Appeal No. EA-2020-000006-JOJ (previously UKEAT/0014/20/JOJ)

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 22nd June 2021

Before

THE HONOURABLE MR JUSTICE CHOUDHURY

(SITTING ALONE)

MR O EMUEMUKORO — APPELLANT

1) CROMA VIGILANT (SCOTLAND) LTD
2) MISS C HUGGINS & OTHERS — RESPONDENTS

Transcript of Proceedings

JUDGMENT

FULL HEARING OF CROSS-APPEAL ONLY

APPEARANCES

For the Appellant	MS CARIN HUNT (Of Counsel) Instructed by: Pattinson and Brewer Solicitors Ground Floor, Leeman House Station Business Park Holgate Park Drive York YO26 4GB
For the First Respondent	Mr Rad Kohanzad (Of Counsel) Instructed by: Peninsula Business Services Peninsula Victoria Place Manchester M4 4FB

SUMMARY

PRACTICE AND PROCEDURE

On the first day of a five-day hearing to consider the Claimant's claims of unfair dismissal, wrongful dismissal and holiday pay, the Tribunal struck out the Respondents' Response for failing to comply with the Tribunal's orders. Those failures meant that it was impossible for the trial to proceed within the five-day trial window. The short issue in this Appeal is whether the Tribunal erred in law in striking out the Respondents' Response.

Held, dismissing the appeal, that the Tribunal did not err in law. It was not necessary, in order for the power to strike to out to be triggered, for a fair trial not to be possible at all; it is enough for the power to be exercisable that, as a result of a party's conduct, a fair trial was not possible within the trial window.

THE HONOURABLE MR JUSTICE CHOUDHURY

1. I will refer to the parties as the Claimant and the Respondents as they were below. On the first day of a five-day hearing to consider the Claimant's claims of unfair dismissal, wrongful dismissal and holiday pay, the Employment Tribunal ("the Tribunal/ET") struck out the Respondents' Response for failing to comply with the Tribunal's orders. Those failures meant that it was impossible for the trial to proceed, or so the Tribunal found. The short issue in this Appeal is whether the Tribunal erred in law in striking out the Respondents' Response.

Background

2. The Claimant was employed by the Respondent as a security officer until his dismissal on 28th December 2017, purportedly for failing to produce documentation to prove his entitlement to work. The Claimant was one of several employees dismissed for that reason.

3. In May 2018, the Claimant and others brought claims of unfair dismissal, wrongful dismissal in respect of notice pay and holiday pay. Several of those claims, including that of the Claimant, were consolidated and listed to be heard before Employment Judge Snelson sitting in the Central London Employment Tribunal at a hearing on 4th to 8th November 2019.

4. At a case management Preliminary Hearing on 1st May 2019, the Parties were given various directions to ensure readiness for that hearing. The Respondent did not comply with any of them. The Claimants' representative made an application for the Respondent's Response to be struck out for that reason, but it appears it had not been practicable to deal with that application in advance of the hearing in November 2019. The application was renewed by the Claimants on

A the first morning of the hearing before EJ Snelson. The Tribunal dealt with that application in its Judgment as follows:

