

62. Sub-paragraph (c) supported the District Judge's interpretation of 'attend'. 'In his absence' could only mean, 'the absence of himself personally'. The purported notice under paragraph 27.9(1)(c) was defective (paragraph 13). A had not attended the hearing and had not given the requisite notice (paragraph 14).

63. Paragraph 27.9(2) gave the court a discretion to strike out the claim. The interests of justice required the court to balance the interests of the parties. A's representative 'put very forcibly' to the District Judge that A's case was made out on the papers including the material from R. He argued that R has conceded both that the commission was unfair and its amount (paragraphs 17 and 18).

64. The issue of limitation was not relevant. The test was what was just (paragraph 19). In his reading before the hearing, the District Judge had found three discrepancies 'of some substance' in A's material (paragraph 20). He described those in paragraphs 20-23. That was all 'rich material for cross-examination' (paragraph 25). As a general

principle, if a party wanted his evidence to be taken into account, he had to expose himself to cross-examination. At the very least, R had been deprived of the opportunity to cross-examine A by his 'unilateral decision not to attend'. 'The absence of the opportunity to cross-examine is an injustice to [R]' (paragraph 26).

65. Cross-examination was all the more important given the discrepancies between A's evidence and the documents (paragraph 27). The District Judge did not accept that A's case was made out on the documents (paragraph 29). The interests of justice demanded that the claim be struck out and that is what the District Judge decided to do (paragraph 30).

The Judge's decision

66. The Judge said that the only question on the appeal was whether 'if a claimant does not attend the hearing' means the same in the CPR in the provisions about small claims as it does in the rest of the CPR (paragraph 2). He observed that the appeal had originally challenged the District Judge's exercise of his discretion, but that it no longer did so (paragraph 3). He also summarised the District Judge's reasoning in paragraph 3.

67. On the face of it, the same phrase should mean the same thing in different provisions of the CPR, but the context was different (paragraph 4).

68. The Judge summarised the relevant provisions of the CPR in paragraphs 5-7 and 9-10 (Part 27.1(2), 27.8(1), 27.9(1), 27.11) and Part 39. In paragraph 8 he said that it was not in dispute that A had sent an email to R's solicitors which did not comply with rule 27.9(1).

69. Part 39 does not apply to small claims. The meaning of rule 39.3 (which applies to trials) had been considered in two authorities, *Rouse v Freeman* and *Falmouth Housing Limited v Abou-Hamdan*. Both judges considered that a party could 'attend' a hearing by its legal representative. In paragraph 22 of *Rouse*, Gross J referred to Part 27.9 and 27.11. He did not express a concluded view about those provisions. He was prepared to assume that his preferred approach to the meaning of Part 39.3 might lead to inconsistency with Part 27.9 and 27.11. That possible inconsistency did not persuade him that his construction of Part 39.3 was wrong.

70. The Judge said that there was no decision about the interpretation of Part 27.9. Part 27 is intended quickly to resolve disputes about small sums between parties who may represent themselves. He referred to paragraph 35 of *Kenny v Abubaker* [2012] EWCA Civ 1962.

71. Mr Neville (for R) had pointed out that in that case this Court used the phrase 'not attending or being represented at trial' five times, which was said to show that this Court did not consider the phrase to be tautological (paragraph 17).

72. Mr Butters (for A) had submitted that *Rouse* and *Falmouth House* were binding, as the phrase in the two Parts of the CPR was the same (paragraph 18). The Judge did not accept that because the other provisions of the two Parts were different. The Judge

nevertheless did accept that a court should try to give the two phrases a consistent meaning (paragraph 18).

73. Mr Butters had also submitted that Part 27.9 should be interpreted on its own terms and that Part 27.11 was not relevant to that exercise. The Judge rejected that submission. Part 27.11 referred expressly to Part 27.9(1) and to 'judgment under this Part'. It set out the procedure for applying to set aside such a judgment. Mr Butters had pointed to the contrast between 'attend' and 'present' in the two paragraphs and had submitted that they must mean something different (paragraph 19).

74. Mr Butters had been unable to explain the phrases 'neither present nor represented' and 'not attending or being represented' in Part 27.11. The Judge observed that the phrase would be 'unnecessary and tautologous' if 'attendance' in Part 27.9 includes attendance by a legal representative. The phrase is not used in Part 39.3 (paragraph 20). Mr Butters had further submitted that there could be practical difficulties if the party was a company or an insurer or where the hearing was held remotely (paragraph 22).

