IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
[2021] EWHC 419 (QB)

No. QB-2020-002526

Royal Courts of Justice
The Strand
London, WC2A 2LL

Wednesday, 27 January 2021

Before:

MR JUSTICE MARTIN SPENCER

B E T W E E N :

(1) ASHFORD BOROUGH COUNCIL
(2) TRACEY KERLY — Claimants

- and -

FERGUS WILSON — Defendant

MR A. SOLOMON QC and MR S. DAVIS appeared on behalf of the Claimants.

MR A. DEAKIN appeared on behalf of the Defendant.

J U D G M E N T

(via Microsoft Teams)

(Transcript prepared without the aid of documentation)

MR JUSTICE MARTIN SPENCER:

1 By this application, the defendant applies to adjourn the trial of this matter, which is fixed to take place in a three-day window starting next week, on 1 February 2021.

2 The background is that the claimant borough council and the second claimant assert that over a period of time, starting in April 2011, the defendant has carried out a campaign of harassment against various officers of the first claimant, escalating in 2020, such that on 20 July 2020 a Part 8 claim was issued and the following day an application for an interim injunction was served on the defendant with the Part 8 claim. In response, on 23 July the defendant sent a large volume of documents to the court which the claimants say duplicated many of the documents already in the evidence in support of the interim injunction. The matter came before HHJ Auerbach, sitting as a Deputy High Court Judge, on 24 July and he made an order for an interim injunction.

3 On 19 August 2020, the defendant applied to change the trial listing so as to enable oral evidence, that is, he sought to transfer these to Part 7 proceedings rather than Part 8, and when the claimants refused that, he made an application on 9 September 2020. That came before Master Cook on 19 October 2020, when the defendant's application was refused and Master Cook certified the application as having been made totally without merit. He made an order for costs against the defendant and he supplemented that with an order that the defendant make an interim payment of £5,000 on account of those costs. I am informed that those costs have not been paid, save for, I think, three payments of £50 made by the defendant's wife.

4 In any event, the matter was listed for trial in December, and on 7 December the defendant applied to adjourn the trial on the basis of his need to self-isolate by reason of potential exposure to Covid-19 (coronavirus). That application was opposed but it was allowed by Judge Auerbach, again sitting as a Deputy High Court Judge, in a hearing on 9 December. In allowing that application, Judge Auerbach gave very full reasons, which I do not need to repeat in full for present purposes, but at para.36, he said this,

> "If any application is made for a postponement of the hearing once listed on grounds of the defendant's hearing impairment or otherwise on any medical or health related grounds, this should be supported by appropriate medical or other specialist evidence".

5 In making that direction, the learned judge was reflecting the authorities upon which Mr Solomon QC for the claimants has relied, including the case of *Decker v Hopcraft* [2015] EWHC 1170, a decision of Warby J (as he then was), where the learned judge referred to the issue of whether effective participation is possible or not owing to an applicant's medical condition. He said, at para.28:

> "... the question of whether effective participation is possible depends not only on the medical condition of the applicant for an adjournment but also, and perhaps critically, on the nature of the hearing, the nature of the issues before the court, and what role the party concerned is called on to undertake. If the issues are straightforward and their merits have already been debated in correspondence, or on previous occasions, or both, there

> may be little more that can usefully be said. If the issues are more complex but the party concerned is capable, financially and otherwise, of instructing legal representatives in his or her place and of giving them adequate instructions, their own ill-health may be of little or no consequence. All depends on the circumstances, as assessed by the court on the evidence put before it".

6 Furthermore, in *GMC v Hayat* [2018] EWCA Civ 2796, the Court of Appeal set out well-established principles in relation to applications on the basis of alleged or asserted ill-health. Thus I refer to para.37, in which the court referred to the required standard of medical evidence and the endorsement of the decision of Norris J in *Levy v Ellis-Carr* [2012] EWHC 63 (Ch), where he said, at para.36:

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

Thus, in making the ruling that he did, Judge Auerbach was properly, in my view, with respect, reflecting these authorities as to both the standard of medical evidence that would be required and also the approach of the court to any further application for an adjournment.

7 Returning to the history: on 21 December 2020, Stewart J ordered that the trial be listed in the Hilary term 2021 and gave directions, including in relation to special measures for the defendant.

8 On 11 January 2021, the claimants applied to the court for an order that the trial be held remotely by video platform because of the severe nature of the current public health emergency. Putting that into context, at about the same time, the Government ordered the third significant lockdown as a result of the Covid-19 pandemic, and there appears to be no prospect of that lockdown being lifted before the date when this matter has been fixed for trial next week.

9 On 13 January, Steyn J ordered the defendant to file evidence in opposition to the claimants' application for a remote hearing and the defendant did so by way of a statement dated 15 January 2021, which is at p.61 of the bundle. In that statement Mr Wilson said, at para.3, that he believed the trial could proceed in person but with the claimants' representatives attending remotely in a form of hybrid hearing. He asserted, at para.4, that he had considerable hearing difficulties. He contested that he had coped well in the hearing before Judge Auerbach in July 2020 and said that any recording of that hearing would confirm that Judge Auerbach accepted that he, Mr Wilson, had a hearing difficulty. He said at para.7,

"I would ask for a postponement of the trial until the first open date after 21 February 2021".

