



Neutral Citation Number: [2021] EWHC 3198 (Ch)

Case No: BL-2021-BRS-000008

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
BUSINESS LIST (ChD)

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 29 November 2021

Before :

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

Between :

RUPERT ST JOHN WEBSTER
- and -
(1) JOHN FRANCIS PENLEY
(2) WITHERBOTHAM SMITH PENLEY LLP

Claimant

Defendants

The Claimant in person
Womble Bond Dickinson LLP for the Defendants

Application dealt with on paper

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.

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HHJ Paul Matthews :

Introduction

1. This is my judgment on an application by an undated notice, sealed on 25 November 2021, on behalf of the claimant for an order to vacate a hearing currently fixed for 2 December 2021. The application is made in the context of a claim for professional negligence made by claim form issued in February 2021 by the claimant against the defendants as solicitors to his parents, both now long deceased. The hearing of 2 December 2021 was listed to deal with an application by notice dated 2 August 2021 on behalf of the defendants for an order striking out the claimant's claim or giving summary judgment against the claimant.
2. The current application is, as I have said, an application to adjourn the hearing of 2 December 2021, on the basis that the claimant's preferred counsel is unavailable on that day. In order to deal properly with this application, it is necessary for me to set out, not only the procedural history of the listing of the application to strike out/for summary judgment, but also the background to this litigation itself.

Background

3. I can take the first part of the background from my own decision in a case called *Ashcroft and Penley v Webster* [2017] EWHC 887 (Ch), in which I decided to extend the life of an extended civil restraint order made against the Defendant on 23 March 2015 by HHJ McCahill QC for another two years:

“2. Captain Antony Webster and his wife Valerie had four children. There were two sons and two daughters. Valentine was the elder son and Rory was the younger. Virginia (later Ashcroft, the First Claimant) and Antonia (later Sloane) were the two daughters. Valentine married Jennifer, and they had three children, Rupert (the Defendant), Letitia and Arabella. Rupert married Jane, and they have three children, Beatrice, Roselle and Luke.

3. In 1950 Captain Webster acquired the property in the village of Ash Priors, Taunton, known as Priory Farm, consisting of some 44 acres including eight cottages. In 1965 two of these cottages were sold to Valerie. She later sold a half share to Rory. In 1987 Captain Webster transferred another three cottages to Valerie. In 1990 part of the estate known as Priory Barn was sold to a company belonging to Valentine.

4. Meanwhile, in 1971 Valerie purchased a nearby property known as Monks Walk. She sold most of it to Valentine in 1972, and gave him the rest in 1990. Valentine attempted to develop the Barn, using Monks Walk as security, but ran into financial difficulties. In 1992 the mortgagee took possession of Monks Walk, and sold it.

5. In April 1992 Captain Webster transferred the farmhouse and two fields out of the Priory Farm estate to himself and Valerie as tenants in common. Three weeks later, Captain Webster transferred the remaining agricultural land and certain cottages to Valerie. Two days later, Valerie created a discretionary trust of that land and cottages, of which her four children were discretionary objects. This was

all part of a tax planning exercise, carried out on the advice of Bevirs solicitors, assisted by the Second Claimant, Mr Penley, the family solicitor (not from Bevirs).

6. In December 1992, Valentine became bankrupt. Other members of the family became bankrupt later. In October 1995 Priory Barn was repossessed and sold by the mortgagee. Valentine and Jennifer moved into the farmhouse, The Priory. In February 1996, Captain Webster died, and probate of his will was granted to Virginia and Mr Penley, the Claimants, in May 1996. His will operated on his 50% interest in the farmhouse and two fields, and created a nil rate discretionary trust for the benefit of Valerie and his issue, with a small legacy to Virginia and the residue going to Valerie. She died in August 2007, and the Claimants became personal representatives of her estate also. Valentine had unfortunately died the year before, in September 2006, aged only 64, and his son Rupert, the Defendant, became personal representative of his estate.

7. After the death of his father, Valentine, in 2006, and of his grandmother in 2007, Rupert, as personal representative of his father's estate, sought to make a claim in proprietary estoppel against his grandparents' estates. The claim was issued in 2009. It was based on various alleged representations or promises made over the years, but apparently starting in the 1970s, by both Captain Webster and his wife Valerie, to the effect that The Priory would come to Valentine.

