Case No: HC13F00294

Neutral Citation Number: [2015] EWHC 2184 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

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

Date: 22/07/2015

Before :

MRS JUSTICE ASPLIN DBE

- -

Between :

(1) ALFRED VAN COLLEM
(2) PETER VAN COLLEM
(3) SOCRATES MANAGEMENT CORPORATION

Claimants

- and –

(1) STEPHAN VAN COLLEM
(2) HELIOS MANAGEMENT & CONSULTING LTD
(3) EURO CONTRACTING CORPORATION LTD
(4) ALPHAGENETICS LTD
(5) CITIZEN ENGINEERING SERVICES LIMITED

Defendants

- -
- -

Gary Blaker QC and Isabel Petrie (instructed by **LSG Solicitors**) for the **Claimants**
The Defendants not being represented or present

Hearing dates: 21st & 22nd July 2015

- -

Judgment

The Hon Mrs Justice Asplin :

1. Yesterday morning I dealt with Stephan van Collem's application for an extension of time to comply with my order of 8th July 2015 and an adjournment of the hearing that day at which it was intended to deal with his two applications neither of which had been issued, one of which was for an adjournment of the trial which recommenced on 3rd July 2015 and the other was to set aside my decision to strike out the Defence under CPR 39.3 in the light of the fact that Stephan had not attended court on 3rd July 2015.

2. On that occasion I gave a full judgment setting out the nature of this matter and its procedural history. I dismissed Stephan's application for an extension of time and adjournment of the hearing of yesterday, the 21st July. It is now necessary to turn to the two applications themselves. The first of 6th July 2015 requests an adjournment of the trial and the second of 7th July seeks an order setting aside the order striking out the Defence "based on medical grounds in support of preliminary evidence brought forward now."

3. Although it is repetitious, the background having been set out in my judgment relating to an adjournment of yesterday's hearing which should be read with this judgment, because Stephan is not present and is a litigant in person, I will set out the background again here, albeit in summary.

4. This matter commenced in January 2013. Stephan has made more than thirty-three applications not including the ones to which I refer below. There have been a number of applications for adjournment by Stephan: the first was in October 2014 when the trial was listed for the first available date after 1st December 2014; he applied again on 30th January 2015 and the application was heard and refused on 9th February 2015; on 26th February 2015 the trial having commenced, he obtained an adjournment to 2nd March to deal with the new documentation which he brought to court and on 2nd March 2015 a further adjournment was granted.

5. When I adjourned this trial part heard on 2nd March 2015, the Order made clear that the matter should be listed on the first available date after 15th June 2015 and that the listing should include one day for pre-reading. In the event, the adjourned trial date was fixed for the most part at Stephan's convenience. He attended the appointment at which it was fixed and Mr Blaker says that this trial window was chosen in order to enable Mr Goodhead, a barrister who has assisted Stephan in the past, to attend the hearing. The pre-reading day was 2nd July 2015 and the trial was due to commence on Friday 3rd July. Mr Blaker says that during the week running up to the commencement of the adjourned trial, he contacted Mr Goodhead and another barrister who has also attended in order to assist Stephan in the past and that neither of them were expecting to represent or assist him at the trial.

6. In fact, Stephan had attended before me on 14th May 2015 on an application concerning the date for filing a further expert's report and the receipt of evidence by video link. As a result, in part at least, further evidence by Mr Van de Keybus, Stephan's forensic accountant was served on 22nd May 2015. In early June, Stephan made an application on paper for an extension of time for service of further witness evidence and was required to serve the application on the

Claimants. The Claimants also made a similar application and they were dealt with together.

7. When the trial re-commenced on 3rd July 2015, Stephan was not present. I delayed the beginning of the trial until 10.45am. In the circumstances Mr Blaker urged me to strike out the Defence pursuant to CPR 39.3(1)(c). He had stated that the last communication his solicitor had received from Stephan prior to the resumption of the trial was an email on 12th June 2015. He said that on 19th June his solicitor emailed Stephan asking about exchange of witness statements pursuant to the further order I had made but received no response. He served the Claimants' further witness statement on Stephan in any event on 22nd June. No further witness statement was served on behalf of Stephan. On 29th June new pages for the bundles and instructions as to where to file them were sent to two email addresses and the same thing happened on 1st July. The contents of the housekeeping bundle which included the trial timetable were sent electronically to the same addresses on 2nd July 2015. No response was received.