75. Mr Neville had submitted that Part 27 was a self-contained procedure for small claims. It was separate from Part 39.3. The word 'attend' means 'be physically present' (paragraph 23). It was sensible to give the court more powers in small claims; there was a high volume of low-value claims, and there were usually no costs. There were no provisions outside the small claims track which was the same as the provisions for notice in Part 27.9 (paragraph 24).

76. The judge also observed that it was not difficult to understand why a claimant who had not given such a notice and who did not personally attend the hearing might have his claim struck out, even if his representative did attend. The court had a discretion (paragraph 25).

77. It was also understandable why it was only a party who was neither present nor represented at the hearing and had not given the required notice who could apply under Part 27.11 to have judgment set aside. If a claimant did not attend the hearing, but was represented at it, his representative could argue why the discretion conferred by Part 27.9(2) should not be exercised to strike out the claim. That is what happened in the current case (paragraph 26).

78. The Judge further observed that, if a claim is struck out in such a case, an application to set aside is likely to involve a repetition of the same arguments, giving the party a second chance. Accordingly, 'the proper course is to appeal'. If neither the party nor his representative has attended the hearing, the application to set aside 'does not involve a second chance' (paragraph 27).

79. The Judge concluded neither interpretation was 'free from difficulty'. The fact that the court retained a discretion was 'instructive'. If attendance by the claimant was unnecessary, it was difficult to see how his non-attendance could justify the claim being struck out, for example, where the claimant is not a witness and sends a representative when no compliant notice had been served. In this case, the District

Judge had considered that A's failure to attend the trial deprived R of the opportunity to cross-examine him (paragraph 28).

80. 'Present' is used in Part 27.11(1)(a) and 'attending' in paragraph (3)(a). They must mean the same thing, that is, where a party does not personally attend. If that is so, the distinction between that situation and being represented is 'inexplicable on [A's] contention, and in my judgment is too clear to be ignored. On the other hand, on [R's] interpretation there is a rational [sic] for the distinction, as set out in paragraph 26, above' (paragraph 29).

The ground of appeal

81. The ground of appeal is that the Judge was wrong to find that A did not attend the trial for the purposes of CPR 27.9(2)(a) when, although he was not present, his legal representative was. The court therefore had no power to strike out the claim.

The parties' submissions on this appeal

82. A submits that the District Judge had no power to strike out his claim because, although A did not personally attend the hearing, he attended through his solicitor, Mr Durkin. The issue then is whether a person who is not at the hearing, but who is represented at it 'attends' that hearing or not. If the claimant's representative is present, the claimant is not also required to be present. All the relevant factors, including the decision in *Rouse*, which interprets CPR 39, point in the same direction. The same words cannot mean different things in different Parts of the CPR.

83. A accepts that the email dated 1 December 2021 did not comply with CPR 27.9(1).

84. A recognises that, if the District Judge had power to strike out his claim, an appeal against the District Judge's exercise of his discretion 'would present a high hurdle'. He does not wish this to be seen as a concession that he would have lost if there had been a trial in his absence. He asserts that his 'case would have been strong indeed'.

85. There are four strands in A's argument.
    i. He relies on the natural meaning of the words in their context.
    ii. He argues that the words should be construed consistently with CPR 39.3(1)(b).
    iii. He suggests that a purposive interpretation supports his case.
    iv. CPR 27.11 does not lead to a different conclusion.

86. The first strand of the argument rests on the assertion that a party can 'attend' a hearing through his representative. A relies on a statement in the White Book 2022 paragraph 27.9.1 which (a) suggests some confusion on the part of its editors and (b) does not obviously support his interpretation ('…parties in person cannot give written notice of their non-attendance but then attend the hearing by way of a representative appearing on his behalf'). He quotes the statement of Nugee J at paragraph 4 of *Falmouth Housing* that there is no principle that a party cannot appear by counsel and that there is no general requirement that a litigant be physically present if he appears by counsel as 'at many hearings this is entirely unnecessary'. That is said to be the context for the construction of 'the claimant does not attend'.

87. The second strand of the argument is based on the fact that the phrase 'the claimant does not attend' also appears in CPR 39.3(1)(b) in a 'materially identical context'. Gross J and Nugee J both held that a claimant who was not at trial could attend by his legal representatives. The two phrases should be construed consistently.