8. This claim was issued primarily against Virginia and Mr Penley (the Claimants in these proceedings), although Jennifer, Rory and Antonia were also joined as defendants. Ultimately it was taken to trial, when Rupert (as claimant) and Virginia and Mr Penley (as defendants) were represented by counsel, and the other defendants appeared in person.

9. The claim was dismissed by HHJ Purle QC in a written judgment handed down 22 May 2013. He said, in summary:

“23. ... In my judgment, no representation or promise to the effect suggested by Rupert was ever made. Nor, if I am wrong about that, was there detrimental reliance.”

10. The judge also said this:

“28. ... What did emerge very clearly from the evidence, however, was the fact that Valentine held the strong conviction that as the eldest son he was entitled at least morally to control and (ultimately) inherit The Priory as his birthright. That conviction was not, however, shared by other family members, and Valentine knew this. During the course of the tax planning exercise undertaken in 1992, Valentine's conviction was expressly rejected by Valerie at a family meeting in the presence of solicitors (fully minuted) on 25 February 1992. Notably, Valentine did not rely upon any representation or promise at this stage, only a conviction of his prior entitlement as the first born son.

29. That said, there is little doubt that the hope was expressed from time to time, in different ways, especially by Valerie, that Valentine might inherit or

live at Ash Priors, or the farmhouse. But there was nothing amounting to a commitment to ensure that any part of Ash Priors, or the farmhouse, or the two fields, would become his. Moreover, after the 1992 tax planning exercise, Mr Penley was very much against the taking any step that might imperil the tax efficiency of the structure he had helped to put in place, and his advice was heeded."

11. The Defendant having lost at first instance, and having been refused permission to appeal by the judge, he applied on paper for permission to appeal to the Court of Appeal. On 31 October 2013, Lord Justice Lewison refused permission to appeal. The Defendant sought to renew his application at an oral hearing before Lord Justice Floyd on 13 February 2014. Lord Justice Floyd also refused permission to appeal.

12. The Defendant sought to protect his position in the pending litigation by means of entries dated 6 March 2012 in the register of pending land actions, to which he later added two further entries dated 3 September 2013, and then two entries dated 24 February 2014 in the register of land charges to protect claimed substantive rights, all registered against the property in the Land Charges Registry, it being unregistered land. In May 2014, after the original claim had been dismissed and all appeals exhausted, the Claimants applied by notice to vacate those land charges. Sitting then in the Chancery Division of the High Court as a deputy master, I acceded to that application in August 2014, and vacated all six charges.

13. The Defendant then brought a new claim (A00TA241) against the Claimants in September 2014 in the County Court at Taunton, seeking possession of a part of the property at Ash Priors, on the basis that he had a right, whether through his mother Jennifer, pursuant to the estate of his father Valentine, as a member of a class of objects under a discretionary trust, or under a statutory tenancy or licence, to occupy that part of the property. Parts of the claim were then struck out as totally without merit by Deputy District Judge Orme, sitting at Taunton. The remainder of the matter was transferred to Bristol, where on 23 March 2015 HHJ McCahill QC struck out the remainder, also as totally without merit.

15. The Claimants then brought a claim (B30BS071) against the Defendant in early 2015 in trespass and slander of title. On 23 March 2015 HHJ McCahill QC granted a final injunction against the Defendant, requiring him not to enter the property, not to interfere with or prevent the marketing or sale of it, not to make any entry on the title of the property without the permission of the court, and not to publish or use words to the effect that he had an interest in The Priory or that his permission was required before its disposal or that the registered owners were not freehold owners of the property and/or that the trustees did not have the power to give instructions as to the disposition of the property.

16. The Defendant in the meantime brought a new claim (B30BS107) against the Claimants in the Bristol District Registry. This was treated as effectively an application being made by the Defendant to vary the injunction granted in claim number B30BS071. It was struck out by HHJ McCahill QC on 23 March 2015."

