Neutral Citation Number: [2020] EWHC 1025 (QB)

Case No: QB-2020-000001

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/05/2020

Before :

MR JUSTICE CHAMBERLAIN

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Between :

Fiona Morgan & Neil Morgan	**Claimants**
- and -	
Mary Egan	**Defendant**

- -
- -

Nicholas Isaac QC (instructed **directly**) for the **Claimants**
Gilead Cooper QC & Daniel Petrides (instructed by **Clifford Chance LLP**) for the **Defendant**

Hearing dates: 23 April 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE CHAMBERLAIN

Mr Justice Chamberlain:

Introduction

1 The Appellants, Mrs Fiona Morgan and Mr Neil Morgan, are the freehold owners of a property in Sissinghurst, Kent. Next door is the Respondent, Mrs Mary Egan. The Morgans and Mrs Egan are in dispute about the true location of the boundary between the two properties. The details of the dispute do not matter, save that in January 2016 the Morgans issued a claim in the Maidstone County Court alleging that Mrs Egan was occupying land which (i) lay on the Morgans' side of the original boundary or, alternatively (ii) belonged to the Morgans by virtue of adverse possession. Mrs Egan resisted both these contentions and issued a counterclaim of her own for adverse possession and for damages, including aggravated damages based on what she said was the aggressive conduct of Mr Morgan.

2 The trial was listed to start on Monday 18 November 2019, with a time estimate of 3 days, before HHJ Sullivan. The Morgans instructed counsel, Mr Alexander Bastin, directly. Mrs Egan was represented by Mr Gilead Cooper QC, instructed by Clifford Chance. Mr Bastin applied to adjourn the hearing on the grounds that the Morgans were both medically unfit to participate and that defects in the preparation of the trial bundle meant that they had been unable properly to prepare. Mr Bastin made clear that, if the application was unsuccessful, he had no instructions to conduct the trial. The judge refused the adjournment application and conducted the trial in the Morgans' absence. On 20 November 2019, just as she was about to give judgment, Mr Bastin made another application to adjourn the trial, supported by further medical evidence, and an application that the judge recuse herself. HHJ Sullivan referred those applications to another judge, HHJ Simpkiss. He declined to deal with them and referred them back to HHJ Sullivan. They have not been determined and judgment has not been given.

3 Meanwhile, HHJ Sullivan refused permission to appeal her refusal to adjourn. The application was renewed to this Court and, on 15 January 2020, Sir Alistair Macduff, sitting as a Judge of the High Court, ordered that the application for permission to appeal be heard together with the appeal and directed Mrs Egan to prepare for the hearing of the appeal.

4 The hearing took place remotely using Skype for Business. It lasted about 3 hours, considerably longer than the estimate. The Morgans were represented by Mr Nick Isaac QC, instructed directly, who filed a helpful skeleton argument supplementing Mr Bastin's skeleton argument filed in support of the application for permission to appeal. Mrs Egan was represented by Mr Cooper QC and Mr Daniel Petrides, again instructed by Clifford Chance. They filed a helpful and detailed skeleton argument.

The evidence supporting the Morgans' adjournment application on 18 November 2019

5 Before HHJ Sullivan on 18 November 2019 were two witness statements from each of Mrs and Mr Morgan. In Mrs Morgan's statement of 10 November 2019, she said that, since mid-October 2019, she had been suffering from terrible vertigo attacks, which had given rise to severe dizziness. On several occasions, she had been close to losing consciousness and fainting. She had been to her GP twice about this and been prescribed medication. The medication made her dizzy and tired. She had great difficulty concentrating and her head was often "fuzzy". Although dated 10 November

2019, the statement was obviously finalised on 11 November 2019, the date on its first exhibit. That was a letter from Mrs Morgan's GP, Dr D.J. Hindmarsh, which said:

> "Fiona Morgan is my patient. She has been suffering with disabling vertigo. She has had associated nausea and her sleep is affected. She also has some discomfort in her R ear. The symptoms have troubled her for the last month. She has been prescribed prochlorperazine 5mg tds, and I am referring her to an ENT (ear, nose and throat) consultant."

Mrs Morgan went on to explain that, in addition, her husband had sustained a serious back injury on 12 October and had been in a significant amount of pain ever since.

6 Further details of Mr Morgan's injury were given in his witness statement of 12 November 2019. He explained that he had a pre-existing condition affecting his spine, caused by sporting injuries. He had been suffering mild to moderate back pain from November 2018. He had been referred to a consultant, Mr Wilson, whom he saw at the Wellington Hospital in February 2019. He exhibited Mr Wilson's report of that date. Mr Wilson had told him that his condition was progressive and degenerative and an operation would be required within 9-12 months. On 12 October 2019, he fell from a ladder. This exacerbated the pain in his back, which had progressively worsened. He went for an MRI scan on 7 November 2019 and was informed by Mr Wilson that a cyst had formed on his spine. Mr Wilson advised him that he needed an operation as quickly as possible, without which he would risk nerve damage. The first date which Mr Wilson had available was Friday 15 November and an operation was planned for that day. He attached an admission letter, informing him that, because this was a major operation to be performed under general anaesthetic, he would be discharged from the hospital between 3 and 5 days afterwards. Mr Morgan said this:

> "At the time of writing this witness statement I am in a great deal of pain and still taking the same strong painkillers (Diclofenac, Naproxen and Diazepam). I cannot sit or stand for more than five minutes in one go and when I move from one position to the other, I suffer intense pain which is sometimes so bad that it causes me cold sweats. I am not sleeping properly or thinking straight because of the pain and the painkillers are consistently giving me migraine headaches."

Mr Morgan exhibited a photograph of the medication labels.

