Tech problems? Don't assume the court will automatically relist your hearing

All of us have, to a greater or lesser degree, been wading through the murky waters of 'the new normal', particularly when it comes to working from home and remote hearings. Many legal commentators have offered their tips on conducting hearings remotely (as well as the pitfalls to avoid), and this material will not be revisited here. Instead, this note brings to the reader's attention a recent case where a party's inability to join the remote hearing did not justify a relisting.

Smith v Reynolds Porter Chamberlain LLP [2020] EW Misc 11 (CC)

In Smith v RPC, HHJ Matthews, sitting in Bristol County Court, gave consideration to whether a telephone hearing should be re-listed and reheard. The Applicant had not been dialled in by the court, having provided contact details under the cover of an incorrect case name and claim number in error, and having only done so less than one working day before the hearing.

The hearing concerned an application for pre-action disclosure. The underlying facts are largely irrelevant to this note, save for the Respondent's stance, which was that the relevant events were litigated extensively in 2012, 2015, 2017 and 2018, and were therefore an abuse of the court's process.

The notice of hearing stated that contact numbers should be provided no later than two clear days before the hearing, and that a failure to provide this information might result in the case proceeding in the party's absence or being adjourned with an order for costs against that party. On the morning of the hearing the court had not received this information, and e-mailed the Applicant three times in an attempt to obtain a telephone number.

HHJ Matthews decided to proceed with the hearing in the Applicant's absence. He accepted the Respondent's submissions that the application was hopeless, totally without merit, and an

attempt to relitigate issues already determined by the Commecial Court. The application was therefore dismissed, and a costs order was made in the Respondent's favour.

The following day, the Applicant contacted Bristol County Court for an update on the hearing. At this point it became clear that the contact details for the Applicant's barrister had been submitted to the court in an e-mail which contained the incorrect case number and case name in the subject line. As a result, those contact details had not been put on the relevant court file. HHJ Matthews contacted the parties for written submissions on the future of his order (which had been drafted but not yet sealed) and whether the hearing should be relisted.

The relevant provisions of the CPR

The court's power to proceed with an application in a party's absence, and to consider the relisting of a hearing, is set out in CPR 23.11:

> *"(1) Where the applicant or any respondent fails to attend the hearing of an application, the court may proceed in his absence.*
> *(2) Where –*
> *(a) the applicant or any respondent fails to attend the hearing of an application; and*
> *(b) the court makes an order at the hearing,*
> *the court may, on application or of its own initiative, re-list the application."*

Similar – albeit stronger – provisions in respect of trials can be found in CPR 39.3. Those provisions give the court an express power to strike out a claim or defence as a consequence of the party's failure to attend (see 39.3(1)), and specify that any application by a party to set aside a judgment or order must: be supported by evidence (CPR 39.3(4)); demonstrate that the party has acted promptly and had a good reason for not attending the trial (CPR 39.3(5)(a) and (b)); and that the party has a reasonable prospect of success at the trial (CPR 39.3(5)(c)).

Key findings in Smith v RPC

HHJ Matthews agreed with the Respondent that, as with an application to set aside an order or judgment following trial, the merits of the underlying application had to be taken into account when considering its relisting. In this case, the application's lack of merits justified the refusal of a relisting:

> "*16. In my judgment, the respondent is right. The application was hopeless from the start, given the difficulties with the evidence, and in*

> *particular the lack of any evidence showing the applicant's title to sue, the limitation problems of any underlying cause of action and the public policy interest in not permitting collateral attacks on earlier decisions. In addition to that, the applicant's approach on his own documents filed before the hearing was to assert that there was no longer a need for any substantive relief on the application."*

In addition, the applicant's failure to correspond promptly with the court – both in providing contact details and in subsequently explaining its failings – were factors which weighed strongly against a relisting:

> "*17. Moreover, there has been no explanation whatever as to (i) why contact details were not supplied at least two clear days before the hearing, so that they could be passed to the appropriate court staff and then to the judge, (ii) why the applicant's counsel's clerk did not contact the court to make sure that the details had been received, and (iii) why the applicant did not respond to any of the three emails sent to him by the court (at the email address he had used the day before to send the skeleton argument to the court) on the morning of the hearing. In these circumstances, any attempt to justify a rehearing of this application must fail*."

It therefore appears that the courts, in practice, will adopt a similar approach to relisting applications under CPR 23.11 as to the more stringent requirements of setting aside orders or judgments following a failure to attend trial under CPR 39.3.

Where does COVID19 come into all this?

There is no doubt that the majority of the judiciary are understanding of the problems practitioners are facing as a result of the overnight move to remote hearings, and will acknowledge that sometimes errors or tech failings will occur. However, Smith v RPC sends a clear message that the ongoing pandemic will not represent a 'get out of jail free' card, and that courts are still keeping a tight eye on whether it is proportionate to expend court time and resources in relisting applications.

In addition to Smith v RPC, readers are likely to be interested in the case of Agba v Luton Borough Council, Queen's Bench Division (Administrative Court), 4 June 2020 (unreported, Lawtel reference AC5011700, Westlaw reference [2020] 6 WLUK 59), which was cited in HHJ Matthew's judgment (see paragraph 14). In that case, the applicant did not attend court as she was displaying COVID19 symptoms and was following national guidance to stay at home. The court proceeded in her absence, and refused her subsequent application to set aside the

court's order. In doing so, Swift J adopted the language of CPR 39.3, despite the fact that the hearing was not a trial: the court accepted that the applicant had "*acted promptly"*, had a "*good reason*" for her non-attendance, but found that there was no "*reasonable prospect*" of the court reaching a different conclusion on the question of law at a restored hearing.

Takeaway points

- Smith v RPC concerned an error in providing contact details, but it is foreseeable that the ratio could apply to proceedings where parties have experienced technical difficulties: in both instances, a court may (erroneously) reach the view that a party has failed to attend;
- Even in the current climate, courts do not wish to hold superfluous hearings or revisit applications which are considered to lack merit, or where there is no reasonable prospect of the court's conclusions being altered;
- Courts faced with considering whether to relist an application are likely to have regard to the test laid out in CPR 39.3 for setting aside orders following a failure to attend trial. As such, the underlying merits of the application will be an important consideration;
- Whether a party has previously complied with court orders and conducted itself in a timely fashion is likely to influence the court's view and sympathies;
- Be prepared to fully explain any errors or technical failings which caused your inability to attend a hearing. This was notably missing in Smith v RPC;
- Where possible, legal professionals should request that the court acknowledge receipt of their contact details to prevent these misunderstandings arising; however, the likelihood of this materialising is likely to differ from court to court, and a follow up phone call may be required.

Scarlett Milligan acted for the Respondent in Smith v Reynolds Porter Chamberlain LLP