Neutral Citation Number: [2020] EWHC 542 (Ch)

Case No: CH-2019-000099

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
APPEALS LIST (ChD)

Royal Courts of Justice
Rolls Building, Fetter Lane,
London, EC4A 1NL

Date: 12 March 2020

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

- -

Between :

OLUFUNSO ABIODUN OYESANYA	**Applicant/ Appellant**
- and -	
MELISSA LORRAINE JACKSON **(as Trustee in Bankruptcy of Olufunso Abiodun Oyesanya)**	**Respondent**

- -
- -

The Applicant/Appellant in person
Simon Passfield (instructed by **Hugh James**) for the **Respondent**

Hearing date: 5 March 2020

- -

Approved Judgment

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

.....

HHJ Paul Matthews :

Introduction

1. This is my judgment on a "rolled-up" application for permission to appeal with appeal to follow immediately if permission granted, directed by Mann J on 18 November 2019. The judgment below is one given on 4 February 2019 by District Judge Khan sitting in the County Court at Manchester, ordering the applicant to give up vacant possession of a residential property known as 74 The Downs, Altrincham, Cheshire ("the Altrincham property"), to the respondent, who is his trustee in bankruptcy. At the hearing before me, as before the district judge, the applicant appeared in person and the respondent appeared by Simon Passfield of counsel, instructed by Hugh James, solicitors.

2. Before I was able to deal with the rolled-up application, however, I first had to deal with an application for an adjournment of the hearing by the applicant himself. This application, by notice dated 28 February 2020, but received at the Rolls Building only on 4 March 2020 (the day before the hearing), and unserved at all on the respondent, asked for an order that:

> "Upon reading the updated medical report of Dr CT Pughe confirming that the appellant is not medically fit to effectively participate in a hearing in 3 of-5 March 2020; but will be fit to do so in September 2020; aplln/statement; the hearing listed for 3-5 March is postponed and/or adjourned till September 2020".

3. The application notice was accompanied by a document headed "URGENT REQUEST FOR POSTPONEMENT OF HEARING LISTED FOR 3-5 MARCH 2020 UPDATED MEDICAL REPORT OF DR CT PUGHE". This document made submissions in support of the application for an adjournment and more generally on the appeal. Unfortunately, there was no copy of any report of Dr Pughe (or anyone else) with the notice. However, when the applicant arrived at court for the hearing (as it happens, a few minutes after I had sat), he provided Mr Passfield and me with a copy of the report of Dr Pughe. I heard the application to adjourn, and ultimately dismissed it for reasons given orally at the time. The applicant made the application sitting down, as he appeared to be in some distress, and indeed he broke down in tears on two occasions, whilst making the application.

4. After a short break, I then turned to hear the "rolled-up" application for permission to appeal and the substantive appeal. The applicant told me he had not been expecting this, and that he had been told by court staff that this would only be a question of the application for permission to appeal. The standard-form letter which he had been sent by the court before this hearing said that the applicant was required to attend, but that the respondent need not, and would not normally be awarded the costs of doing so. I referred him to paragraph 1 of the order of Mr Justice Mann of 18 November 2019, which made clear that there would be a "rolled-up" hearing, and obviously the respondent was entitled to participate in that. He said he would proceed as a matter of courtesy to the court, but under protest.

5. The applicant then addressed me for approximately an hour and 25 minutes. In marked contrast to his demeanour during the adjournment application, the applicant stood to address me for most of this time, and appeared throughout to be calm and well composed, and able to make the fluent and cogent, though not always relevant, submissions which he wished to make. He was polite, and mostly measured in his submissions. However, during Mr Passfield's submissions, he had a tendency to interrupt counsel whenever he disagreed with him on a point (which was often). After the applicant, I heard from Mr Passfield for about 45 minutes, and finally I heard from the applicant again, in reply, for about 20 minutes. However, most of this simply repeated submissions made to me earlier. Because of the lateness of the hour, and also because of the importance of the matter to the applicant, I indicated that I would not give my decision straightaway, but would put it in writing and hand it down as soon as possible. This is that decision.

Background and procedure

6. In order to make this judgment intelligible, it is necessary for me to set out some of the background and procedural history. To judge from his appearance before me, the applicant is a very intelligent and articulate man. He told me he was a senior consultant, which I understand to mean that he is medically qualified himself, and in a senior position in the medical hierarchy. He also appeared to be well versed in the legal system and with specific legal rules which might be applicable to his case. This may be derived, at least in part, from other litigation in which he has been involved, and which is mentioned in the papers before me.

7. Turning to the history of the matter, on 5 August 2014 Trafford Council presented a petition for the bankruptcy of the applicant. On 2 March 2015, he was adjudicated bankrupt on the petition. On 10 June 2016 the respondent and a Mr John Dickinson were appointed joint trustees in bankruptcy. On 3 August 2017, Mr Dickinson resigned, and the respondent continued as the sole trustee in bankruptcy. Notwithstanding that the bankruptcy dates back to 2015, the applicant remains undischarged even today, because of a failure to cooperate with the respondent in the disclosure and realisation of his assets.

