Neutral Citation Number: [2012] EWCA Civ 1020

Case No: B2/2012/0252

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM The Central London County Court
HH Judge Cowell
9EC05636

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/07/2012

Before :

LADY JUSTICE ARDEN
LORD JUSTICE DAVIS
and
MRS JUSTICE BARON

Between :

POPINDER KAUR DHILLON **(Acting by Her Litigation Friend)**	**Appellant**
- and -	
YAW ASIEDU	**Respondent**

Mr Michael Cronshaw (instructed by **Miramar Legal**) for the **Appellant**
Mr Jonathan Titmuss (instructed by **Messrs Clarke Barnes Solicitors**) for the **Respondent**

Hearing dates : 12th July 2012

Approved Judgment

Mrs Justice Baron:

1. This is an appeal by Ms Popinder Kaur Dhillon (the Appellant) against the decision of HHJ Cowell given on the 14th November 2011 whereby he refused the Appellant's application for an adjournment at the commencement of the trial of action brought by Mr Yaw Asiedu (the Respondent).

The Factual Matrix

2. The Respondent owned a property known as Units 1-16 Cleve Workshops, Boundary Street, London E2 7JP ("Cleve Workshops"). He occupied two units for his own business and rented out the remainder to other, unrelated individuals and businesses.

3. In 2007 the Respondent put Cleve Workshops on the market for sale and agreed to sell them to the Appellant. At all material times the Appellant was represented by a Mr Saeed Mirza who was her business partner/close personal friend and who was the principal negotiator of the relevant deal with the Respondent.

4. Contracts for sale were negotiated and exchanged on the 17th August 2007. Completion was initially set for 17th February 2008 but did not take place on that day. It appears that the Appellant through Mr Mirza agreed with the Respondent (on terms which are not pertinent to this appeal) that the date for completion would be extended to 31st May 2008. Despite this, the revised date for completion was missed. This was because the Appellant was unable to raise the entire amount of capital required to affect the purchase. At her request, the Respondent agreed to loan her some £200,000 for 90 days subject to (i) agreed interest and (ii) security by way of a charge against a property which she owned at 3 Fullwoods Mews, Bevendon Street, London, N1 6BF ("Fullwoods Mews"). The charge was not registered because of difficulties which the Respondent claims were of the Appellant's making.

5. Completion finally took place, some 5 months late, on the 30th July 2008. The Appellant was not, in fact, the ultimate purchaser because, prior to that date, she had assigned the benefit of the contract for sale to her sister, Mrs Iqbal Wallace.

6. The Appellant failed to repay the loan. Thus on the 31st July 2009 (about 1 year later) the Respondent issued proceedings seeking possession of Fullwoods Mews in order to enforce the unregistered charge for the recovery of the monies due under the loan agreement. The first Hearing of the Possession Claim was adjourned to permit the Appellant to file a fully pleaded Defence and Counterclaim.

7. For a period the Appellant and Mr Mirza tackled the defence themselves. But after the adjournment the Appellant (with Mr Mirza's assistance) instructed a solicitor and gave sufficiently clear instructions to enable the Defence and Counterclaim to be filed on the 26th October 2009. That document contained the usual declaration that the Appellant (the Defendant) believed the facts stated therein to be true.

8. The Defence (as drafted by Counsel) alleged that the purchase of Cleve Workshops has been a joint venture between the Appellant, Mr Mirza and Mrs Wallace. Further it claimed that "discussions" had taken place between the Respondent and the Appellant/Mr Mirza whereby, despite the explicit terms of the contract for sale (which

specified the contrary) it had been agreed that all units would be acquired with vacant possession. Moreover, it was initially asserted (although not pursued) that the Appellant had not been made aware that the Workshops were Listed Buildings such that planning restrictions applied. The Counterclaim sought damages, inter alia, for the alleged lost income caused by these two factors plus interest. The effect of the counterclaim was to seek to reduce the claim almost to nil. The Defence and Counterclaim ran to some 35 paragraphs and must have been based on detailed instructions from the Appellant and/or Mr Mirza.

9. In his Defence to Counterclaim the Respondent denied making the oral representations alleged.

10. On the 8th December 2009 the Standard Directions were given and the trial was fixed for 2 days in the window between 10th – 31st May 2010.