8. I adjourned until 2pm. In the meantime I asked solicitors to seek to contact Stephan by email and telephone pointing out that he was not present at 10.30am, the trial had been adjourned to 2pm and that if there is any good reason why he did not attend, to give it immediately. An email was sent to the 2 addresses which the Claimants' solicitors have for Stephan and a mobile telephone number which the Claimants' solicitors have for Stephan was used. There was no reply on the phone and no response to the emails was received. In fact, just before 2pm the court associate also tried to contact Stephan on a mobile number on the court file, but the call was not answered.

9. At 2pm, given the way in which the resumed trial had been fixed, including the fact that the adjourned date was the third occasion on which the trial had been fixed to take place, the waste of costs, the inconvenience and prejudice to the Claimants and their witnesses who for the most part have come from Antwerp, the age of Alfred, the First Claimant and his poor health which is not in dispute, the fact that Mr Goodhead was not instructed despite the date having been fixed with the intention that he should attend, Stephan's attendance before me in May 2015 in full knowledge of the adjourned hearing, the timetable for further expert evidence having been debated on that occasion in the light of the trial date which was mentioned, the further application made on paper for extension of time for service of witness evidence which was granted, all of which are consistent with engagement with the trial and its imminent commencement, together with the failure to respond to email and telephone communication in order to provide a good reason for the failure to attend, I considered it appropriate to strike out the Defence pursuant to CPR 39.3(1)(c). I also took into consideration when making that decision, the seriousness of the issues to which the trial relates.

10. Thereafter, on Monday 6th July 2015 I received a number of emails which had been sent to my clerk and was also informed of a voicemail message left on my clerk's telephone at 16.54 on Friday 3rd July to say that he had been too ill to attend the hearing. The emails from legal@ALPHAGENETICS.CO.UK were as follows:

(i) 6th July 2015 at 4.14 to Mr Chris Ellis and Chancery Listing, copied to Hal Branch, the Claimant's solicitor with a pdf attachment containing an email from Hal Branch to "legal" and "Stephan van Collem" of 12th June 2015 at 12.30, Mr van Collem's response of 12th June at 14.47 and Mr Branch's further response to "Legal" cc: Tom Goodhead of 15th June 2015 at 14.19;

(ii) 6th July 2015 at 5.21 to Mr Chris Ellis and Chancery Listing, copied to Hal Branch attaching an Application Notice seeking an adjournment of the trial and the 18th witness statement of Mr Stephan van Collem of 6th July 2015 setting out details concerning his medical condition and present state of health and stating that Mr Stephan van Collem is seeking medical evidence as soon as possible and that what is in his possession is in Flemish;

(iii) 6th July 2015 at 9.14 to Mr Chris Ellis and Chancery Listing sent from an Iphone stating that "in [his] attempt to come to court with the evidence", Mr Stephan van Collem "collapsed and fell on [his] face and was unconscious" and had been "brought by ambulance to the university clinic of Utrecht where they are evaluating [his] condition.";

and

(iv) 6th July 2015 at 11.07 to Mr Chris Ellis sent from an Iphone stating amongst other things that "the cardio team has just taken the decision that they do not want to take the responsibility to let me go. I need to stay minimum 2 days in observation. . . . A full medical file is updated. I do not know if I can get a copy or wether [sic] I have to get it from the Antwerp university clinic. They will sent [sic] a full update to Antwerp. Technically or legally they cannot send this information to me by e-mail. ..."

11. As a result, my clerk sent an email to Stephan, copied to the Claimants' solicitors setting out what I had received and what had occurred on Friday 3rd July 2015, pointing out that in order to set aside the Order striking out the Defence it would be necessary to make an application supported by proper evidence and to make it promptly and that it and any application for an adjournment must be supported by cogent medical evidence. A response was received on 7th July by email to my clerk at 16.16. It states:

> "I wish to inform you that I will file an application and witness statement to adjourn based on the first medical evidence that I received.
>
> If I cannot get help on this short notice I will do it on my own and have it improved if necessary by a professional barrister at later stage with more evidence.
>
> The evidence is in Dutch. Due to my physical condition I am not able to translate it all, but the essential points, is will. [sic]

> I am physically not able to attend court, but I can speak, and could be present by skype or by phone to testify what has happened and to defence [sic] my cause."

12. My clerk emailed back acknowledging receipt and stating that if Stephan intended to attend court today by video link, the onus was on him to make the arrangements. In fact, in the first email referred to above, Stephan made three points before turning to his medical condition. He stated that he had not been informed of the trial schedule before the trial started; secondly none of the evidence of the Belgian accounts put forward by the Defendants had been accepted by Mr Branch on behalf of the Claimants; and thirdly, that there had been what was described as an intimidation campaign against the forensic accountant, Mr van de Keybus, intended to cause him to withdraw his witness statement. Stephan went on:

> "My medical condition did not allow me to prepare some applications to address all these issues. After finding out that the trial had not 2 reading days and had started I contacted a lawyer and then I left a message on the answering machine of Chris Ellis."