8. On 8 August 2017, the respondent applied for an order for possession of the Altrincham property. The applicant was and is the sole registered proprietor. The first hearing of that possession application took place on 28 November 2017. The applicant sought an adjournment for six months, arguing that his wife had a beneficial interest in the property. The district judge gave directions to enable the applicant's wife to intervene in the proceedings, or at least provide evidence, if she wished to assert a beneficial interest in the property. In fact, the applicant's wife did not seek to be joined or otherwise intervene, and neither did she – or the applicant – serve any evidence in support of any claim to a beneficial interest. In fact, the applicant, whilst he has produced copious written submissions, has never filed any evidence in opposition to the possession application.

9. On 6 March 2018 the matter came back before the court, when the respondent trustee in bankruptcy herself applied to stay the possession application. This

was on the grounds that the applicant was the owner of another residential property, in Harrow, north-west London, the mortgagee of that property had sold it, and it was thought that that sale would release sufficient funds, after discharge of the mortgage, to pay off the bankruptcy debts and all the costs. District Judge Khan acceded to the application and stayed the possession application. As it happened, the Harrow property did not realise as much money as had been hoped, and, after the mortgagee had been paid off, there remained a deficiency of about £121,000 in the bankruptcy.

10. As a result, the respondent applied for the stay on the possession application to be lifted, which the court did on 11 July 2018. The next hearing of the possession application was listed for 9 October 2018. At that hearing, the applicant appeared in person and applied for an adjournment on medical grounds. District Judge Obodai was not satisfied with the evidence of medical incapacity put forward by the applicant that he was unable to participate in the hearing, since he had appeared and made cogent submissions as to the merits of the possession application itself. She went on to make a declaration that the Altrincham property had vested in the respondent as trustee in bankruptcy. But she adjourned consideration of whether to make a possession order to the first available date after 30 November 2018 (which, when the order was drawn, turned out to be 4 February 2019). The applicant was directed to file appropriate medical evidence by 9 November 2018, subsequently extended by agreement to 23 November 2018. In fact, no medical evidence was ever filed by the applicant in compliance with this direction.

11. The possession application came back before District Judge Khan on 4 February 2019. At that hearing, the applicant (acting in person) for the first time produced to the court and to the respondent (represented by counsel) a letter from his general practitioner Dr Thomas Earnshaw, dated 10 January 2019. This was a short letter of just over a page. It said that the applicant was suffering from back pain, plaque psoriasis, and depression. The applicant sought a retrospective extension of time in which to file medical evidence, and an adjournment of the possession application for six months. The district judge refused both applications, and went on to make a possession order and an order for sale to take effect in 56 days, that is by 1 April 2019. I will have to return to the judgment of the district judge.

12. The applicant did not give up possession of the Altrincham property on 1 April 2019. On 11 April 2019, well out of time, he lodged an appellant's notice seeking permission to appeal against the order of District Judge Khan of 4 February 2019. The following day, the applicant applied for a stay of the possession order, not before the court in Manchester, where the order had been made and the bankruptcy was proceeding, but in London, at the Rolls Building, in the interim applications court. No notice of this application was given to the respondent. On this occasion he was represented by counsel under the CLIPS scheme. Fancourt J granted a stay of the possession order to 1 May 2019, but also ordered the applicant to serve copies of the appellant's notice and the application for a stay on the respondent. The applicant did not, however, do so.

13. On 1 May 2019, the application for a stay came back before Birss J in the interim applications court. He ordered that the possession order be stayed until the determination of the application for permission to appeal. On 16 May 2019, the time for the applicant to file his appeal bundle expired, without the applicant having complied. On 18 June 2019 Mann J considered the application for permission to appeal on the papers. He extended time for appealing on the basis that it was better to focus on the application for permission to appeal. Noting the absence of an appeal bundle, he ordered that, unless the applicant lodged the bundle by 16 July 2019, the appeal would be struck out automatically.

14. On 15 July 2019, the day before the deadline of 16 July 2019, the applicant applied to Mann J, again without notice to the respondent, for an extension of time for filing the bundle. Once again, he was represented by counsel under the CLIPS scheme. Mann J extended time for providing the bundle to 12 August 2019, but again in the form of an unless order. He also directed that a transcript be made of the judgment of District Judge Khan at the public expense. The applicant did not lodge the bundle by 12 August 2019. On 20 August 2019 the respondent's solicitors wrote a letter to the applicant giving notice of their intention to enforce the possession order, on the basis that the unless order had taken effect, and the appeal had been struck out, thus determining the stay on the order.

15. The respondent obtained a warrant of possession on 9 September 2019, and it was due to be enforced at 11 AM on 3 October 2019. The respondent's solicitors wrote to the applicant on 20 September 2019, notifying him of the bailiff appointment and requesting his contact details. On 2 October 2019, the day before the warrant was due to be enforced, the applicant applied, once more by counsel under the CLIPS scheme and once again without notice to the respondent, to Nugee J in the interim applications court for a further stay of the possession order, a suspension of the warrant, and an extension of time for filing the bundle. The judge stayed the possession order and suspended the warrant until 9 October 2019. When the bailiff attended on the following day, he was given a copy of the judge's order, and went away.

16. The matter returned to Nugee J on 9 October 2019, when the applicant was once more represented by counsel under the CLIPS scheme. Counsel told the judge on instructions that the appeal bundle had been lodged on 2 October 2019. However, the court office had no record of this. The judge granted relief from sanctions, extended time for filing the bundle, stayed the possession order and suspended the warrant until the determination of the application for permission to appeal, which was to be referred to Mann J on paper.