11. In March 2010 Mr Mirza, who was only 40 years old, died unexpectedly. The Appellant took his death very badly. She was particularly vulnerable to loss having suffered a bout of depression when her mother died in 2007. It seems that Mr Mirza's death precipitated a severe bereavement reaction. She visited her GP and was given antidepressant medication but the drugs did little to ameliorate her condition. In the light of this, the first Hearing date was vacated. On the 8th July 2010 the Appellant went to see her GP who then wrote a letter to her solicitor stating that *"In her current psychological state she is not fit to give or receive instructions regarding her business affairs. This will remain the case until further notice"*. On the 28th July 2010, the Appellant applied for an extension of 6 months to serve her witness evidence.

12. On the 20th August 2010 a report was prepared by a Consultant Psychiatrist, Dr Makhdum, who described the Appellant as suffering from a severe adjustment disorder. He reported that she would *"continue to exhibit these symptoms for many months, if not for a year"*. This suggested that her problems would last for some time and possibly until about August 2011. Following the service of this Report, the parties entered into a consent order dated the 15th October 2010 whereby the trial was re-fixed in the window between 14th January – 14th March 2011. It is to be noted that the Appellant's advisers specifically consented to the Witness statements being exchanged by the 14th December 2010. Despite this, no statement was filed on behalf of the Appellant and the second prospective hearing date was vacated.

13. On the 21st February 2011 the Respondent sought the first (of many) unless orders with regard to the witness statement. His application prompted the Appellant to seek another letter from her GP who stated she *"doubt[ed] that Popinder will be fit to undertake either business or court responsibilities for at least another six months"*. I remind myself that that would have taken the date to about September 2011.

14. On the Hearing for the unless order (16th March) the Appellant specifically raised the question of her capacity. The Court made an order adjourning the matter and ordered her to file evidence with regard to capacity together with consent from a Litigation Friend if she lacked such. Some 28 days later nothing had happened and the matter was re-adjourned to 20th May 2011.

15. In parallel with these legal matters, evidence was sought from the Appellant's treating Consultant Dr Nick Price. He e-mailed her GP on the 12th May 2011 as follows *"I*

have seen Popinder in my clinic recently and I think with legal support she would be able to attend court. I do believe that she has capacity. In fact, ***I believe that resolution of these legal matters will be beneficial to her in the long run and will aid her recovery*** [emphasis added]. *I would advise that her husband attends with her for support and that her legal team should forewarn the Judge that she may require support through the process".*

16. In the light of this the Appellant accepted that she had capacity and on the 20th May she consented to an unless order that she file her witness statement by the 20th June 2011. On the 1st June she instructed a new firm of solicitors to take over her case and they received all the papers on about 17th June. It is quite clear that the Appellant appreciated that the deadline for filing her statement was fast approaching because on the 20th June 2011 she filed in her own name and personally signed an application further to extend the time for filing her statement.

17. The Appellant's Consultant psychiatrist went on leave for 3 months, therefore on the 14th July 2011 she was reviewed by a Dr Giordano who is described as *"Specialty Doctor to Dr Price"*. He increased the dose of her medication and indicated that she should be reviewed further in 3 months. In a follow up letter to her GP he described her as being *"extremely subdued"* and stated *"most of the time it is very difficult to assess her mental state because she remains mute and does not let out her emotions"*.

18. It is clear that between the 1st June and 26th August the Appellant was able to give her solicitors sufficient instructions for the preparation of a draft statement. I so state because her Counsel's chronology concedes that *"26.8.11....A witness statement has by this stage been taken by A's new solicitor"*. Despite this, the statement was not completed and her new solicitors filed another application to extend time for the service of the document. On the 22nd July, by consent, the date for filing the statement was extended to 26th August.

19. The Appellant's solicitors also sought a medical report from Dr Giordano as to her mental health/capacity. On the 14th September the psychiatrist saw the Appellant for the purposes of that report. The letter of instruction (which we do not have) obviously asked specific questions for the doctor's letter answers specific questions. He reports that the Appellant has a severe depressive disorder and severe adjustment disorder which reduces her ability to cope with stress and verbalise her feelings. He states specifically *"in her current state Ms Dhillon is not able to concentrate and instruct you to complete a witness statement"*. He continues .... *"I foresee a very slow and gradual improvement in not less than 12 months time* [i.e. by September 2012]. *I believe that Ms Dhillon* ***has full capacity to make decisions*** [emphasis added] *but at present her mental state is so frail that her ability to provide instruction is* ***impaired***".