10 At para.14, Mr Wilson set out some of his medical history. He suggested that he had already exceeded his prognosis for survival by the medical profession. He said he had diabetes and an oxygen mask to help him to breathe. He said that by reason of his diabetes he was at risk of going into a hypoglycaemic state, of which the trial judge would need to be aware, and that a nurse would need to be available at the Royal Courts of Justice to attend to him. He also referred to his problems of dysuria and urinary frequency, with the difficulties that would cause for him in both travelling to London and attending in court all day.

11 On that basis, the matter came before Steyn J again on 20 January and she made an order for a hybrid hearing, refusing the application of the claimants that it be a wholly remote hearing. By implication, she also refused the application which the defendant had made in para.7 of his witness statement for an adjournment of the hearing. In her order, which starts at p.40 of the bundle, she gave full reasons for the order she was making, and she said this,

"4. I consider that a fair hearing of the trial could be held remotely and if it were not possible for it to proceed in court on the 1st and 2 February 2021, I would have acceded to the claimants' application rather than postpone the trial.

5. However, the measures in place in the courts are such that it is possible to proceed with hearings in court and judges and court staff are continuing to attend courts to enable that to happen. Equally, the courts are accommodating hybrid hearings so as to reduce the number of people in court and enable parties/representatives who wish to attend remotely to do so.

6. In these circumstances, bearing in mind that this is the trial of the claim, and having regard to the evidence that the defendant would have some difficulty hearing if he were to attend via a remote video platform and engaging with his counsel, I consider that it is in the interests of justice for this hearing to proceed as a hybrid hearing with the claimants and their representatives able to attend remotely if they wish.

7. I note that the defendant is currently having to self-isolate. However, his period of self-isolation ends prior to the trial and so it does not affect his ability to attend court. I also note the difficulties he has referred to, seeing his counsel in conference prior to the hearing. However, there is no reason he cannot engage with his counsel by telephone, email and/or before the court. No application to adjourn the hearing has been made. I make clear that if it were being said that the hearing must be adjourned in order to enable it to proceed in person, I would have acceded to the claimants' application".

I think in saying that, Steyn J must have overlooked para.7 of the defendant's witness statement of 15 January 2021.

12 Two days later, on 22 January 2021, the defendant then made a formal application to adjourn the trial, and that is the application which has come before me pursuant to the order

of Stewart J of 25 January. In a letter to the claimants' solicitor (Mr Mortimer) the defendant said,

> "I've been in contact today with a man who has tested positive for Covid-19 at the Limes. That will mean I have to self-isolate for 10 days, which will take us to 1 February 2021. Consequently, can I ask you to agree an adjournment till the first open date after 1 February 2021?".

The claimants did not agree to that request and so the defendant made his formal application, by application notice, on 25 January 2021. The basis for that application is the document at p.49 of the bundle, signed by Mr Wilson on 25 January, simply repeating what he had said in his letter to the claimants on 22 January.

13 Opposing the application, the claimants' solicitor, Mr Mortimer, has made a witness statement on 26 January 2021 and from that witness statement, Mr Solomon QC for the claimants derives four points:

(i) Firstly, Mr Mortimer asserts that the prolongation of the litigation has involved the prolongation of Mr Wilson's harassment of the council, and he has referred to pages and pages of photographs of young ladies clad in bikinis (or scantily clad) which has been exhibited by Mr Wilson in relation to this trial. It is described as semi-pornographic. Whether that is right or not - as it seems to me, there may be some question about that. What is certainly said is that the material appears to bear no relevance at all to the issues in this case that can be discerned and by bombarding the claimants with pages and pages of such material, that amounts to further harassment. I have to say that I have doubts whether the filing of evidence in legal proceedings can be said to amount to harassment simply by virtue of the fact that it is sent to the council because they have in-house solicitors. Had they had external solicitors, the material would have been sent to the solicitors and it is difficult to see how that can amount to harassment, especially as the court has the means to regulate its own proceedings by ordering material to be excluded if it is irrelevant.

(ii) Secondly, Mr Mortimer relies upon the ongoing anxiety caused to the claimants' officers by the litigation.

(iii) Thirdly, there is the fact that there will be additional costs occasioned by an adjournment, costs which there is at least a doubt whether they will be ever paid by Mr Wilson, given the fact that he has not made the interim payment on account of costs ordered by Master Cook and has given evidence in his witness statement of his own impecuniosity.

(iv) Finally, Mr Mortimer points to the lack of proper evidence of Mr Wilson's illness or impairment and the cause of the contact with someone who is positive for Covid-19.

14 In support of the application, Mr Deakin has appeared on behalf of the defendant and he made his application on commendably brief grounds, which are simply that the defendant, having come into contact with someone who was Covid-19 positive, now needs to self-isolate and that self-isolation will take him through to the trial date and that the trial should not proceed but should be adjourned because were it to proceed remotely, the defendant, who is profoundly deaf, would be unable to hear the proceedings adequately, as is his right.