7 On 13 November 2019, Mrs Morgan filed a witness statement complaining about Mrs Egan's failure to comply with directions, about Mrs Egan's "misleading and deceitful" conduct and about what Mrs Morgan said were failures in the agreed procedure for preparation of the trial bundle by Mrs Egan's solicitors. Mrs Morgan said that she and her husband were being "seriously disadvantaged, in a variety of ways" by Mrs Egan's solicitors, who were "seeking to take maximum advantage of the fact that we are laypersons". As a result, she said, "[n]either ourselves nor Alex Bastin have had any opportunity to prepare for the trial (outside of our current medical conditions)" and this had been a deliberate strategy by Mrs Egan's solicitors.

8 On 17 November 2019, Mr Morgan prepared a further witness statement. He explained that the operation, which had been scheduled to take place on 15 November 2019, had been postponed because Mr Wilson had been unwell. He had been told that the operation would take place in the afternoon of Monday 18 November, provided that Mr Wilson had recovered by then and subject to another patient's operation being cancelled. Mr Morgan indicated that he would attend Maidstone County Court on the morning of Monday 18 November *en route* to the hospital. He explained that he had been calling Mr Wilson's secretary and leaving messages chasing a report from 11 November 2019. Mr Morgan exhibited an email from Mr Wilson's secretary, dated 14 November 2019, indicating that she had contacted him about the report but was unsure whether she would get an answer given that he was unwell. Mr Morgan gave further details of his condition, including that he was in "constant pain". He exhibited photographs of his MRI scan. After describing his medical condition, he went on to explain in some detail why the case was in any event not ready for trial because important documents had not been disclosed by Mrs Egan and/or had not been included in the trial bundle. He invited the court to adjourn the trial to a date after 1 February 2020 "due to the serious and incapacitating health conditions of both Fiona and myself (to include the fact that I need an urgent operation to relieve the pressure on my spinal nerves with all its associated symptoms, and the further fact that Fiona is suffering debilitating vertigo attacks), and additionally because this matter is not ready for trial".

The adjournment application and the judge's ruling

9 Mr Bastin explained that Mr Morgan had come to court on the morning of 18 November 2019 *en route* to hospital. By the time the case was called on, however, he had left. Mr Bastin drew attention to the evidence I have summarised and explained that Mr Morgan had done all he could to obtain a report from Mr Wilson. He submitted that it would be unfair to proceed in the light of the Morgans' medical conditions and that the case was not ready for trial because of problems with the trial bundle.

10 Mr Cooper QC opposed the adjournment. He said that there was no proper medical evidence before the court and the application had been made on the basis of assertions by Mr and Mrs Morgan. Mrs Egan's solicitors had informed Mr and Mrs Morgan on 7 November 2019 that they would expect to see expert evidence in support of any application to adjourn. Mrs Egan had herself suffered a setback when her own counsel had been injured in an accident over the weekend. However, Mr Cooper had been able to step into the breach.

11 The judge gave an *ex tempore* judgment. She considered the authorities as to the evidential requirements for adjournment, in particular *General Medical Council v Hayat* [2018] EWCA Civ 2796, [37]-[39] and *Levy v Ellis-Carr* [2012] EWHC 63 (Ch). She said that the former judgment "sets out what is required". As to the evidence of Mrs Morgan's medical condition, she noted that neither the consultation note nor the GP's letter referred to the trial at all. They did not, therefore, give any indication whether Mrs Morgan would be able to participate in the trial if arrangements were made to accommodate her condition, such as short breaks. As to the evidence of Mr Morgan's condition, she said that, beyond the letter of March 2019, there was no other medical evidence before the court to show that treatment had to take place before the trial and no medical evidence of the kind required by the authorities. The judge noted

that there was no substantive medical evidence, or indeed any evidence, that Mr Morgan was being considered for surgery today. She then noted that she may be in error in this respect: there may be such evidence in Mr Morgan's second statement. The judge then said this:

> "I make it very clear that I am not suggesting that Mr Morgan is telling lies about his condition or what he is suffering or indeed, trying to mislead the court in anyway. I make that clear because it is equally clear from some of the correspondence that I have seen between the parties, when Mr Morgan is self-representing, that there is a level of animosity sometimes within the correspondence that one would not normally expect to see. So as I say, I make it very clear on my part that I am not suggesting that those statements of evidence are not setting out what Mr Morgan is feeling.
>
> But of course, that is not the only thing that I have to consider and what I have to consider is the fact that, even at this very late juncture, 2:25 pm on the first day of the trial, the court still has no evidence of a medical nature, no expert medical evidence to support Mr and Mrs Morgan's claims."

12 The judge went on to consider the second basis for the adjournment application: the alleged problems with the trial bundle. These problems were not, she said, sufficiently evidenced and were, in any event, "the sort of matters which were normally expect to be lashed out on the first morning of trial, if need be".

13 The judge then returned to the medical evidence. She explained that "neither of the claimants have managed to meet the test set out in the *Levy v Ellis-Carr* case, and the other cases I have referred to" and, although she had some sympathy for them as litigants in person, the rules applied to litigants in person just as they applied to represented parties. She continued:

> "on that basis, therefore it seems to me that the test has not been met. I have given consideration to the obvious prejudice that this will cause the claimants if the adjournment is refused.
>
> What concerns me is that the claimants appear to have taken a view, at some stage anyway, that the court would have to agree to their adjournment come what may and that seems to be, to a certain extent, born out by the fact that I understand from Mr Bastin that he has not been instructed to appear in the event that the adjournment was not granted…"

14 The application to adjourn was refused, Mr Bastin withdrew and the judge continued with the trial.

The second application

15 On 19 November 2019, after the trial had started in his absence, Mr Morgan made a further witness statement. In it, he explained that he had gone to the hospital on 18 November, but Mr Wilson was not there and the operation did not take place. He exhibited the report which he had been chasing, which set out the details of his condition, explained that the surgery had been rescheduled for 22 November and concluded as follows:

> "It is inconceivable that with his current level of symptoms he could tolerate a period of several hours in court regardless of whatever position was provided for him i.e. even laying down would be very uncomfortable. The effect of the drugs as well is not insignificant on his ability to concentrate and respond to questioning. I would therefore strongly support his request that the trail is delayed for a period sufficient to enable him to recover from the surgery satisfactorily which would be of the order of 6-12 weeks."

