Ref. L00NG782

IN THE COUNTY COURT AT NOTTINGHAM

The Nottingham Justice Centre,
Carrington Street,
Nottingham,
NG2 1EE.

Before HIS HONOUR JUDGE JONATHAN OWEN

IN THE MATTER OF

KATHLEEN MATTHEWS (Claimant/Appellant)

-v-

NOTTINGHAM CITY COUNCIL (Defendant/Respondent)

MR A HOGAN appeared on behalf of the Claimant/Appellant
MR E WEBB appeared on behalf of the Defendant/Respondent

30 APRIL 2025
APPROVED JUDGMENT

HIS HONOUR JUDGE JONATHAN OWEN:

1. I am very grateful to both counsel in this case, Mr Andrew Hogan for the appellant, who is the claimant in the underlying action, Mr Edward Webb, who is the counsel for the respondent, who is the defendant in the underlying action. Both have produced excellent skeleton arguments and then followed them up with really very good and focused and concise submissions on behalf of their clients. I will say, for the benefit of the losing party in this case, that I do not think that this procedural appeal could have been better argued than it was argued by their counsel today, and they can be quite pleased that they have at least been well represented in court.

2. The appellant is Kathleen Matthews. Insofar as it is material to the arguments in this case, which the appellant says it is, her date of birth is 21 April 1950, making her 75 years old at today's date. She is the claimant in the underlying claim. In the claim form issued on 3 June 2024, the appellant claimed against the respondent damages for housing disrepair and associated loss and damage, which is essentially a claim for breach of covenant in a tenancy, and by that claim form, and the accompanying particulars of claim, signed on 29 May 2024, she seeks an order for specific performance in relation to repairs to the tenanted property in which she lives and/or damages in relation to such works, including general damages for the diminution in enjoyment of her occupation of the premises.

3. The brief background is that it is uncontroversial that the appellant is the respondent's tenant at 17 Clover Green, Basford, Nottingham, NG6 0QT pursuant to a written tenancy agreement which has been entered into in relation to those premises. The appellant's case is that the premises with which we are concerned are a first floor flat and that there has been and continues to be a leak in the kitchen as a result of issues with the roof. The defective roof has caused water ingress resulting in degraded plaster and black spot mould growth to the ceiling and stand down beam over the rear kitchen window. She alleges that the respondent was put on notice of this on or around 22 November 2022 and then at various dates thereafter and that the respondent has failed to act timeously or at all upon those reports, putting the respondent in breach of the implied covenants to maintain the structure and exterior of these premises under section 11 of the Landlord and Tenant Act 1985. She further contends that the premises are not fit for human habitation, in breach of the implied covenant under section 9A of the same Act.

4. In terms of the statement of value on the claim, it was stated to be a claim for damages of in excess of £1,000 but limited to £3,000, with a claim of specific performance in relation to outstanding disrepair, which disrepair was worth in excess of £1,000. The appellant relies upon, and indeed annexed to the statement of case in this matter, an expert written surveying report from Mr Fraser Andrews, MRICS, dated 21 December 2023. The expert's conclusion in this case was that the implied covenants under the 1985 Act were breached and that the property was in disrepair with respect to the water leak and mould growth, which I have already alluded to, and that the value of the works needed to bring the property into repair was to be estimated at £1,683.60, inclusive of VAT.

5. The respondent acknowledged service of the claim in the case with an intention to defend the entirety of these proceedings. It later filed a defence on 29 July 2024, in which essentially the housing disrepair was not admitted and no admissions were made as to the alleged loss and damage. The respondent, for its part, relied upon an expert written disrepair survey report from a Mr Costa Charalambous, dated 24 May 2024. Mr Charalambous examined the property and found a leak from the ceiling which was caused by a problem with

the roof. He concluded that in terms of repairing the problem the total cost would be £120.30 plus VAT in relation to kitchen and £1,276.54 plus VAT in relation to the loft.

6. The court then sent out a form N149A notice of proposed allocation to the small claims track dated 6 August 2024 and required the parties to file directions questionnaires. The parties did so file directions questionnaires. The appellant filed hers on 21 August 2024, in which she certified that she had complied with the relevant pre-action Protocol and she sought Fast Track allocation.