17. The clerk to Mann J wrote to the applicant on 21 October 2019 seeking a further copy of the appeal bundle to be supplied by 28 October 2019. The applicant did not comply with this. On 5 November 2019, Mann J made an order that unless the applicant delivered the bundle by 8 November 2019 the appeal would be struck out. This order was complied with. On 18 November 2019, Mann J refused permission to appeal from the declaration of vesting made by District Judge Obodai on 9 October 2018. He recorded this application for permission as totally without merit. In relation to the

application for permission to appeal from the decision of District Judge Khan, and as I have already said, he ordered a "rolled-up" oral hearing of the application with the appeal to follow immediately if permission given. In his reasons for the order, the judge expressly referred to the benefit to the court of the respondent attending this hearing. In fact, as I have previously noted, the respondent was represented before me by counsel and solicitors.

18. The appellant's notice makes clear in section 5 that the applicant seeks to appeal against the refusal of the application for an adjournment, the declaration that the Altrincham property was vested in the respondent, as well as the order for possession and sale and costs. As mentioned above, Mann J refused permission to appeal against the vesting declaration, so that in substance the appeal is now sought to be made in relation to the adjournment order and the possession and sale order.

Rules concerning appeals

19. I remind myself of certain relevant rules concerning appeals. By virtue of CPR rule 52.21(1), an appeal is limited to a review of the decision of the court below, unless the court considers that in the circumstances of a particular appeal it would be in the interests of justice to rehear the case: *Audergon v La Baguette Ltd* [2002] EWCA Civ 10, [83]. In the present case I saw no need for a rehearing of the case, so that this appeal is a review. Secondly, rule 52.21(2) provides that no fresh evidence shall be admitted on the appeal "unless the court considers otherwise". This corresponds to what used to be called the rule in *Ladd v Marshall* [1954] 1 WLR 1489. (I add that, when I mentioned this rule and case name to the applicant during the hearing, he agreed that he knew of it, and moreover its name.)

20. Thirdly, rule 52.21(3) provides that the appeal court will allow the appeal where the decision was (a) wrong, or (b) unjust, because of serious procedural or other irregularity in the proceedings below. Here wrong means wrong in law, wrong in fact, or wrong in the exercise of discretion. But the test is different for each of these. The court must distinguish between a finding of primary fact on oral evidence where credibility is in issue, the evaluation of facts by a judge, and the exercise of discretion by the judge. Fourthly, the court below must give reasons for its decisions: *Bassano v Battista* [2007] EWCA Civ 370. But these must be read on the assumption that the judge knew how to perform the judicial functions and the matters which had to be taken into account: *Piglowska v Piglowska* [1999] 1 WLR 1360, 1372. Moreover, specific findings of fact are inherently an incomplete statement of the impression which was made upon the judge by the primary evidence. Expressed findings are always surrounded by a penumbra of imprecision which may still play an important part in the judge's overall evaluation: *Biogen Inc v Medeva plc* [1997] RPC 1, 45.

Grounds of appeal

21. The grounds of appeal attached to the appellant's notice lodged by the applicant are contained in a document of some 17 closely typed pages, grouping the grounds under eight headings (although they run from 1 to 7,

number 6 appears twice). These are prolix and rather repetitive, but cover error of law (four pages), wrong exercise of discretion (five pages), serious procedural or other irregularity resulting in injustice (one page), article 6 of the European Convention on Human Rights (one page), errors of fact (four pages), perversity (one page), reasons (less than one page), and new evidence available (less than one page). I have read all of them, and the applicant addressed me on some of them in detail.

The judgment below

22. The *ex tempore* judgment of District Judge Khan of 4 February 2019 was transcribed, and approved by the judge. It runs to 36 paragraphs over some 5½ pages of single-spaced typescript. In that judgment the district judge deals with (i) the application by the applicant to adjourn the hearing on medical grounds, (ii) the application for a retrospective extension of time for putting in medical evidence, and (iii) the application for possession of the Altrincham property. I also note in passing that the applicant attempted on two occasions to interrupt the judge while he was giving judgment. Such interruptions are apt to disturb the judge's train of thought when giving a detailed *ex tempore* judgment, and I bear this in mind. In addition to this transcript, the rest of the proceedings before the district judge were also transcribed (though not, so far as I am aware, approved by the judge). I have read this transcript also, and I was referred to it in argument.

The order of 18 November 2019

23. In giving the direction on 18 November 2019 for this hearing, Mann J had observed in his reasons:

> "So far as the order and judgment of District Judge Khan are concerned, it is arguable that he did not have sufficiently in mind the difference between considering an extension of time for complying with the previous order setting a timetable for medical evidence and the application itself. It is also unusual for a judge to make up his or her own mind as to the ability of a litigant to conduct litigation in the face of a medical report on the matter. It is true that the absence of any apparent medical evidence that the appellant would be in a better position to conduct the litigation after six months may be fatal to his application to adjourn on medical grounds. However, all these matters are best determined on an oral hearing of the wrapped-up kind referred to above."

24. The judge also observed:

> "While I do not rule on any application to delay the hearing of the appeal on medical grounds, the appellant must understand that the court will be highly reluctant to allow further delays in this already very delayed matter on the basis of continued medical difficulties. If the appellant feels that he is still under some sort of medical disability, then he would be very well advised to seek sufficient assistance to enable him to cope with the appeal. The appellant might consider himself to be a little fortunate to have

> permission to appeal at all, and he should not waste this opportunity to forward his appeal."