13. I adjourned the hearing on 8th July over to 21st July in order to give Stephan a proper opportunity to serve and file cogent medical evidence as he described in paragraph 44 of his witness statement and to deal with the setting aside of the strike out. Shortly after the 8th July 2015 hearing, Mr Branch emailed Stephan setting out the terms of my Order of that day and he served the sealed order on Stephan on 8th July at 15.53. He sent a further email on 9th July at 15.00 enquiring whether Stephan intended to instruct a medical expert and asking for his details. He did not receive an acknowledgment for any of those emails.

14. The application for an adjournment of the trial appended to the second email of 6th July sent at 5.21am, is based upon Stephan's health which he describes under headings for 2011, 2012 and 2015. He says that he is suffering from a leaky heart valve and that his condition deteriorated from January 2015 and in particular from May. He says that in the middle of June he fainted in the house and contacted his GP. He says that the "cardio team" at the University Clinic Antwerp conducted initial tests and that further tests are scheduled for 9 July 2015. He says that on Friday afternoon he tried to send an email to court and discovered the schedule for the trial beginning that day. He says that he had not looked at his emails as a result of computer crashes and not being well. As soon as he saw that the trial had begun he contacted a lawyer and left a message for my clerk.

15. As I have already mentioned, at paragraph 44 of the witness statement he states that he has been advised that he needs "proper medical evidence to demonstrate that I am unable to attend and participate in the trial" and that "such evidence should identify with particularity what my medical condition is and the features of that the condition which (in the medical attendant's opinion) prevent participation in the trial process, should provide a reasoned prognosis and should give the Court some confidence that what is being expressed is an independent opinion after a proper examination." He goes on to state that he is seeking such evidence as soon as possible but what he has at present is in Flemish.

16. The application for an adjournment is opposed. In this regard, Mr Hal Branch, the Claimants' solicitor, has produced a 16th witness statement. He says that this is the latest in Stephan's attempts to scupper the trial and that he considers that Alfred's ill health and the question of whether he would be well enough to attend a further adjourned hearing is at the forefront of Stephan's mind when seeking another adjournment. Mr Branch emphasises that Stephan attended the listing appointment for the adjourned trial and exhibits the note written by counsel's clerk on that occasion which expressly states: "Reading 2nd July 2015 Start 3rd July 2015". As Mr Branch points out this was in accordance with my order of 2 March 2015 which made express reference to one reading day. Mr Branch also exhibits junior counsel's note of the hearing before me on 14 May 2015 attended by Stephan in which she notes that it was stated that there was to be a reading day on 2nd July with evidence to commence on 3rd July 2015. He also refers to his email to Stephan of 26th May 2015 in which he mentioned that the trial was listed to take place on 3rd July and the failure of Stephan to complain on receipt of the housekeeping file on 2nd July which included a trial timetable showing evidence commencing on 3rd. He says therefore, that there is overwhelming evidence that Stephan knew that the trial was to re-commence on 3rd July. This evidence formed the basis of Mr Blaker's submissions in this regard.

17. In relation to the medical reasons put forward by Stephan, it is said on behalf of the Claimants that it is wholly unsupported and reference is made to the fact that it has barely been mentioned before now despite the fact that Stephan's witness statement suggests that it has been an ongoing issue since 2011. Mr Branch points out that Stephan has failed to produce any evidence whether from his English GP or from St Thomas' Hospital where he says he was admitted in 2011. He also refers to a series of what he says are inconsistencies in Stephan's evidence including references to collapse at Gatwick but going to hospital in Antwerp; reference to tests on Thursday 9th with a possible operation the next day; together with references to an appointment in the week of 6th July at which it will be decided whether an operation is necessary and which will be followed by having to "walk for at least 1 week with a heart monitor to verify irregular heartbeats"; and a contrary assertion that he is "laying down 70% of the time to prevent pain and risk of a heart attack." He points out that although it is said that Stephan's condition worsened in 2015, he appeared fine at four hearings that took place on 9th and 26th February, 2nd March and 14th May 2015 at which no mention was made of ill health.