16 Mr Morgan continued by saying that there was a serious issue to be tried and that Mrs Egan and her expert ought to be subject to rigorous cross-examination. Then he said this:

> "This entire case is built on Mrs Egan's simple say-so, yet when we provide copious evidence ourselves of our respective medical conditions (effectively a detailed say so), but in our case backed up by a wide variety of other evidence, in combination with the obvious and unmissable 'commonsense' [sic] fact that I was listed for an urgent operation one week after consulting Mr Wilson on 7 November; miraculously all of our evidence is apparently not good enough and it is conveniently rejected, both by the defendant's solicitor Mr Eagle (you did not tell us of his rejection beforehand despite us asking him several times – please see contemporaneous emails), and then subsequently by the judge. The convenience of the double standards are both stunning and unmissable.
>
> What has taken place has been nothing less than outrageous. These events have had a profound and deeply disturbing effect on both Fiona and myself and this is particularly cruel and particularly unacceptable in the context of our current medical conditions. Any person with the slightest modicum of understanding of humanity would well understand what we have been enduring, and what we have had to cope with over the past few days."

17 Mr Morgan went on to say that the judge's decision to refuse the application to adjourn had been not only "extreme and extraordinary", but also "motivated by bias and prejudice". This was because HHJ Sullivan had made orders in 2013, when she was a

district judge, in previous proceedings to which Mr Morgan had been a party; and Mr Morgan had made "detailed complaints" about these orders. The matter had only come to Mr Morgan's attention because of comments made by HHJ Sullivan about the previous case at the hearing of the adjournment application on 18 November 2019 and relayed to him by Mr Bastin. The complaints referred to, made in an email sent direct to District Judge Sullivan (as she then was), were apparently occasioned by two orders she made of her own motion against Mr Morgan in previous proceedings *(Morgan & Tallington Lakes Ltd v Ancasta International Boat Sales Ltd).* Mr Morgan was acting in person; Mr Morgan's opponent was legally represented. Mr Morgan accused the judge, in intemperate terms, of "intense and overwhelming prejudice shown in favour of the legal profession".

18 Also dated 19 November 2019 was a further witness statement from Mrs Morgan. That exhibited a letter from Dr Hindmarsh dated 15 November 2019 but apparently not produced until after the hearing on 18 November. It gave further details of Mrs Morgan's condition, explaining that she suffered severe dizziness and nausea, particularly when getting up from lying down, looking upwards or standing after being seated for a period of time. Her symptoms were said to be particularly acute in the morning and had caused her to feel extremely faint and unstable. The vertigo had left Mrs Morgan struggling with daily life, unable to focus properly and very tired and anxious. Dr Hindmarsh continued:

> "In conclusion Mrs Morgan will not be able to attend a trial in her current condition with her current high level of symptoms. Following treatment from the consultant to whom I have referred her, this will hopefully mean she will be able to attend trial in the New Year, but not before."

19 These two statements were placed before HHJ Sullivan on the morning of 20 November 2019 by Mr Bastin, who was instructed to renew his application for an adjournment and to invite the judge to recuse herself. As I have said, HHJ Sullivan referred these applications to Judge Simpkiss, who declined to deal with them. They are still undetermined and no judgment has been given.

Mr Morgan's witness statement of 30 November 2019

20 Mr Morgan filed a further witness statement on 30 November 2019. In it, he explained that his operation had taken place on 22 November 2019 and his condition was much improved. He accused Chris Mills (Mrs Egan's son-in-law, who had been assisting her with the litigation) of acting in a way that was "profoundly unreasonable and highly opportunistic" by opposing the adjournment. He repeated his contention that HHJ Sullivan had acted with "both real prejudice, and perceived prejudice" and noted that he had subsequently heard from Mr Bastin that she had on 18 November referred to the Morgans' "unfortunate" and "unreasonable" conduct and "aggression". He continued as follows:

> "Plainly HHJ Sullivan was only interested in what she identified as our 'aggression' in setting these important matters out, and she was not at all interested in the actual substance of what Fiona had said, or why she had said it. In short it was a preoccupation with form over substance. This is just more of

> exactly the same prejudice and exactly the same strong bias that I had encountered many years before when HHJ Sullivan made various orders; without notice; without application from either party; without a hearing; but always strongly in favour of a firm of solicitors. I have never met or appeared before HHJ Sullivan, but over a period of time she seriously repeatedly discriminated against me and my company on multiple occasions, always heavily in favour of the legal profession and it is my belief that she had significant prejudice against litigants in person or laypersons in the litigation process and especially me personally…"

Mr Morgan went on to say that:

> "I do not mean or intend any disrespect to the Court in general, I am just stating the facts as known to me."

The parties' submissions

21 The Morgans' grounds of appeal were that the judge erred in that she: (1) gave insufficient weight to the medical and lay evidence before her and applied in an overly rigid way the authorities about the evidential requirements for adjournment applications; (2) left out of account or failed to give proper weight to the Morgans' efforts to obtain proper medical evidence; (3) left out of account or failed to give proper consideration to the Morgans' evidence about deficiencies in the preparation of the trial bundle; (4) failed to balance fairly the various factors in favour of adjourning the trial; and (5) was guilty of real or apparent bias. These were accompanied by a skeleton argument settled by Mr Bastin, pursuing all of these grounds.