25. I understand the use by the judge in the last sentence of this extract of the phrase "fortunate to have permission to appeal at all" to mean that, in the judge's view, the applicant was fortunate to have the opportunity to seek permission at an oral hearing, and that another judge might have refused permission on the papers. I add that the applicant told me that he had understood the reference earlier in the same paragraph to seeking "sufficient assistance to enable him to cope with the appeal" to be a reference to his seeking *medical* assistance rather than *legal* assistance. I cannot accept this. As I have said, the applicant is a highly intelligent man, and has apparently acquired considerable knowledge of the legal system and its procedures. Judges are always recommending to litigants in person that they obtain *legal* assistance before embarking on an important hearing. It is not their function to advise litigants that they should see a doctor as well (or instead). The applicant obtained *legal* assistance for other important hearings. In my judgment, the applicant cannot possibly have supposed that Mann J in saying what he did was suggesting that he obtain *medical* assistance.

The Submissions

26. I turn to deal with the applicant's submissions in relation to the three strands of the district judge's judgment, beginning with the application for an extension of time for serving medical evidence.

1. Application for extension of time to serve medical evidence

27. The applicant submitted that the district judge had been wrong on 4 February 2019 to refuse an application for an adjournment of the hearing on medical grounds. He said he had been not well on that occasion, and was not performing well. Having read the transcript of the proceedings, it is clear that the applicant was given the opportunity by the judge to make his applications for an adjournment and for retrospective permission to extend the timetable for medical evidence, and also his opposition to the possession application, and that the applicant took full advantage of this opportunity. He need not have addressed the court himself, but could have obtained representation. Short of representation, he could also have been accompanied by a so-called McKenzie friend to assist him, and advise him quietly. But the applicant did none of that. Instead, he chose to go ahead on his own and without contemporaneous assistance.

28. The judge dealt with the procedural history of this matter, including the applicant's past failures to comply with court orders, and his latest failure to comply with the direction for service of medical evidence. His provisional view on the application for retrospective permission to extend the timetable for medical evidence was that

> "in the circumstances, it would not be just to entertain the application"

because it

> "chimes with the approach that [the applicant] has taken in the past to seek to delay the trustee in bankruptcy's pursuit – or rather the trustee in bankruptcy's duty to realise assets to discharge the bankruptcy debts and expenses."

29. Nevertheless, in case he was wrong about this, the judge went on to consider the application on its merits. He referred to and went on to apply the *Denton*/*Mitchell* criteria for relief from sanctions. He held (at [33]) that the failure to comply with the direction for the service of medical evidence was serious and significant, and that no good explanation had been provided. His conclusion (at [34]) was that it would be unjust in all the circumstances to grant the application. (I add that I rather think the first sentence of [34] really belongs at the end of [33], and that this may have been the transcriber's decision rather than the judge's, but nothing turns on that.)

30. A decision on relief from sanctions demands the application of the relevant criteria to the facts. The judge had recited all the relevant circumstances and applied the correct criteria to them. Inevitably there is an element of subjective judicial appreciation involved in reaching a conclusion. Nevertheless, I can detect no error of law or procedure in this part of the judge's decision. It was a decision well open to him on the facts. In particular I am satisfied, after hearing from both the applicant and the respondent, that the judge did not confuse the application for an extension of time for serving medical evidence with the application for an adjournment itself. It is true that in paragraph 21 of his judgment he refers to only two applications rather than three, and does not specifically mention the application to adjourn. But when he is considering the quality of the medical evidence, both by reference to *Levy v Ellis-Carr* and otherwise, it is clear that he is dealing at that point with the application to adjourn rather than with the application to extend time for service of the medical evidence. It could be more clearly expressed, but in my judgment it is clear enough.

2. Application for an adjournment

31. The applicant submitted that the district judge should have granted an adjournment because of his (the applicant's) inability on medical grounds to conduct the hearing. In relation to the application for an adjournment, the judge referred to and applied the decision of Norris J in *Levy v Ellis-Carr* [2012] EWHC 63 (Ch), approved by the Court of Appeal in *Ketley v Brent* [2012] EWCA Civ 324. In *Levy* the judge said:

> "33. … For my own part, bearing in mind the material upon which and the circumstances in which decisions about adjournments fall to be made (and in particular because the decision must be reached quickly lest it occupy the time listed for the hearing of the substantive matter and thereby in practice give a party relief to which he is not justly entitled) I do not think an appeal court should be overcritical of the language in which the decision about an adjournment has been expressed by a conscientious judge. An experienced judge may not always articulate all of the factors which have borne upon the decision.