> **"Strike-out**
> **6. Prior to the hearing there had been an application on behalf of Mr Emuemukoro for the response form to be struck out on account of the Respondents' non-compliance with the directions given on 1 May, but it had not been practicable to deal with it in advance of the hearing. Accordingly, Mr Hitchens renewed it when the case was called on. I decided to read into the case and give the representatives an opportunity to talk. After an interval, the hearing resumed. At that stage, there was common ground that, as a consequence of the failure of Peninsula Business Services ('Peninsula'), the Respondents' representatives, to comply with the case management directions, it would not be possible to conduct a fair trial of the case at any point during the five-day allocation. A massive bundle of documents had been prepared but it did not include the documents which mattered. The Respondents had failed to prepare their witness statements. It was not feasible to remedy these deficiencies in the time available.**
> **7. Mr Hitchens, supported by Mr Powles and Mr Mann, submitted that, in the circumstances, the only proper course was to strike out the response, enter judgment for the Claimants and proceed to deal with their remedy claims. He acknowledged that striking-out orders were draconic but contended that such a measure was not only richly merited in this case but also the only way to do justice. The Claimants had lost their jobs almost two years ago and had suffered considerable hardship in consequence. Any further delay would be wholly contrary to the interests of justice.**
> **8. Mr Keenan for the Respondents frankly acknowledged that the case was not ready for hearing purely as a consequence of the failure of Peninsula to comply with the case management orders and to engage with the Claimants' side. He explained that a former colleague had had charge of the matter and had left the organisation without arrangements being made to cover the case. It had simply been overlooked. (We hasten to say that Mr Keenan had nothing whatsoever to do with this unfortunate history and had been entrusted at the eleventh hour with the unenviable task of managing the fallout as best he could.) Putting the matter very simply, Mr Keenan submitted that granting the Claimants' application would inevitably cause substantial prejudice to his clients and invited us to decide that adjourning the proceedings amounted to the lesser of two evils**
> **9. Under the Employment Tribunals Rules of Procedure 2013, rule 37(1)(b) and (c) the Tribunal has power to strike out a claim or response on (among others) the grounds that the proceedings have been conducted unreasonably or that a party has failed to comply with an order. Where a response is struck out the effect is that the respondent is treated as never having presented a response (rule 37(3)). A respondent who has failed to present a response is entitled to participate in proceedings only to the extent permitted by a judge (rule 21(3)).**
> **10. I reminded myself that the power to strike out is widely drawn but the higher courts have often stressed the fact that the sanction is a severe one, to be used with restraint. That said, there will be cases in which it is a proper course to take, particularly where it is shown that to do otherwise would be to deny justice to another party.**
> **11. I concluded that it was necessary in the interests of justice to make a striking-out order. The alternative would have been an adjournment of many months (the Tribunal's lists are full into the late summer of 2020). That would have entailed unacceptable prejudice to the Claimants. They lost their jobs nearly two years ago. They have sustained considerable losses and in all or most cases those losses continue to grow substantially from week to week. Their first remedy claims are for reinstatement and they are entitled to have those claims determined without more delay. Continuing uncertainty as to whether reinstatement will be ordered would exacerbate the prejudice which postponing the case would entail. Moreover, the Claimants have done nothing to cause or contribute to the procedural impasse: the fact that the case cannot proceed as an effective contest**

> **on liability is wholly attributable to Peninsula's neglect of its obligations. On the other side of the balance, it must be acknowledged that striking-out will deprive the Respondents of the chance to contest the claims on their merits, but they will have the comfort of what appears to be an unanswerable claim against Peninsula for compensation for all consequential losses. Stepping back, I was satisfied that the factors in favour of granting the Claimants' application comprehensively outweighed those against and that the interests of justice and the overriding objective demanded the adjudication which they had asked for.**
>
> **12. Having heard my ruling, the parties agreed that the case should be stood over to Thursday, 7 November (day four of the allocation) to allow time for preparation of the evidence needed to deal with the remedies claims. When the hearing was resumed the representatives were agreed that the preparations had been completed and the matter could proceed. This was in large part due to the hard work and co-operative spirit of the representatives on all sides. I was satisfied that it was in the interests of justice to permit the Respondents to participate in the remedies hearing, nothing being said to the contrary on the Claimants' side."**

5. Having struck out the Response, the Tribunal proceeded to determine the claims of unfair dismissal and wrongful dismissal and found them to be well-founded. The Tribunal considered remedy and permitted the Respondent to participate in that part of the hearing. The Tribunal ordered the Respondent to reinstate the Claimant and his colleagues on or before 27th December 2019. In determining remedy, the Tribunal was required to consider whether an ACAS uplift would apply to arrears of pay and other benefits payable pursuant to its Reinstatement Order. The Tribunal determined that it did not, for the reasons set out in paras. 35 to 41 of the Judgment.

6. The Claimant initially appealed on the grounds that the uplift should have been applied to the award of back-pay. Permission to proceed with that appeal was granted on the sift by HHJ Auerbach. In the event, the Respondent did not reinstate the Claimant and he was awarded an additional award of compensation. There was an uplift in respect of that award. As such, the Claimant's appeal against the initial failure to uplift the award became academic and his appeal was withdrawn on 2nd June this year. The Respondent has also sought to appeal against the Judgment, however, that appeal was out of time.