18. Mr Branch also points out that although Stephan states that his condition has worsened in the last six weeks, he failed to mention that he had been in correspondence by email on 12th June concerning the trial and the possibility of mediation. In fact, the email traffic was attached to the email from Stephan to which I referred at paragraph 10(i) above. Mr Branch also refers to the email of 6th July 2015 which refers to having been taken to the University Clinic of Utrecht by ambulance. Mr Branch says that Peter telephoned the hospital on 6th July and was informed that Stephan had attended on foot that day. Further, Mr Branch says that Peter telephoned the hospital again on 7th July and was informed by "Chief Nurse Maya" that Stephan was departing the hospital that morning and that there was "no problem with the First Defendant's health".

19. In addition, Mr Blaker submits that Stephan's evidence is full of assertions without documentary evidence to support them; he has failed to take simple steps which were open to him such as to seek the release of his medical records from St Thomas' or from his GP; the terms in which he describes his condition suggest that it is very serious but his conduct in not seeking emergency assistance is contrary to that; he himself describes his condition as "life threatening" and that he is "at risk of a heart attack", but then, for example, says that he took no steps in relation to it in 2013 and 2014. Whilst mentioning that an operation might be necessary he gives no indication of why no steps were taken to set it in train.

20. In relation to what is said to be the further deterioration from January 2015, Mr Blaker submits that there was no physical sign nor any suggestion of cognitive impairment when he was before the court in February and brought twenty document boxes filled with documents to court. He also draws attention to the fact that Stephan has made a large number of witness statements and applications and sent copious numbers of detailed emails. Mr Blaker points out that it is said that there was a further deterioration from May of this year. However, Stephan attended before me on 14th May 2015 and made no mention of his condition or the effect it might have on the trial, the date of which was mentioned. However, Stephan's evidence, albeit unsupported by medical evidence is that he felt as if he had a clamp on his chest at this stage and that he was forced to lie down for 70% of the time.

21. Mr Blaker also emphasises that it is clear from paragraph 44 of Stephan's 18th witness statement that he had been advised about the kind of evidence necessary to persuade the court to adjourn and at paragraph 45 stated that he was seeking it. However, the only evidence put before the court was produced on the morning of the 8th July hearing and was inconclusive rather than cogent. It was in the form of a referral letter from a GP in Antwerp, Dr Hershko, to a cardiologist for cardiology assessment of chest pain, dated 23rd June 2015, an initial report by the cardiologist Dr Heyning at UZA in Antwerp, also of 23rd June 2015 and a further report from UMC Utrecht Heart and Lung Division in relation to Stephan's admission for tests from 6 – 7th July 2015.

22. Stephan's 19th witness statement in support of his second application to set aside the order striking out the defence, contains more about his medical condition. Once again Mr Blaker points out the inconsistencies. For example, he refers to the fact that Stephan suggests that his condition is so severe that he lost the entirety of the weekend of 27-28th June, although there is no evidence of it and that his condition was said to be so serious although no emergency medical treatment was sought or given. He also refers to the fact that the 19th witness statement which stretches to 73 paragraphs was produced nevertheless. He also points out that Stephan's diary of events including visits to lawyers after hospital visits is inconsistent with a need to lie down for 70% of the time.

23. Despite the fact that no evidence was provided by Stephan of the kind referred to in paragraph 44 of his witness statement and referred to in my Order of 8th July, Mr Branch instructed Professor Robin Choudhury MA, DM, FRCP, FESC, a professor of Cardiovascular Medicine at the University of Oxford, UK and Honorary Consultant Cardiologist at the Oxford Heart Centre, which Mr Branch believes to be part of the John Radcliffe Hospital in Oxford who has a wide

experience in clinical practice and research relating to general and interventional cardiology. He provided the professor with translated copies of the documents relating to Stephan's medical condition which he had supplied to the court and to which I have referred. On 9th July 2015, the professor provided his opinion on those documents. Quite properly he made clear that his opinion is upon the limited medical documentation which has been provided to him and is not a medical opinion on the patient's clinical case.

24. In summary, the professor says that the documentation points away from coronary heart disease as the cause for the chest pain, the cardiologist suspecting musculo-skeletal pain. He also says that there is reference to the possibility of a ventricular arrhythimia which he points out is a potentially serious condition and that the level of suspicion is sufficiently high to warrant implantation of an electronic monitoring device. He also points out that there is reference to moderate leakage from the mitral valve in the left ventricular pumping chamber of the heart. The professor notes that the cardiologist's plan is for "watchful waiting" and concludes that the functional consequences of the leakage are relatively modest. He says this because "the patient is asymptomatic and there are no physical signs of heart failure related to the leakage, or of long term deleterious effects on the lungs, which is sometimes a complicating factor." He concludes that as long as Stephan were permitted to sit in court and was not required to stand for long periods he would not be affected. In relation to the leaky valve he says that repair or replacement may be required but not in the short or medium term.