22 At the hearing before me, Mr Isaac made no submissions in relation to the third or fifth grounds of appeal, though he indicated that he had no instructions to withdraw those grounds. He concentrated on the judge's decision to refuse the adjournment and made three submissions. First, given the evidence as to the Morgans' medical conditions, it was not open to the judge to refuse the adjournment. Second, the judge failed to take into account the Morgans' attempts to obtain better medical evidence (attempts which were unsuccessful through no fault of their own) and apparently did not even consider exercising her discretion to make directions for the provision of such evidence in short order. Third, in the light of the evidence produced on 19 and 30 November 2019, which should be admitted applying the principles in *Ladd v Marshall* [1954] 1 WLR 1489, it can be seen that the Morgans were in fact both unfit to attend the trial.

23 For Mrs Egan, Mr Cooper submitted that the evidence relied upon by the Morgans did not come close to meeting the standard required to justify an adjournment. Mr Morgan had 10 days in which to obtain expert medical evidence and he failed to offer any or any adequate explanation for his failure to do so. Mr Morgan had been well enough to attend court on the morning of 18 November, but chose to leave before the hearing began. He gave the court no opportunity to consider alternative arrangements to accommodate his difficulties. He had a track record of attempting to disrupt or delay these and other proceedings on supposed medical grounds. He was a wealthy man and had the means to instruct both junior and leading counsel on other occasions. He deliberately decided not to instruct Mr Bastin to conduct the trial. In any event, neither

he nor Mrs Morgan had any first-hand evidence that had any bearing on the issues in the trial. The case turned on conveyancing documents and expert evidence; and Mrs Egan expressly disavowed her counterclaim for aggravated damages (based on a history of intimidating and threatening behaviour), so there was no need for the court to hear evidence about Mr Morgan's conduct. The attack on supposed defects in the trial bundle was "desperate". His case on the substance was hopeless. His general conduct of the litigation had been deplorable.

24 As to the renewed application on 20 November 2019, Mr Cooper submitted that the new medical evidence would have been insufficient to warrant an adjournment even if it had been available earlier; the explanation given for failing to obtain it in time was inadequate; and there had been no explanation as to why the Morgans were well enough to provide further witness statements and to instruct counsel, but not well enough to participate in the trial either in person or remotely. The recusal application was obviously hopeless.

Discussion

The proper approach to an appeal against a decision to refuse an adjournment

25 It is important to start by acknowledging that a decision whether to adjourn a trial turns on the exercise of the judge's case management discretion. In *Teinaz v Wandsworth London Borough Council* [2002] EWCA Civ 1040, [2002] ICR 1471, Arden LJ (with whom Buckley J agreed) said this:

> "39. The starting point is that the appellate tribunal does not read the original application with a view to forming, and if necessary substituting, its own judgment as to the way the discretion should be exercised. Nor does the appellate tribunal consider whether the exercise of discretion by the inferior tribunal is one of which it approves. The discretion remains that of the inferior tribunal. The appellate tribunal only intervenes in a limited number of situations. It sets aside the exercise of discretion by the inferior tribunal if the exercise of discretion is outside 'the generous ambit within which a reasonable disagreement is possible': see *G v G (Minors: Custody Appeal)* [1985] 1 WLR 647, 652e or, as this court put it in *Carter v Credit Change Ltd* [1979] ICR 908, 919g , the tribunal's decision is perverse or such that no reasonable tribunal could have come to. Other situations in which the appellate tribunal can intervene in the exercise of discretion by the inferior tribunal are where the tribunal has made a mistake in law, acted in disregard of principle, misunderstood the facts or failed to exercise the discretion. The other situation in which the appellate tribunal can intervene, and which is the relevant one in this case, is where the inferior tribunal took into account some irrelevant consideration or, alternatively, left out of account some relevant consideration.
>
> 40. Two points flow from this last point. First, it is for the appellate tribunal to determine what considerations are relevant

> to the question at issue. It does not defer to the inferior tribunal in the selection or identification of these considerations. Second, unless permission is given for fresh evidence to be adduced on appeal, the appellate tribunal makes this determination on the factual material before the inferior tribunal. If the appellate tribunal finds that an irrelevant consideration has been taken into account or that a relevant consideration has been left out of account, the appellate tribunal must conclude that the exercise of discretion by the inferior tribunal is invalidated, unless it can be satisfied that the consideration did not play any significant role in the exercise of the discretion and thus constituted a harmless error involving no prejudice to the appellant.
>
> 41. It is to be noted that the standard of review as respects the exercise of discretion involves the grant of considerable deference to the inferior tribunal. In particular, where several factors going either way have to be balanced by the inferior tribunal, the appellate tribunal does not interfere with the balancing exercise performed by the inferior tribunal unless its conclusion was clearly wrong."

26 The only qualification to this is that, in reviewing the trial judge's exercise of discretion, the appellate court must be satisfied that the decision to refuse the adjournment was not "unfair" in terms of Article 6 ECHR. This does not, however, mean that in any given situation, only one outcome is fair: *Terkuk v Beresovsky* [2010] EWCA Civ 1345, [18]-[20] (Sedley LJ), cited with approval in *Solanki v Intercity Telecom Ltd* [2018] EWCA Civ 101, at [32]-[35] (Gloster LJ).

Ground 3: The trial bundle

27 In her witness statement of 13 November 2019, Mrs Morgan makes a number of complaints about failures on the part of Clifford Chance to include various documents in the trial bundle. Clifford Chance sent a letter on 26 February 2020 in which they explain that everything identified by the Morgans as relevant was either already in the trial bundle at the time or was subsequently added. Mr Isaac did not attempt to respond to that at the hearing before me. I therefore have no proper basis for criticising the conduct of Clifford Chance in the preparation of the trial bundle.

