



Neutral Citation Number: [2023] EWHC 1742 (KB)

Case No: QA-2022-000004

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/07/2023

Before :

THE HON. MR JUSTICE CHAMBERLAIN

Between :

Harun Miah

**Appellant/
Defendant**

- and -

Amir Uddin Ahmed

**Respondent/
Claimant**

Arfan Khan (instructed by **Gunnercooke**) for the **Claimant**.
Nora Wannagat (instructed by **Capital Solicitors LLP**) for the **Defendant**.

Hearing dates: **04 July 2023**

APPROVED JUDGMENT

Mr Justice Chamberlain:

Introduction

1. Harun Miah was the defendant to a claim brought by Amir Uddin Ahmed in the Central London County Court. The claim sought a declaration that an agreement dated 27 November 2018, by which it was said that Mr Miah had agreed to pay Mr Ahmed £60,000 (“the 2018 Agreement”), was binding between the parties and an order requiring Mr Miah to discharge his remaining liability under that agreement. The trial was listed to start on 6 December 2021. Mr Miah applied for an adjournment. HHJ Lethem KC (“the judge”) refused the adjournment and proceeded with the trial. He granted the declaratory relief sought and gave judgment for Mr Ahmed.
2. Mr Miah appealed. At a renewed permission to appeal hearing, Steyn J gave permission to appeal on three grounds, namely that: (1) the judge was wrong to hold that the 2018 Agreement was binding; (2) the judge applied the wrong test in refusing to adjourn and/or was wrong not to adjourn for a short period to enable a remote hearing to take place; (3) the judge was wrong to proceed on the basis that there was an arbitration agreement or that it was a matter of semantics whether there was such an agreement.
3. Mr Miah was represented at the hearing before me by Arfan Khan, who also appeared at the renewed permission to appeal hearing. Mr Ahmed was represented by Nora Wannagat. I was assisted by their focussed and concise submissions.

Background

4. Mr Ahmed’s case was that he and Mr Miah had entered into an oral agreement in 2016 under which Mr Ahmed was to transfer money to various individuals in Bangladesh and, one year later, Mr Ahmed was to repay the money with interest in 52 weekly instalments. Mr Ahmed says that he performed his part of the bargain, transferring a total of £72,784 to the nominated beneficiaries. He relies on text messages he sent to Mr Miah containing PIN numbers which were to be forwarded to the beneficiaries to enable them to draw the funds.
5. Mr Miah’s case was that the only arrangement was for Mr Ahmed to transfer £500 to Bangladesh. He did not know why Mr Ahmed had sent him the PIN numbers.
6. The parties agreed that there had been a meeting involving persons from the Bengali community on 27 November 2018. Mr Ahmed said it was an “arbitration” meeting convened to decide how to resolve the dispute between him and Mr Miah. There were negotiations and discussions as a result of which the parties agreed that Mr Miah would pay Mr Ahmed £60,000. Mr Ahmed relied on a written agreement with what appeared to be Mr Miah’s signature on it.
7. Mr Miah said that he had been invited to the meeting by a friend and was surprised to discover that its purpose was to discuss the dispute. He did not

accept that he had signed the document relied upon and did not agree that that document reflected the agreement reached. The Defence makes reference to “pressure” placed on Mr Miah to remain at the meeting, though it does not expressly aver that the agreement was procured by undue influence.

8. Directions were given for a joint expert report from a handwriting expert, but the expert could not say whether the signature on the document was Mr Miah’s.

Ground 2: Was the judge entitled to refuse the application to adjourn?

The facts

9. Logically, the first question is whether the judge was entitled to refuse the application to adjourn. If so, it was common ground that the judgment could not stand.
10. The relevant chronology was as follows. Mr Miah had originally instructed a barrister, Philip Brown, on a direct access basis. He signed the Defence. The trial had been listed for Monday 6 December 2021 for some time. Shortly before the trial he was disinstructed. On Wednesday 1 December 2021, Mr Ahmed’s solicitor received a call from a solicitor working for Exons, which was newly instructed to represent Mr Miah. There is a dispute about exactly what was said on that call, but it appears that Mr Miah’s solicitor requested an adjournment of the trial for two reasons. One was that he would need additional time to prepare; a second was that Mr Miah had symptoms of Covid-19.
11. The request was refused, so later that day, at 18.27, Mr Miah’s solicitor sent Mr Ahmed’s solicitor an application to adjourn on form N244, together with a witness statement with exhibits in support and a draft order.
12. Mr Ahmed’s solicitor emailed at 20.30 that evening to say that he could not consent to the adjournment and would oppose it. He said:

“We are surprised that your client has not yet made a booking for PCR test which is available in his area. Under government guidance, your client must do so immediately. Also noted test kits are available free at pharmacy or GP practice. If your client needs kits, we can arrange supply tomorrow morning by courier [sic] as our practice of close to our office.”