20. The Appellant's solicitors sought to adjourn the trial for 12 months. That application was dismissed by DJ Lightman. His decision was not appealed.

21. On that occasion, the time for filing the statement was extended once more (on an unless basis) to 7th October 2011. On that date, no evidence having been filed, an order was finally made debarring the Appellant from relying on any further witness evidence at trial. That Direction was not appealed.

22. To my mind by this time it must have been absolutely clear to those representing her that the Appellant had difficulties which needed to be addressed immediately, particularly given an order which provided for a trial in November 2011 with the added direction that no further evidence from the Appellant was permissible. The Appellant's apparent presentation in the context of the medical evidence should have made it obvious that her case required detailed preparation.

23. There were several courses open to the Appellant's legal team. For example (and I mention but a few), they could have appealed the orders or sought relief from the sanction imposed; they could have sought directions for special measures to assist their client (who was confirmed to have capacity) such as the taking of a deposition of her evidence (perhaps at her home with family support) or they could have sought to introduce her (seemingly almost complete) statement by way of an application under the Civil Evidence Act. No such actions were taken. Instead in October 2011 (with the trial looming in about 4 weeks) Dr Giordano was approached once more for a further report. This time he was provided with the standard form (used by the Official Solicitor) and asked to address capacity again. He did not review his patient but completed the form on the 24th October stating that she lacked capacity. There is no reasoned explanation for his change of stance which, speaking for myself, I find puzzling given he had no fresh first hand evidence upon which to base his new and opposite conclusion. His report was, apparently, only received by the Appellant's solicitors on 31st October. That delay remains unexplained given the urgency of the situation. On the 2nd November an application was filed to adjourn the trial and on the 6th November a Litigation Friend (the Appellant's brother) was appointed. It seems quite astonishing, given that the alleged problems in taking instructions were manifest from (at the latest) early September 2011, so few steps were taken to ensure this case was ready for trial in the event that an adjournment was refused. It should have been obvious, given the history which I have outlined, that the Appellant's primary application might not succeed and I would have thought it was essential that the Appellant's case was as well prepared as it could be allowing for the difficulties.

24. The trial of the claim and counterclaim that came before HHJ Cowell on 14th November 2011 was the third time that case had been listed for final disposal. On the first day of the hearing the Appellant made an application to adjourn on two bases:

i) She was lacking capacity and unable to attend trial to give evidence or be cross examined on that evidence; and

ii) Her litigation friend had had insufficient time to prepare the case since his appointment on 6th November.

25. The Respondent had filed his written evidence in early November. This had been delayed only because he was waiting to exchange it with the Appellant's evidence. The Appellant's team filed a supporting witness statement from Mrs Wallace on the 11th November.

26. HHJ Cowell refused the application to adjourn and the trial continued over the next five days. The decision to adjourn a trial was an exercise of judicial discretion on a case management decision.

27. The first day was taken up with the Application to adjourn and the second with the evidence in chief of the Respondent and Mr Clarke (the Respondent's conveyancing solicitor). The Court did not sit on the third day to permit the Litigation Friend to have further time to consider the oral evidence. The Judge was informed that the Appellant's case was put at a grave disadvantage because of the lack of time her Litigation Friend had had to absorb all the evidence. The Judge did not accept that submission but, to accommodate the Litigation Friend, he made the special arrangements outlined to assist the Appellant. The remaining two days of hearing were taken up with cross examination; the Appellant's case; submissions and Judgment.

28. The Judge found in favour of the Respondent and dismissed the counterclaim.

The Legal Framework

29. The power of a Court to adjourn a trial arises by virtue of CPR 3.1(2)(b).

30. The decision of Lightman J in Albon (trading as NA Carriage Co) v Naza Motor Trading Sdn Bhd and another (No 5) [2007] EWHC 2613, [2008] 1 WLR 2380 confirms, at paragraphs 14 to 19:

i) That the power is an exercise of the Court's discretion;

ii) That discretion must be exercised in accord with the overriding objective;

iii) Whilst the factors set out in pre-CPR cases are relevant, they are no longer, necessarily, determinative. All relevant factors must be weighed in the balancing exercise that the trial judge must carry out; and

iv) The determinative factors concluded by the pre-CPR cases were:

a) The witness was unable to attend trial on grounds of ill health;

b) The witness's evidence was reasonably necessary if the party's case were to be properly presented;

c) There was a reasonable prospect that the witness would be able to attend an adjourned hearing at a **specific reasonable future date**; [emphasis added] and

d) The other party would suffer no injustice which cannot be remedied by an award of costs or otherwise.