First ECRO and further claims

4. It was in these circumstances that HHJ McCahill QC on his own initiative made an extended civil restraint order (“ECRO”) against Mr Webster (then the defendant, now the claimant), restraining him until 22 March 2017 from issuing any claim or application against Mrs Ashcroft or Mr Penley (in their capacity as executors of the estate of Valerie and trustees of the will of Captain Webster), except for any personal claim that he might bring in professional negligence as a disappointed beneficiary or otherwise. I mention now that, on 28 September 2015, Lord Justice Lewison on the papers refused permission for the Defendant to appeal against the decision of HHJ McCahill QC of 23 March 2015, recording that the appeal was totally without merit.
5. However, before the extended civil restraint order was made in March 2015, Mr Webster had also issued three further claims against Mr Penley alone, under claim numbers HC14B01306, HC14C01307, and HC14D01309. Each claim sought to challenge the valuation of the estate of (respectively) Valentine, Valerie and Captain Webster. On 11 June 2015 Mr Justice Birss struck out all three claims, recording that each was totally without merit. The judge made a (second) extended civil restraint order against the Defendant. On 17 December 2015 Lord Justice Floyd on the papers refused permission for the Defendant to appeal the decision of Mr Justice Birss of 11 June 2015. On 17 November 2016 Lord Justice Patten refused a renewed (oral) application for permission to appeal the decision of Mr Justice Birss. He recorded in his judgment that an appeal would be totally without merit.
6. On 21 April 2017, I extended the life of the ECRO of HHJ McCahill QC for two years, to expire on 22 March 2019.

Appeal out of time and second ECRO

7. I referred above to the fact that in 2014, when I was a deputy master, I made an order vacating certain entries in the land charges registry. On 5 August 2020, an appellant’s notice from Mr Webster was sealed by the Business & property Courts in London. This sought to appeal against my order of 4 August 2014. On 3 November 2020 Mr Justice Adam Johnson refused on paper to extend time for filing the notice for the six years necessary. On 11 November Mr Webster sought an oral hearing. This was listed for 10 February 2021 before Mr Justice Morgan, when Mr Webster appeared before him personally. Mr Justice Morgan gave an extempore judgment, dismissing the application for an extension of time, certifying that the application was totally without merit, and making a further ECRO (the third) against Mr Webster, for two years.

The present claim

8. However, on 9 February 2021, the day before the third ECRO, Mr Webster had issued the claim form in these proceedings to make the present “claim in professional negligence” against the present defendants. Detailed particulars of claim were attached to the claim form, which was issued in the High Court in London. The particulars were not signed by counsel, and I infer that Mr Webster prepared them himself.
9. The particulars alleged negligence by the defendants (inter alia) in (i) giving estate planning advice to the claimant’s father’s parents in 1992, (ii) preparing wills for each of them and two family trusts, (iii) estate administration after the deaths of each such grandparent (in 1996 and 2007 respectively), (iv) giving further advice in 2001, (v)

procuring in 2006 the revocation of his grandmother's will of 2000 by making a new one, (vi) failing to remain neutral with respect to the claimant's own family, (vii) and breach of contract by the second defendant in July 2014. As I have already said, the claimant's father died in 2006. The claimant claims damages in excess of £5 million.

10. On 9 March 2021 Chief Master Marsh made an order transferring the claim to the Business and Property Courts in Bristol. The defence of both defendants was filed on 2 July 2021. By their defence the defendants plead that "Any claim in negligence arising out of any act before 9 February 2006 is accordingly barred for limitation pursuant to s. 14B Limitation Act 1980." They say that "paragraphs 8 to 20 should be struck out accordingly". In any event it is denied both that that the defendants were negligent, and also that they owed any duty to the claimant. Many of the factual allegations made are denied, it is denied that the claimant is entitled to sue in respect of any losses caused to members of his family other than himself, and other parts of the case are said to amount to an abuse of process as a collateral attack on earlier judicial decisions.