The email went on to describe Mr Miah’s claim to have symptoms of Covid-19 as “unbelievable”, given that the adjournment had first been sought on the basis that time was needed to prepare.

13. Mr Miah’s solicitor replied at 12.51 on 2 December, vigorously disputing the suggestion that Mr Miah’s symptoms were not genuine and making clear that he had booked a PCR test. It was said that the tests available at pharmacies and GP practices were lateral flow tests (“LFTs”) and these were not always reliable.
14. Mr Ahmed’s solicitor’s response, at 14.40 on 2 December, was to reiterate his opposition to the application. He said:

“We require you to disclose PCR test result to us as soon as he receives. You must be aware PCR test result comes in 24 hours.

...mere covid symptom will not be acceptable for adjournment unless your client can show any positive test result.”

15. Mr Miah’s witness statement exhibited the email he received on 1 December informing him that his PCR test kit would arrive within 2 days. It included the following:

“If you have symptoms, self-isolate straight away until you get your test results. Do not leave home, except to post your test kit.”

The hearing and the judge’s refusal to adjourn

16. The judge indicated that he would not adjourn the case on the papers and the hearing commenced on Monday 6 December. Mr Miah sent his son to the hearing to argue for an adjournment. The judge permitted him to make submissions. In the course of his submissions Mr Miah junior explained that his father had experienced “shortness of breath and a lot of coughing” on Tuesday 30 November; and he had stayed away from work and ordered a PCR test on Wednesday 1 December; the test kit had arrived and he had taken the sample and sent it off on Thursday 2 December; but the result had not been received. Mr Miah junior said that there had been 312,450 Covid-19 infections in the last seven days and it would be irresponsible and reckless if his father had come to court.
17. The judge said that the relevant principles were those set out in *Decker v Hopcraft* [2015] EWHC 1170 (QB), at [21] *et seq.*, applying observations in *Levy v Ellis-Carr* [2012] EWHC 63 (Ch). The judge noted at [11] that the requirements in the latter authority regarding medical evidence could not always be applied strictly where it was impracticable for a full medical report to be prepared. He recognised at [12] that this was the first application for an adjournment, that Mr Miah had been “fully engaged throughout the history of this case” and that this was the trial of the action, at which the dispute would be finally determined. At [13] he said that he did not take the view that one party had an excessively strong case and was bound to win or lose. Thus, the starting position was that, however, irksome, he should grant an adjournment. The question, he said at [14], was whether there were other factors which caused him to draw back from this.
18. As to these other factors, the judge noted that he had very little information about why Mr Miah had changed his legal team, and it was a sad fact of life that parties sometimes had to proceed without lawyers: [14]. Taken in isolation, the lack of representation would not be a sufficient grounds for an adjournment: [15]. Then, at [16], he turned to the significance of Mr Miah’s claimed symptoms of Covid. These were “to say the least, convenient as far as the defendant is concerned”. The judge was “not going to say that they are not genuine or overriding considerations” but the timing required him to “pay particular attention to the medical evidence”. He applied the *Ellis-Carr* requirements flexibly given the circumstances of the pandemic: [17].

19. The question was what evidence could reasonably be expected of someone suffering from Covid-19 symptoms. The answer was “more than I have received from Mr Miah”, since it was possible to obtain an LFT over the counter “and indeed the population carry out such tests day in and day out, not necessarily when they are feeling unwell but before they travel, before they go to events, and before they go to meetings”: [18]. At [19], the judge noted that, although not conclusive, a positive LFT result “would have provided considerable support for the self-diagnosis of the defendant” and that Mr Miah junior had conceded that he could and should have obtained an LFT from the GP practice where he worked and provided it to his father.
20. At [20] the judge said that he was “somewhat in the dark about the severity of the symptoms”. He had been told that there was “a shortness of breath and coughing but no more than that”. This meant that he had been unable to consider whether to convert the hearing to a Teams hearing or make other adjustments.
21. At [21], the judge expressed his deep concern that the case seemed to have undergone a metamorphosis between Friday afternoon (when he had indicated that he would not adjourn without a hearing) and the hearing. Mr Miah had procured a GP’s letter, which mentioned Mr Miah’s mental health issues, but not his symptoms of Covid-19. The judge was “struck by the paucity of the evidence, particularly in relation to the Covid issues”. He therefore focussed on the mental health issues and found that the GP’s letter did not meet the requirements in *Levy v Ellis-Carr*: [22]-[25].

