

Case No: A3/2010/2517

Neutral Citation Number: [2012] EWCA civ 570
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE CHANCERY DIVISION
(BRISTOL DISTRICT REGISTRY)
Mr John Jarvis QC (Sitting as a Deputy High Court Judge)
OBS90200

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3rd May 2012

Before :

LORD JUSTICE WARD
LORD JUSTICE ETHERTON
and
LORD JUSTICE LEWISON

Between :

TONY D SULLIVAN	<u>Appellant</u>
(aka RUDEY SOLOMAN)	
- and -	
BRISTOL FILM STUDIOS LIMITED	<u>Respondent</u>

(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
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Tel No: 020 7404 1400, Fax No: 020 7404 1424
Official Shorthand Writers to the Court)

Mr Tony R Sullivan (aka Rudey Soloman) appeared in person (Appellant)
Mr Benet Brandreth (instructed by Charles Cook & Co Solicitors, Bristol) for the
Respondent

Hearing date : 25 April 2012

Judgment

Lord Justice Lewison:

1. On 14 September 2010 Mr John Jarvis QC, sitting as a judge of the Chancery Division in Bristol, struck out Mr Soloman's claim. He did so, not because the claim was bound to fail, but because even if it were to succeed the costs of fighting it were out of all proportion to the amount that Mr Soloman was likely to recover. With the permission of Kitchin LJ Mr Soloman appeals.
2. Mr Soloman is self-represented. He put an enormous amount of work into the presentation of his appeal for which we were all grateful. He put his points fluently and clearly. Mr Benet Brandreth appeared for Bristol Film Studios Ltd ("BFS").
3. Because the claim was struck out at a preliminary stage, no facts have been found. The background to the claim, in what I hope is uncontroversial language, is as follows. Mr Soloman is a hip hop artist who performs rap music and is well-known in the field. His stage name is "Dappa Dred". He has already produced tracks which have been put on the internet one of which was officially viewed by some 35,000 people. He may have uploaded as many as 30 tracks onto the internet. He has been interviewed in specialist magazines, and is well regarded. However, he does not have the cash available to fund the promotion and marketing of his work.
4. In 2009 Mr Soloman contacted BFS, who as their name suggests, make films. Mr Soloman asked BFS to make a video for him. The video was to be a digital video recording added to a sound recording of a track that Mr Soloman had made. Mr Soloman was also to appear in the video. Mr Soloman would not pay anything up front. BFS' reward would come in a profit share from future sales of the video to the public. BFS shot a video which featured Mr Soloman among the performers. On about 21 November 2009 BFS uploaded the video onto You Tube and sent Mr Soloman a link so that he could view it. However, the link did not work; and so BFS took down the video and uploaded it again with a new link. Mr Soloman viewed the video. He did not like what he saw. He also complained that BFS had uploaded the video to You Tube without his consent, thereby infringing both his copyright and his performance right and also infringing his moral right not to have his work subjected to degrading treatment. BFS responded by removing the video from You Tube on 26 November 2009. By 30 November BFS had deleted all copies of the video on their system. The video had remained on You Tube for some 5 days. BFS claim that the video was in fact uploaded to You Tube with Mr Soloman's consent; but Mr Soloman disputes that. For the purposes of this appeal I will assume that Mr Soloman is right about that issue.
5. Mr Soloman began proceedings in the High Court in Bristol on 3 February 2010. His claim form put the value of his claim at £800,000. The causes of action relied on in his statement of case (which he drafted himself) were breach of statutory duty, infringement of copyright and what he called loss of a chance.
6. The nub of the complaint about infringement of copyright and performance right was the presence of the video on You Tube for five days. The nub of the complaint about loss of chance was that the video had damaged the marketing potential of the work, and had, in some way, prevented him from making and selling more records and LPs.