7. In terms of the submissions which accompanied it in support of Fast Track allocation, the Claimant made a number of points, including the fact that the normal track for this claim would be the Fast Track, in circumstances in which both the costs of the repairs and the damages claim were estimated to be in excess of £1,000. The submissions suggested that to allocate the claim other than to the Fast Track, which is the cost bearing track, would result in the appellant being deprived of legal representation and lead to an inequality of arms.

8. Amongst other matters, the submissions referred to the case of *Birmingham City Council v Lee* [2009] 2 Costs LR 191, being a decision of the Court of Appeal. The quotation from that was from the judgment of Hughes LJ, as he then was, in which it was said,

> "It was accepted before us that, although of course the protocol is meant to be open for operation by tenants in person if they wish to act alone, it was reasonably to be expected that many tenants would not be in a position to do so and would need legal help. For the layman, the requirements of the protocol are quite complex. The terms of the protocol make it clear that it anticipates that the tenant may incur legal costs in operating it."

9. It also, at the end of those submissions, says,

> "It is arguable that a vulnerable person whose case is otherwise suitable for fast track allocation is not on legal footing and can participate fully in proceedings and that parties and witnesses can give their best evidence."

That does not make complete sense and it does not say what precisely the alleged vulnerability in this case is.

10. As far as the respondent was concerned, it filed its directions questionnaire on 23 August 2024. It concluded that the small claims track was the appropriate track for allocation in this case. It said that liability and quantum are to be determined by Court and it attached written submissions regarding allocation to the small claims track.

11. It was said that it is the defendant's case that both the costs of the repairs and any claims of damages, if successful at trial, will either be below or marginally above the £1,000 threshold and given the distinct lack of complexity or legal issues involved the defendant submits the Court ought to use its discretion and allocate the matter to the small claims track.

12. In terms of the further submissions made in there, it was said that, as to damages, the damages would, in practice, fall to be assessed by reference to a diminution in rental value in the first instance. The current rent was £104.53 and various other points are made about the

rental amount, but the submission was that, even if the Court found that the respondent was on notice from November 2022, which was not admitted, the rent since that time would have been about £8,558 and applying a notional 10 per cent rent reduction would give damages of £855.80. Further, the respondent contended that any sums awarded needed to be further discounted to reflect the fact they would not all clearly fall within the scope of the section 11 implied covenant.

13. The overall submission was, this was a low value claim, which ought to be allocated to the small claims track. It was further asserted there is no genuine claim for specific performance because this is not a case in which the respondent has deliberately refused to carry out works. To the contrary, the respondent's surveyor had inspected the property and recommended that works be undertaken.

14. By way of notice dated 1 October 2024, the matter was set down for a hearing on 9 December 2024, to be an allocation hearing via Cloud Video Platform. That hearing then took place on 9 December 2024 before Deputy District Judge Griffiths. At that hearing, both parties were legally represented, and in a short hearing, and there is no criticism in that respect, these matters have to be dealt with briefly, broadly the following happened, having seen the transcript of both the hearing itself and the judgment.

15. The appellant submitted that the case was of a value which put it well above the usual Small Claims limit. It was also asserted that the case was one of some complexity and that the respondent was engaging in a cynical attempt to try to get the matter put down into the small claims track with the obvious costs consequences that would follow. The respondent's position was that the case was a simple and straightforward case and the point was made, the fact that it is just marginally above the £1,000 limit, for that reason it should stay in the small claims track. Both parties had referred to their written submissions in the case.

16. The learned Deputy District Judge gave a short oral ex tempore judgment in which he or she recited various rules from Part 1 and Part 26 of the Civil Procedure Rules 1998. At paragraph 5 he or she said,

> "When I look at those matters set out in CPR 26.13 and, specifically, the financial value of the claim, this claim is very much on the cusp or marginally above the £1,000 mark in both instances."

Paragraph 6, he or she said,

> "In terms of repairs, there is an element of repair that may not truly be a section 11 claim, but we are looking at probably £1,200 plus VAT on the defendant's case and slightly more on the claimant's case."

At paragraph 7,

> "As to damages, I was particular assisted by the defendant's submission when I look at the rent of £104.53 per week, and even if I was making a finding of notice from November 2022 and applying the 10 per cent rent reduction, that would get us to £855.80. So, again, we are on the cusp and marginally below."

