

CA on appeal from the Central London CC (HHJ Dean) before Chadwick LJ. 1<sup>st</sup> November 2005.

**JUDGMENT : LORD JUSTICE CHADWICK**

1. This is a renewed application for permission to appeal from an order made on 26th January 2005 by HHJ Dean QC, sitting in the Central London County Court, in proceedings brought by Miss Syma Ahmed against the applicant, Mr Waleed Ahmed Butt. The application has been listed for hearing with appeal to follow if permission is granted. In those circumstances we have had the benefit of submissions from both parties.
2. The claim in the proceedings was for a share in the proceeds of sale of property at Goodmayes in Essex known as 137 Mayesbrook Road. Put shortly, the claimant alleges that she lent to the applicant a sum just short of £30,000 to fund the purchase of that property on terms that it would be resold within a few months on a rising market. She would then be repaid the £30,000 plus interest and would share equally in the profit.
3. The agreement which the claimant alleges is evidenced by a document described as an "agreement and mandate", dated 29th May 2003; and by a subsequent undated document which refers to that document of 29th May 2003 and which is signed by both parties. The importance of the undated document is that it contains an acknowledgment by Mr Butt to repay the initial investment paid by Miss Ahmed and the half share of the profit, amounting together to £33,464.55 by 15th January 2004. There is a manuscript attachment to that undated document which shows how that figure of £33,464.55 is calculated.
4. In the light of those documents it is perhaps unsurprising that the applicant does not deny the arrangement. But he asserts, in the defence and counterclaim, filed on 29th April 2004, that he had paid the amount due. He does not say that he paid it to Miss Ahmed. The payment was made, he says, in Pakistan to Miss Ahmed's father, Mr Bashir Ahmed.
5. In answer to an allocation questionnaire, filed on 19th May 2004, Mr Butt named three witnesses that he intended to call to support his case. Two of those witnesses were said to be in Pakistan; and not to be available until respectively 26th August 2004 and 8th September 2004.
6. The trial was listed for hearing at the end of January 2005. However, on 10th November 2004 HHJ Knight QC stayed the claim in order to enable the parties to seek a settlement by mediation. That order, dated 10th November, directed: *"The action be stayed for 1 month and thereafter until the mediation and that the directions timetable be suspended as from the date of this order until the date of the mediation and that the parties time for complying with such directions be extended for the same period of time."*  
  
The directions timetable had been set by an order made on 25th June 2004. That timetable fixed the window during which the trial was to be heard and gave directions for the exchange of lists and the service of case summaries.
7. An attempt at mediation was made on or about 5th January 2005 in the sense that an appointment was fixed for that date. Miss Ahmed attended (or was represented) at that appointment; but Mr Butt did not attend. It seems that mediation was not pursued after that date. The trial then came on, within three weeks thereafter, without further directions. The claimant was represented by counsel. Mr Butt appeared in person. At an early stage of the trial Mr Butt asked the judge for an adjournment because, as he said, he had *"a very bad voice since three or four days ago"*. He had, in fact, sought to issue an adjournment application notice the day before in the court officer but was not in a position then to pay the fee. However, he did pay the fee for the issue of the application notice on the morning of the hearing. By that stage, of course, it was too late to prevent the hearing from commencing. Everyone was there and the judge had a day's trial in his list.
8. So, no doubt, an application for an adjournment, made without prior notice to the judge, came as an unwelcome surprise to him. Further, the judge had not had an opportunity to read the trial bundle - which had been lodged over the weekend but not reached him - and had not had the opportunity to read any witness statements. So, at the stage when the adjournment request was made to him, the judge really had little or no idea as to what the trial was all about.

9. The adjournment request was resisted by counsel for the claimant, Mr Barood. He told the judge that Mr Butt had been able to talk to him and to the judge's clerk only ten minutes earlier without apparently any difficulty. The suggestion, clearly, was that Mr Butt's ailment was not genuine.
10. The judge dealt with the matter in this way: *"You tell me what the case is all about, Mr Garood, and we will see how Mr Butt gets on. .... And if we do reach a stage where he does not seem in a position to put forward his defence to the claim, then we may have to revisit the question but for the moment, in the light of what you say, I think we will have to do our best."*
11. In that context the phrase *"in the light of what you say"* must be a reference to counsel's suggestion that Mr Butt's ailment was not genuine. The judge was in no position to tell, at that stage, whether the ailment was genuine or not. Mr Butt had not produced any medical certificate, or other evidence, to support his request for an adjournment.
12. What the judge is saying at that stage, as it seems to me, is, *'Well let us carry on for the time being, but I must keep under review the possibility that Mr Butt is not going to be able to present his case properly. If I come to the conclusion that he is disadvantaged, then I will have to reconsider whether or not an adjournment is necessary.'* For my part I do not think the judge can be criticised for adopting that approach; but it was important that he did keep firmly in mind the possibility that this unrepresented defendant might not be in a position to put forward his case as a result of some ailment.
13. After the claimant's counsel had opened the case Miss Ahmed gave her evidence. Her evidence was really of almost no relevance in the proceedings; because it was common ground that she had never met Mr Butt and the documents on which she relied were not challenged. So there was no evidence that she could usefully give other than formally to prove the documents, and to confirm that no money had been paid to her personally by Mr Butt.
14. Nevertheless, Mr Butt took the opportunity to cross-examine her. It is clear from the transcript that, within the first ten minutes of that cross-examination, the judge intervened three or four times to say that he could not hear what Mr Butt was saying. The judge's interventions in the first few pages of the transcript of the cross-examination are these: *"I really cannot hear a word he is saying."* *"I cannot hear him. I really cannot hear him."* *"I really cannot hear a word he says."* *"I cannot hear any of this. It is not that I could not understand his English. I just cannot hear him. His voice is so croaky."*
15. By that stage, as it seems to me, the judge should have been asking himself whether or not this was a trial that should continue. He was having obvious difficulty in hearing what Mr Butt had to say from the well of the court in the course of cross-examination. It might be said that actually the ultimate outcome did not turn on the cross-examination of Miss Ahmed; because her evidence was unchallenged, so far as it went. But that is not really the point. The point is that, to an observer in the Central London County Court on 26th January 2005, a trial was proceeding in circumstances where the defendant had asked for an adjournment on the grounds that he could not make himself heard and the judge was demonstrating by his interventions that he could not hear him. That was the time at which the judge should have reviewed the request for the adjournment. If he had done so, it seems to me difficult to avoid the conclusion that, at that stage, he must have granted an adjournment.
16. Miss Ahmed's father, Mr Bashir Ahmed, then gave his evidence. He was cross-examined by Mr Butt. The judge observed to counsel in the course of that cross-examination: *"The trouble is you are against a litigant in person who I cannot hear properly which may be my fault but he is speaking with a rather croaky voice which makes it very difficult to understand from this distance what he is saying."*  
He referred again, a few pages later in the transcript, to the difficulty of hearing what Mr Butt had to say.
17. The position improved when Mr Butt himself went into the witness box to give his evidence. There is no indication from the transcript that the judge was having any difficulty in hearing and understanding what Mr Butt's evidence. But he was under the disadvantage that there was no witness statement setting out that evidence. The timetable had been interrupted by the stay granted on 10th November 2004. It seems that it had never got back on to course.