The application to strike out/for summary judgment

11. As I have said, on 2 August 2021 those defendants made an application for an order striking out the claimant's claim or giving summary judgment against the claimant. In making that application, the defendants rely on both the principles of abuse of process and the principles of limitation under the Limitation Act 1980. In relation to a number of the paragraphs in the particulars of claim, it is also submitted that no sufficient cause of action is pleaded, or that reverse summary judgment should be given.
12. On Friday 3 September 2021 the defendant's solicitors telephoned, and then emailed, the court (at the Bristol Specialist email address) with a list of dates to avoid in listing the hearing of their application. The court had not asked them to do this. It was their initiative. They copied that letter by email to the claimant, Mr Webster. He emailed the court (also at the Bristol Specialist email address) the same day to say that he hoped to provide dates to avoid in respect of his counsel early the following week. Unfortunately, this did not happen.
13. It was only on Friday 10 September 2021 that one of his counsel's clerks sent an email, giving details of dates to avoid, to the court, but using the email address e-filing.bristol.countycourt@justice.gov.uk. This is the email address for ordinary civil work in the County Court. The email would have been printed out by the civil team on that or the next business day to be added to the pile of pending work. It would not have been seen and attended to by the civil team until the following week at the earliest. (Indeed, neither the specialist team nor I became aware of it until it was sent again to the correct email address, on 22 November 2021.)
14. Unfortunately, as I have said, that email was not sent to the Bristol Chancery Listing address or the Bristol Specialist email address, which are the correct email addresses for the Business and Property Courts in Bristol. The email was also not copied to the defendants' solicitors. The clerk concerned has now left those chambers, and accordingly I do not know why she chose to send an email concerning a High Court case in the Business and Property Courts to the county court email address. One possibility is that that address appears in the automatic signatures of all the court clerks, even when writing from another email address (such as Bristol Chancery

Listing or Bristol Specialist) about High Court work. The mistake is obviously regrettable, and has led to the present application.

Listing and afterwards

15. On Saturday, 11 September 2021, my then clerk, working overtime in order to clear a backlog of work, listed the hearing before me for a remote hearing via MS Teams on Thursday, 2 December 2021. On that day, she had no way of knowing about the email sent to the wrong email address the day before. A notice of hearing for 2 December 2021 was sent to both sides. Mr Webster says in his skeleton argument that *the system* did not send out the notice. That is correct, in the sense that *the clerk* sends out the notice (as she did). But the notice remained on the system for the parties to see if they logged into it. (The notice asked the parties to send their details for the remote hearing to the Bristol Chancery Listing email address.)
16. No complaint was made by Mr Webster in response. Indeed, Mr Webster next wrote to the court on 25 September 2021 (by email to the Bristol Specialist email address) about another matter in this litigation, but did not mention his counsel's availability, and neither did he complain that his counsel was not available for 2 December 2021. On 27 September 2021, the defendants' solicitors sent a copy of the Notice of Hearing to Mr Webster by email, and he acknowledged receipt on the same day. On 11 October 2021 the defendants' solicitors wrote to the court (at the Bristol Chancery Listing address) to give the court contact details in relation to those on the defendants' side who were to attend it by Teams. The letter was copied to the claimant, and specifically referred to the hearing on 2 December 2021. There was still no complaint by Mr Webster.
17. The claimant's skeleton argument says that it was only at a conference with counsel on 26 October that the clash of dates for the hearing on 2 December 2021 was discovered. Even so, the claimant did not contact the court then. Instead, it was only on 11 November 2021, some two weeks later, that the claimant's (direct access) counsel's clerk emailed the court (at the Bristol Chancery Listing address) to say that the claimant's counsel was not available on 2 December 2021, and providing a list of other dates when he would be available. That email was not copied to the defendant's solicitors.
18. As a result of pressure of other work this email was referred to me only on 22 November 2021. On the same day I responded as follows:

“Please tell Mr Cole (with copy to Ds) that the Application Notice was issued on 3 August, on 3 September both sides said they would send in dates to avoid, the Defendants did but the Claimant did not, and on 11 September the matter was listed and the parties notified.

There was no objection from either side. Two months later the Claimant's counsel says he is not available. None of the alternative dates put forward by counsel's clerk is available for both the court and the Defendants' counsel, so the listing must remain as it is. If necessary, the Claimant will have to engage alternative counsel.”

19. On 22 November 2021 the claimant’s counsel’s clerks responded (to the Bristol Chancery Listing address) to point out that an email *had* been sent on 10 September 2021, albeit to the wrong email address. Mr Webster himself also wrote an email to one of the specialist clerks (at her own work email address). These were immediately passed to me, and I responded later the same day as follows:

“Please tell the parties I have considered the further emails. The fact remains that the dates to avoid were sent to the wrong email address and my then clerk did not see them. Then when she notified the date to the parties, no complaint was made. It is too late to change now, as this would mean adjourning off into the New Year. Mr Webster has plenty of time to find another representative.”