7. On 28 June 2010 the claim came before DJ Watson. He refused to give summary judgment against Mr Soloman. He must therefore have thought that Mr Soloman's claim had a real prospect of success. At that stage there was no real investigation of the value of Mr Soloman's claim; so DJ Watson must have taken it to have been worth what Mr Soloman said it was worth. He transferred the claim to the Chancery Division, allocated it to the multi-track and identified four preliminary issues to be tried. These preliminary issues would, in effect, dispose of liability, leaving quantum to be assessed in the event of success for Mr Soloman. The time estimate for those issues was one and a half days. DJ Watson struck out a part of Mr Soloman's Particulars of Claim and also gave BFS liberty to apply to strike out the remainder after determination of the preliminary issues. DJ Watson's order has not been appealed. In my judgment this court must also assume that Mr Soloman's claim has a real prospect of success. I note also that the time estimate given by the court was one and a half days. That time estimate has not been changed by the court, although BFS assert that it may not be enough even for the trial of the preliminary issues.
8. In August 2010 Mr Soloman applied for an injunction under section 99 of the Copyright Designs and Patents Act 1988 ("the CPDA") requiring delivery up of all infringing materials. That application was ordered to be heard on 14 September. On 8 September 2010 BFS applied to strike out the claim as an abuse of process; and for that application also to be heard on 14 September. Both those applications came before the deputy judge on that day.
9. Before coming to the judge's judgment I should refer to some procedural criticisms that Mr Soloman made. He says that the application was an ambush because he did not receive the bundle on which it was based until the Friday before the hearing (which took place on a Tuesday); and did not receive the skeleton argument until the day of the hearing itself. Mr Soloman pointed to the rules for the service of evidence on an application for summary judgment under CPR Part 24. But this was not an application under CPR Part 24. It was an application under CPR Part 3.4 and Part 23. So service of evidence was governed by CPR 23.7. The evidence appears to have been served in accordance with that rule, and the skeleton argument was e-mailed to Mr Soloman before the weekend. In addition the judge gave Mr Soloman time to read the skeleton argument; and in addition Mr Brandreth, then as now appearing for BFS, repeated his submissions orally at length. Mr Soloman says that he was told that he should not interrupt or cross-examine Mr Brandreth. That is not a subject for complaint: it is the normal way in which applications are conducted. Mr Brandreth was not a witness: he was and is an advocate. The judge also gave Mr Soloman ample time to make his own submissions. In his written material Mr Soloman complains of bias in the way that he was questioned by the judge. But we have not been shown any example of the alleged bias. I am not persuaded that there was any procedural irregularity such as to make the decision unjust. Moreover, all these alleged irregularities have in practical terms been cured by the time that Mr Soloman has had to mount and prepare his appeal. The only live question as it seems to me is whether the judge's decision was wrong.
10. Mr Soloman also said that the power that the judge exercised under CPR Part 3.4 was only a power to strike out a statement of case and could not have been used to strike out his whole claim. However, the phrase "statement of case" is defined by CPR Part 2.2 as including a claim form as well as Particulars of Claim. In my judgment

therefore the power to strike out a statement of case includes a power to strike out a whole claim, consisting of the claim form and its accompanying Particulars of Claim.

11. The judge said that he could not conclude that Mr Soloman's case was so weak that it could not succeed. This was, of course, in line with what DJ Watson had already decided. He therefore considered the question of abuse of process without regard to the merits of the case. In other words, he considered the question on the assumption that Mr Soloman would succeed (or at least had a real prospect of succeeding) in his claim.
12. On that assumption the judge went on to consider what Mr Soloman would be likely to recover if his claim succeeded. He first considered the claimed injunction. He said that BFS already destroyed or returned all Mr Soloman's material; with the exception of only one copy of an MP3 file of the original recording. They had given that to their solicitors for the purposes of the litigation. They were willing to undertake not to use that copy without further order of the court. The judge concluded that there was no further relief that Mr Soloman could seek under that head. Mr Soloman did not challenge that conclusion.
13. The judge then turned to consider the question of damages. He considered the evidence about what had happened during the short period that the video had been viewable on You Tube. There was evidence before him that showed that during the period that the video had been posted on You Tube it had been viewed nearly 100 times. That is not to say that it had been viewed by 100 different people, because You Tube only records "hits" which may be multiple hits by the same person. But the judge concluded that apart from BFS' own personnel a maximum of some 50 people had seen the video. He assumed, in Mr Soloman's favour, that the video in its unfinished state was "derogatory" treatment within the meaning of the CPDA. He reasoned as follows. There were three possible consequences of 50 persons having seen the video. First, having seen its poor quality, they would decide not to buy the record when it eventually came out. On the basis of figures given to him by Mr Soloman the judge decided that Mr Soloman stood to make a maximum of £1.20 for each record sold. The judge was prepared to assume in Mr Soloman's favour that of the 50 people who saw the video, 40 would have bought the record once it had been released but for the poor quality of the video. This would produce for him a recovery of approximately £50. Second it was possible that those 40 people would themselves disparage or bad mouth the video. The judge was not prepared to make that assumption in Mr Soloman's favour since there was no evidence that anyone had done that. Nor is there now. Third, the 50 people might have liked the video so much that they bootlegged it. Again the judge was not prepared to make this assumption in Mr Soloman's favour in the absence of any evidence that this had in fact happened. Again there is no evidence now of any bootlegging. I might also add that there would in any event be a considerable overlap between this way of putting the claim and the first way, because the lost sales attributable to bootlegging would have been to some extent the mirror image of the lost sales due to people not buying the record at all.
14. The judge also said that he was not satisfied that Mr Soloman had put forward any real claim to loss of market potential.
15. Thus he assessed the maximum possible recovery by Mr Soloman at £50.

