Neutral Citation Number: [2021] EWCA Civ 221

Case No: A3/2021/0077

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
FINANCIAL LIST (ChD)
Marcus Smith J
[2021] EWHC 36 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 February 2021

LORD JUSTICE DAVID RICHARDS
LORD JUSTICE PETER JACKSON
and
LORD JUSTICE NUGEE

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Between :

BILTA (UK) LTD (in liquidation) & Others	**Claimants and Respondents**
- and –	
TRADITION FINANCIAL SERVICES LTD	**Defendant and Appellant**

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David Scorey QC and **Laurence Emmett** (instructed by **Greenberg Traurig LLP**) for the **Appellant**

Christopher Parker QC and **Andrew Westwood** (instructed by **Enyo Law LLP**) for the **Respondents**

Hearing date: 19 January 2021

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Approved Judgment

Lord Justice Nugee:

Introduction

1. This is an appeal by the only active Defendant, Tradition Financial Services Ltd (**"TFS"**), against an Order of Marcus Smith J (**"the Judge"**) on 11 January 2021 dismissing TFS's application for an adjournment of the trial of the action, which was due to commence before him on 25 January, for the reasons given in his judgment handed down that day at [2021] EWHC 38 (Ch) (**"the Judgment"** or **"Jmt"**). The Judge refused permission to appeal for reasons given in a ruling on the same day (**"the PTA Ruling"** or **"PTA"**). Permission was granted by Lewison LJ on 14 January.

2. The appeal is essentially on the ground that it was unfair for the trial to go ahead in circumstances where an important witness for TFS who was accused of dishonesty was unable to attend trial to give live oral evidence for bona fide medical reasons, but there was every reason to think that she would be able to attend if the adjournment were granted.

3. We heard the appeal on an expedited basis on 19 January, and at the conclusion of the hearing indicated that we would allow the appeal for reasons to be given later. This judgment gives my reasons for agreeing to the appeal being allowed.

Background

4. The action is brought by 5 companies now in liquidation and their respective joint liquidators. TFS is the 5th Defendant, but the claims against the other defendants have either been resolved by agreement, or, in the case of the 1st Defendant SVS Securities plc (**"SVS"**), have been stayed due to SVS entering administration, and the action is therefore now only proceeding against TFS.

5. The claims arise out of the spot trading of carbon credits known as European Union Emissions Trading Allowances (**"EUAs"**) over a period between May and July 2009. The allegation is that this trading was part of a large-scale VAT fraud of the type known as "missing trader intra-community" (**"MTIC"**) fraud. There have been numerous descriptions of MTIC fraud in reported cases: for a recent brief description see *Bilta (UK) Ltd v Nat West Markets plc* [2020] EWHC 546 (Ch) (a similar claim concerned with spot trading of EUAs in the same period) at [12] per Snowden J. It is not necessary for the purposes of this appeal to add yet another description; all that one needs to know is that an MTIC fraud will involve the fraudsters dishonestly arranging matters so that one or more traders are deliberately left with liabilities for VAT which they cannot discharge. In the present case the claimant companies are said to have effectively played the role of "importers", to have failed to account to HMRC for VAT, and to have gone into insolvent liquidation owing large VAT liabilities.

6. TFS was not itself one of the traders; it was a broker. But it is admitted in its Defence that SVS was one of its clients and that it acted as a "name-passing broker" in respect of certain transactions for the purchase of EUAs by SVS from various sellers, including two of the claimant companies, and liaised between SVS and the sellers for the purpose of informing them of the price and amount at which each was willing to

trade.

7. The case against TFS is pleaded in two ways. The first, brought by the companies in liquidation, is a claim in dishonest assistance. The basis of the claim is that the directors of the claimant companies were in breach of their fiduciary duties by causing their respective companies to incur VAT liabilities and arranging their affairs so that they could not discharge them; that by introducing the sellers to SVS and liaising between them, TFS assisted in these breaches of duty; that TFS acted dishonestly in doing so; and that it is therefore liable in equity to compensate the companies for the losses sustained by them, being the amount of their liability to HMRC for VAT on the relevant transactions. The amounts claimed are substantial, the total being over £22m.

8. The second way in which the claim is put is a claim by the liquidators of each company under s. 213 of the Insolvency Act 1986 for fraudulent trading. The factual basis of this claim is much the same, namely that the directors of each company carried on its business with intent to defraud creditors or for a fraudulent purpose, and that TFS was knowingly party to the fraudulent trading. The loss claimed is the same. For the purposes of this appeal it does not add anything material to the analysis and it is not necessary to refer to it, and I will refer to the claims as if they were simply claims for dishonest assistance.

9. Although TFS makes no admissions as to the fraud, and other points are taken in its Defence (such as whether what TFS did amounted to assistance in the fraud alleged, and a limitation point), a substantial part of its Defence is devoted to a denial that it acted dishonestly, and the question whether it did or did not is likely to be a central issue, or as the Judge put it to "loom large", at trial (Jmt at [4]). Where dishonesty is alleged, the role of the fact-finder at trial is firstly to identify the actual subjective state of mind of a defendant and then to test that against an objective test of whether that is honest or not: *Ivey v Genting Casinos (UK) Ltd* [2017] UKSC 67 at [74] per Lord Hughes JSC. TFS is of course a corporate body that can only act through individuals, and so it will be necessary for the Claimants to establish the requisite dishonesty on the part of one or more relevant individuals; the Court will therefore be required to make findings as to their subjective states of mind.

10. The pleaded claim makes allegations of dishonesty against the following individuals who were employees of TFS at the relevant time:

    (i) Mr Luca Bertali, a senior broker.

    (ii) Mr Darren Gurner, Mr Amit Oza and Mr Chris Kemper, who were brokers.

    (iii) Ms Lucy Mortimer, who was a manager. She was head of the desk responsible for the EUA trading, and the individual brokers reported to her.

    (iv) Mr Mike Anderson who was Head of Energy. Ms Mortimer reported to him.

    (v) Mr Peter Weston, who was TFS's Compliance Officer.