18. Following Mr Butt's evidence the judge - of his own motion - decided to recall Mr Bashir Ahmed. It is clear that the judge, by that stage, thought that he had understood Mr Butt's case and wanted to test it by questions to Mr Bashir Ahmed which might have been put on behalf of a represented litigant at the time when Mr Ahmed first gave his evidence. By the time that the judge had questioned Mr Ahmed there is no doubt that he had reached a conclusion that the only question for him was which of Mr Butt and Mr Ahmed he was going to believe.
19. Just before he recalled Mr Ahmed, the judge had said to Mr Butt that he was to leave the witness box and go back to the well of the court, where he could address him on any arguments he wished to raise in the case. So that, at that stage, the judge was excepting Mr Butt to make a closing statement in the light of the evidence as a defendant named expert would have the opportunity to do. And, if Mr Butt was to have that opportunity, it was (if anything) even more important that he had it after Mr Bashir Ahmed had given further evidence in response to the judge's decision to recall him.
20. But that did not happen. What happened was that immediately before the short adjournment the judge said: *"I think Mr Butt has said all he wants to say"* and he invited counsel to make his submissions at 2 pm.
21. Counsel's submissions were brief - in the sense that they cover no more than a page of the transcript - at the end of which the judge intervened to say: *"Well, it is really a question of credibility, is it not?"* The judge then stopped counsel from addressing him further. He never gave Mr Butt an opportunity to comment on the evidence of Mr Ahmed, given after Mr Butt had given his evidence.
22. The judge then gave his judgment. He set out the facts. He identified the substance of the defence as being that the money had been repaid; and he said this: *"At the end of the day, it is a simple dispute as to whether Mr Butt has, indeed, repaid Mr Ahmed through his agent in Pakistan and whether that would be a good settlement of the debt due to Mr Ahmed's daughter, the present claimant."*  
  
The judge never reached the second of those two points because he decided that - as between Mr Bashir Ahmed and Mr Butt - he preferred the evidence of Mr Ahmed. He reached the conclusion that he was *"totally unsatisfied"* that repayment was made in Pakistan.
23. The judge reached that conclusion notwithstanding that Mr Butt had presented certain documents in Urdu which, as he said, were receipts for the payments which he had made in Pakistan. The difficulty for the judge, of course, was that he could not read the documents in Urdu and no one had provided a translation for him. Further, the witnesses, who had been identified in the answers to the questionnaire filed in May 2004 were not in court to support Mr Butt's case.
24. In all those circumstances it might be said that, by the end of this trial, the judge had understood what the cases were on both sides; had identified the relevant question - namely, who should he believe out of Mr Bashir Ahmed and Mr Butt; and had reached a conclusion on that question. But he completed the facts and reached his conclusion in circumstances where, for the reasons that I have explained, he ought to have asked himself, at a much earlier stage, whether this was a trial which could fairly continue; and he ought to have been particularly careful to give this unrepresented defendant the opportunity to make what submissions he wished to make on the evidence of Mr Bashir Ahmed.
25. The transcript of these proceedings reads - I am afraid - as a record of a trial in which the judge was determined to reach the end without being properly concerned as to the perception of injustice that the proceedings would convey to an objective observer in this court. It is for that reason that I am left with the view that this trial cannot be regarded as satisfactory. Whether or not the judge reached the right result on the evidence, this trial could not have appeared to meet the standards of fairness which the law requires. There is, I think, no alternative but to grant the permission to appeal that is sought; to allow the appeal; and to remit this action for a new trial before a different judge.

26. **LORD JUSTICE WILSON:** I agree.

**Order:** Application allowed; no order as to costs.

M Tempset for the Applicant, Mr Butt instructed by Akal;  
D Giles for the Respondent instructed by Messrs David Giles