25. Mr Branch in his 17th witness statement goes on to comment upon Stephan's statement that he had trouble with his computer. He points out that he received his email on 3rd July and that as he was aware that the trial was imminent one might assume that he would have told Mr Branch to contact him in another way, if in fact, he was in difficulty. In his witness statement, Stephan states that there were a number of computer crashes. It is unclear precisely when they are said to have occurred. In any event, two of the emails sent to my clerk on 6th July 2015 were sent from Stephan's Iphone. Mr Blaker submits therefore, that one way or another Stephan was receiving and sending emails.

26. With regard to the allegation of intimidation of Mr Keybus, Mr Branch exhibits a complaint made by Peter to the Instituut der Bedrijfsrevisoren (the Belgian auditors' regulatory body referred to hereafter as the "Institute") dated 18 June 2015. It suggests that he has aided and abetted criminal acts by Stephan and sets out in some detail, what is alleged to be Stephan's criminal record and activity and the bare bones of these proceedings and Mr van de Keybus' evidence. Mr Branch points out that rather than prevent Mr van de Keybus from giving evidence, his email correspondence had emphasised the need for him to attend and the trial timetable had included him.

27. Mr Branch's 17th witness statement, the skeleton for the hearing yesterday and copies of the authorities relied upon were sent to Stephan on Friday 17th July 2015. However, nothing was heard from him until around 4pm on 20th July and then shortly before 9am on 21st July. His 20th witness statement was received under cover of an email dated 20th July 2015 and timed at 15.19. It is dated 17th July at the beginning at 20th July at the end. It is unsigned. A signed version was brought to court by Mr Davey who appeared for Stephan on the application to

adjourn yesterday's hearing. The witness statement runs to 11 pages. In it, Stephan seeks an "extension of time in regard to the order of 8 July concerning filing further medical evidence and translations of files due to my medical condition" and "an adjournment of the hearing, scheduled for 21 July 2015 because of essential medical evidence not being provided yet and therefore, subsequently not being possible to provide the court with it." I dealt with those matters in yesterday's judgment.

28. The content of the witness statement provides what is said to be an update on Stephan's medical condition and therefore, is relevant to the issues before me now. In summary, he states that there is no updated report from UMC Utrecht, no report from UZA in Antwerp, and that no report could be given from UZA because the tests are not completed or complete and the results have yet to be analysed. He says that the tests were carried out by paramedics and that an appointment with a doctor was declined. He says that he has not been able to find a reasonably priced translator but that he continues to have chest pain, headache and extreme tiredness which make it difficult for him to function and nearly impossible to carry out intellectual tasks. He says that he will hand in the test device by which I assume he means the heart monitor, on 23rd July and request an appointment, between 23rd and 31st there will be an appointment and a decision in relation to further tests and subsequently there will be a report by his Belgian doctor and optionally a UK specialist. He adds that the doctor who "checked him", although he does not say when or whom, is now on holiday. He accepts that nothing has been found other than his leaking heart valve. He adds that given the large amount of documentation in this case he would not be able to "locate them within a reasonable amount of time just due to the headache, regardless the dizziness and chest pain."

29. In relation to the complaint against Mr van de Keybus he sets out a large amount of background and asserts that the intention is to cause Mr van de Keybus' licence as an auditor to be revoked and that it is a costly and time consuming matter to deal with which is intended to cause him to "retreat".

30. A further witness statement by Stephan dated 21st July 2015 but also erroneously numbered his 20th rather than 21st was received under cover of an email of 8.50 yesterday morning. In the email, Stephan states that he accepts the translations of the medical records and the matters in relation to Mr De Clippele undertaken on behalf of the Claimants and exhibited to Mr Branch's most recent witness statement. In the new witness statement, in summary, Stephan states that he tried to obtain an appointment with the doctor/cardiologist who dealt with him in April 2012 at the beginning of June 2015. He does not state the name of the doctor or whether he obtained an appointment and if not, why not. He comments on Professor Choudhury's opinion stating that it is based upon insufficient evidence. He reiterates that he could not obtain a report because he was denied an appointment until sufficient information was available from the tests being carried out and that tests were carried out on 16th July. He says that he could not return to the hospital on 17th because he was not fit to drive the 90 miles, he tried on the 20th July but the "day was bridged" by which I understand that it was a day on which many are on holiday because Tuesday 21st is a national holiday and he goes on to point out that 21st July is such a holiday. He states that a full diagnosis is

imminent. In relation to the translations he says that he had insufficient time and budget. In relation to the complaints about Mr van de Keybus he describes them as intimidation of a witness. He says that together with perjury, false witness statements and intimidation of witnesses in the past are sufficient to strike out the claim. Lastly, he states that Mr Branch and Mr Blaker are representing Socrates without authority and that the documents they claim to have are forgeries. He exhibits translations of the medical records and the letter of 4 June 2015 from Mr Clippele to the Institute.