31. In Tanfern Limited v Cameron MacDonald [2000] 1 WLR 1311, paragraph 32, Brooke LJ stated:

'...the appellate court should only interfere when they consider that the judge of first instance has not merely preferred an imperfect solution which is different from an alternative imperfect solution which the Court of Appeal might or would have

adopted, but has exceeded the generous ambit within which a reasonable disagreement is possible'

32. In Terluk v Berezovsky [2010] EWCA Civ 1345) at paragraphs 18 to 20 it was stated:

18 Our approach to this question is that the test to be applied to a decision on the adjournment of proceedings is not whether it lay within the broad band of judicial discretion but whether, in the judgment of the appellate court, it was unfair. In Gillies v Secretary of State for Work and Pensions [2006] UKHL 2 , Lord Hope said (at §6):

"[T]he question whether a tribunal ... was acting in breach of the principles of natural justice is essentially a question of law."

As Carnwath LJ said in AA (Uganda) v Secretary of State for the Home Department [2008] EWCA Civ 579 , §50, anything less would be a departure from the appellate court's constitutional responsibility. This "non-Wednesbury" approach, we would note, has a pedigree at least as longstanding as the decision of the Divisional Court in R v S W London SBAT, ex parte Bullen (1976) 120 Sol. Jo. 437 ; see also R v Panel on Takeovers, ex p Guinness PLC [1990] 1 QB 146 , 178G-H per Lord Donaldson (who had been a party to the Bullen decision) and 184 C-E per Lloyd LJ. It also conforms with the jurisprudence of the European Court of Human Rights under article 6 of the Convention – for we accept without demur that what was engaged by the successive applications for an adjournment was the defendant's right both at common law and under the ECHR to a fair trial.

19 But, as Lord Hope went on in his next sentence in Gillies to point out, the appellate judgment

"requires a correct application of the legal test to the decided facts ..."

Thus the judgment arrived at at first instance is not eclipsed or marginalised on appeal. What the appellate court is concerned with is what was fair in the circumstances identified and evaluated by the judge. In the present case, this is an important element.

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

33. Although the language in these two cases is entirely different, the foundation of the decisions is both consistent and analogous. The conclusions which I derive from the authorities are that:

a. the overriding objective requires cases to be dealt with justly. CPR 1.1(2)(d) demands that the Court deals with cases 'expeditiously and fairly'. Fairness requires the position of both sides to be considered and this is in accordance with Article 6 ECHR.

b. fairness can only be determined by taking all relevant matters into account (and excluding irrelevant matters).

c. it may be, in any one scenario, that a number of fair outcomes are possible. Therefore a balancing exercise has to be conducted in each case. It is only when the decision of the first instance judge is plainly wrong that the Court of Appeal will interfere with that decision.

d. unless the Appeal Court can identify that the judge has taken into account immaterial factors, omitted to take into account material factors, erred in principle or come to a decision that was impermissible (Aldi Stores Limited v WSP Group Plc [2007] EWCA Civ 1260, [2008] 1 WLR 748, paragraph 16) the decision at First Instance must prevail.

The Appellant's case and discussion

34. The first major ground propounded in support of this Appeal is that the Appellant suffered fundamental unfairness in the trial continuing, given that she was lacking capacity and unable to attend the trial to give evidence or be cross examined on that evidence. In support of that basic ground the Appellant has raised the following specific points

e. The medical evidence provided not only clear support for the Appellant's lack of capacity but also provided a clear picture of an individual who had been afflicted by serious mental illness for a considerable period of time. For my own part and in the light of the chronology which I have outlined above, the Judge was fully entitled to reach the conclusion that the late arrival of the evidence of incapacity was not a sufficient factor in this case to merit an adjournment. If there were perceived difficulties, history demonstrates they stemmed primarily from a lack of proper preparation on behalf of the Appellant.