20. The defendants’ solicitors wrote to the court (by CE-Filing) on 23 November 2021. They set out the history of the matter from their point of view. That letter concluded:

“In any event, it is clear that the Claimant has known of the hearing date for the application since 13 September 2021. Following the listing, we have written to the Claimant on no fewer than five separate occasions in relation to the application. At no time prior to 22 November 2021 has the Claimant informed us that he objected to the hearing date or advised us that the date was inconvenient for his Counsel. In the circumstances, the Defendants therefore respectfully request that the application remain in the list for hearing on 2 December 2021.”

Application to adjourn the hearing

21. Mr Webster then decided that he wished to make a formal application to adjourn the hearing on 2 December 2021 by application notice. However, under the terms of the ECRO of Mr Justice Morgan of 10 February 2021, he had first to seek permission to make that application. He did so and, on 26 November 2021, Mr Justice Miles gave that permission. As it happens, the application notice for the order adjourning the hearing of 2 December 2021 was actually sealed the day before, on 25 November 2021. In circumstances where Mr Webster was trying to do the right thing, in a hurry, I am not minded to cavil at that.
22. In these circumstances, I have to consider whether it is appropriate to adjourn the hearing already listed, as requested by the claimant, or to proceed with it on that date, as requested by the defendants. Ultimately, this is a matter of case management. As to that, CPR Rule 3.1(2) simply provides:

“Except where these Rules provide otherwise, the court may—

[...]

(b) adjourn or bring forward a hearing; ... ”

23. In *Boyd & Hutchinson (A Firm) v Foenander* [2003] EWCA Civ 1516, Lord Justice Chadwick (with whom the other member of the court, Lord Justice Auld, agreed) said this:

“9. ... in deciding whether or not to grant an adjournment, the court must have regard to the overriding objective of the Civil Procedure Rules set out in CPR 1.1,

and in particular at subrule (2) of that rule. Having regard to the overriding objective requires the court to deal with a case, so far as is practicable, in a manner which saves expense, is proportionate to the amount of money involved and allocates to it an appropriate share - - but no more than an appropriate share - - of the court's limited resources. Courts are directed (by CPR 1.4) to have the overriding objective in mind when managing cases.”

Submissions

24. The claimant has made two written submissions to me in support of his application to adjourn and relist. Since they are not signed by counsel, I infer that he prepared them himself. The defendants’ solicitor, Sarah Tivey, has made a witness statement dated 26 November 2021 in opposition, exhibiting relevant correspondence.
25. In the first of his helpful written submissions, labelled “witness statement/skeleton argument”, Mr Webster argues that, when the matter was transferred from the High Court in London to Bristol, “it appears to have been tracked into the Bristol specialist team instead of the general civil court teams for reasons unclear to” him.
26. I do not accept that the reasons were unclear. Mr Webster well understood that this was *not* a matter going to the County Court at Bristol to be dealt with in its ordinary civil jurisdiction. The first letter to him after the transfer of the matter from London, dated 11 May 2021, told him that it had been transferred to the Business and Property Courts in Bristol rather than to the ordinary civil jurisdiction in the County Court.
27. As I have already said, matters in the Business and Property Courts (and those generally in the High Court) are dealt with in Bristol by the specialist team, rather than by the County Court civil team. Mr Webster already knew this. He had dealt with the High Court in general, and the Business and Property Courts in particular, in Bristol on many occasions before then, and indeed also in the present litigation, using their Specialist or Chancery email addresses (see paras [9]-[13] above).
28. Mr Webster further argues that it was the court’s or the defendants’ fault that the hearing on the defendant’s application to strike out/for summary judgment was listed for 2 December 2021, which was a day that the court or the defendants already knew, or ought to have known, was unavailable for the claimant’s counsel. This is a confused submission. It is not a matter of fault, on anybody’s part, that the hearing was listed for a particular day. It is the result of what happened. I have already set out the relevant events. The defendants by their solicitors sent in their dates to avoid. They copied in the claimant. The claimant said that he would send in his dates to avoid “early next week”. Unfortunately, he did not do so, and when his counsel’s clerk *did* reply (at the end of the following week) she sent it to the wrong address, *and* moreover did not copy in the defendants’ solicitors.
29. Accordingly, there was no way that my clerk, in listing the matter on Saturday, 11 September 2021, or the defendant’s solicitors, could have known at that date what were the non-available dates for the claimant’s counsel. That meant that she listed the matter without being able to take account of those dates. Moreover, at no time thereafter until 11 November 2021, and despite several communications in the meantime to the claimant giving the date of the listed hearing, did the claimant or his counsel’s clerks complain that the date was one which counsel could not meet.