31. As I have already mentioned, I have already dismissed Stephan's application for an adjournment of yesterday's hearing. In that judgment I set out the jurisprudence in relation to adjournments on the basis of medical evidence. I referred to the decision of Warby J in *Decker v Hopcraft* [2015] EWHC 1170 (QB). The learned judge set out the relevant principles at paragraphs [21] – [31] of his judgment. He emphasised that the question of whether to adjourn or to continue in the absence of a party is an exercise of discretion in accordance with the overriding objective in the light of the particular circumstances of the case. I agree. He pointed out that the court should be hesitant to refuse an application of this kind made by a litigant in person on the first occasion but went to list a number of qualifications: first, the decision is for the court to make and cannot be forced upon it: *Levy v Ellis-Carr* [2012] EWHC 63 at [32] per Norris J; secondly, the evidence in support must be scrutinised carefully. In particular, at paragraph [24], Warby J referred to the criteria which Norris J had set out at [36] of his judgment, Norris J's approach having been expressly approved by Lewison LJ in *Forrester Ketley v Brent* [2012] EWCA Civ 324, 26. It is as follows:

> "Such evidence should identify the medical attendant and give details of his familiarity with the party's medical condition (detailing all recent consultations), should identify with particularity what the patient's medical condition is and the features of that condition which (in the medical attendant's opinion) prevent participation in the trial process, should provide a reasoned prognosis and should give the court some confidence that what is being expressed is an independent opinion after a proper examination. It is being tendered as expert evidence. The court can then consider what weight to attach to that opinion, and what arrangements might be made (short of an adjournment) to accommodate a party's difficulties. No judge is bound to accept expert evidence: even a proper medical report falls to be considered simply as part of the material as a whole (including the previous conduct of the case)."

32. This, of course, was the basis of paragraph 44 of Stephan's witness statement and my directions contained in the Order of 8 July 2015. Warby J also noted that Vos J (as he then was) in *Governor and Company of the Bank of Ireland v Jaffery* [2012] EWHC 734 (Ch), at 49 had made clear that inability to work is not necessarily the same as an inability to attend court to deal with legal proceedings and that the learned judge had taken into account contents of the Defendant's

litigation correspondence, observing that he "has been communicating with the court and with the Claimants over a lengthy period in the most coherent fashion. He is plainly perfectly capable of expressing his point of view, taking decisions and advancing his case".

33. Warby J goes on to point out that it may be possible for a party to participate in a trial if suitable and reasonable accommodations are made and the court needs to assess the evidence to see whether this can be done or not. He also stated that whether effective participation is possible depends not only on the medical condition but also on the nature of the issues before the court and the role therefore, which the party will have to undertake. Next he pointed out that it may be of significance if it appears to the court that it is a matter in which one side or the other is bound to succeed and went on to make clear that when determining whether to adjourn it is relevant to take account of whether the issues in question are of a case management nature or are a final determination on the merits where Article 6 of the Convention is engaged where the court should be more cautious. I take all these matters into consideration when considering the medical evidence before the court in support of the adjournment of the trial.

34. In addition, to the manner in which the court approaches applications for adjournment on the basis of medical evidence (in relation to which Mr Blaker submits that there is no cogent evidence to justify an adjournment) and the terms of CPR 39.3(5) in relation to setting aside a decision to strike out under CPR 39.3(2) or (3) to which I shall refer below, Mr Blaker also quite properly drew attention to what has become known as the "Barrell jurisdiction". He referred me to the notes in the White Book at 40.2.1 and in particular at 40.2.1.0.1. He referred to the decision of the Supreme Court in *Re L (Children) (preliminary findings: power to reverse)* [2013] UKSC 8 in which it was held that a judge's power to recall and reconsider his or her judgment before it is perfected is not restricted to "exceptional circumstances". He paraphrased part of the judgment of Lord Neuberger in which he stated that whether to recall a judgment will depend upon all the circumstances of the case and that the relevant considerations include: plain mistake by the court; failure of the parties to draw attention to relevant facts or law; discovery of new facts after the judgment; whether a party has acted on the judgment to his detriment. Mr Blaker says that none of those apply here and that I should not depart from the decision I reached on 3rd July to strike out the Defence. I should say at this stage that I agree with Mr Blaker that the circumstances of this case do not fall within the "Barrell jurisdiction". There was no mistake or additional facts here. The question is whether the late application for an adjournment should be granted and the decision to strike out the defence should be set aside under CPR 39.3.