28 Even if there had been some error or failing in the preparation of the trial bundle, the judge who was due to hear the trial was well placed to decide to what extent (if any) such errors or failings had an impact on the fairness of the trial. As I have shown, she considered that the problems the Morgans had identified (if they were truly problems at all) were the sort of housekeeping matters she would expect to see resolved on the first day of the trial. It is quite impossible to impugn that decision as perverse or irrational or as falling outside the "generous ambit within which a reasonable disagreement is possible". The decision was also not such as to make the trial "unfair" in terms of Article 6 ECHR.

29 The Morgans' Ground 3 is therefore unarguable. I refuse permission to appeal on that ground.

Ground 5: The complaint of bias on the part of HHJ Sullivan

30 It is necessary to say a little about the procedure by which the Morgans' complaint of bias has come before this court. Ordinarily, a party who during proceedings wishes to advance an allegation of actual, presumed or apparent bias against the judge should, if there is a proper evidential basis for the allegation, apply *to that judge* to recuse himself or herself; and the judge should in general determine the application him or herself, rather than referring it to another judge. There are several reasons for this. First, the question whether actual or apparent bias is made out may depend on facts known only to the judge about whom the allegation has been made (such as whether the judge was aware of a connection alleged to give rise to presumed bias: see e.g. *R (United Cabbies Group (London) Ltd v Westminster Magistrates' Court* [2019] EWHC 409 (Admin), [45]-[46] (Lord Burnett CJ & Supperstone J)). Second, it is invidious for a judge of co-ordinate jurisdiction, not sitting in an appellate capacity, to opine on whether a colleague has demonstrated bias. Third, in practical terms, the routine referral of recusal applications to another judge would provide an opportunity for unscrupulous litigants to disrupt proceedings by making unmeritorious allegations of bias. Judges should be astute to avoid any procedure that affords such an opportunity.

31 In this case, as I have said, HHJ Sullivan did not deal with the recusal application herself, but referred it to HHJ Simpkiss. He declined to deal with it. In the result, it has not been addressed at first instance at all. On one view, the correct approach for me might be to decline to deal with the issue until it has been, but neither party invited me to take that course. I have therefore proceeded on the basis that the Morgans are, in principle, entitled to seek to appeal HHJ Sullivan's decision of 18 November 2019 on the basis, *inter alia*, that it is vitiated by bias on the part of the judge. I say "in principle" to make clear that these comments are about procedure, rather than about the merits of this ground of appeal. I turn to these next.

32 In Mr Bastin's skeleton argument in support of permission to appeal, the complaint of bias on the part of HHJ Sullivan was advanced on two bases. First, he submitted that the judge had made orders against Mr Morgan in previous litigation in 2013; that Mr Morgan had complained about these orders; and that, at the hearing of the adjournment application on 18 November 2019, the judge made an unprompted reference to this litigation. Mr Bastin submitted that the fact that the judge could recall this previous litigation after so long "is most likely attributable to the fact that Mr Morgan made complaints about her". Second, Mr Bastin relied on the judge's references during the course of the hearing on 18 November 2019 to a "level of animosity" in the Morgans' correspondence and to the tone of Mrs Morgan's witness statement of 13 November 2019.

33 There are limited circumstances in which things done by a judge in the course of one piece of litigation will preclude him or her from hearing a subsequent case involving one or more of the same parties. In *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, Lord Bingham CJ, Lord Woolf MR and Sir Richard Scott V-C said this at [25]:

> "…a real danger of bias might well be thought to arise if, …in a case where the credibility of any individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw

> doubt on his ability to approach such person's evidence with an open mind on any later occasion; or if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind (see *Vakauta v. Kelly* (1989) 167 CLR 568); or if, for any other reason, there were real ground for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him. The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection."

That passage has been cited with approval on numerous occasions since: see e.g. *JSC BTA Bank v Ablyazov* [2013] 1 WLR 1845, [49] (Rix LJ).

34 In this case, it is not said that HHJ Sullivan had commented adversely on Mr Morgan or found his evidence unreliable in 2013. All that is said is that she made two orders, of her own motion, against Mr Morgan in litigation to which he was party. There is nothing to suggest that she expressed herself, at that time or any other, in an "outspoken" or "extreme" or "unbalanced" way. All those terms would be apt to describe Mr Morgan's email to her in 2013, as would "rude" and "disrespectful". There is, however, no evidence that Mr Morgan's email prompted District Judge Sullivan (as she then was) to respond, let alone to do so in a way that would call into question her impartiality in subsequent litigation involving Mr Morgan. The judge's reference to the *Tallington Lakes* litigation may indicate that she remembered it. She may even have remembered Mr Morgan's unpleasant email. That does not, however, begin to justify a complaint of bias, whether actual, presumed or apparent, against her.

35 Nor does the judge's observation that Mr Morgan's correspondence demonstrates "a level of animosity… that one would not normally expect to see". I have not read the correspondence to which the judge was referring. I have, however, seen other samples of Mr Morgan's correspondence, both before and after 18 November 2019. I have also read Mr Morgan's witness statements of 19 and 30 November 2019, extracts from which I have set out. If these samples of Mr Morgan's writing style are anything to go by, the judge's observation was wholly justified. In any event, the observation was expressed in measured terms.

36 Finally, there is the remark made by the judge about the tone of Mrs Morgan's witness statement of 13 November 2019. Mr Bastin took the judge to paragraphs 15-17 of Mrs Morgan's statement, relevant excerpts from which I have set out at [7] above. The judge then said:

> "Yes, again, unfortunate that the tone in which they deal with things is aggressive and probably unfounded, but there we are."