> That is not an encouragement to laxity: it is intended as a recognition of the realities of busy lists.
>
> […]
>
> 36. Can the Appellant demonstrate on this appeal that he had good reason not to attend the hearing (as he would have to do under CPR 39.5)? In my judgment he cannot. The Appellant was evidently able to think about the case on 24 May 2011 (because he went to a doctor and asked for a letter that he could use in the case, plainly to be deployed in the event that an adjournment was not granted): if he could do that then he could come to Court, as his wife did. He has made no application to adduce in evidence that letter (and so has not placed before the court any of the factual material necessary to demonstrate that a medical report could not with reasonable diligence have been obtained before the hearing before the Registrar). But I will consider that additional evidence. In my judgment it falls far short of the medical evidence required to demonstrate that the party is unable to attend a hearing and participate in the trial. *Such evidence should identify the medical attendant and give details of his familiarity with the party's medical condition (detailing all recent consultations), should identify with particularity what the patient's medical condition is and the features of that condition which (in the medical attendant's opinion) prevent participation in the trial process, should provide a reasoned prognosis and should give the court some confidence that what is being expressed is an independent opinion after a proper examination. It is being tendered as expert evidence. The court can then consider what weight to attach to that opinion, and what arrangements might be made (short of an adjournment) to accommodate a party's difficulties. No judge is bound to accept expert evidence: even a proper medical report falls to be considered simply as part of the material as a whole (including the previous conduct of the case).* The letter on which the Appellant relies is wholly inadequate" (emphasis supplied).

32. In the present case the district judge quoted the words italicised above from paragraph 36 of the judgment of Norris J. He applied this test to the letter from Dr Earnshaw of 10 January 2019, but added that what Dr Earnshaw said was "somewhat at odds with the way that after he had composed himself, [the applicant] presented himself to the court." In his reasons for making the order of 18 November 2019, Mann J had said that it was unusual for a judge "to make up his or her own mind as to the ability of a litigant to conduct litigation in the face of a medical report on the matter". But, as I read the judgment of the district judge, he was discounting the value of the medical evidence, and one element of that discount was his observation of the applicant in court before him, something which Dr Earnshaw could not possibly have taken into account. Provided that the judge does not purport to give himself expert evidence (or any other evidence, for that matter) I see no reason why a judge cannot take into account his or her own observations of the demeanour and behaviour at a hearing of a party to proceedings (a kind of real evidence) in considering what weight to accord to expert medical evidence.

33. A judicial decision as to whether or not to adjourn the hearing is a case management decision, and will not lightly be overturned by an appeal court. In the present case the application to adjourn was being made by the applicant, and the burden therefore lay on him to satisfy the court that it was appropriate to adjourn. The judge took into account what the applicant had said (including the importance of this matter to him and his family), he took into account the medical evidence proffered by the applicant, and he took into account the applicant's demeanour at the hearing. He also took into account the history of the case and the relevant case law. In my judgment the district judge made no error of law or procedure. In particular, there was no serious procedural or other irregularity in the proceedings before the district judge leading to injustice. Accordingly, the second argument cannot succeed.

34. In any event, however, even if there were any substance in the argument that the judge was wrong to refuse an adjournment, the lapse of time since then (13 months) means that no prejudice can have accrued to the applicant. If the judge had granted the adjournment, the matter would have come back to the court seven months ago. Yet it is only today that the appeal court is deciding the appeal in relation to the substantive possession order, which involves it in dealing with the same law and facts as – if the applicant had succeeded with his adjournment application – the district judge would have done seven months ago.

3. Possession order

35. This brings me to the third strand of the judgment, which was the possession and sale order. Here the applicant had two main arguments for saying that the judge below was wrong. The first was that the Harrow property had been sold at a gross undervalue, and that, had it been sold for its proper value, sufficient would have been realised so that the surplus passed to the respondent as trustee in bankruptcy after the mortgagee had been repaid would have paid off the bankruptcy debts and costs. So there would have been no need to resort to the Altrincham property. The second argument was that the costs and expenses of the respondent of the respondent trustee in bankruptcy were far too high, and if they were reduced to what was strictly proper, again there would be no need for the respondent to have to resort to the Altrincham property. In the light of these arguments, the applicant said that the district judge should not have ordered the sale of the Altrincham property, which was his home and that of his family. Other assets should always be realised first, so that a bankrupt's home would be the last resort for the trustee in bankruptcy.

36. As against that, Mr Passfield submitted, in my view correctly, that the Altrincham property was not held upon a trust of land within the Trusts of Land and Appointment of Trustees Act 1996, but was subject to the jurisdiction of the court under section 363(2), (3) of the Insolvency Act 1986. Those provisions read:

> "(2) … an undischarged bankrupt … shall do all such things as he may be directed to do by the court for the purposes of his bankruptcy or, as the case may be, the administration of that estate.

> (3) … the trustee of a bankrupt's estate may at any time apply to the court for a direction under subsection (2)."

37. In making this submission, Mr Passfield relied on the decision of Evans-Lombe J in *Holtham v Kelmanson* [2006] BPIR 1422. In that case the judge said:

> "15. … In my view the vesting of the bankrupt's property in the trustee in bankruptcy under Section 306 puts the Trustee in the same position as Mr Holtham was in relation to the property. Mr Holtham owned the property absolutely. The trustee in bankruptcy is not a person falling within sub-section 1(1) of the 1996 Act. A trustee in Bankruptcy, although called a trustee, is not a trustee of the assets comprised in the estate for the creditors or the bankrupt. He holds the assets subject to statutory duties to liquidate them and distribute their proceeds in satisfaction of the debts pari passu and any surplus to the bankrupt. In my view the application fell to be made under Section 363(2) of the Insolvency Act 1986…"

38. So in this case, the applicant was the sole registered proprietor of the Altrincham property, his wife having been invited to put forward any claim she might have to a share of the beneficial interest but having declined to do so. Accordingly, the property now vested absolutely in the trustee in bankruptcy, subject only to the statutory scheme for realisation of assets and distribution to creditors. But this is not a trust within the meaning of the 1996 Act. So the kind of balancing exercise which takes place as between co-owners of the beneficial interest in land, whether under sections 14 and 15 of the 1996 Act (replacing the Law of Property Act 1925, section 30) or under section 335A of the Insolvency Act 1986, has no place here. Given that the applicant's wife has asserted no claim and has not applied to join the proceedings, matrimonial legislation is also irrelevant.