30. Mr Webster relies on the decision of Mr Justice Fraser in *Bates v Post Office Ltd* [2017] EWHC 2844 (Ch), [17], where the judge says:
- “Fixing hearings in this group litigation around the diaries of busy counsel, rather than their fixing their diaries around this case, is in my judgment fundamentally the wrong approach. If the court embarks upon a course of organising hearings around counsel, more and more time will creep into the timetable of the litigation as a direct result. This applies to all hearings, but particularly to trials of substantive issues. All the parties are to be treated fairly. If a request by the defendant for delay of two to three months into 2019 is agreed by the court at this stage, there will be the risk of at least the appearance of unfairness if similar requests by the claimants' counsel are not acceded to in the future.”
31. That was a decision in group litigation on a vast scale. This is not. The opening sentence tells you everything: “Fixing hearings in this group litigation around the diaries of busy counsel, rather than their fixing their diaries around this case, is in my judgment fundamentally the wrong approach.” The judge was, if I may respectfully say so, quite rightly pointing out that, the more parties that are involved, the more difficult it is to take matters forward at a reasonable pace using dates available to the court and expecting all the counsel preferred by all of the parties to be available for those dates. When the judge said, “All the parties are to be treated fairly”, he was not saying that all parties are to have the counsel of their choice for every hearing. Far from it. He was simply saying that procedural fairness is a fundamental principle of English law. No one doubts that. But it does not especially help me in the present case.
32. Mr Webster in his detailed skeleton argument further comments that my comment that counsel's clerk's email was sent to the wrong email address
- “was not an impartial comment when neither the court nor D's counsel's clerks involved C or C's counsel's clerks to request dates of availability as done for D's solicitors.”
33. The factual basis for this comment is wrong. The court did *not* ask the defendants' solicitors for dates of availability, yet refuse to do so for the claimant. It was the defendants' solicitors themselves who wrote to the court on 3 September 2021, offering dates of availability, and copying their letter to the claimant. It was *the claimant* who offered to send his dates of availability “early next week” but did not do so. After more than a week, my clerk listed this case on the basis of the dates of availability that she then had. Having notified the parties (including the claimant), and the claimant having been also informed of the date by the defendants on numerous occasions, the court received no complaint from the claimant that his counsel was unavailable for the date listed, until the email of 11 November 2021, two months later.
34. It is of course unfortunate that the claimant's counsel's clerk sent the dates of non-availability to the wrong email address for the Business and Property Courts in Bristol. But that is not the fault of the court, nor of the defendants. It is also unfortunate that no complaint was made thereafter on behalf of the claimant. But that too is not the responsibility of the court or the defendants.

35. The claimant has also produced a supplemental skeleton argument, which I have read. He complains that for the defendant's solicitors to contact the court without informing him was a breach of CPR rule 39.8. That rule relevantly reads as follows:

“(1) Any communication between a party to proceedings and the court must be disclosed to, and if in writing (whether in paper or electronic format), copied to, the other party or parties or their representatives.

(2) Paragraph (1) applies to any communication in which any representation is made to the court on a matter of substance or procedure but does not apply to communications that are purely routine, uncontentious and administrative.

[...]”

36. In my judgment, there was no breach of this rule in the present case. The communication of dates to avoid for a forthcoming hearing is an administrative matter, and not one of substance or procedure. Accordingly, the rule does not apply: see sub-rule (2). But even if it did, the telephone conversation between the defendant solicitors and the court on 3 September 2021 *was* disclosed to the claimant, by being referred to in the letter to the court of the same date. This was copied by email to the claimant on that date, and to which the claimant responded by contacting the court himself. Nor do I consider that the mere fact of breach of the rule (if there had been one) would be automatically sufficient to justify an adjournment, as the claimant submits. In my judgment, that must depend on all the circumstances.