7. The Respondent had lodged a cross-appeal to the Claimant's appeal. The Grounds of the cross-appeal were the same as the Respondent's out-of-time appeal and were focussed on the

striking-out of the Respondent's Response. The cross-appeal contained six Grounds of Appeal, only two of which were permitted to proceed on the sift. Although numbered Grounds 1 and 3 in the original Grounds, they have been referred to today as Grounds 1 and 2. That cross-appeal was permitted to proceed to Full Hearing, notwithstanding the withdrawal of the Claimant's appeal.

The Legal Framework

8. Rule 37 of Schedule 1 of the **Employment Tribunal Constitution (Rules and Procedure) Regulations 2013** provides:

> **"Striking out**
> **37.—(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—**
> **(a) that it is scandalous or vexatious or has no reasonable prospect of success; (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;**
> **c) for non-compliance with any of these Rules or with an order of the Tribunal;**
> **(d) that it has not been actively pursued;**
> **(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).**
> **(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.**
> **(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above."**

9. The approach to be taken in exercising the power to strike out under Rule 37 (b), in the face of unreasonable conduct, was considered by the Court of Appeal in **Blockbuster Entertainment v James** [2006] EWCA Civ 684 IRLR 630. Having set out the predecessor version of Rule 37 contained in Rule 18 of the 2004 Employment Tribunal Rules, Lord Justice Sedley said as follows:

> **"5. This power, as the employment tribunal reminded itself, is a Draconic power, not to be readily exercised. It comes into being if, as in the judgment of the tribunal had happened here, a party has been conducting its side of the proceedings unreasonably. The two cardinal conditions for its exercise are either that the unreasonable conduct has taken the form of deliberate and persistent disregard of required procedural steps, or that it has made a fair trial impossible.**

> **If these conditions are fulfilled, it becomes necessary to consider whether, even so, striking out is a proportionate response. The principles are more fully spelt out in the decisions of this court in *Arrow Nominees v Blackledge* [2000] 2 BCLC 167 and of the EAT in *De Keyser v Wilson* [2001] IRLR 324, *Bolch v Chipman* [2004] IRLR 140 and *Weir Valves v Armitage* [2004] ICR 371, but they do not require elaboration here since they are not disputed. It will, however, be necessary to return to the question of proportionality before parting with this appeal."**

10. It is quite clear from that passage, and is not in dispute before me, that the two conditions for the exercise of the power are in the alternative, such that either condition being satisfied would trigger the exercise of the power to strike out. At paras. 18 to 21, the Court of Appeal dealt with proportionality and said as follows:

> **"18. The first object of any system of justice is to get triable cases tried. There can be no doubt that among the allegations made by Mr James are things which, if true, merit concern and adjudication. There can be no doubt, either, that Mr James has been difficult, querulous and uncooperative in many respects. Some of this may be attributable to the heavy artillery that has been deployed against him - though I hope that for the future he will be able to show the moderation and respect for others which he displayed in his oral submissions to this court. But the courts and tribunals of this country are open to the difficult as well as to the compliant, so long as they do not conduct their case unreasonably. It will be for the new tribunal to decide whether that has happened here.**
> **19. In deciding this, the tribunal needs to have in mind that the application before it is one that was made, in effect, on the opening day of the six days that had been set aside for trying the substantive case. The reasons why this happened are on record and can be recanvassed; but it takes something very unusual indeed to justify the striking out, on procedural grounds, of a claim which has arrived at the point of trial. The time to deal with persistent or deliberate failures to comply with rules or orders designed to secure a fair and orderly hearing is when they have reached the point of no return. It may be disproportionate to strike out a claim on an application, albeit an otherwise well-founded one, made on the eve or the morning of the hearing.**
> **20. It is common ground that, in addition to fulfilling the requirements outlined in §5 above, striking out must be a proportionate measure. The employment tribunal in the present case held no more than that, in the light of their findings and conclusions, striking out was "the only proportionate and fair course to take". This aspect of their determination played no part in Mr James's grounds of appeal and accordingly plays no part in this court's decision. But if it arises again at the remitted hearing, the tribunal will need to take a less laconic and more structured approach to it than is apparent in the determination before us.**
> **21. It is not only by reason of the Convention right to a fair hearing vouchsafed by article 6 that striking out, even if otherwise warranted, must be a proportionate response. The common law, as Mr James has reminded us, has for a long time taken a similar stance: see *Re Jokai Tea Holdings* [1992] 1 WLR 1196, especially at 1202E-H. What the jurisprudence of the European Court of Human Rights has contributed to the principle is the need for a structured examination. The particular question in a case such as the present is whether there is a less drastic means to the end for which the strike-out power exists. The answer has to take into account the fact – if it is a fact – that the tribunal is ready to try the claims; or – as the case may be – that there is still time in which orderly preparation can be made. It must not, of course, ignore either the duration or the character of the unreasonable conduct without which the question of proportionality would not have arisen; but it must even so keep in mind the purpose for which it and its procedures exist. If a straightforward refusal to**