    These claims are pleaded in great detail, but the essential allegation is that, given what they knew, the individuals would have been aware that the nature and pattern of the

EUA trading was suspicious and called for proper consideration and inquiry whether it was part of or connected with a VAT fraud, but that they failed to seek any explanation and wilfully shut their eyes to the obvious risk that it was. There are also allegations, including against Ms Mortimer and Mr Weston, in connection with the onboarding processes, such as Know Your Client checks, for clients. The allegations of dishonesty are all denied in TFS's Defence, often in considerable detail.

11. The Claimants' case is that the dishonesty of these individuals is to be attributed to TFS, or alternatively that TFS is vicariously liable for their wrongful acts. The principle that if any individual acted dishonestly with the ostensible authority of TFS, his or her dishonesty is to be attributed to TFS is not disputed; nor is it disputed that TFS would be vicariously liable for any wrongful acts committed by an individual which had a close connection with their employment.

12. There is a long history to the proceedings which can be summarised quite briefly. A claim form was initially issued in 2015, but at that stage TFS was not joined as defendant. A separate claim was issued against TFS in November 2017, and consolidated with the previous claim by order of Snowden J in May 2018. Pleadings as between the Claimants and TFS were closed by July 2018. Trial was originally listed for March 2020, which was subsequently pushed back to a 5-week window commencing on 21 April 2020. On 2 April 2020 however TFS applied for an adjournment of the trial; we were told that this was in the immediate aftermath of the first Covid lockdown and based on practical difficulties for all witnesses that could not be overcome at the time. The Claimants consented to the adjournment, and it was re-fixed, pursuant to an order of the Judge, to commence on 25 January 2021.

The expected evidence at trial

13. It is helpful to give a brief account of the evidence that was expected to be called at trial.

14. The Claimants' factual witnesses are two of the liquidators, one of whom covers the underlying fraud, and the other of whom addresses the liquidators' investigations in the context of the limitation issue. Neither therefore directly addresses the question of TFS's dishonesty. To establish this the Claimants rely heavily on recordings of telephone conversations at the time of the trading, and other matters that are documented. We have seen the Claimants' very detailed written opening for trial, the bulk of which consists of a day-by-day account of the transcripts of the relevant recordings, and the inferences that they say can be drawn from them.

15. TFS served factual witness statements for trial from Mr Bertali, Ms Mortimer, Mr Anderson and Mr Weston, all of whom it at that stage intended to call to give oral evidence.

16. There are also experts who are due to give evidence, one called by the Claimants on the carbon market at the time, and one called by each party in the field of forensic accountancy who address the construction of the "deal chains" (ie the details of the underlying fraud).

17. In very broad outline, we were told that the shape of the trial, if it went ahead as scheduled, was expected to consist of a week's pre-reading for the judge on 18

January, one week for openings and the Claimants' factual case, one for TFS's factual witnesses, one for experts, and one for closings.

Developments with Ms Mortimer

18. Ms Mortimer's witness statement was dated November 2019. There was then no reason to think that she would not give live evidence. In August 2020 however she was diagnosed with a serious illness. It is unnecessary to give the details in a public judgment, but by November 2020 it was very clear that it would be quite impossible for her to give evidence at trial in January 2021. At that stage, her prognosis was not good and it appeared doubtful whether she would ever be in a position to give evidence. In those circumstances TFS, "entirely understandably" as the Judge said (Jmt at [20(1)]), did not then seek an adjournment. TFS served a hearsay notice in respect of her witness statement and prepared to conduct the trial without her giving live evidence.

The application to adjourn

19. That forms the background to TFS's application for an adjournment of the trial.

20. The impetus for the application was concern expressed in late December 2020 by each of Mr Bertali, Mr Anderson and Mr Weston about attending court to give evidence in person in the light of the deteriorating situation with the pandemic. In the event, the Judge held that although these concerns were "perfectly understandable" (Jmt at [16]-[17]), he would not accede to an adjournment to accommodate them, instead giving detailed directions for trial to take place in hybrid form in a supercourt in the Rolls Building in such a way as to assuage any reasonable person's concerns about Covid infection through attending court in person, and leaving open for further consideration whether these witnesses would in fact give evidence in person or remotely (Jmt at [19]). No appeal has been brought against this aspect of the Judgment, and we have not heard any argument about it, but simply by reading the Judgment one can see that the Judge dealt with the point carefully, thoughtfully and with great sensitivity. It is not necessary to make any further reference to the position of these three witnesses, or the application to adjourn so far as based on their position.

21. However in the course of investigating the position TFS contacted Ms Mortimer and learnt that she had very recently (shortly before Christmas) received a much improved prognosis and that although it was still quite impossible for her to attend a trial in January 2021 or for some time thereafter, there was now good reason to expect her to be fully recovered by the end of September 2021 and to be able to give live evidence at a trial thereafter.

22. When TFS issued an application to adjourn the trial therefore, which it did on 6 January 2021, it was based not only on the concerns of the other three witnesses, but on the change in Ms Mortimer's circumstances. It was supported by a witness statement from her explaining in some detail how strongly she felt that she did not want the allegations of dishonesty against her to be resolved by a judge without hearing from her directly. It is unnecessary to go into the details: the Judge accepted that findings of dishonesty against any of the individuals would affect their own reputation and future employability (Jmt at [5]), and I see no reason to doubt that a finding of dishonesty against Ms Mortimer would be likely to have a very significant

impact on her future career, if not destroy it entirely.

23. TFS's application sought an adjournment to the first convenient date after 1 October 2021. It suggested a partial adjournment, with the existing trial fixture used for the resolution of certain aspects (the limitation defence and a question of law as to whether the Claimants had, on the pleaded case, a valid claim under s. 213 of the Insolvency Act 1986), but the Judge said (Jmt at [22]) that although it did not arise, if he had been minded to accede to an adjournment his instinct would have been to adjourn everything rather than splitting the issues. The possibility of a partial adjournment has not been revived by either party before us, and we have been addressed on the basis that the trial should either be adjourned as a whole or not at all.