16. The judge directed himself by reference to the decision of this court in *Jameel v Dow Jones & Co Inc* [2005] EWCA Civ 75; [2005] QB 946. That was a case in which Mr Jameel sued Dow Jones in England for defamation in respect of an article posted on an Internet website in the USA, which was available to subscribers in England. Dow Jones did not dispute the jurisdiction of the English courts to hear the claim but applied to strike it out as an abuse of process. This court acceded to that application. The first point that Mr Jameel's counsel made was that since Dow Jones had not contested jurisdiction they could not subsequently apply to strike out the claim as an abuse of process. Lord Phillips MR rejected that submission in the following terms (§ 54):

“Mr Price's submissions amount, so it seems to us, to asserting that Dow Jones's failure to challenge English jurisdiction estop them from relying at this stage on arguments that could have been advanced in support of such a challenge. We do not accept this. An abuse of process is of concern not merely to the parties but to the court. It is no longer the role of the court simply to provide a level playing field and to referee whatever game the parties choose to play upon it. The court is concerned to ensure that judicial and court resources are appropriately and proportionately used in accordance with the requirements of justice. If Dow Jones have caused potential prejudice to the claimant by failing to raise the points now pursued at the proper time, it does not follow that the court must permit this action to continue. The court has other means of dealing with such prejudice. For instance, appropriate costs orders can compensate for legal costs unnecessarily incurred and relief can be made conditional on Dow Jones undertaking not to raise a limitation defence if proceedings are now commenced in another jurisdiction.”

17. Lord Phillips then pointed out that since the passing of the Human Rights Act the court had to keep a proper balance between the article 10 right to freedom of expression and the protection of individual reputation. He then turned to consider what Mr Jameel stood to gain from the action. Lord Phillips MR said (§ 69):

“If the claimant succeeds in this action and is awarded a small amount of damages, it can perhaps be said that he will have achieved vindication for the damage done to his reputation in this country, but both the damage and the vindication will be minimal. The cost of the exercise will have been out of all proportion to what has been achieved. The game will not merely not have been worth the candle, it will not have been worth the wick.”

18. The essence of the judge's conclusion was expressed as follows:

“It seems to me that to pursue a claim which has the potential for the recovery of so little money and which would take up so much of the court time is a disproportionate use of the court's resources.”