39. The applicant argues that the respondent should not have made the possession order because there were – or should have been – other assets to which recourse could be had. The evidence before the district judge included a statement created by the respondent as an "Estimated Outcomes Statement as at 23 January 2019", and provided to the court. It shows that there were bankruptcy debts of £43,116.54 together with statutory interest amounting to £13,454.01, although these debts and interest were reduced by an interim dividend already paid to the creditors of £32,337.41 so that, taking into account the sum of £12,933.33 which the respondent held as a balance at bank, the position so far as the debts and interest were concerned was that they amounted to a net total of £11,299.81. But fees for the trustee in bankruptcy and for lawyers engaged in this matter together with other costs amounted to £109,215.28. Therefore, with the outstanding debts and interest, the total estimated deficiency at that date was £120,515.09.

40. The Altrincham property was valued at £680,000 in August 2018. It is subject to a charge in favour of Lloyds Bank securing a debt which in January 2019 stood at £374,000. So at that date the equity available would be somewhere in the region of £306,000, meaning that on the sale of the Altrincham property,

after discharging the deficiency in the bankruptcy, a surplus would be available to the applicant. However, because of the further accrual of interest and costs, the deficiency has increased, and therefore the potential surplus has diminished. As at the date of the hearing, I was told the deficiency had become £185,033.92. This bears out what Nugee J said in giving judgment on 9 October 2019 ([2019] EWHC 3745 (Ch)) when the applicant sought relief from sanctions, an extension of time for filing the bundle, and a stay of the possession order and the suspension of the warrant until the determination of the application for permission to appeal.

41. He said:

> "25. The longer this matter goes on, the greater must be the likelihood that his remaining equity in the mortgage of the property will be eroded. The figures that I were given were that in the early part of this year the property was thought to be worth some £680,000, but subject to a charge of £374,000, leaving some £300,000 available to meet the remaining liabilities to the creditors and the Trustee's costs and expenses, which were then estimated at £141,000.
>
> 26. Every day that goes by will increase the liabilities to the creditors in the shape of accruing interest to which they are entitled and every application to the court, or, at any rate, those of which the Trustee is aware will increase the costs to the Trustee, which will all come out of the proceeds of sale before anything is paid to [the applicant]."

Sale of the Harrow property at an undervalue

42. The applicant's complaint about a possible sale at an undervalue of the Harrow property by the mortgagee (Barclays Bank) does not bear directly on the decision of the district judge, because the actions of the mortgagee are not the actions of the trustee in bankruptcy. But, if there is any substance in the complaint, that may represent a potential claim for the bankruptcy estate as against the mortgagee. The question is whether the district judge should have stayed his hand in relation to the possession application and first investigated the possibility of a claim being made in respect of the Harrow property. In my judgment it is a matter for the exercise of discretion by the court. On the one hand there is the undoubted value of the Altrincham property as an asset of the estate. It can be realised relatively easily and (very importantly) at modest and known expense. On the other hand there is speculative litigation for which a great deal of cost will have to be invested before it is even known whether it is worth pursuing. In my judgment, on the facts of this case, the district judge cannot be criticised for acceding to the application of the respondent and preferring the former to the latter.

Excessive costs and expenses

43. The second argument put forward by the applicant was that the respondent's costs and expenses were simply too high. Yet, as Mr Passfield pointed out, no challenge has ever been made to the trustee in bankruptcy's costs and

expenses. There is a specific procedure under rule 18.35 of the Insolvency (England and Wales) Rules 2016, but that has never been engaged.

44. So far as relevant, rule 18.35 of the Insolvency (England and Wales) Rules 2016 provides as follows:

> "(1) A bankrupt may, with the permission of the court, make an application on the grounds that –
>
> (a) the remuneration charged by the office-holder is in all the circumstances excessive;
>
> (b) the expenses incurred by the office-holder are in all the circumstances excessive.
>
> […]
>
> (4) The court must not give the bankrupt permission to make an application unless the bankrupt shows that –
>
> (a) there is (or would be but for the remuneration or expenses in question); or
>
> (b) it is likely that there will be (or would be but for the remuneration or expenses in question),
>
> a surplus of assets to which the bankrupt would be entitled."

45. The application may be made at any time. If such an application had already been made by the applicant, and determined by the court, by the time the possession application was finally decided the position would have been clear as to whether there was any reduction, and if so how much, in the respondent's fees and expenses. But it appears that on this point the applicant has been willing to wound and yet afraid to strike, and has not challenged those fees and expenses. It hardly therefore lies in his mouth to complain that the district judge did not consider the possibility that the respondent's fees and expenses might be reduced so far as to render it unnecessary to sell the Altrincham property, when the applicant already had a remedy available to him in respect of his complaint, but nevertheless did not take it.