The Judgment

24. In the Judgment the Judge first set out the background at [1]-[6], noting in particular that the stakes, for the individual witnesses as well as the parties, were very high. The case had been docketed to him and he was evidently very familiar with it. At [7] he made the point that all the witnesses (that is Messrs Bertali, Anderson and Weston and Ms Mortimer) wanted to give evidence, saying at [7(3)]:

> "Independently of TFS, the Witnesses positively wish to give evidence to vindicate themselves in light of Bilta's allegations. Obviously, on one level, the trial is only concerned with the issues as between Bilta and TFS, and the purpose of the trial is to determine those issues. But – and again this is not seriously contested by Bilta, and was positively advanced by TFS – I must bear in mind the effect of my judgment (particularly, if it is adverse) on persons apart from TFS. That includes – although it is not limited to – the Witnesses."

At [8(4)] he made the point that in Ms Mortimer's case it was only medical reasons that prevented her from giving evidence at trial. At [12] he reverted to her position and recorded that although it was impossible for her to attend trial as then scheduled, nevertheless if he adjourned the trial and it took place in early to mid-2022 (as it would, given the present state of the lists) there were excellent prospects that she could attend to give evidence, adding:

> "That, it seems to me, is a self-standing point in favour of adjournment, which I must take into account. I will deal with it separately, and will consider first the principal reason why TFS seeks an adjournment now…"

That principal reason was the position of the other three witnesses, and he proceeded to consider that in detail over 10 pages at [14]-[19], concluding at [19] that, considering their position only, he would not accede to the application to adjourn. I have already said that this is a careful, thoughtful and sensitive treatment of the issue, of which no criticism is made.

25. He then turned to the position of Ms Mortimer at [20] as follows:

> "…I turn then, to the separate position of Ms Mortimer. Ms Mortimer – for reasons that are entirely independent of the pandemic – cannot give evidence at the trial. If the trial were to be adjourned, I am prepared to assume that she would be able to give evidence and (I hope I may say) everyone concerned wishes this assumption to be a safe one. The question is whether I should adjourn the trial for this reason:

(1) It seems to me that, as a self-standing reason, this is not sufficient to justify an adjournment of a significant trial. Mr Scorey did not – quite properly – argue TFS's application on this basis. The appropriate time for making such an application would have been in early November 2020, when the issues regarding Ms Mortimer came to the attention of TFS's solicitors. Entirely understandably, TFS's solicitors did not apply for an adjournment, but rather served a "hearsay" notice in respect of Ms Mortimer's evidence.

(2) It may be said that an application could not be made in November 2020 because Ms Mortimer's condition was considered permanent whereas it now appears to be temporary. As Mr Scorey said in submissions, an adjournment application in November 2020 would not have had any point for this reason. Considering a self-standing application to adjourn in this light, made now in light of all the evidence, I still do not consider that it could justify standing out of the list a trial of this sort, so close to hearing. Accordingly, had an application to adjourn solely on the basis of Ms Mortimer's position been made – and, I stress, this was not Mr Scorey's position – I would have refused it.

(3) The question is therefore whether – taking the prospect of Ms Mortimer's availability if I were to adjourn as a relevant and material factor in the case-management decisions that I have described in this ruling – that factor makes a difference. It does not. I have concluded – for the reasons I have given – that the trial can go ahead, and that has not been a "marginal" decision, where Ms Mortimer's presence/absence could swing the balance of my consideration. Taking fully into account Ms Mortimer's position – including her clearly expressed desire to give evidence – an adjournment nevertheless remains inappropriate.

He therefore dismissed the application for an adjournment.

26. In the PTA Ruling he accepted that Mr Scorey did in fact advance Ms Mortimer's ill-health as a free-standing basis for adjournment (as the transcript bears out), saying that that was where the application ended up, but not how it began (PTA at [4]). At [6] he expanded on his reasoning as follows:

"It is fair to say that I did not consider that Ms Mortimer's ill-health and her consequent inability to attend trial constituted an absolute reason for adjourning. Indeed, the case was not put in that way, and I do not consider that that would be a correct (or even arguable) statement of the law, whether the applicant is a party (as Ms Mortimer is not) or a witness who:

(1) is an important witness to the party calling her (TFS);

(2) is willing to give evidence;

(3) is unable, through no fault of her own, to give evidence at the time scheduled for the trial, but available at a later date, were the trial to be adjourned; and

(4) positively wants to give evidence to "clear" her name from what she considers unsubstantiated and false allegations by Bilta.

All of these points were taken into account in the Ruling. They are obviously material and important. However the decision to adjourn remained, in my judgment, a discretionary one for me as the trial judge, and one with which (in my judgment) an appellate court will be slow to interfere. Despite the undoubted

> importance of Ms Mortimer's attendance at trial to TFS and to Ms Mortimer herself, I consider that my decision to adjourn lies within the range of decisions open to me…"

Ground of appeal

27. Although somewhat elaborated in the grounds of appeal, the central submission of Mr David Scorey QC, who appeared with Mr Laurence Emmett for TFS, amounts to this: the proper approach to an application to adjourn in circumstances such as this was to ask whether if the trial went ahead it would be fair; if it would not be, then, absent some countervailing consideration, an adjournment should be granted even if it would cause inconvenience. In the present case, he submitted, the Judge had not asked himself the question whether a trial would be fair; but he should have concluded that it would not be, and should therefore have granted an adjournment.

28. For the relevant principles he relied on the comparatively recent statement of them by this Court in *Solanki v Intercity Telecom Ltd* [2018] EWCA Civ 101 (***"Solanki"***) at [32]-[35] per Gloster LJ (with whom Singh LJ agreed).

29. The central submission of Mr Christopher Parker QC, who appeared with Mr Andrew Westwood for the Claimants, was that there was a significant difference between an application to adjourn based on a party's own availability, and one based on the unavailability of a witness, even an important one, and that the principles in *Solanki* were dealing with the former and not the latter. In the present case, although the Judge did not in terms say that the trial would be fair, it was implicit that he considered it would, and that was a decision that was open to him.