37. The claimant also says that his counsel's clerk contacted the court “shortly after D's communication”. In fact, as I have already said, it was a week later, and it was not sent to the correct email address, with the result that it did not reach the listing clerk in time.

38. Subject to specific provision made in the rules, the position of a litigant in person (such as the claimant is) is the same as that of a represented litigant, and it is generally not right to give advantages to such litigants which are not given to represented litigants: see *eg Barton v Wright Hassall* [2018] 1 WLR 1119, SC, [18], per Lord Sumption (with whom Lord Wilson and Carnwath agreed), [42] per Lord Briggs (with whom Lady Hale agreed).

39. However, in the present case, the claimant relies on CPR 3.1A. This relevantly provides:

“(1) This rule applies in any proceedings where at least one party is unrepresented.

(2) When the court is exercising any powers of case management, it must have regard to the fact that at least one party is unrepresented.

(3) Both the parties and the court must, when drafting case management directions in the multi-track and fast track, take as their starting point any relevant standard directions which can be found online at www.justice.gov.uk/courts/procedure-rules/civil and adapt them as appropriate to the circumstances of the case.

[...]”

40. However, in the present case, the court *did* take into account the fact that Mr Webster was a litigant in person. If he had done what he told the court that he would do, namely, to send in his dates to avoid “early next week” instead of a week later, and to the correct email address (which he was in the habit of using anyway), this problem would not have arisen. So there was no breach. Nonetheless, the claimant says that this rule “provides that care should be taken by the listing office to ensure that a party may retain counsel of their choice”. But self-evidently the rule does not say that.

41. The claimant further relies on the decision Mr Justice Neuberger in *Maltez v Lewis* [1999] All ER (D) 425, given *ex tempore* on 27 April 1999. The problem that arose in that case was that the claimant was to be represented at trial by junior counsel, whereas the defendant was to be represented by leading and junior counsel. The claimant sought an order debarring the defendant from retaining leading counsel. So the problem was not that which now faces me. The applicant had argued that, if counsel on the two sides were of very different seniority, there would be no level playing field (within CPR rule 1.1(2)(a)) and it would be disproportionate (within rule 1.1(2)(c)). The judge held that the court had no jurisdiction to make the order sought.

42. The claimant says that the judge decided that

“The fundamental right of the parties to be represented by counsel or solicitors of his or her choice was well established and the new civil procedure rules, although containing wide new powers, have not cut down or removed that right”.

This statement is taken verbatim from the short digest of the case available at [1999] All ER (D) 425. It is plainly a summary.

43. However, according to the official transcript, what the judge actually said in his judgment on this point was this:

“However, it has always been a fundamental right of every citizen to be represented by advocate and/or solicitors of his or her choice. That right is not of course absolute; circumstances may cut it down. Thus a person's chosen lawyer may be ill or engaged elsewhere or conflicted out. A legally aided party may find that the Legal Aid Board is not prepared to fund his or her particular selection of legal representative. Further, it is clear that no party has the right to expect a hearing date to be fixed on the basis of the availability of his or her choice of advocate or solicitor.

Subject to that type of consideration, it seems to me that there is a fundamental right to a choice of legal representative; indeed, I would go so far as to say it is an important feature of any free society. I do not consider that the CPR, while accepting that they confer (and are intended to confer) very wide new powers on the court, could or should be interpreted so as to cut down, let alone so as to remove, that right.”

44. So, contrary to what the claimant suggests, the right is not absolute, and must give way to circumstances. Moreover, and expressly, the judge said that “no party has the

right to expect a hearing date to be fixed on the basis of the availability of his or her choice of advocate or solicitor”. But that is this case.

45. The claimant also submits that

“there are serious human rights breaches going on here to expect to secure alternative counsel. The court is fully aware that personally I have few resources with which to pay. Nor would it appear to put both parties on an equal footing when 1 side retains preferred counsel with 7 years knowledge. I have been fortunate enough to secure pro bono counsel. The case requires pro bono counsel with sufficient expertise to argue the points – in which any point whatsoever is contradicted, and appears to be followed by abuse.”