46. In any event, the chances of costs and expenses being reduced by a figure greater than the deficiency on the insolvency (then £120,000, now more like £185,000) must be very remote. In this connection, I note that at the hearing on 9 October 2019, Nugee J said during the argument (transcript, p 15):

> "If it were the case that a payment in full calculation to date was £10,000, you can say 'look, there was a real prospect and might persuade district judge to reduce the (inaudible) costs by that much and indeed the property,' but a payment in full calculation as at the beginning of this year was 120,000 and now we rather more. Of course, in theory it is possible that there has been overcharging by a (inaudible) at the moment, but I have got no basis for thinking that is

> likely. And one would have to go a very long way before the court is likely to say that there is nothing still due to the Trustee…"

Creditors paid in full?

47. The applicant has asserted several times that the bankruptcy creditors have been paid in full. The respondent says this is not correct. The statement which she produced shows that there has been an interim dividend only. There is no evidence put forward by the applicant to support his view that the creditors have in fact been paid in full. But even if that were true, it would be irrelevant because there would still be outstanding the fees, costs and expenses of the trustee in bankruptcy, at least in the absence of any reduction in them by the court under rule 18.35 (and no such application has ever been made).

The respondent's knowledge of the Harrow property

48. A point was made forcefully by the applicant that the respondent trustee in bankruptcy knew about the Harrow property at the time of making the possession application on 8 August 2017. The respondent denies this, and says that the applicant did not cooperate with her about his assets, so she simply did not know exactly what they were. The Harrow property was found by making land registry searches, although at that stage it was not clear whether it belonged to the applicant or not, because it had been registered only in his middle and last names, and not his first name. A restriction was put on the property, and it was this that caused the mortgagee, after selling the Harrow property, to contact the trustee in bankruptcy in order to pay over the surplus to her.

49. But even if the allegation of knowledge at the time of issuing the possession application were true, I cannot see how it would help the applicant. The applicant complained that the respondent should have waited to see what the Harrow sale realised before making the application. But it was the trustee in bankruptcy herself who on 6 March 2018 applied to stay her own application for possession on the grounds that she had found out that the Harrow property was being sold by the mortgagee. Perfectly reasonably, she did not want to spend more money on court proceedings until she knew how much that property would realise, and what the surplus available for the bankruptcy would be. So she did in substance what the applicant wanted. The only possible loss to the estate, if the trustee were wrong to issue the application at the time she did, would be the trustee's fees and legal costs of issuing the application and preparing for and attending two hearings before District Judge Khan. The amount involved would make no appreciable difference to the deficiency.

Prospects of success

50. The applicant also maintained that he had "excellent prospects of succeeding on the appeal". Whether he did or not have such prospects is no longer important, because I am considering the matter in a "rolled-up" application, an application for permission and a substantive appeal all at the same time. But I want to correct a misapprehension by the applicant. He pointed to statements

made by other judges at earlier stages. But none of them at that stage was answering the one question which mattered, which was whether permission to appeal should be given to the applicant. All that those judges were doing was pointing out that there were some possible arguments to be put forward, which would have to be considered at the stage when permission to appeal was finally considered. As I have noted, in relation to the decision of District Judge Obodai, Mann J in November 2019 held that permission should be refused, the application being totally without merit. But as regards the rest of the decision sought to be appealed against, it is only at *this hearing* that the question of permission to appeal has actually arrived for decision, although by this stage it is no longer important, because the whole appeal is being considered at the same time.

ECHR article 6

51. So far as concerns the argument that the applicant's rights under article 6 of the European Convention on Human Rights have been violated, it is not entirely clear from the grounds of appeal and the further submissions made by the applicant whether the complaint is made in relation to (i) the refusal of the application to adjourn, or (ii) the order for possession and sale (or both). In relation to the former point, however, in *Levy v Ellis-Carr* [2012] EWHC 63 (Ch) (to which I have already referred in a different context), Norris J said:

> "36. The Appellant complains that the failure to grant the adjournment is a breach of his human rights. The complaint is misconceived. The Appellant's right to a fair trial means that he must have a reasonable opportunity to put his case. He had that right on 9 February 2011 (but asked the Court to postpone it). He was urged to exercise that right by the trustee's solicitors on 23rd May 2011: but he and his legal representatives chose not to avail themselves of it."

In the present case, not only did the applicant have an opportunity to put his case, he actually exercised it. He could have exercised it with legal representation, or even by himself with the help of a McKenzie friend. Instead he chose to do it alone. If this is his complaint under article 6, it is without substance.

52. In relation to the latter point, on the substantive order, in *Holtham v Kalmenson* [2006] BPIR 1422 (another case to which I have already referred in a different context), a similar argument was made by the bankrupt. Evans-Lombe J said:

> "17. I will however go on to consider whether Article 6 of the Convention is capable of conferring any defence on Mr Holtham against the Trustee's claim for possession and sale of the property. In my judgment it cannot do so for the following reasons:-
>
> i) The administration of a bankrupt's estate is not a process which results in the determination of the civil rights and obligations of the bankrupt either before or after his discharge within Article 6(1) of the Convention. The administration of the estate of a

bankrupt is a process whereby his assets are gathered in, liquidated and applied for the benefit of the creditors any surplus being returned to the bankrupt. The judgment of the European Court of Human Rights in the case of *Mitchell & Holloway v The United Kingdom* 36 EHRR 52 p 951, relied on by Mr Macpherson is of no relevance to this case. That case was dealing with delays in the resolution of a contract claim which would have, and did, determine the civil rights and obligations of the parties to the proceedings arising under the contract in question.