The learned District Judge then said, at paragraph 8,

> "I also remind myself that whilst the financial value of the claim is important in terms of allocation, it is not the sole determining factor."

The learned Deputy District Judge then referred to the nature of the remedy sought and said that,

> "whilst their claim for specific performance is pleaded, the respondent is not disputing that repairs have been carried out and they still need to be undertaken",

and said,

> "so there will be an element of repair to be determined and decided in terms of a date and then the other items will be damages."

He or she then went on to refer to the complexity of the facts, law and evidence, the expert evidence, the number of parties involved, the absence of a counterclaim, the limited amount of oral evidence there would be, the lack of importance to the parties other than those who were a party to the proceedings, and the view of the parties, which of course were diametrically opposed.

17. He or she then said that:- in terms of the circumstances of the parties, as it stands at the moment, both have the ability to access legal advice, and whilst I note reference to that within the claimant's submissions there is no strong evidence before me that that will alter regardless of the track to which this matter is allocated. He or she then said, at paragraph 18 that the Court may allocate to the small claims track a claim the value of which is above the limits mentioned in 26.9 and he or she then said,

> "and so, that is something that I may do."

18. At paragraph 19, the judge said,

> "Exercising my discretion, for all the reasons set out above, applying both CPR 1.1 and the factors contained within CPR 26.13, I am satisfied that it is entirely appropriate to allocate the matter to the small claims track in view of all the factors that I have gone through. So that is what I will do. I will allocate it to the small claims track and give the usual small claims track directions."

And, indeed, that is what happened, and on 20 December 2024, the court issued notice for a fixed date for a Small Claims Hearing with a time estimate of three hours, on 18 February 2025.

19. On 21 January 2025, Her Honour Judge Coe KC sitting in the County Court at Nottingham vacated the small claims track hearing that had been listed and stayed proceedings pending the appeal with which we are now concerned.

20. In terms of today's hearing, that is the hearing of an appeal brought by the appellant against the case management order to which I have already referred. That appeal was filed on 23 December 2024 and on 20 January 2025, Her Honour Judge Coe KC sitting at the County Court at Nottingham granted permission to appeal against that order and it is now the hearing of that appeal with which the Court is concerned.

21. As I have already indicated, both sides have filed very high quality documentation prepared by counsel in this matter. In terms of the appellant, the grounds of appeal are three-fold, all of which assert that the decision of the learned Deputy District Judge as to allocation was wrong. The first ground is that the learned Deputy District Judge misdirected himself or herself as to the scope of his or her discretion and thereafter misapplied the discretion by adopting a broad discretionary approach whereas, instead, he or she should have concluded that the normal track was the Fast Track, given its pleaded value, as to the damages and costs of repairs. He or she should then have taken that as the starting point and thereafter consider whether there were other relevant factors of sufficient weight to displace the normal track in the context of a claim for housing disrepair.

22. The second ground of appeal is that the learned Deputy District Judge misdirected himself or herself as to the correct approach in law required by the Rules by concluding at the case should be allocated to the small claims track and failed to characterize it correctly and weigh in the balance properly the matters specified in the Rules.

23. Finally, the third ground is that the learned Deputy District Judge wrongly misapplied the Rules and discretion by concluding the case should be allocated the small claims track for reasons of proportionality, failing to characterize and weigh in the exercise of his or her discretion all of the relevant factors in Part 1 of the Civil Procedure Rules 1998.

24. The respondent's position in this case is that the learned Deputy District Judge's decision should stand. The respondent urges upon me that what the learned Deputy District Judge was undertaking was the exercise of a discretion and it must be shown that the exercise of the discretion was wrong, not merely that a different judge on a different day might have reached a different decision in respect of the same facts.

25. The respondent's position is that the learned Deputy District Judge correctly analysed the matter and/or in any event ought to have concluded that the normal track was the small claims track and then have regard to all the proper factors with matters of weight being a matter for the learned Deputy District Judge at first instance, but, in any event, all those factors properly pointed towards the case remaining on the small claims track.