f. The complaint made is that, despite making no finding that the Appellant had capacity, the judge indicated that he wanted her to attend to give oral evidence which was "*unfair given her serious mental health difficulties*". This factor is prayed in aid as indicating that the judge misunderstood or ignored the evidence that the Appellant was manifestly incapable of attending court. I do not accept that submission. It is clear that the Judge accepted that the Appellant lacked capacity for he permitted the Litigation Friend to conduct the case on her behalf. By offering the Appellant the opportunity to attend to give evidence (with the special arrangements which, it is accepted, he suggested) the Judge was doing no more than stating the Appellant could attend if she was able. This was apposite in the light of medical evidence to the effect that over the relevant period she had passed in and out of capacity.

g. The Certificate of Incapacity (dated 24.10.11) stated *"in my professional opinion Severe Depressive Disorder has a long prognosis that could last for more than twelve months despite pharmacological treatment"*. In the light of this it is submitted that the judge was plainly wrong to find that *"there was no probability of her being of capacity in 12 months time"* and *"little if any prospect"* of her becoming capable in 12 months time. Counsel submitted that the Judge should have adopted a staged approach with regular reviews to monitor her mental health. As a matter of record the Appellant produced a further medical report to this Court (which was admitted without objection) in support of her application for the appointment of a new Litigation Friend for this Appeal. In this recent report Dr Nick Price opined *"I do however* ***suspect*** [emphasis added] *that* ***should*** *her good progress continue she will* ***be in a much better prospect*** *of managing these considerations in 6- 9 months time"* (which would be December 2012 – March 2013). This conclusion does not bode well in the context of the pattern of previous difficulties and demonstrates that the Judge's finding was not flawed.

h. Complaint is made that the trial took place without a substantive witness statement from the Appellant. This is correct but, as I have pointed out above, no proper steps were taken by the Appellant's team to introduce such evidence as they had amassed. Witness statements from the Appellant herself had been produced (i) on about 5th October 2009 (in support of a proposed amended defence) and (ii) on 18th May 2010 (dealing with disclosure). That indicates to me that during certain periods the Appellant could and should have prepared a full witness statement. To my mind the Judge was correct to criticise the Appellant for having failed to comply with the numerous orders which were made over some 2 years to provide a witness statement when the Appellant clearly had capacity during that time.

i. It is asserted that only the Appellant could have given relevant oral evidence to support her counterclaim and was not given that opportunity. As such, the submission is that the Judge was plainly wrong in failing to give her that opportunity. It is obvious that oral agreements were a key part of the case put on behalf of the Appellant. However, after his decision to continue with the trial the Judge found that the major part of the negotiations had been carried out by Mr Mirza. He then concluded that the Appellant would have had little to offer on the issues before the Court. He was at liberty to reach that later conclusion. As I have pointed out Mr Mirza was alive when the proceedings commenced and for some time thereafter. HHJ Cowell was free to take this factor into account in the exercise of his discretion and his conclusion to continue the trial cannot be undermined in this regard.

j. Finally, under this head, complaint is made that substantive witness statements were only provided by the Respondent in October 2011, after the Appellant had lost capacity. It is asserted that the Appellant was severely prejudiced by not being able to comment upon the Respondent's evidence and provide counsel with instructions. I am unimpressed with this submission because the late filing was only due to the Appellant's dilatory approach over many years. Accordingly, I reject that argument.

35. The second major ground of appeal is that the Litigation Friend had had insufficient time to prepare the case given his appointment on 6th November. It is claimed that the procedural steps taken by the Judge to enable him to acquaint himself with the case were inadequate and were manifestly insufficient to cure the unfairness of refusing to adjourn the case given that:

a) The Litigation Friend had no prior knowledge of the case,

b) The Ligation Friend signed a Certificate of Suitability only a week before the commencement of the trial.

c) The trial bundle ran to some 1,300 pages, and contained a wealth of detailed relevant material.

d) He was not able to provide any meaningful instructions to counsel on the Appellant's case.

36. I do not accept these criticisms. The Appellant (and her legal advisers who had been in place for several months) had plenty of time to prepare her case.