30. In those circumstances we were taken to a number of authorities, dating back to long before the introduction of the CPR, and received much more extensive submissions on the law than it appears the Judge did. I consider the authorities below, but it may be helpful if I indicate my conclusions on the relevant principles at the outset. These are that Mr Scorey is right that the guiding principle in an application to adjourn of this type is whether if the trial goes ahead it will be fair in all the circumstances; that the assessment of what is fair is a fact-sensitive one, and not one to be judged by the mechanistic application of any particular checklist; that although the inability of a party himself to attend trial through illness will almost always be a highly material consideration, it is artificial to seek to draw a sharp distinction between that case and the unavailability of a witness; and that the significance to be attached to the inability of an important witness to attend through illness will vary from case to case, but that it will usually be material, and may be decisive. And if the refusal of an adjournment would make the resulting trial unfair, an adjournment should ordinarily be granted, regardless of inconvenience to the other party or other court users, unless this were outweighed by injustice to the other party that could not be compensated for.

The authorities

31. The authorities to which we were referred were the following. With one exception (the decision of Lightman J in *Albon v Naza Motor Trading Sdn Bhd (No 5)* [2007] EWHC 2613 (Ch) (***"Albon"***)), they were all decisions of this Court.

32. *Dick v Piller* [1943] 1 KB 497 was an appeal by the defendant from the Epsom

County Court. The plaintiff was a racehorse trainer who sued for monies due under an oral contract with the defendant for the training and racing of his daughter's racehorses; the contract was not denied, but the defendant disputed the quantum due on the basis of overpayments and other grounds. Scott LJ referred at 499 to the fact that the arrangements were all made by word of mouth and the payments not documented, and said:

> "The defendant's evidence was, therefore, material, and perhaps, critically important, if the issues raised were really to be tried on their merits, for nobody else could give his evidence."

The case had already been adjourned part-heard once and at the resumed hearing the defendant applied for a further adjournment on the basis of a medical certificate that he was unable to leave his house for two weeks due to illness. The County Court judge refused an adjournment and gave judgment for the plaintiff.

33. At that date an appeal from the County Court only lay on a point of law. The majority of the Court of Appeal (Scott LJ and Croom-Johnson J) held that the judge had made an error of law. Scott LJ put it like this (at 499):

> "I think the judge caused a serious miscarriage of justice, and that, in doing so, he neglected a first principle of law, for he deprived the defendant of his elementary right to be heard before he was condemned.
>
> …The case resolves itself into a short question of law. If an important witness – a fortiori if he is a party – is prevented by illness from attending the court for an adjourned hearing, at which his evidence is directly and seriously material, what is the legal duty of the judge when an adjournment is asked for? In my view, if he is satisfied (1.) of the medical fact and (2.) that the evidence is relevant and may be important, it is his duty to give an adjournment – it may be on terms – but he ought to give it unless, on the other hand, he is satisfied that an injustice would thereby be done to the other side which cannot be reduced by costs. These questions may depend on matters of degree, and matters of fact may be involved (as du Parcq L.J. truly says), but on the facts of the present case I think the judge went wrong in law because (1.) my two positive conditions were satisfied, and (2) no suggestion was made that an injustice would result to the plaintiff."

Croom-Johnson J said (at 505) that he had no doubt not only that the defendant's evidence was relevant but also that it was:

> "essential to the proper presentation of the defence and vital to be considered if justice were done"

and added:

> "I cannot believe that the judge applied his mind to the possibility of an injustice resulting from the case being decided without the defendant's evidence. Had he done so, he must, I think, have come to only one conclusion."

Du Parcq LJ disagreed, but only on the question whether the judge was entitled to find as a fact that it had not been established that the defendant was in fact ill and unable to attend (and hence that no appeal would lie), saying (at 502-3) that he would assume that if the judge had been satisfied of this, his decision to proceed would be an error of

law.

34. Two things are notable from the decision. The first is that although it was the defendant himself whose evidence was in issue, this was not said to be the decisive factor: Scott LJ referred to his evidence being "material, and, perhaps, critically important" and stated the principles by reference to "an important witness – a fortiori if he is a party" whose evidence is "directly and seriously material"; Croom-Johnson J based his decision on the evidence being "essential" and "vital", rather than on the fact that the evidence was that of the defendant. It is difficult to think that the decision would have been any different if the relevant witness had not in fact been a party – if, for example, all the arrangements had been made orally between the plaintiff and the defendant's daughter, and she were the one who was unable to attend.

35. The second is that the members of the Court of Appeal, or at any rate the majority, thought it plain that a trial in such circumstances would *prima facie* cause injustice to the defendant – or in other words would be unfair. There have of course been many procedural changes since 1943, not least the introduction of the CPR, but unless these have made all the difference, it would I think be surprising that what struck them then as giving rise to a clear risk of injustice should be regarded very differently today.

36. *Green v Northern General Transport Co Ltd* (1970) 115 SJ 59 (***"Green"***) was an appeal from a decision of Eveleigh J refusing an adjournment of the trial of a personal injuries action. The action was heard in Durham and the defence applied for an adjournment on the ground that a material witness, aged 73 and with bronchitis, was in Somerset. Lord Denning MR (with whom Edmund Davies and Megaw LJJ agreed) was reported as saying:

> "If by refusing an adjournment an injustice would be done, the judge erred in point of law if his decision was unjustified. If there was a material witness who was not available or whose presence was desirable the judge should grant an adjournment provided that any injustice so caused could be compensated in costs."

He cited *Dick v Piller* and the same two points can be made: this was a case of the unavailability of a material witness, rather than that of the defendant (a corporate body) itself; and the relevant question was whether an injustice would be done by refusing an adjournment.