88. The third strand is that A relies on Nugee J's statement in paragraph 6 of *Falmouth Housing* that if a claimant was not going to represent himself, or to give evidence, there is no obvious purpose in making him attend the trial. The approach of the District Judge and of the Judge is said to restrict access to the courts, to confuse the roles of party and witness, to be inconsistent with Part 27.9 construed as a whole, to cause significant practical problems, and to be inconsistent with the overriding objective. A purposive interpretation, it is said, 'becomes even stronger in the context of' small claims. Remote hearings make their approach even more problematic. Whether a party is a witness is irrelevant. If the intention was to give the court power to strike out a claim if a witness did not attend, that should have been done in a separate rule.

89. The fourth strand was designed to deal with the difficulty identified by the Judge in paragraph 20 (see paragraph 74, above). Mr Butters submitted, first, that if rule 27.9(2)(a) is interpreted as including both personal attendance by a party and attendance through a legal representative, its effect is consistent with rule 27.11. The scope of the jurisdiction to strike out for non-attendance and the scope of the jurisdiction to set aside when a party has not attended should match each other. If the Rules Committee had intended rule 27.9 to have the meaning which the Judge held that it did, that should have been made clear, by words such as 'if a party does not attend a final hearing even if he is represented'.

90. He also submitted that the drafting styles in rules 27.9 and 27.11 were different. An explanation for the difference in language was not required. The language of rule 27.11 did not require the Court to abandon a common sense interpretation of rule 27.9. The word 'attend' must mean 'be present' in both provisions, but perhaps it did not matter.

91. Nevertheless, if an explanation was necessary, rule 27.11 was a context in which the Rules Committee must have thought that it was appropriate to specify 'being present' and 'being represented'. But it casts no light on the meaning of rule 27.9. The different contexts explained the different drafting styles. The effect of rule 27.11 is to specify when a party can apply to set aside a judgment, rather than appeal against it. There are more litigants in person, and more lay representatives, who can represent individual litigants, and companies (see paragraph 28, above), in the small claims track than in other tracks. In the light of that, it was possible that the Rules Committee thought it necessary to spell out clearly the circumstances in which the court has jurisdiction to set aside a judgment. That specificity was unnecessary in rule 27.9, which would be applied by District Judges, who can be taken to know that a party can appear, or attend, or be present, by his legal representative, even if he is not personally present. That could also explain why rule 39.3(3) refers to a party who 'does not attend'. There are no lay representatives at trials in the other tracks. A party

will either be wholly absent or will attend through a legal representative (or an officer of a company, with the court's permission).

92. Mr Neville for R submitted that the rules distinguish between attending in person and being represented, and that the concepts were mutually exclusive. The only interpretation of rule 27.9 which made grammatical sense was that the court had power to strike out a claim if the claimant did not attend in person. The fact that A's solicitors served a purported notice under rule 27.9(1)(a) showed that that they also interpreted the provision in that way. If A was right, the language of rule 27.11 was 'a nonsense'. It would require this Court to decide that 'the Rules Committee has no grasp of basic grammar'.

93. He submitted that the grammatical meaning did not lead to an absurd outcome. He accepted that his construction meant that if a party was not personally present but was represented at a hearing, that party's claim or defence could be struck out and he would have no right to apply to set aside that judgment, whereas if the party was not present and was not represented, he could apply to set aside the order. His argument was that this was not unfair, because the party's representative would be able to make submissions to the District Judge to dissuade him from exercising the power to strike out the claim or defence.

94. There are, he submitted, good policy reasons for giving District Judges wide powers to strike out small claims. Because there are no adverse costs consequences, the small claims track is vulnerable to misuse. District Judges face an immense workload. If the outcome was inevitable, that was a strong reason to dispose of the case, in effect giving a power to issue summary judgment.

95. Any concerns about this interpretation were mitigated by the fact that, in practice, a claim or defence could only be struck out under rule 27.9 if it was bound to fail without the party's oral evidence. *Rouse v Freeman* concerned a different provision, and Gross J acknowledged that his interpretation of rule 39.3 might be inconsistent with rules 27.9 and 27.11.

96. It was clear beyond dispute that the Rules Committee saw 'attending' and 'being represented' as different concepts. If 'attending' includes 'being represented', there is tautology.

97. Mr Neville accepted in oral argument that if a legal representative was present, he would have a right to address the court, even if his client was not present.