Having re-read the relevant parts of Mrs Morgan's witness statement of 13 November 2019, the descriptor "aggressive" was, in my judgment, wholly apt.

37 The suggestion that anything said or done by the judge in 2013 or on 18 November 2019 gives rise to an arguable complaint of bias, or that it rendered the proceedings "unfair" in terms of Article 6 ECHR, lacks any semblance of merit. It is not surprising that the complaint was made: Mr Morgan has a tendency to complain of bias when things do not go his way in court. It is, however, surprising that Mr Bastin was prepared to advance this ground of appeal in his skeleton argument in support of permission to appeal. Mr Isaac wisely and properly declined to say anything about it. I refuse permission to appeal on ground 5.

Grounds 1, 2 and 4: The judge's treatment of the medical reasons for adjournment

38 The following relevant principles can be distilled from the authorities:

(a) A litigant whose presence is needed for the fair trial of a case, but who is unable to be present through no fault of his own, will usually have to be granted an adjournment, however inconvenient it may be to the tribunal or court and to the other parties: *Teinaz*, [21] (Peter Gibson LJ).

(b) However, the court must satisfy itself that the inability of the litigant to be present is genuine, and the onus is on the applicant to prove the need for such an adjournment: *ibid*.

(c) In considering the need for an adjournment, it is important to focus on the nature of the hearing and the role that the party claiming to be unfit is called on to undertake in it, bearing in mind:

(i) any reasonable accommodations (e.g. breaks, hearing evidence remotely etc.) that can be made to enable effective participation; and

(ii) that if the party is financially able to instruct legal representatives and able to give effective instructions to them, his absence may, depending on the facts, be of little consequence.

See *Decker v Hopcraft* [2015] EWHC 1170 (QB), [27]-[28] (Warby J).

(d) Generally, the court should adopt a strict approach to scrutinising the evidence adduced in support of an adjournment application on the grounds that a party or witness is unfit on medical grounds: *Mohun-Smith v TBO Investments Ltd* [2016] 1 WLR 2919, [25] (Lord Dyson MR).

(e) Where medical evidence is relied upon in support of an application for an adjournment, it should:

(i) identify the medical attendant and give details of his or her familiarity with the party's medical condition (detailing all recent consultations);

(ii) identify with particularity what the condition is and what features of it prevent participation in the trial process;

(iii) provide a reasoned prognosis; and

(iv) give some confidence that what is being expressed is a reasoned opinion after a proper examination.

See *Levy v Ellis-Carr* [2012] EWHC 63 (Ch), [36] (Norris J), approved in *Forresters Ketley v Brent* [2012] EWCA Civ 324, [26] (Lewison LJ).

(f) Accordingly, a "sick note" may well be insufficient to justify an adjournment, particularly if it refers only to an unfitness to attend work. However, in considering whether that is so, the court must consider (i) the pressure under which GPs are working and the difficulties that may be faced by a litigant in person in obtaining more a detailed report and (ii) the frequency with which late, unmeritorious adjournment applications are made: *Emojevbe v Secretary of State for Transport* [2017] EWCA Civ 934, [31] (King LJ); *Hayat*, [41] (Coulson LJ).

(g) If the court is not satisfied as to the quality of the medical evidence supporting an adjournment application, the court has a discretion (not a duty) to conduct further enquiries – e.g. by seeking a fuller report in short order: *Teinaz*, [22] (Peter Gibson LJ); *Solanki*, [35]; *Hayat*, [42].

(h) If there is a challenge to the exercise of this discretion, it is incumbent on the challenger to show that the further enquiries would have led to a different decision: *Hayat*, [43].

39 The information supporting the adjournment application on 18 November 2019, insofar as it pertained to the Morgans' medical conditions, was as follows:

(a) two witness statements from Mr Morgan:

(i) describing his symptoms in some detail – he was in a great deal of pain, taking strong painkillers could not sit or stand for more than five minutes in one go, suffered intense pain so bad that it caused cold sweats when moving from one position to another, was not sleeping properly or thinking straight because of the pain and was suffering migraine headaches because of the painkillers;

(ii) explaining that he had been told by his consultant that he required an urgent operation to remove a cyst from his spine, without which he would risk nerve damage – the operation was originally scheduled for Friday 15 November 2019 but then had to be provisionally rescheduled for the afternoon of Monday 18 November 2019 because the surgeon was unwell;

(iii) exhibiting a hospital admission note making clear that the operation was a major one, to be performed under general anaesthetic, and would require 3-5 days of recovery before discharge;

(iv) explaining his efforts to secure a report from the surgeon – as the attached email from his secretary showed, these had been unsuccessful because the surgeon had been unwell;

(b) two witness statements from Mrs Morgan:

(i) describing her symptoms – vertigo attacks which had given rise to severe dizziness, on several occasions being close to losing consciousness and fainting and taking prescribed medication which made her head feel "fuzzy";

(ii) exhibiting a letter from her GP confirming the diagnosis (vertigo) but saying very little about her symptoms or their effect and nothing about her ability to participate in a trial;

(c) Mr Bastin's indication that Mr Morgan had come to court on his way to the hospital, but had left before the proceedings started so as to be on time for his operation.