37. *Lombard Finance v Brookplan Trading & Ors* (22 Feb 1990, unrepd) (***"Lombard Finance"***) was another appeal from a refusal to grant an adjournment, this time from the Oxford County Court. The appellant, one of the defendants, was an individual who was sued on a guarantee. His defence, among other things, was that the guarantee had been materially altered after he signed it and his initials forged on the alteration. He applied to adjourn the trial two weeks before its fixed date having discovered that his expert handwriting witness was already committed to other hearings in Leeds on the relevant dates. The County Court judge refused, effectively on the basis that he had left it too late. Taylor LJ (with whom Bingham LJ agreed) said that the judge's discretion was unfettered but had to be exercised judicially, and that this Court would not interfere unless it were such as to amount to an error of law or be likely to cause a miscarriage of justice, citing *Dick v Piller*. He said he had considerable sympathy with the judge's concern that administrative arrangements of the courts should not be frustrated by capricious applications for adjournments. But

the application here was genuine, made two weeks before trial, and without his expert witness the applicant's case, certainly in relation to the alleged forgery, would "clearly be at a very severe disadvantage." He continued:

> "I have borne in mind the reluctance this court should have to interfere with the exercise of a judge's discretion, but it does seem to me that it would be unfair in the extreme that, against the background of circumstances I have described, this applicant should be deprived of the expert witness simply because he did not notify the court a little earlier that the witness was not available."

Again this was a case where the unavailability was that of an important witness not of the defendant himself, and the relevant question was whether it would be unfair to go ahead with a trial in the circumstances.

38. In *Teinaz v Wandsworth London BC* [2002] EWCA Civ 1040 (***"Teinaz"***) the applicant had brought a complaint to the Employment Tribunal of racial discrimination and unfair dismissal, and applied to adjourn the hearing on medical grounds. The Tribunal had refused to adjourn it but the Employment Appeal Tribunal had allowed an appeal. On the defendant Council's further appeal to this Court, Peter Gibson LJ (with whom Arden LJ and Buckley J agreed) made some general observations on adjournments at [20]-[23], including the following:

> "20. … Although an adjournment is a discretionary matter, some adjournments must be granted if not to do so is a denial of justice. Where the consequences of the refusal of an adjournment are severe, such as where it will lead to the dismissal of the proceedings, the tribunal or court must be particularly careful not to cause an injustice to the litigant seeking an adjournment. As was said by Atkin LJ in *Maxwell v Keun* [1928] 1 KB 645, 653 on adjournments in ordinary civil actions:
>
> > "I quite agree that the Court of Appeal ought to be very slow indeed to interfere with the discretion of the learned judge on such a question as an adjournment of a trial, and it very seldom does so; on the other hand, if it appears that the result of the order below is to defeat the rights of the parties altogether and to do that which the Court of Appeal is satisfied would be an injustice to one or other of the parties, then the court has power to review such an order, and it is, to my mind, its duty to do so."
>
> 21. 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 or to the other parties. That litigant's right to a fair trial under article 6 of the European Convention on Human Rights demands nothing less. But the tribunal or court is entitled to be satisfied that the inability of the litigant to be present is genuine, and the onus is on the applicant for an adjournment to prove the need for such an adjournment."

39. He then gave some guidance as to what a court or tribunal should do if it is presented with some evidence that a litigant is unfit to attend, but has doubts whether it is genuine or sufficient. Such a situation arises not infrequently, and it often calls for careful handling: see the notes in *Civil Procedure (the White Book) 2020* at §3.1.3 and the cases there cited, in particular the guidance given by Norris J in *Levy v Ellis-Carr* [2012] EWHC 63 (Ch), endorsed by decisions of this Court. But the present case was

not one where there was any doubt about the medical evidence, which was detailed, recent and entirely compelling, and which the Judge rightly accepted without qualification.

40. *Teinaz* then was a case of a litigant's unavailability rather than that of a witness, which explains the reference to Article 6 of the European Convention on Human Rights (**"Article 6"**), but with that difference does not seem to me to take any different view from that found in the earlier authorities.

41. *Albon* was a case where shortly before the hearing of a crucial application the defendant stood down its legal team, save to apply for an adjournment on the basis that a witness was too sick to travel from Malaysia to England, failing which the application would be abandoned. Lightman J was faced with a submission, supported by *Dick v Piller* and other authority, that if four conditions were met, the defendant was entitled to an adjournment as of right. The four conditions were that (i) a witness was unable to attend on grounds of ill-health; (ii) the witness's evidence was reasonably necessary to present the party's case properly; (iii) there was a reasonable prospect that the witness would be able to attend an adjourned hearing at a specific reasonable future date; and (iv) that there was no injustice to the other party that could not be compensated for in costs or otherwise (at [14]).

42. Lightman J held that the first condition was met but not the other three. In particular, the witness's evidence was already before the Court in the form of a witness statement, and the absence of cross-examination would go to weight not admissibility; there was in fact no evidence that cross-examination could not take place by video link (at [15]). Her evidence was very much of secondary importance in any event, not least because she was a personal assistant who herself said her knowledge was limited, and her recollection vague, of the relevant events (ibid). The date when she might be able to attend a hearing was also left uncertain (at [16]); and there was irremediable prejudice to the claimant (at [17]).

43. These conclusions were by themselves sufficient to justify a refusal of an adjournment. Lightman J however went on to say that the question of an adjournment was not, since the introduction of the CPR, governed by the old authorities, but by the overriding objective, and that while no doubt the considerations held critical in the relevant authorities were relevant, they were not decisive (at [18]). He then proceeded to give further reasons for refusing an adjournment: he was very unimpressed with the defendant's conduct, which had been fairly described by counsel for the claimant as "holding a gun to the court" and for which the defendant and its solicitors were to be seriously criticised (at [19]); he also concluded that the defendant's claimed reason for abandoning the application was a pretext and not genuine, and was designed to prevent the Court deciding the authenticity of a particular document (at [21]).

44. I will come back to the question as to the effect of the introduction of the CPR on the pre-CPR authorities, but simply note at this stage that Lightman J had ample reasons to refuse an adjournment in any event, and that what he said about the status of the pre-CPR authorities was not necessary to his decision.