> **admit late material or applications will enable the hearing to go ahead, or if, albeit late, they can be accommodated without unfairness, it can only be in a wholly exceptional case that a history of unreasonable conduct which has not until that point caused the claim to be struck out will now justify its summary termination. Proportionality, in other words, is not simply a corollary or function of the existence of the other conditions for striking out. It is an important check, in the overall interests of justice, upon their consequences."**

11. It is relevant for present purposes to note, as stated in para. 21 of the Court of Appeal's judgment in **Blockbuster**, that the proportionality question was considered in that case having express regard to the fact that the application in respect of strike-out was made at the commencement of the trial in that matter.

The Grounds of Appeal

12. The two permitted Grounds of Appeal are as follows:

a. Ground 1: the Tribunal erred in failing to address whether the Respondent's unreasonable conduct took the form of a deliberate and persistent disregard of required procedural steps.

b. Ground 2: the Tribunal erred in its approach to proportionality in that it should only have proceeded to strike out if that was the *only* proportionate response available, and that was *not* the case here.

13. As I have already said, the Respondent was not permitted to proceed on a number of other Grounds. One of those other Grounds challenged the Tribunal's finding that it would not be possible to conduct a fair trial of the case at any point during any of the five-day allocation. It contended that the Tribunal *ought* to have considered whether a fair trial was no longer possible *at all* and not just whether it would be possible within the trial listing. Mr Justice Lavender, on the sift, refused permission for that ground to proceed on the grounds that it was unarguable. The Respondent did not seek to renew its Application for Permission to Appeal on that Ground.

14. I shall deal with the two permitted Grounds of Appeal in turn.

Ground 1 – Submissions

15. Mr Kohanzad, who appears for the Respondent (but who did not appear below), submits that neither of the two cardinal conditions referred to by LJ Sedley in **Blockbuster** for the exercise of the power to strike out were satisfied in this case. His primary submission is that the judge struck out the Response here because a fair trial was not possible within the five-day allocation, but that does not satisfy the *relevant* condition which is that a fair trial is not possible *at all*. The fact that a fair trial was not possible within the allocated trial window is merely a factor to be taken into account, submits Mr Kohanzad, but does not, on its own, give rise to the power to strike-out. It is not enough, he says, that the parties are not trial-ready, unless the conduct giving rise to that situation is such that a fair trial at any stage is rendered impossible.

16. Mr Kohanzad sought to bolster his submissions in this regard by reference to Rule 37(e) of the ET Rules, which provides that one of the grounds for striking-out is that the tribunal no longer considers it possible to have a fair hearing in respect of the claim or response or part to be struck out. Mr Kohanzad further submits that, if he is right about that, then the only basis on which the strike-out power could have been exercised was under the first of LJ Sedley's cardinal conditions; namely, that the unreasonable conduct had taken the form of deliberate and persistent disregard of required procedural steps. He submits that there was no such deliberate and persistent disregard in this case. That is because the Tribunal found that the failure to comply was due to an oversight or, at worst, negligence on the part of the Respondent's advisers and that is not the same as a contumelious disregard of procedural requirements.

17. Ms Hunt submits that it was common ground in this case that a fair trial would not be possible at any point during the five-day allocation (see para. 6 of the Judgment). That is enough, she submits, to satisfy the second of LJ Sedley's cardinal conditions. She submits that it is quite clear from what he said in **Blockbuster** itself at para. 21 that it is a highly relevant question that strike-out is considered on the first day of the trial and that it is obvious that whether or not a fair trial was possible includes the consideration of more than merely whether a trial can be held after an adjournment to allow any procedural defects to be remedied. She referred me to the following passage in the case of **Arrow Nominees Inc & Anor v Blackledge & Ors** [2000] WL 775004:

> **"55. Further, in this context, a fair trial is a trial which is conducted without an undue expenditure of time and money; and with a proper regard to the demands of other litigants upon the finite resources of the court. The court does not do justice to the other parties to the proceedings in question if it allows its process to be abused so that the real point in issue becomes subordinated to an investigation into the effect which the admittedly fraudulent conduct of one party in connection with the process of litigation has had on the fairness of the trial itself. That, as it seems to me, is what happened in the present case. The trial was "hijacked" by the need to investigate what documents were false and what documents had been destroyed. The need to do that arose from the facts (i) that the petitioners had sought to rely on documents which Nigel Tobias had forged with the object of frustrating a fair trial and (ii) that, as the judge found, Nigel Tobias was unwilling to make a frank disclosure of the extent of his fraudulent conduct, but persisted in his attempts to deceive. The result was that the petitioners' case occupied far more of the court's time than was necessary for the purpose of deciding the real points in issue on the petition. That was unfair to the Blackledge respondents; and it was unfair to other litigants who needed to have their disputes tried by the court.**
>
> **56. In my view, having heard and disbelieved the evidence of Nigel Tobias as to the extent of his fraudulent conduct, and having reached the conclusion (as he did) that Nigel Tobias was persisting in his object of frustrating a fair trial, the judge ought to have considered whether it was fair to the respondents - and in the interests of the administration of justice generally - to allow the trial to continue. If he had considered that question, then - as it seems to me - he should have come to the conclusion that it must be answered in the negative. A decision to stop the trial in those circumstances is not based on the court's desire (or any perceived need) to punish the party concerned; rather, it is a proper and necessary response where a party has shown that his object is not to have the fair trial which it is the court's function to conduct, but to have a trial the fairness of which he has attempted (and continues to attempt) to compromise."**

Discussion

18. In my judgment, Ms Hunt's submissions are to be preferred. There is nothing in any of the authorities providing support for Mr Kohanzad's proposition that the question of whether a

fair trial is possible is to be determined in absolute terms; that is to say by considering whether a fair trial is possible *at all* and not just by considering, where an application is made at the outset of a trial, whether a fair trial is possible within the allocated trial window. Where an application to strike-out is considered on the first day of trial, it is clearly a highly relevant consideration as to whether a fair trial is possible within that trial window. In my judgment, where a party's unreasonable conduct has resulted in a fair trial not being possible within that window, the power to strike-out is triggered. Whether or not the power ought to be exercised would depend on whether or not it is proportionate to do so.

19. I do not accept Mr Kohanzad's proposition that the power can only be triggered where a fair trial is rendered impossible in an absolute sense. That approach would not take account of all the factors that are relevant to a fair trial which the Court of Appeal in **Arrow Nominees** set out. These include, as I have already mentioned, the undue expenditure of time and money; the demands of other litigants; and the finite resources of the court. These are factors which are consistent with taking into account the overriding objective. If Mr Kohanzad's proposition were correct, then these considerations would all be subordinated to the feasibility of conducting a trial whilst the memories of witnesses remain sufficiently intact to deal with the issues. In my judgment, the question of fairness in this context is not confined to that issue alone, albeit that it is an important one to take into account. It would almost always be possible to have a trial of the issues if enough time and resources are thrown at it and if scant regard were paid to the consequences of delay and costs for the other parties. However, it would clearly be inconsistent with the notion of fairness generally, and the overriding objective, if the fairness question had to be considered without regard to such matters.

20. Mr Kohanzad's reliance on Rule 37 (e) does not assist him; that is a specific provision, it seems to me, where the Tribunal considers that it is no longer possible to have a fair hearing in

respect of a claim, or part of a claim, that may arise because of undue delay or failure to prosecute the claim over a very substantial length of time, or for other reasons. However, that provision does not circumscribe the kinds of circumstances in which a tribunal may conclude that a fair trial is not possible in the context of an application made under Rule 37 (b) or (c), where the issue is unreasonable conduct on the part of a party or failure to comply with the tribunal's orders or the Rules.

21. In this case, the Tribunal was entitled, in my judgment, to accept the parties' joint position that a fair trial was not possible at any point in the five-day trial window. That was sufficient to trigger the power to strike-out. Whether or not the power is exercised will depend on the proportionality of taking that step. I bear in mind when considering whether or not to interfere with the Tribunal's decision here that the test for the Employment Appeal Tribunal ("EAT"), as confirmed in the case of **Riley v Crown Prosecution Service** [2013] IRLR 966, is a "Wednesbury" one; that is to say, in an appeal against striking out, a case will only succeed if there is an error of legal principle in the tribunal's approach or perversity in the outcome. In my judgment, there was no such error of principle here and neither was the Tribunal's conclusion perverse in respect of Ground 1. Mr Kohanzad's primary submission under Ground 1 therefore does not succeed. In those circumstances, Ground 1 fails.