40 The evidence before HHJ Sullivan did not include any explanation for the Morgans' decision not to instruct counsel to conduct the trial in the event that the adjournment application was unsuccessful. There was nothing to suggest, for example, that they could not afford to do so. Nor was there any indication that their medical conditions had prevented them from doing so. Nevertheless, both the Morgans were witnesses of fact. Mr Cooper suggested in argument before me that the issues at the trial turned largely on submissions about conveyancing and documentary evidence, and expert evidence, relating to the original location of the boundary. But, at the time of the adjournment application, there were three issues to which the Morgans' factual evidence was potentially relevant. These were: (i) the Morgans' alternative claim for adverse possession; (ii) Mrs Egan's counterclaim for adverse possession; and (iii) Mrs Egan's counterclaim for aggravated damages on the basis that Mr Morgan had acted "in an aggressive and high-handed manner", had "knowingly committed trespass" and had "then sought to inflame the situation by the tone of his correspondence". Mr Isaac told me on instructions (without demur from Mr Cooper) that a draft trial timetable prepared before the adjournment application was made had allowed 2 hours for cross-examination and re-examination of Mr Morgan. That would not have been necessary if, as Mr Cooper at one stage suggested in his submissions to me, Mr Morgan's evidence had been mostly irrelevant to the pleaded issues. It was not until after the adjournment had been refused that Mr Cooper indicated that Mrs Egan would not be pursuing (iii) and not until the end of the trial that he indicated that she would not be pursuing (ii). The Morgans' alternative claim for adverse possession remains live.

41 A judge faced with evidence from a party about his or her medical condition and symptoms is not required to accept that evidence at face value. Here, however, the judge went out of her way to say that she was "not suggesting that Mr Morgan is telling lies about his condition or what he is suffering or indeed, trying to mislead the court in anyway". As she properly appreciated, the fact that a party has acted in a rude or unreasonable way is not, in and of itself, a reason to believe that he is lying, or even exaggerating, about his medical condition. In those circumstances, her decision to refuse the adjournment was based squarely on the absence of medical evidence. In that respect, I consider that, in exercising her discretion, the judge erred in law or exceeded the margin properly to be accorded to her in five respects.

42 First, the judge twice referred to the absence of medical evidence capable of satisfying the "test" laid down in *Levy*, as approved in *Hayat*. The use of the word "test" suggests that she regarded *Levy* or *Hayat* as laying down a rigid rule that, where an adjournment is sought for medical reasons, expert evidence of the kind referred to in *Levy* is always

required. Neither of those cases purports to lay down any such rule. Indeed, as the passage from *Emojevbe* cited in *Hayat* at [41] makes clear, the sufficiency of the evidence relied upon will depend on the circumstances. One of the circumstances likely to be germane is the difficulty of obtaining such evidence from busy medical professionals.

43 A second and related point is that the judge does not appear to have taken into account Mr Morgan's explanation for the absence of a report from Mr Wilson. If the pressure on GPs in general can constitute a good reason for regarding as sufficient evidence falling short of the standard set out in *Levy*, then, *a fortiori*, so must the unavailability through illness of a consultant surgeon. I accept that Clifford Chance, for Mrs Egan, had put the Morgans on notice on 7 November 2019 that they would require expert evidence to support any adjournment application. But, on Mr Morgan's evidence, that was the day he went for his MRI scan. On his evidence, he chased for a report thereafter. If Mr Morgan's evidence is accurate (and the judge did not doubt that it was), it is difficult to see what more he could have done. It would be unfair to suggest that he should have taken steps to obtain medical evidence earlier, when his evidence is that his condition gradually worsened since the accident; and in any event, Clifford Chance only put him on notice that they would require such evidence on 7 November 2019.

44 Third, I accept that it will in general be difficult to impugn the exercise by a trial judge of the discretion whether to make further enquiries with a view to curing any deficiency in the medical evidence before the court. In this case, however, the judge does not appear to have considered that possibility at all. Given that Mr Wilson's report had apparently been delayed because he had been unwell, there was every reason to think that it might be available soon – as turned out to be the case. At 2.25pm on the first day of the trial, and faced with evidence from Mr Morgan that he was in serious pain, debilitated by painkilling medication and had gone to hospital for an operation his surgeon had said was urgent, the possibility of making further enquiries should, in my judgment, have been considered. If it had been, the judge might have considered a range of procedural options to enable her, or the parties, to obtain the expert evidence needed to corroborate what Mr Morgan had said. The decision in those circumstances simply to proceed with trial was, in my judgment, one that fell outside the range of reasonable responses properly open to her.

45 Fourth, it is apparent from what the judge said at the end of her judgment that she was concerned that, by not instructing Mr Bastin to conduct the trial, the Morgans were trying to make the adjournment a *fait accompli*. Having read the correspondence and witness statements and having formed my own view about Mr Morgan's approach to litigation, I can understand the judge's concern. But the fact that the Morgans had not instructed Mr Bastin for the trial was a neutral factor so far as the adjournment was concerned. If there was no sufficient medical basis for the adjournment, the fact that the Morgans would be unrepresented could not justify granting an adjournment. Equally, however, if there *was* a sufficient medical basis for adjournment, the fact that Mr Morgan may have been trying to influence the court by limiting his instructions to Mr Bastin could not count against him. To my mind, the judge could well take the view that the Morgans had the financial wherewithal to instruct counsel; and the work they had managed to do on their witness statements (which were by no means restricted to the medical issues) provided some basis for thinking that their medical conditions

would not have prevented them from instructing counsel in advance of the trial, especially given that the parties' cases would have been apparent from the pleadings, expert reports and witness statements. But even where a party is represented, he or she is ordinarily entitled to attend a trial, in person or remotely, to hear what is being said and to give instructions as the trial progresses. That right must, of course, be balanced against other considerations (including the need to deal with cases need at proportionate cost in accordance with the overriding objective in CPR r. 1.1). In this case, however, Mr Morgan was not only a litigant, but also a factual witness with material evidence to give, in particular in relation to his adverse possession claim. The fact that it was anticipated that his oral evidence would take two hours gives an indication of its perceived importance. Taking at face value Mr Morgan's evidence about the pain he was suffering and the effect of the medication he had been prescribed, it is difficult to see how he could have given that oral evidence effectively, or how it would have been fair to require him to do so, whatever accommodations were made. There is nothing in the judgment to show that the judge considered these points adequately or at all.