19. He therefore struck out the claim. Mr Soloman agreed in the course of his oral submissions before us that if his claim were indeed only worth £50 or thereabouts, it should not go forward to trial.
20. Accordingly the focus of his challenge was to the judge's assessment of the maximum recoverable damages. Although the judge did not mention it in his judgment he was referred in the course of argument to the decision of the House of Lords in *General Tire and Rubber Co v Firestone Tyre and Rubber Co Ltd* [1975] 1 WLR 819 on the approach to an award of damages. In that case Lord Wilberforce grouped cases into a number of categories:
 - i) Where the patentee would have exploited his invention by sales. In such a case the measure of damages would be lost sales;
 - ii) Where the patentee would have exploited his patent by granting licences to others to manufacture or sell the patented article. In such cases the measure of damages would be lost royalties;
 - iii) Other cases, not falling into either of the above categories where the court will be guided by more general considerations.
21. But Lord Wilberforce emphasised that in all cases there are two essential principles in valuing the claim: first, that the claimant has the burden of proving his loss: second, that, the defendants being wrongdoers, damages should be liberally assessed but that the object is to compensate the claimant and not punish the defendants.
22. That case was one of patent infringement rather than copyright infringement. That is Mr Soloman's first criticism of the judge. He says that a case on patent infringement should not be applied to a case of copyright infringement. However, in *Blayney v Clogau St. David's Gold Mines Ltd* [2002] EWCA Civ 1007 [2003] FSR 19 the Court of Appeal held that the same principles apply to any case of infringement of intellectual property rights, and applied the *General Tire* case to a case of copyright infringement. So this point is not open to Mr Soloman. Mr Soloman's other ground of complaint is that the judge was wrong to dismiss his argument that the marketing potential of his track had been damaged.
23. This ground was backed up by meticulously prepared spreadsheets. But stripped to its essentials the argument ran as follows. The infringement of Mr Soloman's copyright, performance rights and moral rights sabotaged the project of releasing the track for commercial exploitation promoted by a suitable video. No record company would now invest the time and effort in re-making a video to promote the track. Without promotion the track will fail commercially. Mr Soloman is therefore entitled to all the profits that he would have made if a successful video to promote the track had been made by BFS in accordance with the arrangement between them. It is fair to say that none of this chain of reasoning was pleaded in Mr Soloman's Particulars of Claim, but Mr Brandreth took no point about that.
24. However, it is important to recall that the causes of action upon which Mr Soloman relies do not include a cause of action consisting of BFS having failed to produce the required video (which might have been a breach of contract). They are limited to the consequence of the actual video having been viewable on You Tube for a few days.

Mr Soloman remains free to market his track and to commission a video to promote the marketing. There is no evidence before the court of any record company having turned him down as a result of the infringements.

25. In his written material Mr Soloman postulates a leaked version of a track having irreparably damaged its commercial potential. While that might be possible on some facts, it is in my judgment inconceivable that 50 viewings in the present case could have had that effect. Nor is there any evidence that would support such a hypothesis. Mr Soloman has also made submissions in his written materials on the possibility of some form of restitutionary award or disgorgement of profits. Again, while such an award is a theoretical possibility there is no credible suggestion in the present case that BFS have profited from the exposure of the video to public view for the few days in November.
26. Although Mr Soloman did apply for permission to adduce additional evidence that additional evidence did not address the deficiencies in his damages claim to which I have referred.
27. In addition to the categories of damage to which the judge referred, it is also possible that Mr Soloman would recover a modest amount of damages for derogatory treatment amounting to a breach of his moral rights. But in my judgment the judge was right to approach the case on the basis that the recoverable damages were likely to be extremely modest, on the assumption that Mr Soloman established liability. In the light of Mr Soloman's acceptance that if the judge was right about the likely scale of damages his claim should not go forward to trial, I would dismiss the appeal.
28. I would, however, like to say something more about *Jameel v Dow Jones & Co Inc*. As noted, the claim in that case was a defamation claim. That is of some relevance because Lord Phillips said (§ 70):

“It would be an abuse of process to continue to commit the resources of the English court, including substantial judge and possibly jury time, to an action where so little is now seen to be at stake. Normally where a small claim is brought, it will be dealt with by a proportionate small claims procedure. Such a course is not available in an action for defamation where, although the claim is small, the issues are complex and subject to special procedure under the CPR.”
29. Section 15 (2) of the County Courts Act 1994 precludes the county court from hearing actions for libel or slander. Thus to some extent defamation actions are a special case. What is important however is that Lord Phillips recognised that a small claim should normally be dealt with by a proportionate procedure. The mere fact that a claim is small should not automatically result in the court refusing to hear it at all. If I am entitled to recover a debt of £50 I should, in principle, have access to justice to enable me to recover it if my debtor does not pay. It would be an affront to justice if my claim were simply struck out. The real question, to my mind, is whether in any particular case there is a proportionate procedure by which the merits of a claim can be investigated. In my judgment it is only if there is no proportionate procedure by which a claim can be adjudicated that it would be right to strike it out as an abuse of process.