45. In *Terluk v Berezovsky* [2010] EWCA Civ 1345 (***"Terluk"***) the question was whether an adjournment should have been granted not on the grounds of the unavailability of a

party or witness but to enable the defendant to obtain legal representation. It is of interest for two points made by Sedley LJ (on behalf of himself and Mummery LJ). First at [18]:

> "Our approach to this question is that the test to be applied to a decision on the adjournment of proceedings is not whether it lay within the broad band of judicial discretion but whether, in the judgment of the appellate court, it was unfair. In *Gillies v Secretary of State for Work and Pensions* [2006] UKHL 2, Lord Hope said (at §6):
>
> > "[T]he question whether a tribunal … was acting in breach of the principles of natural justice is essentially a question of law."
>
> As Carnwath LJ said in *AA (Uganda) v Secretary of State for the Home Department* [2008] EWCA Civ 579, §50, anything less would be a departure from the appellant court's constitutional responsibility. This "non-*Wednesbury*" approach, we would note, has a pedigree at least as longstanding as the decision of the divisional court in *R v S W London SBAT, ex parte Bullen* (1976) 120 Sol. Jo. 437; see also *R v Panel on Takeovers, ex p Guinness PLC* [1990] 1 QB 146, 178G-H per Lord Donaldson (who had been a party to the *Bullen* decision) and 184 C-E per Lloyd LJ. It also conforms with the jurisprudence of the European Court of Human Rights under article 6 of the Convention – for we accept without demur that what was engaged by the successive applications for an adjournment was the defendant's right both at common law and under the ECHR to a fair trial."

And second at [20]:

> "We would add that the question whether a procedural decision was fair does not involve a premise that in any given forensic situation only one outcome is ever fair. Without reverting to the notion of a broad discretionary highway one can recognise that there may be more than one genuinely fair solution to a difficulty. As Lord Widgery CJ indicated in *Bullen*, it is where it can say with confidence that the course taken was not fair that an appellate or reviewing court should intervene. Put another way, the question is whether the decision was a fair one, not whether it was "the" fair one."

46. In *Dhillon v Asiedu* [2012] EWCA Civ 1020 (***"Dhillon"***) the claim was to enforce a charge to recover monies due under a loan that was part of an arrangement under which properties were sold by the claimant to the defendant. The defence relied on oral discussions between the claimant and a Mr Mirza who was the defendant's business partner and who had conducted the negotiations on her behalf. An adjournment was sought on the first day of the trial on two grounds, one that the defendant was lacking capacity and unable to give evidence, and the other that her litigation friend had had insufficient time to prepare. There had been a long history of adjournments and extensions of time for her to serve evidence; the trial was the third time the matter had been listed for final disposal and by that stage the defendant was debarred under an unless order from adducing any further witness evidence. The judge refused the application to adjourn, and that was upheld on appeal. Baron J (with whom Arden and Davis LJJ agreed) referred to the decisions in *Albon* and *Terluk*. The conclusions that she derived from these two authorities (there is no indication that any others had been cited) were as follows (at [33]):

> "a. the overriding objective requires cases to be dealt with justly. CPR 1.1(2)(d)

> demands that the Court deals with cases 'expeditiously and fairly'. Fairness requires the position of both sides to be considered and this is in accordance with Article 6 ECHR.
>
> b. fairness can only be determined by taking all relevant matters into account (and excluding irrelevant matters).
>
> c. it may be, in any one scenario, that a number of fair outcomes are possible. Therefore a balancing exercise has to be conducted in each case. It is only when the decision of the first instance judge is plainly wrong that the Court of Appeal will interfere with that decision.
>
> d. unless the Appeal Court can identify that the judge has taken into account immaterial factors, omitted to take into account material factors, erred in principle or come to a decision that was impermissible (*Aldi Stores Limited v WSP Group Plc* [2007] EWCA Civ 1260, [2008] 1 WLR 748, paragraph 16) the decision at First Instance must prevail."

On the facts she held that the judge's decision was one that he was entitled to reach, the defendant being largely responsible for any difficulties, having failed to comply with numerous previous orders at a stage at which she had capacity, and having had plenty of time to prepare her case. She also took into account the fact that the judge concluded that it was most unlikely that she could have given material evidence in any event as the negotiations had been carried out by Mr Mirza (who had died before the trial).

47. The latest case we were shown was *Solanki*. This was another case where an application for an adjournment of the trial on the grounds of illness of the defendant had been refused. Gloster LJ considered the principles at [32]-[35]. At [32] she summarised the position as follows:

> "Mr Small rightly accepted that the question of whether or not to grant an adjournment of a trial on health grounds was a discretionary matter for the trial judge. However, as he submitted, and as I accept, the jurisdiction of this court is not confined simply to considering whether irrelevant factors were taken into account, or relevant ones were ignored in the *Wednesbury* sense, or whether the decision not to adjourn lay within the broad band of judicial discretion of the trial judge. Rather, the authorities make clear that, in reviewing the exercise of discretion, the Court of Appeal has to be satisfied that the decision to refuse the adjournment was not "unfair": for example, see *Terluk v Berezovsky* [2010] EWCA Civ 1345 (per Sedley LJ at paras 18-20), quoted below, particularly in circumstances where his right to a fair trial under Article 6 ECHR is at stake."

Having cited from *Teinaz* and *Terluk* she said at [35]:

> "Obviously overall fairness to both parties must be considered."

On the facts the appeal was allowed.

Conclusion on the principles

48. I have undertaken this extensive review of the authorities in the light of the submissions we have received. As so often when a number of authorities are examined, it is possible to find differences of emphasis, but I do not myself think that

it is difficult to identify the principles which should be applied. I can do so by reference to the propositions advanced by Mr Scorey and Mr Parker respectively.

49. Mr Scorey's propositions were as follows:

(1) Whether as a matter of the common law's insistence on a fair trial, or the requirements of Article 6, or the application of the overriding objective, the test is the same, namely whether a refusal of an adjournment will lead to an unfair trial.

I agree. This is a consistent thread from the early cases (*Dick v Piller, Green*) which refer to a miscarriage of justice or an injustice, through *Teinaz* ("a denial of justice") to the more recent cases, which repeatedly identify the question as one of fairness: see in particular *Terluk* at [18] and *Solanki* at [32].

(2) Although the decision is a discretionary one, the appellate court will adopt a "non-*Wednesbury*" review of the lower court's decision.