Discussion

22. If the application to adjourn had been pursued purely because of the late change of representatives and because of the mental health issues raised in Mr Miah’s GP’s letter, the judge’s analysis would have been exemplary. As he said, a party is not entitled to change representatives without explanation at a late stage before trial and then demand an adjournment so that his new representatives can have time to prepare. The judge was also entitled to find that the GP’s letter did not satisfy the requirements in *Levy v Ellis-Carr*. It did not adequately identify the respects in which Mr Miah’s mental health condition would hamper his ability to conduct the trial himself and, importantly, did not contain any prognosis sufficient to enable the court to know for how long it should adjourn. Had it not been for the Covid-19 issues, I would have dismissed the appeal.
23. As to the Covid-19 issues, there is no doubt that the judge considered the evidence presented to him with some care and that he had real doubts about the claimed symptoms. But, having said that the timing was “convenient”, he went on to say at [17] that he was not making a finding that the symptoms were other than genuine. Given that Mr Miah had signed a witness statement endorsed with a statement of truth attesting to such symptoms and that his son had confirmed orally to the judge that his father had a severe cough, and in light of the prevalence of such symptoms at the relevant time, that is not surprising. The judge’s reason for not adjourning on the basis of the Covid-19 symptoms was, therefore, not that Mr Miah did not have Covid-19 symptoms, but rather that he could and should have taken an LFT to show that he actually had Covid-19. I

have concluded that it was at this stage of the analysis that the judge fell into error.

24. First, in December 2021, Government guidance was that those who had symptoms of Covid-19, which included shortness of breath and coughing, should take a PCR test. LFTs were for asymptomatic individuals. The guidance was also quite specific that, after ordering a PCR test, a symptomatic patient should not leave their home except to post the test kit and should remain at home until the result was received. A negative LFT result would not affect this obligation. (I refer to it as an obligation even though it was imposed by guidance rather than by law.) It follows that, even if Mr Miah had asked his son to bring him a LFT from the GP surgery where he worked, and even if the result of that test had been negative, he would still have been obliged (in the sense I have described) to remain at home pending his PCR test result. That being so, and given that LFTs were said to be appropriate only for asymptomatic individuals, I do not think it was right to criticise him for failing to arrange to have an LFT delivered to him.
25. Second, although the GP's letter did not support the diagnosis of Covid-19, it could not be expected to do so. GPs had no way of diagnosing Covid-19 except by asking patients to take a PCR test. In those circumstances, the absence of reference to Covid-19 symptoms had less significance than the judge appears to have thought. Mr Miah and the GP would both have known that the GP could add nothing on this point, other than to recount the symptoms Mr Miah had said he had.
26. Third, although it is true that the application made was for a substantial adjournment sufficient to enable the new solicitors to read into the case, and there was no distinct application for a remote hearing, it must be borne in mind that Mr Miah junior was not a lawyer. Given that, as the judge found, Mr Miah had engaged throughout with the process, had not applied for an adjournment before and did not have an obviously weak case, the judge should in my view have made arrangements to enquire whether Mr Miah wished (and was well enough) to participate remotely. I bear in mind that this was a case management decision. Nonetheless, the decision to proceed without enquiring into these matters in my view fell outside the range of responses open to him.

Conclusion

27. In the light of these conclusions, the trial will have to be reheard. Although I am sure that the HHJ Lethem would if rehearing the case himself make every effort to put what he has already heard out of his mind, such an exercise would be difficult for any judge. Accordingly, I consider that the trial should be reheard by a different judge.
28. Grounds 1 and 3 challenge conclusions reached after a trial where the judge heard evidence from only one side. Given that the trial will have to be reheard, there would be no point in my expressing conclusions on these grounds.

29. The appeal succeeds on ground 2. The order of HHJ Lethem will be set aside and the matter remitted to the County Court for rehearing before a different judge.