30. As I have said in the present case the causes of action relied on were infringement of copyright, infringement of performance right and infringement of moral rights. All these claims are governed by CPR Part 63 and PD 63 para 16.1. This has the following consequences. First by virtue of CPR Part 63.1 (3) these claims are allocated by the rules to the multi-track. Second by virtue of CPR Part 63.13 these claims may be started in the High Court, in the patents county court or in any county court where there is also a Chancery District registry. Bristol county court is a county court where there is also a Chancery District registry. So a case of this nature could have proceeded in any of these venues.
31. If such a case were to proceed in the Patents County Court would that be a proportionate procedure? Mr Brandreth says “No”. He makes the following points:
- i) At the date when the judge heard the applications there was no real difference in procedure or in the costs regime as between the Patents County Court and the High Court. However, new rules were due to come into force on 1 October of that year.
 - ii) Although the position is now different as a result of changes to CPR Part 45 which lays down a fixed scale of maximum costs, those changes are not retrospective. In *Technical Fibre Products Ltd v Bell* [2010] EWPC 11 [2011] Bus LR 1405 HH Judge Birss QC held that the new regime did not apply to cases begun in the Patents County Court before 1 October 2010 when the new regime came into force. However, he also said that a court transferring a case from the High Court into the Patents County Court after 1 October 2010 would do so in the expectation that the new procedures perhaps suitably modified would apply following the transfer. This point was confirmed by the decision of Kitchin J in *Caljan Rite-Hite v Sovex* [2011] EWHC 669 (Ch) [2011] FSR 23. If, therefore, an intellectual property claim were to be transferred now from the High Court to the Patents County Court, the new regime would henceforth apply to it.
 - iii) Mr Brandreth says that even if the new regime were to apply, there would still be a gross disproportionality between the time and costs involved and the likely recovery in the event of Mr Soloman’s success. The maximum recoverable costs under the new regime are £50,000. If (as the judge thought) the maximum recovery was of the order of £50 (or perhaps a little more), then the costs would be a thousand times more than the value of the claim. This is a powerful point, and it is made all the more powerful by the way in which the case has in fact proceeded. If the true value of the claim had been recognised at the outset of the proceedings then it may be that DJ Watson would have made different directions. But at the stage when the case management directions were made Mr Soloman was still asserting (wrongly as it turned out) that his claim was worth hundreds of thousands of pounds.
 - iv) Mr Brandreth also says that the case would not in any event be suitable for the Patents County Court because even the preliminary issues would take several days to try. However, in the first place the only judicial time estimate is that recorded in DJ Watson’s order; and that was one and a half days. Second, the IPCC has an unrivalled record for robust case management and speedy trials. I am not persuaded that this is of itself a powerful point.

32. In my judgment in principle a claim like Mr Soloman's could have been tried in the PCC if its true value had been recognised at the outset. When in future a judge is confronted by an application to strike out a claim on the ground that the game is not worth the candle he or she should consider carefully whether there is a means by which the claim can be adjudicated without disproportionate expenditure. As I have said, in addition to the PCC the claim could also have proceeded in the Bristol County Court. The normal process of allocation in the county court is dealt with by CPR Part 26. Part 26.6 (3) says that subject to Part 26.6 (1) (which relates to personal injury claims and certain claims by residential tenants) the small claims track is the normal track for any claim which has a value of not more than £5,000. The following provisions of Part 26 deal with how the court chooses the appropriate track. The process is triggered by the filing of allocation questionnaires which must be done by each party once a defence has been filed: CPR Part 26.3. In some specified cases (e.g. claims by tenants for harassment or unlawful eviction) the court may not allocate the claim to the small track: CPR Part 26. 7 (4). Assessing the value of the claim is a matter for the court rather than the parties: CPR Part 26.8 (2). Once the allocation has been made the court must notify the parties. CPR Part 26.10 then provides that the court may subsequently reallocate a claim to a different track.
33. Although the claim in this case was initially allocated to the multi-track by virtue of CPR Part 63. 1 (3), could it have been reallocated to the small claims track (or the fast track) under CPR Part 26.10? There are places in the CPR which make it clear that where the rules allocate a case to the multi-track, that is where it must stay. CPR Part 59 deals with claims in the mercantile courts. CPR Part 59.11 (1) says:
- “All mercantile claims are treated as being allocated to the multi-track, and Part 26 does not apply.”
34. Clearly this precludes the possibility of reallocation by excluding all the powers under Part 26. In similar fashion Part 62 (which deals with arbitration claims) allocates them to the multi-track. Part 62.7 (1) says:
- “Part 26 and any other rule that requires a party to file an allocation questionnaire does not apply.”
35. Again, the position is clear. Turning to Part 63, which governs intellectual property claims, Section I of that Part (which applies to some intellectual property claims but not the claims relied on in this case) provides in CPR Part 63.8 (1) that the parties do not need to file an allocation questionnaire. However, there is no exemption from that requirement in the case of claims falling within Section II of that Part (which includes copyright claims). So the parties to such a claim are required to file an allocation questionnaire, despite the automatic allocation of the claim to the multi-track. There can be little point in the parties being required to file an allocation questionnaire unless the court has power to reallocate the claim to a different track.
36. Although CPR Part 63. 1 (3) allocated Mr Soloman's claim to the multi-track I cannot see anything in Part 63 or the accompanying practice direction which ousts the court's general power of reallocation under CPR Part 26.10. There is no express prohibition in the rules which applies to intellectual property claims comparable to CPR Part 26.7 (4), Part 59.11 (1) or Part 62.7 (1). If, however, it was not the intention that the rules