46 Fifth, there is some indication in the transcript of the hearing that the judge had in mind that, even if Mr Morgan could not present the case, Mrs Morgan might be able to do so. I accept that the medical evidence before the court on 18 November 2019 is less compelling in relation to her than in relation to Mr Morgan. In particular, it does not provide a solid basis for concluding that she would be unable to cope with a trial if appropriate accommodations were made. It is unclear whether these considerations played a part in the decision the judge ultimately made. If they did, this was in my view a further error. Even if Mrs Morgan could have presented the case, that would not have obviated the need for Mr Morgan to give evidence, which – if his evidence was taken at face value – he was medically unable to do.

47 Having reached the view that, in refusing to adjourn on 18 November 2019, the judge erred *(inter alia)* by not allowing further time for the Morgans to file medical evidence, I must now consider whether that error was material: see the principle set out at [38(h)] above. Because the renewed application to adjourn was never considered by HHJ Sullivan, it is necessary for me to consider that evidence myself. Given what is said in *Hayat* at [43], the subsequently obtained evidence must be admissible pursuant to CPR r. 52.21(2), at least for that purpose. Notwithstanding Mr Cooper's submissions to the contrary, I am satisfied that Mr Wilson's letter of 19 November 2019 does what Norris J in *Levy* said medical evidence should do: Mr Wilson identifies himself (a consultant spinal surgeon) and gives details of his or her familiarity with Mr Morgan's condition (detailing recent consultations); he identifies with particularity what condition Mr Morgan was suffering from and what features of it prevent participation in the trial process (his inability to sit or stand, having constantly to move between the two, and the "not insignificant" effect of drugs on his ability to concentrate and answer questions); he provides a reasoned prognosis (that Mr Morgan would take between 6 and 12 weeks to recover from the surgery); and his report gives the requisite degree of confidence that the opinion expressed is a reasoned one, reached after a proper examination.

48 Mr Wilson's conclusion was that it was "inconceivable" that Mr Mogan could tolerate a period of several hours in court, even if lying flat. Given that the problem was the pain caused by the cyst on his spine, and the effect on him of the drugs he was taking,

hearing his evidence (or submissions) remotely would not have helped. It is difficult to think that, if this letter had been before HHJ Sullivan on 18 November 2019, she would have decided to proceed with the trial. In any event, it would in my judgment have been wrong to do so. This means that the failure to allow Mr Morgan to obtain further evidence to substantiate his unfitness to continue with the trial was material. I would add for completeness that in those circumstances the subsequent evidence satisfies the three limbs of the test in *Ladd v Marshall* [1954] 1 WLR 1489.

49 Finally, it is necessary briefly to address Mr Cooper's submission that the Morgans' claim was so hopeless on the merits that there was no point in granting the adjournment and there is now no point in allowing the appeal. There is some authority for the proposition that a court can proceed in the absence of a party if it is obvious that one or other party is bound to succeed: *Decker v Hopcraft*, [29] (Warby J). I do not doubt that there are some applications or appeals where that can properly be said. But extreme caution should be exercised before proceeding in the absence of a party with a contested trial (where, ex hypothesi, there has been no successful application for summary judgment) solely on the basis that the claim is obviously without merit. Megarry J's dictum from *John v Rees* [1970] Ch 345, 402 is pertinent here:

> "As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events."

50 Here, Mr Cooper submitted before HHJ Sullivan that the lack of merit in the claim was a basis for refusing the adjournment. She declined to consider the point, because it was based on a document that had been discovered by Mrs Egan's team over the weekend. The document in question was a guidance note from Ordnance Survey dealing with the way in which boundary features are represented on OS maps. Mr Cooper invited me to consider this document as effectively determining the claim in Mrs Egan's favour and rendering it futile to remit the claim to be determined again. Mr Isaac disputed the relevance of the document. I consider this point wholly unsuitable for resolution in this appeal. My reasons are different from those of the judge. This appeal is concerned with HHJ Sullivan's refusal to adjourn the trial. It is not concerned with the merits of the claim. In order to understand the significance of the document relied upon by Mr Cooper, it would be necessary for me to investigate the legal and factual issues in the underlying dispute. The materials before me do not enable me to do that. They do not, for example, include the witness statements or expert evidence relied upon at trial. Even if they did, the resolution of this issue, in circumstances where there has been no resolution of it below (either on the adjournment application or otherwise) would be a wholly disproportionate use of this court's limited resources.

Conclusion

51 For these reasons, I have concluded as follows:

(a) Ground 3 is unarguable. Permission to appeal is refused on that ground.

(b) Ground 5 is unarguable and ought never to have been pleaded. Permission to appeal is refused on that ground.

(c) Grounds 1, 2 and 4 are arguable and the appeal is allowed on those grounds. In summary: HHJ Sullivan erred in law and reached a decision that was not properly open to her in refusing to adjourn without seeking or permitting Mr Morgan to file further medical evidence. In the light of evidence filed subsequently, the error has been shown to be material. The judge should not have proceeded with the trial.

52 The matter will be remitted to the County Court at Maidstone for the claim to be tried by a judge other than HHJ Sullivan. This is because, having already conducted the trial in the absence of one party and having reached the point where she was about to give judgment, it would be impossible for any judge to put out of her mind the conclusions she had already reached. It is not because of the allegation of bias against her, which I have rejected as hopeless and which should never have been made.

53 I will hear submissions from counsel as to any other directions that may be necessary, and as to ancillary matters, before finalising the order.