35. Lastly, Mr Blaker points out that in order to be successful in setting aside an order to strike out under CPR 39.3 it is necessary to satisfy all of the requirements of CPR 39.3(5). They are: a prompt application; good reason for not attending; and reasonable prospect of success at trial. Other than a prompt application which Mr Blaker accepts was made in this case, he says that Stephan fails to meet the criteria. He referred me to an extract from the judgment of Lord Neuberger MR *Bank of Scotland v Pereira* [2011] EWCA Civ 241 which is quoted in the White Book at 39.3.7 in which the then Master of the Rolls states that:

> "The strictness of the trio of hurdles is plain but the rigour of the rule is modified by [a number of] factors. First, what constitutes promptness and what constitutes a good reason for not attending is, in each case, very fact-sensitive, and the court should, at least in many cases, not be very rigorous when considering the applicant's conduct; similarly, the court should not be pre–judge the applicant's case, particularly where there is an issue of fact, when considering the third hurdle. Secondly, like all other rules, CPR 39.3 is subject to the overriding objective, and must be applied in that light."

Conclusions:

36. It seems to me that the two applications are entirely intertwined. It having been accepted that the application under CPR 39.3(5) was made promptly, it is for Stephan to satisfy the court that there was a good reason for his non attendance on 3rd July and that his defence has a reasonable prospect of success at trial. Despite the fact that Mr Blaker submitted that the defence is insubstantial, it seems to me that in the light of the fact that Stephan is a litigant in person and has not been represented in the these applications or for the most part, in the substantive matter, I should take care to adopt Lord Neuberger's direction in the *Bank of Scotland* case not to adopt too rigorous an approach. It seems to me that in the light of the fact that the Claimants were intending to embark upon a full resumed trial of some 6 days in length and had not applied to strike out the defence or to seek summary judgment, that I should conclude for the purposes of this application that the defence had a reasonable prospect of success. Therefore, the only live issue for the purposes of CPR 39.3(5) is whether there was a good reason for non-attendance. This takes me back to the medical evidence and the other matters raised by Stephan in relation both to a "good reason" and as to an adjournment.

37. When considering the medical evidence I take into account that if Stephan's applications are unsuccessful, the result will be a final determination of the issues in this case and as a result, I approach the matter with a high degree of caution. I also take account of the fact that this is the first occasion of reliance on a medical condition. The medical evidence must be considered in some detail and I am not bound to accept it.

38. First, it seems to me that the evidence which is available is not cogent and does not satisfy either the requirements enumerated by Norris J in *Levy v Ellis-Carr* or the matters set out in my directions contained in the Order of 8th July 2015. It was clear from paragraph 44 of Stephan's own witness statement of 6th July 2015 that he was aware of the kind of evidence which would be necessary to satisfy the court, that the evidence he had supplied was insufficient for that purpose and he stated at that stage that cogent evidence was being sought. The evidence supplied does not identify the medical attendant and give details of his/her familiarity with Stephan's medical condition (detailing all recent consultations), identify with particularity what the patient's medical condition is and the features of that condition which (in the medical attendant's opinion) prevent participation in the trial process and it contains no reasoned prognosis.

39. In fact, Stephan himself accepts that nothing has been found other than his leaking heart valve in relation to which a watching and waiting approach has been adopted and in relation to which Professor Choudhury concludes accordingly that the leakage must be moderate. The reference by a general practitioner dated 23 June 2015 refers to "Thoracic pain" and refers Stephan for "Further cardiological assessment". The report of the same date from Dr Heyning refers to the "known moderate mitral valve insufficiency". The report from UMC Utrecht in relation to Stephan's admission from 6-7th July 2015 for "rhythm observation" states that "except for a once-only telemetry triplet, no abnormalities" and goes on to state "acute cardiac pathology could be ruled out, however, the symptoms continued to come and go." Stephan has made no attempt to obtain any explanation of his present condition and the effect upon his ability to participate in the trial even from his GP. Other than the doctors named in the documents which have been produced he has given no details of those in charge of his care, which individuals are said to be on holiday and when they will return and what is said by a doctor to be his present state of fitness, as opposed to his own assertions.