22. It is not strictly necessary to consider whether there was any error of approach in considering the nature of the respondent's unreasonable conduct, since it is enough to trigger the power to strike out that a fair trial is no longer possible. However, I make the following brief observations as to Mr Kohanzad's secondary argument: The authorities are clear that what is required in terms of unreasonable conduct is "deliberate and persistent disregard" of the required procedural steps. The reference to the conduct being "deliberate" would probably exclude mere

oversight or negligence which is not the result of any intentional or deliberate failure to implement proper systems for managing case progress.

23. Ms Hunt sought to persuade me that the requirement for conduct to amount to a "deliberate and persistent disregard" of procedural steps is really intended for the party in question and a different approach is justified in the case of professional advisers, where negligence, albeit unintentional, could still trigger the power to strike-out. It seems to me, however, that it would be to distort the Court of Appeal's choice of terminology in describing the kind of unreasonable conduct necessary for the exercise of the power to strike out, if it were to include "ordinary" negligence cases, particularly where, as in this case, the default appears to be the result of oversight rather than contumelious default.

Ground 2 - Proportionality

24. Mr Kohanzad's submission here is that the proportionality requirement can be met only if the strike-out option was the only proportionate response to the conduct which the Tribunal was required to consider. He submits that the Tribunal erred in weighing up the competing options here, of striking-out on the one hand and adjourning on the other. Instead, it should have considered whether there was a "less drastic means to the end for which the strike-out power exists" (see **Blockbuster** at para. 21). Here there was, he submits, a more reasonable response, which was to adjourn the hearing, with costs being awarded to the Claimant if the Tribunal considered that appropriate.

25. Ms Hunt submits that there is nothing in the authorities to suggest that strike-out must be the only proportionate response before it would be appropriate to take that step. I was referred

to para. 5 in LJ Sedley's judgment in **Blockbuster** where it was stated that: "striking out must be *a* proportionate measure" (emphasis added). Even if that is not right, Ms Hunt submits that, in any event, the Tribunal was correct to conclude that the only proportionate response was to strike out.

Discussion

26. If there are several possible responses to unreasonable conduct, and one of those responses is "less drastic" than the others in achieving the end for which the strike-out power exists, then that would probably be the only proportionate response and the others would not. There may be cases, which are likely to be rare, in which two or more possible responses are *equal* in terms of their efficacy in achieving the desired aim and *equal* in terms of any adverse consequences. However, in most cases there is likely to be only *one* proportionate response which would be the least drastic of the options available.

27. In the present case, I see no error in the Tribunal's approach to proportionality. It correctly directed itself that strike-out is a severe sanction to be used with restraint (see para. 10 of the Judgment). It then concluded that it was necessary in the interests of justice to strike out in this case, but at para. 11 of the Judgment it specifically found that an adjournment would have entailed "unacceptable prejudice to the Claimants". This was because of the delay since losing their jobs almost two years prior to the hearing and the fact that the Claimants' considerable losses continued to grow substantially from week-to-week. Striking out was, therefore, considered to be the least drastic course to take in this case, given that the alternative, suggested by Mr Kohanzad, would necessarily entail unacceptable prejudice.

28. It was a highly relevant factor, as confirmed by the Court of Appeal in **Blockbuster**, that the strike-out application was being considered on the first day of the hearing. The Parties were

agreed that a fair trial was not possible in that hearing window. In other words, there were no options, such as giving the Respondent more time within the trial window to produce its witness statements or prepare a bundle of documents, other than an adjournment. If adjournment would result in unacceptable prejudice (a conclusion that is not challenged by the Respondent), then that leaves only the strike-out. The Tribunal did not err in considering the prejudice to the Respondent; indeed, it was bound to take that into account in reaching its decision.

29. For these reasons, Ground 2 of the Appeal also fails and is dismissed.

Conclusion

30. For these reasons, and notwithstanding Mr Kohanzad's helpful submissions in this matter, this Appeal fails and is dismissed