applicable to “soft IP” should have the flexibility contained in CPR Part 26.10 then the Rules Committee should make that clear.

37. Since the small claims track is the normal track for claim which has a value of not more than £5,000, I am inclined to think that the best solution would have been for a small claim for copyright infringement to have been allocated to that track in the Bristol county court.
38. All that, however, is for the future. For the reasons I have given I would dismiss the appeal.

Lord Justice Etherton:

39. I agree that this appeal should be dismissed for the reasons given by Lewison LJ.
40. For my part, I would emphasise that the disproportion justifying the strike out of Mr Soloman’s claim is not merely between the likely amount of damages he would recover if successful in the proceedings and the litigation costs of the parties. It includes consideration of the extent to which judicial and court resources would be taken up by the proceedings. That was the approach rightly taken by the Deputy Judge, who said in paragraph 27 of judgment that the proceedings would involve a large amount of court time and would cost a great deal of money to argue and would be a disproportionate use of the court’s resources and unfair to the defendant.
41. That approach echoes the judgment of the Court of Appeal in defamation proceedings in *Jameel v Dow Jones & Co Inc* [2005] EWCA Civ 75, [2005] QB 946, delivered by Lord Phillips MR, in which he said at [54]:

“An abuse of process is of concern not merely to the parties but to the court. It is no longer the role of the court simply to provide a level playing field and to referee whatever game the parties choose to play upon it. The court is concerned to ensure that judicial and court resources are appropriately and proportionately used in accordance with the requirements of justice.

42. He also referred (at [57]) to the following statement of Eady J in *Schellenberg v British Broadcasting Corpn* [2000] EMLR 296 at 319:

"I am afraid I cannot accept that there is any realistic prospect of a trial yielding any tangible or legitimate advantage such as to outweigh the disadvantages for the parties in terms of expense, and the wider public in terms of court resources."

43. And, in paragraph [70], Lord Phillips said:

“It would be an abuse of process to continue to commit the resources of the English court, including substantial judge and possibly jury time, to an action where so little is now seen to be at stake. Normally where a small claim is brought, it will be dealt with by a proportionate small claims procedure. Such a

course is not available in an action for defamation where, although the claim is small, the issues are complex and subject to special procedure under the CPR.”

44. As that last observation indicates, the Court must, in accordance with the Overriding Objective, consider at the earliest opportunity the most efficient, cost effective, proportionate and fair way of resolving the dispute. In the present case, had the Court at the outset been aware of the true value of Mr Soloman’s claim, consideration could and should have been given to a transfer to the Patents County Court or to an appropriate county court for (re-) allocation on the small claims track. Unfortunately, up until and at the hearing before the Deputy Judge, Mr Soloman persisted in a grossly inflated value of his claims which ruled out those alternative routes. The consequence was that, by the time of the hearing before the Deputy Judge, considerable costs had already been incurred in the proceedings in the High Court and that fact, together with the increasingly apparent complexity and likely length of the proceedings, amply supported the Deputy Judge’s exercise of discretion.

Lord Justice Ward:

45. I agree with both judgments.