40. I also take account of the inconsistencies in Stephan's evidence in particular, the reference to tests on Thursday 9th July with a possible operation the next day; together with references to an appointment in the week of 6th July at which it will be decided whether an operation is necessary and which will be followed by having to "walk for at least 1 week with a heart monitor to verify irregular heartbeats"; and a contrary assertion that he is "laying down 70% of the time to prevent pain and risk of a heart attack." This is also in part inconsistent with the most recent evidence in Stephan's 20th witness statement which makes reference only to tests. I also take account of the way in which Stephan describes his own condition as being "life threatening" which seems inconsistent with the kind of care which he is receiving. His assertion that he was taken to hospital by ambulance on one occasion is also in dispute.

41. I also place some weight upon the fact that although it is said that Stephan's condition worsened in 2015, he appeared unimpaired and made no mention of his condition at four hearings that took place on 9th and 26th February, 2nd March and 14th May 2015 and the fact that although Stephan states that his condition has worsened in the last six weeks, he failed to mention that he had been in correspondence by email on 12th June 2015 concerning the trial and the possibility of mediation and has engaged with the process of seeking an adjournment by the preparation of a number of applications and further witness statements, some of which are relatively lengthy, despite what he says about his condition.

42. In the circumstances, therefore, I am far from convinced by the medical evidence either as to the seriousness of Stephan's condition in relation to which I take account of the inconsistencies in his evidence and the evidence of Professor Choudhury. In this regard, I also take account of the fact that the GP referral letter and the first report are dated 23 June 2015 but that no steps were taken to alert the Claimants of any difficulty in attending the trial as a result. That report does not suggest anything life threatening or an inability to conduct a trial. Neither does the report after the observation which took place on 6th July. In this regard, I take account of Professor Choudhury's conclusion albeit on the papers only, that Stephan's difficulties could be accommodated by sitting down. Of course, the

observation itself took place during what would have been the trial itself. However, there is no explanation of why it was essential it took place at that time or any suggestion in the medical evidence of sufficient urgency to make it necessary to have taken place on that date rather than another.

43. Although the documentation reveals that Stephan's condition is under medical investigation, in my judgment, there is nothing to suggest that the investigation is a matter of extreme urgency or that his present condition prevents him or prevented him on 3rd July from attending the trial and participating in it with proper adjustments being made. I consider the evidence to be wholly insufficient for that purpose.

44. What of the other reasons originally given for Stephan's non- attendance? In my judgment it is quite clear from the documentation exhibited to Mr Branch's witness statement to which I have referred, that Stephan was present at the listing appointment and was well aware of the date on which the trial was to re-commence and the number of reading days. He also came before me in May at a hearing at which the date of re-commencement of the trial was relevant and was referred to. He was also involved in email correspondence about a mediation in June 2015 which also made reference to the trial. Therefore, I am unable to accept his evidence that he was confused or unaware of the 3rd July date for the commencement of the hearing or that such confusion or lack of awareness was a good reason for failure to attend.

45. I am also unable to accept his evidence in relation to his computer difficulties. First, it is not clear from his witness statement whether in fact, the "crashes" occurred over the weekend of 4-5th July rather than in the days running up to the re-commencement of the trial. Further, it is clear from the emails received by my clerk in the run up to the 8th July hearing, that Stephan also used his telephone for email traffic.

46. What of the allegations of intimidation? I have read both the complaint by Mr Clippele and that of Peter to the Institute. They are in strong terms and certainly refer to this action and the terms of the expert evidence. It seems to me that they are in some respects designed to put pressure on Mr van de Keybus. However, he has not been prevented from giving evidence and was included in the trial timetable to give evidence on 10th July 2015. I do not consider this to be a factor therefore, to be taken into consideration.

47. I must now consider all of these matters in the round in the light of the history of this matter as a whole and in the light of the overriding objective and of the seriousness of the substantive issues. In that light and in particular, in the light of the fact that this trial was first to come on in October of last year and has already been adjourned on numerous occasions, albeit that one of them was because Stephan contended that the copious number of documents produced by him at the very last minute had not been disclosed by the Claimants, it nevertheless seems to me that given the very long history of this matter, the number of applications made by Stephan and the way in which he has dealt with most of them including these applications by sending evidence to the court at the very last minute, and taking into account the prejudice to the Claimants, I am unable to conclude that

there was a good reason for Stephan's non- attendance on 3 July 2015 or that there would have been sufficient reason for a further adjournment of the trial.

……