26. I remind myself of the legal principles governing this matter as follows. First of all, under Part 1 of the Civil Procedure Rules 1998, the Court should deal with the case justly and at proportionate costs, including, so far as practicable, the various particular factors listed in Rule 1.2(2) of the Rules. In Practice Direction 1A, participation of vulnerable parties or witnesses, the overriding objective requires that, in order to deal with a case justly, the Court should ensure, so far as practicable, that the parties are on an equal footing and can participate fully in proceedings and that parties and witnesses can given their best evidence. The parties are required to help the Court to further the overriding objective at all stages of civil proceedings. Vulnerability of a party may impede participation, and also diminish the quality of evidence. The Court should take all proportionate measures to address these issues in every case. Factors which may cause vulnerability in a party include but are not limited to that person's age.

27. Turning to Part 26, which concerns case management, the preliminary stage. There are a number of tracks including materially the small claims track and the Fast Track. Under Rule 26.6 the small claims track is the normal track for a number of types of claim, including materially at Rule 26.6(1)(b)

> "any claim which includes a claim by a tenant of residential premises against his landlord where –
>
> (i) the tenant is seeking an order requiring the landlord to carry out repairs or other work to the premises (whether or not the tenant is also seeking some other remedy);
>
> (ii) the cost of the repairs or other work to the premises is estimated to be not more than £1,000; and
>
> (iii) the financial value of any other claim for damages is not more than £1,000."

28. Further on in that Rule at sub-paragraph 5,

> "Subject to paragraphs 6 and 10, the Fast Track is the normal track for any claim for which the small claims track is not the normal track and which is a claim for monetary relief the value of which is not more than £25,000 or is or includes a claim for non-monetary relief and if the claim includes a claim for monetary relief the value of the claim is monetary relief and is not more than £25,000",

And then there are various other provisions as well.

29. Further on at Rule 26.12,

> "In considering whether to allocate a claim to the normal track for that claim under Rules 26.9 and other rules, the Court shall have regard to the matters mentioned in Rule 26.13(1). Under Rule 26.13(1), when deciding the track for a claim, the matters to which the Court shall have regard include (a) the financial value, if any, of the claim, (b) the nature of the remedy sought, (c) the likely complexity of the facts, law or evidence, (d) the number of parties or likely parties, (e) the value of any counterclaim or additional claim and the complexity of any matters relating to it, (f) the amount of oral evidence which may be required, (g) the importance of the claim to persons who are not parties to the proceedings, (h) the views expressed by the parties and (i) the circumstances of the parties. Under paragraph 2, it for the Court to assess the financial value of the claim and, in doing so, it shall disregard various matters."

30. In the Practice Direction accompanying Part 26, there is a summary of the allocation principles at paragraph 14 providing amplification and further provisions about the same. In paragraph 15, the small claims track - allocation case management, it is said that,

> "The small claims track is intended to provide a proportionate procedure by which most straightforward claims with a financial value of not more than £10,000 can be decided, without the need for substantial pre-hearing preparation and the formalities of a traditional trial, and without incurring large legal costs."

31. The procedure laid down in Part 27 is designed to make it possible for the litigants to conduct their own case without legal representation if they wish. Later on, the Practice Direction says in paragraph 15 that,

> "The court may allocate to the small claims track a claim, the value of which is above the limits mentioned in rule 26.9(1). The court will not normally allow more than one day for the hearing of such a claim."

32. Under paragraph 16, the fast track - allocation and case management,

> "Where the court is to decide whether to allocate to the fast track a claim for which the normal track is the fast track, it will allocate the claim to the fast track unless it believes that it cannot be dealt with justly on that track."

33. I have been referred by the appellant to the Pre-action Protocol of housing disrepair, which specifies the procedure which both parties must follow in such a claim. At paragraph 11 of that Protocol it is said that,

> "If the tenant's claim is settled without litigation on terms which justify bringing it, the landlord will pay the tenant's reasonable costs."

34. I have also been referred to the decision of the Court of Appeal in the case of *Lee* to which I have already referred, which was the case referred to in the appellant's written submissions on allocation which were before the learned Deputy District Judge. Their Lordships made clear that there was a marked difference between the costs recoverable in a claim allocated the small claims track, as opposed to one which was allocated to the fast track. The Lordships also observed that that difference is undoubtably a deliberate difference. In terms of disrepair claims, their Lordships referred to the then different Rules on allocation, but which for all present purposes are materially the same as the present Rules, such that I do consider what was said in *Lee* still to be binding guidance upon this Court upon the material questions which it addresses.