There is undoubtedly support in the cases for describing the question of an adjournment as a discretionary decision, as in one sense it plainly is, CPR r 3.1(2)(b) (which is where the Court's power to adjourn is found) providing that the Court "may" adjourn a hearing. But as pointed out by David Richards LJ in argument, if the question is whether the resulting trial will be fair, this is more of an evaluative question. Nothing turns in the present appeal on the precise classification and I prefer to say simply that the question on appeal is whether the lower court was entitled to reach the decision it did, and that in this particular context it is clear from the authorities that the appellate court must itself be satisfied that a decision to refuse an adjournment was not such as to cause injustice or unfairness. Again this is a consistent thread from the early cases through *Teinaz* and *Terluk* to *Solanki*. And I accept Mr Scorey's submission that insofar as *Dhillon* at [33(c) and (d)] suggests that the appellate court's review is similar to that of any discretionary case management decision, it is out of line with the other authorities.

(3) When considering whether a particular outcome is fair, it should not be assumed that only one outcome is fair.

This is established by the authorities: *Terluk* at [20], *Dhillon* at [33(b)]. But equally in some circumstances there is really only one answer: see *Teinaz* at [20] ("some adjournments must be granted").

(4) Fairness involves fairness to both parties. But inconvenience to the other party (or other court users) is not a relevant countervailing factor and is usually not a reason to refuse an adjournment.

This is again established by the authorities. As to fairness involving fairness to both parties, see *Dhillon* at [33(a)], *Solanki* at [35]. As to the requirements of a fair trial taking precedence over inconvenience to the other party or other court users, see *Teinaz* at [21]. But Mr Scorey acknowledged, as can be seen from the earliest cases, that uncompensatable injustice to the other party may be a ground for refusing an adjournment.

50. Mr Parker's central proposition was that there is a real and significant difference between an application to adjourn based on a party's own unavailability and the unavailability of an important witness. I have already indicated that I do not accept this submission. I do not think any support for it can be found in the authorities. As shown above, *Dick v Piller* was premised on the importance of the defendant's evidence, not on the fact that he was a party; and *Green* and *Lombard Finance* were examples of important witnesses being unavailable. Although none of the cases since *Albon* have concerned the unavailability of a non-party witness, nothing in them suggests that this has changed.

51. What is true is that since the Human Rights Act, Article 6 has underlined a party's right to a fair trial in the determination of his civil rights and obligations, and no doubt Article 6 is likely to be engaged when it is the party himself that is unavailable. But even then, this may depend on the extent to which the party's own presence is important: see *Teinaz* at [21] referring to the case of a litigant "whose presence is needed for the fair trial of a case". The question may of course be affected by whether a litigant is acting in person, but where litigants are represented, it is far from universally the case that a fair trial requires their personal attendance. Some cases turn on pure points of law on which contested evidence is not required at all. In others, although there are issues of fact, the litigant himself has little relevant evidence to give. *Dhillon* was such a case (as well as being an example where there was no unfairness as the situation was really of the defendant's own making). And where the litigant is a corporate entity, those responsible for the conduct of the litigation may be very different from the witnesses it intends to call, and the inability of the latter to attend court may be much more significant.

52. We were not shown any authority on whether Article 6 is engaged when a party is able to attend trial but a significant witness is not. But in any event the applicability of Article 6 is not the determining factor. The common law's insistence on a fair trial long pre-dates it, and for the reasons I have given I do not accept that a sharp distinction can be made between the case of the illness of a party as opposed to that of a witness; what fairness requires will depend on all the circumstances of the case.

53. Mr Parker also submitted that whereas the pre-CPR cases had laid down very prescriptive rules to the effect that if an important witness was unavailable, the party was almost guaranteed an adjournment, *Dick v Piller* was no longer good law since the introduction of the CPR, relying on *Albon* and its approval in *Dhillon*. I have already said that what Lightman J said in *Albon* was unnecessary to the decision, and technically what Baron J said about it in *Dhillon* was also *obiter* as that was not a case of the unavailability of a witness. But I have no difficulty with the proposition that what fairness requires must depend on current procedures, and litigation is now conducted in a way that is very different in some respects from how it was conducted in 1943. Evidence was almost all given orally, with very limited scope for hearsay to be adduced, whereas now evidence in chief is universally given by witness statement, and hearsay evidence is generally admissible, with the result, as Lightman J pointed out, that the non-attendance of a witness does not prevent their evidence being adduced at all; it goes to the weight to be attached to it. And although oral evidence with cross-examination is still the hallmark of English trials, the significance of oral evidence varies from case to case: in some it is critical, whereas in others the contemporaneous documentation is in practice of far more utility in deciding the

issues.

54. I accept therefore that the importance of a particular witness's oral evidence to the fairness of a trial will all depend on the facts, and the question cannot be approached in a mechanistic or box-ticking manner. But Mr Scorey did not suggest it could. And, as I have already said, I do not find anything in the authorities since the introduction of the CPR which suggests that the availability of an important witness has ceased to be a relevant consideration, and there is no reason to conclude that it has.

55. Mr Parker had a third submission, which was that in applying the overriding objective under CPR r 1.1 the need to ensure that a case is dealt with expeditiously and fairly is only one of the factors to be taken into account, and that all the factors are relevant. As a matter of the drafting of the rule that is no doubt true (see CPR r 1.1(2) where this is but one of the matters listed), but in the ordinary case if a judge concludes that the unavailability of an important witness would make the resulting trial unfair, it is difficult to see how an adjournment could properly be refused, and indeed as I understood it Mr Parker accepted that.

56. In my judgment therefore the relevant principles are as I have set them out at paragraph 30 above.

Application of the principles to the present case

57. Mr Scorey submitted that it followed from the principles discussed above that the Judge should have asked himself whether it would be fair to have a trial without the oral evidence of Ms Mortimer, and then if the answer were No, whether that was outweighed by uncompensatable prejudice to the Claimants. For the reasons I have given I accept that submission.