37. The Appellant has also submitted that the judge was wrong to attach so much weight to the alleged prejudice to the Respondent in circumstances where the claim was in respect of a secured loan. This ground is not made out. The Judge had a balancing exercise to carry out. He was entitled to take into account that the Respondent was Ghanaian and had flown over especially for the hearing which, as I have pointed out above, was the third time that the case had been listed for disposal. He was also at liberty to take into account the facts that the Respondent had financial pressures of his own and, if correct, the Respondent was being kept out of a large sum of money. In addition there was evidence that the Appellant was subject to other secured debts which might have affected his ability to recover monies due to him. These were relevant considerations to be weighed in the balance in a permissible exercise of discretion. HHJ Cowell accepted that whatever his decision, it would be an imperfect solution. He balanced all relevant factors and reached the conclusion that the matter was not to be adjourned. Nothing that the Appellant has submitted demonstrates that there was an impermissible exercise of discretion on his part.

38. I have paid some regard to the fact that, following the conclusion of live evidence, in a detailed reasoned judgment the Judge concluded that, even though she was debarred from filing evidence, it was most unlikely that the Appellant could have given material evidence on the matters in issue in the case. Evidence of the major negotiations (if it existed) could have been provided at an early stage in the proceedings by Mr Mirza, who was a prime mover, in the alleged "joint venture". Although he had passed away before the trial, he had left no corroborating documentation and had not made any witness statement in support of the Appellant's case. He was alive at the commencement of the litigation and had assisted the Appellant with the case at that time. In circumstances where it was most unlikely that the Appellant would be able to give any pertinent evidence to the Court within a year or 9 months (the latter being the best projection on the medical evidence), it was within the permissible limits of an exercise of discretion for the Judge to find that it was not unfair to the Appellant that the matter was not adjourned. On the evidence before the Court the merits of the defence were poor. The Court was entitled to

conclude that it was very unlikely to be altered by the evidence of the Appellant, particularly in circumstances where the allegations were wholly at odds with the contemporaneous documentation.

39. HHJ Cowell was equally at liberty to conclude that there was no probability that the Appellant would be of capacity if the trial of the matter were to be adjourned for a further period of 12 months, particularly where the litigation was, by the time of the trial, a cause of the depressive illness from which the Appellant suffered.

Conclusion

40. HHJ Cowell found

> *"The overwhelming impression given to me on the part of the Defendant on the first two days of the trial, which were on Monday and Tuesday, 14th and 15th November, is that almost any tactic was going to be used in order to obtain an adjournment of the hearing of this matter. First I should note that during such times as the Defendant herself may have had capacity she has consistently failed to comply with court orders about the serving of witness statements, particularly a statement of her own evidence, while at the same time she appeared to be capable of making applications and taking other steps in this case, although the evidence of Mrs Wallace is that she gave considerable assistance to her sister in making those applications. However the problems about adjournment and the reasons given for the absence of any witness statement were such that I understand District Judge Lightman at an interim hearing summarised the situation by the memorable observation, 'Enough is enough'* ".

41. In the light of the chronology that conclusion cannot be faulted and for my part I agree with it.

42. On Wednesday 18th July 2012 the Court received a letter from the Appellant's solicitors enclosing a signed but undated witness statement from Mr Rajpaul Singh Dhillon who was the appointed Litigation in the proceedings before HHJ Cowell. The covering letter indicates that such statement had been produced in draft on the 11th July but was not filed with the Court or served on the Respondent. The letter asks that the new statement *"be brought to attention of the Court prior to Judgment. The reason that unusual request is made is that towards the end of the Hearing ..... Bailey [sic] LJ asked what was the specific prejudice suffered by the Litigation Friend. Baron LJ [sic] asked if there was evidence or a statement from the Litigation Friend"*. My own question was posed in the context of whether such evidence was before the Trial Judge. Indeed, the specified requests for information were in no way unusual in the context of an Appeal Hearing and cannot be used as an excuse for such a belated request. Moreover, there was no assertion by Counsel appearing for the Appellant that any new, detailed evidence was available or would be relevant.

43. This Court did not seek or require further evidence nor did it give permission for any further statement. No application to adduce fresh evidence was made during the Appeal. For my part, I consider it wholly unsatisfactory to seek to adduce this evidence, in this manner, after the Hearing has ended and without the apparent knowledge (or agreement) of the Respondent. Its admission into evidence at this time

would require a further hearing and renewed submissions. As the covering letter makes clear it was already available in draft before the case was heard but its existence was never mentioned. In the circumstances I do not consider it should be admitted into evidence and I decline so to do.

44. For the reasons set out above I would dismiss this appeal.

Lady Justice Arden:

45. I agree.

Lord Justice Davis:

46. I also agree.