98. In a 'late addendum' to his skeleton argument, Mr Neville relied on *Family Channel Limited v Fatima* [2020] EWCA Civ 824. In that case, the defendant did not attend the first day listed for trial; her counsel did, but he was only instructed to apply for an adjournment, and not to represent her if the adjournment should be refused. The judge ('judge 1') refused that application, and listed the trial to begin the following day. The defendant did not attend, nor did any legal representative. Judge 1 then struck out her defence and Part 20 claims. She then applied, promptly, to set that judgment aside. A District Judge allowed that application, but a Circuit Judge ('Judge 2') allowed the claimant's appeal. Judge 2 held that the District Judge had had no good reason to

depart from Judge 1's decision. The issue for this Court was whether Judge 2's approach was correct or not. This Court held that it was not, because Judge 2 had not asked whether the District Judge's decision was wrong. There was no issue about whether or not rule 39.3 applied; unsurprisingly, because, on any view, neither the defendant nor any legal representative had attended the trial on the day for which it was listed, Judge 2 having refused an application for an adjournment the previous day. Mr Neville's submission was that this case supports his argument, among other things, because it was not suggested in that case that the defendant needed to show good reason for not being able to be represented by counsel at the trial, and because 'attending' was treated as meaning 'present'. I do not consider that the decision in this case does support his argument.

Discussion

99. I have summarised the facts, the relevant legal materials and the parties' arguments at some length. I can therefore decide the issue briefly.

100. R's strongest argument, which persuaded the Judge, is that the difference in language between rule 27.9 and rule 27.11 must be deliberate, and that it must be given effect to. There is some force in this linguistic argument. But it is necessary to test it by considering its implications. If R is right, the circumstances in which a party's case can be struck out for non-attendance do not match the circumstances in which a party whose case has been struck out for non-attendance can apply for his case to be re-instated. R's interpretation means that rule 27.9 and rule 27.11 do not match. There is no sensible practical reason for such a mismatch. It is incoherent. That incoherence overrules Mr Neville's appeals to grammar and tautology.

101. There is a further reason why R's argument is unlikely to be right. In *Rouse v Freeman* Gross J decided, as respects rule 39.3, that a party 'attended' a trial if he was represented at the hearing (see paragraphs 41-47, above), and in *Falmouth House v Abou Hamdan* (paragraphs 48-55, above) Nugee J explained lucidly why he agreed with that approach. I acknowledge that Nugee J's remarks were not necessary to his decision, and that Gross J's decision, which concerns the interpretation of a different provision, does not bind this Court. Nevertheless the views of those two judges merit respect. For what it is worth, I consider that those views were obviously right as respects rule 39.3.

102. I accept that there are significant differences between the small claims track and the other tracks. The smaller amounts at stake mean that the parties and the court are expected to, and can, deal with cases informally, and in a way which is proportionate to what is at stake. But if Gross J and Nugee J were, as I consider they plainly were, right about rule 39.3, R's submission, if correct, means that similar provisions in the CPR, with apparently similar functions, but which apply to different tracks, are to be interpreted differently. There is no good reason why that should be so, even when the greatest allowance is made for the different contexts of rule 27.9 and rule 39.3.

103. Gross J's obiter comments about a potential conflict between his interpretation of rule 39.3 and rule 27.9 do not help R. The submission which the respondent made about rules 27.9 and 27.11 in that case seems to have been similar to the submission which R makes in this case (paragraphs 10 and 11 of the judgment, see paragraph 43,

above). But Gross J recorded in paragraph 22 that the appellant did not accept that that submission was correct, and he expressly declined to decide that question of construction. He did no more than to observe that, if the respondent's submission was correct, that might result in an inconsistency between his interpretation of rule 39.3 and rules 27.9 and 27.11 (see paragraph 47, above).

104. Like Gross J, I take into account that *Kirton v Augustus* concerned the construction of a different provision. That provision was, nevertheless, functionally and linguistically, closely connected both with rule 39.3 and with rule 27.9. I consider that the approach of this Court in that case supports, both, the approach taken by Gross J and by Nugee J, and the submissions made by A in this appeal.

105. The essential point is that a party to litigation is entitled to represent himself, or to be represented by a legal representative or representatives. Part 27 does not expressly impinge on that right. Yet if R is right, a party who does not attend the hearing of a small claim in person and is not represented is in a better position than a party who does not attend that hearing in person, but is represented. The former can apply to have any judgment under rule 27.9 set aside, but the latter cannot. Moreover, a party who attends personally is in a better position than a party who does not attend personally but is represented. The former is not exposed to the risk of having his case struck out, whereas the latter is exposed to such a risk. Against the background of the considerations explained by Gross J and Nugee J, neither is a rational outcome.

Conclusion

106. For those reasons I would allow this appeal.

Edis LJ

107. I agree.

Baker LJ

108. I also agree.