ii) Mr Holtham had no right to occupy the property enforceable against the Trustee for the time being of his bankrupt estate at any time after the commencement of the bankruptcy and the vesting of the property initially in the Official Receiver and later in the Trustee. As against Mr Holtham the Trustee's right to possession and sale of the property has, at all times since the commencement of the bankruptcy been unchallengeable. There is no evidence as to the Official Receiver's or the Trustee's intentions with relation to the property since the property vested in them. However it seems to me that they cannot be criticised for delaying taking steps to realise the property at a time when its value did not produce an equity over the amount secured by the mortgage on it. It may well be that had Mr Holtham offered to buy the freehold reversion on the mortgage over the property after he had obtained his discharge the Official Receiver would have sold it to him for a modest amount. Neither the Official Receiver nor the Trustee can be blamed for delaying taking steps to realise the property on a rising property market when the result of doing so has been that the creditors may receive payment in full of their debts or something very near it. The trustee in bankruptcy's primary duty is to the creditors. Had the Official Receiver taken steps to remove Mr Holtham when the property was subject to negative equity there would, no doubt, have been complaints by Mr Holtham that to do so was oppressive without achieving anything for the creditors. All of this illustrates that Mr Holtham's complaints are far removed from Article 6(1).

iii) It is not said that there has been any delay in the prosecution of the Trustee's claim for possession in this court which engages Article 6 (1). Even if it could be said that the delay in commencing those proceedings was in some way a breach of Article 6(1), which in my view it cannot, it is clear that the remedy for a breach of the article would be against the United Kingdom to compensate Mr Holtham for any loss which he was able to prove flowed from such delay. The remedy given by the court in the *Mitchell & Holloway* case illustrates this point. It follows that any finding of the court in favour of Mr Holtham for breach of Article 6(1) cannot affect the Trustee's right to

terminate Mr Holtham's possession of the property vested in the Trustee for the purpose of selling it for the benefit of Mr Holtham's creditors. In the absence of any evidence of persons other than Mr Holtham having any interest in the property no questions arise under Article 8 such as arose in *Barca v Mears* [2005] BPIR 15.

iv) I have no evidence of the extent and timings of the payments Mr Holtham made in respect of the instalments becoming due under the mortgage of the property. It seems to me clear that, to the extent that Mr Holtham, after his discharge, paid off the mortgage debt and interest, he is entitled to be subrogated to the mortgagee's security but he will have to give credit for a notional rent in respect of his occupation of the property over the same period. There will have to be an equitable accounting and, to the extent that such accounting shows Mr Holtham a credit he will be entitled to receive that amount from the proceeds of sale of the house ranking equally with the mortgagees. The most recent case of which I am aware where similar problems were dealt with is the decision of Lawrence Collins J in *Re Byford (deceased)* [2003] EWHC 1267 or [2003] BPIR 1089. The subject is dealt with in *Muir Hunter on Personal Insolvency* at paragraph 3-652. The same may be true of payments made by Mr Holtham before his discharge but here the position is more complicated because the payments, presumably from his own earnings, may constitute after acquired property which the Trustee is still in a position to claim; see Section 307 of the Insolvency Act 1986. The effect of all of this is that Mr Holtham has a remedy under insolvency law, without engaging Article 6, for the fact that during his occupation of the property since the commencement of the bankruptcy he has benefited his bankrupt estate by making payments discharging the mortgage instalments on the property."

53. Accordingly, whether the complaint about violation of article 6 is based upon the failure to grant an adjournment or on the substantive order made for the possession and sale of the Altrincham property, in my judgment it goes nowhere.

Reasons

54. There is a separate head of the grounds of appeal dealing with reasons. The applicant says that the district judge

> "erred in law in not giving adequate reasons for his decisions, and those given did not accord with the available evidence or circumstances."

I have already referred above to authorities which show that the judge's reasons must be read on the assumption that the judge knew how to perform the judicial functions and what had to be taken into account, and that judicial

findings are inherently an incomplete statement of the impression made upon that judge by the evidence. Reading the judgment below in the round, I am satisfied that the judge gave adequate reasons for his decisions and that they were open to him on the evidence available.

New evidence

55. A further ground of appeal is headed "New evidence". The applicant says that there is new evidence available to him "which would have had an important influence on the result of the hearing before the lower court". Again, I have earlier referred to CPR rule 52.21(2), which provides that fresh evidence will not be admitted on the appeal unless the court otherwise considers. The applicant has not identified or particularised this fresh evidence, and no application has been made to the court for it to be admitted on the appeal. Neither I nor the respondent know what this evidence is supposed to consist of, and neither am I in a position to assess any value it might have to determine whether it is otherwise appropriate to admit it. Accordingly this ground of appeal goes nowhere.

Conclusions

56. For all the reasons given in this judgment, I am satisfied that there was no real prospect of the applicant succeeding in the appeals against any of (i) the refusal to extend time for the service of medical evidence, (ii) the refusal to adjourn the hearing of 4 February 2019 on medical grounds and (iii) the possession order. And in my judgment there is no other compelling reason for an appeal to be heard. So I must formally refuse permission to appeal. Even if I were wrong on that, I am clear that all of these appeals must fail, for the same reasons. Since the appeal is now at an end, it follows that the stay of the possession order and the suspension of the possession warrant made by Nugee J on 9 October 2019 are now both lifted, and the order can be enforced and the warrant can be executed without further order.