58. Mr Scorey then submitted that that was not how the Judge approached it. The Judge's reasons are found in the Judgment at [20] (set out at paragraph 25 above). At [20(1)] he said that the appropriate time for applying for an adjournment on the basis of Ms Mortimer's position would have been in November 2020, but he himself answers this at [20(2)] where he accepts that in the light of her then prognosis there would have been no point in doing so. He also says that Mr Scorey did not rely on her position as a self-standing reason for an adjournment; this was not in fact right (as the Judge accepted in the PTA Ruling), but this is not significant as the Judge indicates that he would not have acceded to it on that basis anyway. But the reason he gives is that it is not sufficient to justify an adjournment of a significant trial, and could not justify standing a trial of this sort out of the list.

59. Mr Scorey submitted that the Judge appears to have weighed up the inconvenience of standing a significant case out of the lists very shortly before trial against the fact that Ms Mortimer was an important witness for TFS who positively wished to give evidence (see PTA at [6]), instead of asking himself whether the resulting trial would be fair or not.

60. Mr Parker accepted that the Judge did not expressly deal with the question of the fairness of the resulting trial, but pointed out that in an earlier part of the Judgment, when discussing the question of remote hearings, the Judge had referred to the Court

being the ultimate arbiter of whether proceedings so conducted "can be fair and proper", and suggested that he must have had this in mind and it was implicit in the Judge's reasoning that he considered that the trial would be a fair one even in the absence of Ms Mortimer.

61. To my mind however Mr Scorey's submission is well-founded. Reading both the Judgment and the PTA Ruling together, it does seem to me that the Judge balanced the importance of the evidence to TFS against the inconvenience of an adjournment rather than focusing on whether the trial would be fair; and that that entitles – indeed obliges – us to form our own view on the question of fairness.

Would it be fair to proceed to trial without Ms Mortimer's evidence?

62. I can deal with this quite shortly. Ms Mortimer, as the Judge recognised, is an important witness for TFS. Mr Parker expressly accepted that he had never sought to suggest otherwise. Cases where an individual is accused of dishonesty are paradigm examples where the trial judge will benefit from seeing the witness being cross-examined. The case against her is heavily based on inferences from transcripts of recordings of telephone conversations. TFS is undoubtedly justified in wanting her to give oral evidence to explain, if she can, why those inferences should not be drawn. She has given a witness statement, but to proceed without her oral evidence and without it being tested in cross-examination will undoubtedly limit the weight that the trial judge would be able to give it. In circumstances where it appears very likely that she will be able to give oral evidence at a trial in or after October 2021, it does not seem fair to me that TFS should be deprived of the opportunity of calling her in person.

63. It is not suggested that there would be any uncompensatable prejudice to the Claimants. The Judge himself accepted that the claim was "just" about money, and that it was not one of those cases where there would be extraordinarily adverse consequences if it were put off again (Jmt at [21]). It is admittedly already a stale case, but the Claimants' case, as I have explained, does not rely on recollections of witnesses which would be liable to fade, and there seems no reason to think that the presentation of its case will be adversely affected. TFS has offered in correspondence to pay the Claimants' reasonable legal costs thrown away by the adjournment, and, in the event the claim succeeds, to pay interest in respect of the period from April 2020 until the commencement of the re-listed trial (without prejudice to any arguments the Appellant may make in respect of earlier periods and as to the basis and rate of interest). Mr Parker suggested that that would not fully cover the Claimants against liabilities under their CFA arrangements, but that was not a point dealt with in the Judgment or raised in the Respondent's skeleton, nor have we seen the CFA in question, and I do not think we can go into it.

64. Those were the reasons why I agreed that the appeal should be allowed and the trial adjourned to the first available date after 1 October 2021. We were told that in the normal course the trial would be listed from about March 2022. It is not for us to direct whether the trial should be expedited, but we directed the parties to write to the Chancellor of the High Court inviting him to consider the question.

Postscript – fairness to Ms Mortimer?

65. I have addressed the question of fairness above from the point of view of TFS, which is of course the appellant before us. It is not therefore necessary to give any separate consideration to the question of fairness to Ms Mortimer herself. Mr Scorey indeed made it clear that he represented TFS not Ms Mortimer and that he did not suggest that she had any locus as a witness to come before the Court. He said that he was reticent about proposing any general propositions, but did suggest that in the present case where it was not only TFS who wanted her to give evidence in its own interests, but she herself who wanted to give evidence because of the potentially disastrous consequences to her of a finding of dishonesty, that was a relevant factor.

66. I too am reluctant to advance any general propositions, especially as we have not heard argument on the point. The function of the civil courts is to resolve disputes between parties and it is undoubtedly the interests of the parties that are the primary focus of the Court's concern. But I would not want it to be thought that the Court should simply ignore the interests of other persons caught up in its processes, and to my mind there is considerable force in the suggestion that the Court can, and should, have regard to fairness to witnesses as well. In the present case the potential professional and personal consequences for Ms Mortimer are about as serious as they could be, and the fact that she is not a party does nothing to diminish this. There are examples of the Court having regard to the interests of a witness: a judge will not usually make serious adverse findings against a witness without them having had forewarning of the allegations, and a witness can apply to set aside a witness summons that is oppressive. It is not necessary to explore the point further in the present case, where it makes no difference, but I would like to leave the point open for further consideration in a case where it might.

Lord Justice Peter Jackson

67. I agree, and only add two matters. First, as seen from the transcript and the judgment, the focus of the application made to the Judge was very much on the issue of the physical attendance of the three other witnesses, as to which there is no appeal (see paragraph 20 above). Ms Mortimer's position was in consequence much more shortly dealt with, to the extent that the Judge initially mistook the nature of the application in her regard. Second, I would endorse what Nugee LJ says at paragraph 39. There are two aspects to an application to adjourn: assessing the facts and exercising the discretion. Here, the facts supporting the application were not in dispute and the appeal concerned the exercise of discretion. But in every case, the court will first need to assess the facts behind the application, and where a litigant fails to substantiate the reason for an adjournment, the outcome of the exercise of discretion will scarcely be in doubt.

Lord Justice David Richards

68. I agree with the reasons given by Nugee LJ for our decision to allow the appeal.