46. I assume that this is a reference to the claimant’s right to a fair trial under article 6 of the European Convention on Human Rights. In the recent case of *Brake v Chedington Court Estate Ltd* [2021] EWHC 2700 (Ch), I said:

“13. ... Article 6 implies the principle of ‘equality of arms’ (which also appears in CPR rule 1.1(2)(a) as part of the overriding objective), but this does not mean equality of resources. In the civil context it really means equality of opportunity in an adversarial process, for example to adduce evidence, comment on evidence and cross-examine witnesses in appropriate cases. For a recent example, see *MacDonald v Animal Plant and Health Agency* [2021] EWHC 2325 (QB), [46].”

In the present case, however, the claimant has had all of these opportunities. There is no breach of article 6 here.

47. Moreover, the claimant is not an ignorant, inarticulate layman. He has been involved in complicated property litigation with other members of his family and his grandparents’ personal representatives since at least 2009, and he has addressed me personally on numerous occasions. He is a well-educated, intelligent and articulate man who is perfectly capable of explaining complex points of fact and law (indeed, often somewhat recondite), and otherwise of instructing counsel when necessary, sitting behind him and passing numerous notes forward for counsel’s attention, many of which, I have noticed, result in further (usually helpful) submissions to the court. It appears that he (and not counsel) settled the detailed particulars of claim in the present case, and prepared his two written submissions.

48. The claimant knew on 22 November 2021 that I was not willing (at least at that stage) to adjourn the hearing. There were therefore 10 days in which he could have found alternative representation. For a one-day strike-out hearing that would not have been difficult to obtain. I accept that he may not have been able to find *pro bono* representation in that time. But he must have been aware that, if an adjournment was to be made, it would almost certainly be on terms that he pay the costs of the defendants thrown away by the adjournment. So it would not be free to him. There would be a cost either way. Moreover, this is not a case where the claimant would be utterly incapable of putting forward his own arguments to resist the application of the defendants. As I have said, he has addressed me previously on complex legal and factual arguments.

Discussion

49. Looking at the consequences of adjourning and not adjourning the hearing fixed for 2 December 2021, I can see that there are advantages and disadvantages either way. The application was issued in early August. The first available date to hear it was found to be four months later, in early December. If I adjourn the hearing, it will probably not be heard until well into next year. The process of finding a convenient date for everyone will have to begin all over again. This pushes further into the future the resolution of the parties' dispute. If the defendants are right, and the claim should be struck out or summary judgment given in their favour, they will have this professional negligence claim hanging over their heads for even longer. If on the other hand the claimant is right, and he is entitled to damages for the losses which he claims to have sustained, then he will have to wait even longer for that to occur.
50. Moreover, adjourning the hearing at this late stage means that no other hearing can now be listed for that date. So it is not just the parties themselves who suffer. Other litigants, who might have been able to have their case heard earlier, if it had been made apparent sooner that there was a difficulty listing this case, now have to wait longer to have their matter heard. And the present matter would now take up a further date in the future which could have been used for another case.
51. On the other hand, if I refuse the application for an adjournment, then the claimant will lose the *pro bono* representation by the counsel of his choice, familiar with the case, that he would otherwise have enjoyed. That is significant. But it is not overwhelming. As I have said, I have no doubt that the claimant could represent himself, as he has done in the past. And I have no evidence before me of his financial means, such as to demonstrate that he would be unable to pay for representation by any other advocate. He will not be deprived of a fair hearing complying with the overriding objective and article 6 of the European Convention. But, on the plus side, if I refuse to adjourn the matter will be dealt with sooner, using up a sitting day that would not otherwise be used. And no costs will be wasted.

Conclusion

52. On the whole, I am clear in my mind that the interests of justice in the present case are best served by retaining the date of 2 December 2021, and refusing the claimant's application for an adjournment of that hearing. Apart from the matters I have already referred to, this will save further expense, deal proportionately with the application concerned, and recognise that Mr Webster and his many legal proceedings have already enjoyed a much greater share of the scarce judicial resources available today than can be strictly justified.