15 In answer, Mr Solomon QC, having taken me through the background and the authorities, points out that this is the second application to adjourn by Mr Wilson and has been made on the same basis as the first application. Actually, if one looks at para.7 of the defendant's witness statement of 15 January 2021, where he said, "I would ask for a postponement of the trial until the first open date after 21 February 2021" it could be said that this is in fact the third application for a postponement. Mr Solomon refers to the fact that, on the basis of the paragraphs from her judgment which I have read, Steyn J would have refused to adjourn. In fact it could have been said that if that was an application to postpone made by Mr Wilson, she actually refused to adjourn.

16 He relies on the lack of any clear medical evidence, when the Court of Appeal has made clear on numerous previous occasions the high standard required if an adjournment is to take place on the basis of medical grounds. He refers to the lack of any proper evidence of the defendant's need to self-isolate. He refers to the lack of any proper evidence of the profound hearing impairment asserted by the defendant such that he could not properly participate in a remote hearing, combined with Judge Auerbach's comments of the need for proper medical evidence should a further application to adjourn be made. He submits that the hearing can proceed fairly as a remote hearing in any event, the claimants having served all the documents upon which they rely back in July, and there being no live evidence at the trial, together with the defendant's counsel having had access to all the documents for the trial.

17 This is supported by the fact that I have seen a skeleton argument drafted by Mr Deakin for the purposes of the trial. He submits that on the basis of the principles to which I have referred in the *Decker* case at para.28, this application does not come even close to satisfying the requirements for an adjournment and, indeed, the application is so hopeless that I should certify it as having been made totally without merit. He also refers to the public interest in fixtures not being broken and also the fact that in principle, where interim injunctions have been obtained, it is the interests of justice for all parties that the full trial and the return date should come before the court sooner rather than later.

18 In my judgment, Mr Solomon QC is right in his submissions. This application does not even get off the ground in satisfying the court that there should be an adjournment. Firstly, as Mr Deakin was obliged to acknowledge and recognise, there is no evidence of even a remotely satisfactory nature in support of the application. It is, in my view, no coincidence that the defendant, having asked for a postponement of the trial until the first open date after 21 February, and that application effectively having been rejected by Steyn J on 20 January 2021, should have made an application in exactly the same terms to the claimants two days later on 22 January claiming to have been exposed to someone who had tested positive for Covid-19 on that same day. Otherwise it is an extraordinary coincidence that, having been, effectively, refused a postponement of the trial by Steyn J, he should have encountered somebody only two days later such as to give him, in his view, grounds to make such an application formally to the court.

19 Furthermore, he does not explain how he has managed to expose himself to someone with Covid-19 when, on his own account, he was at that time self-isolating, which of course means self-isolating at home. The place where he says he was exposed (The Limes) is not his home and, if he was indeed self-isolating, he should not have been in The Limes at all, never mind exposed to someone who had Covid-19 and therefore, I assume, put himself at risk by not taking the appropriate precautions. That is all the more mystifying given the medical condition which Mr Wilson has asserted in his witness statement he suffers from, which would make him extremely vulnerable to Covid-19 were he to contract the virus. A combination of his medical condition, namely his diabetes, and his age and his other

medical problems would put him in one of the highest categories of vulnerability, and so it is quite extraordinary that he should have exposed himself to risk in the way that he says he has by leaving his home, going to The Limes and exposing himself (in the Covid sense) to someone who was Covid positive.

20 There is no explanation for any of that from Mr Wilson and, in the absence of such an explanation, I consider that I am entitled, given the background to this case, and the chronology which I have described, to be sceptical of the reasons which have been put forward by Mr Wilson. Furthermore, Mr Solomon is right that were I to accede to this application, I would effectively be going behind the order of Steyn J, because she made it quite clear that had she considered the application before her to be an application for an adjournment, she would have rejected it, and yet inarguably cynical fashion, in the face of those remarks by Steyn J, the defendant has made this application to the court, almost, if I can use this expression, cocking a snook at what Steyn J said.

21 Additionally, now that the crunch has come, as it were, in relation to whether a remote hearing can fairly take place, it seems to me significant that there has been no proper medical basis put before the court as to why such a hearing cannot take place fairly. While the court may have been prepared to take a relatively relaxed view whilst the possibility of a hybrid hearing was still in play, now that Mr Wilson has effectively disqualified himself by his own actions - if his evidence is to be believed, which I doubt - from a hybrid hearing, the court is faced with the very real alternative of either proceeding with a remote hearing or adjourning the hearing, and in those circumstances, nobody in Mr Wilson's position could have been in any doubt from what had been said on previous occasions, by both Judge Auerbach and also by Steyn J, of the need to support the application with proper evidence, including proper medical evidence - and by making this application in the way that he has, without any proper evidential support at all - the defendant has not treated this court with the respect that it deserves, in my view.

22 In those circumstances, and for those reasons, I refuse the application and I certify it as having been made totally without merit.

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CERTIFICATE

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