35. It was still the case at the time that the *Lee* judgment was given that the normal track for a housing disrepair claim was the small claims track, if the costs of repairs or other works to the premises was estimated to be not more than £1,000 and the financial value of the claim was not more than £1,000. As their Lordships said at paragraph 7,

> "The effect of this is providing there is a claim for specific performance, a tenant's claim in a disrepair case will be a fast track case if either the costs of repairs or the consequential damages claim exceeds £1,000."

36. Their Lordships then went on to address the then in force version of the Pre-action Protocol on housing disrepair claims, which similarly included a rule that if the tenant's claim is settled without litigation on terms which justify bringing it, the landlord will pay the tenant's reasonable costs.

37. At paragraph 16, their Lordships observed that,

> "It is quite clear that the Protocol instruction in such a way as (a) to put a claimant of risk of an adverse costs order if he ignores the Protocol and commences action straight away and (b) to assume that if he does not ignore it, but rather operates it correctly, by giving early notification of its impending claim without starting an action, his reasonable costs will be met providing his claim is justified according to whether the claim would fall within the fast track or the small claims track if it were to be made in court."

38. At paragraph 33, when commenting on the Rules and the Protocol, their Lordships said that,

> "The Protocol requires a claim to be advanced initially in accordance with these terms. Under a warning there is likely to be a cost penalty if it is not."

Their Lordships went on to say that,

> "The object is very clearly that, provided the claim was justified, it ought to be settled in terms which provide full payment of the tenant's reasonable costs."

39. At paragraph 34, their Lordships said,

> "The tenant who has a justifiable claim for disrepair needs legal assistance in advance of it. He must initiate it in accordance with the Protocol."

40. Various other things are said in that judgment, all of which are of great assistance, which I have read, which I do not need specifically to reference in this judgment today.

41. In terms of the principles governing the appeal, the following matters are material: under Rule 52.21 of the Civil Procedure Rules 1998,

> "Every appeal will be limited to a review of the decision of the lower court unless,

Materially,

> "the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing."

Further, unless it orders otherwise,

> "the appeal court will not receive … evidence which was not before the lower court."
>
> "The appeal court will allow an appeal where the decision of the lower court was wrong or unjust because of a serious procedural or other irregularity in the proceedings in the lower court."

42. I am reminded by the respondent that pursuant to the of *Broughton v Kop Football (Cayman) Ltd & Ors* [2012] EWCA Civ 1743 at paragraph 51, per Lewison LJ in guidance which is repeated in many other cases of similar pedigree and authority, case management decisions are discretionary decisions.

> "They often involve an attempt to find the least worst solution where parties have diametrically opposed interest. The discretion involved is entrusted to the first instance judge. An appellant court does not exercise the discretion for itself. It can interfere with the exercise of discretion by a first instance judge where he has misdirected himself in law, has failed to take relevant factors into account, has taken into account irrelevant factors or has come to a decision that is plainly wrong, in the sense of being outside the generous ambit where reasonable decision makers may disagree. So the question is not whether we would have made the same decisions as the judge. The question is whether the judge's decision was wrong in the sense that I have explained."

43. Further, I am referred to the case of *BPP Holdings v HMRC* [2017] UKSC 55 at paragraph 33 where their Lordships said that appellant judges must not merely disagree with the decision. They must consider that it is unjustifiable.

44. Now, turning to my decision in this case, in light of the matters which I have just outlined. I am satisfied that the learned Deputy District Judge's decision was wrong for the reasons which I will now give.

45. First, having regard to ground 1 of the grounds of appeal in this case, I do consider that the learned Deputy District Judge erred in principle in terms of the correct way to approach this case. The structure of the Rules, to which I have already referred, clearly requires, first of all, assessment of the value of the case and what the normal track is to be. I have to say that, whilst I have considerable sympathy to the learned Deputy District Judge, who as I observed in submissions is no doubt making any number of difficult discretionary decisions in a very time-pressurized environment in a busy list, the learned Deputy District Judge does not appear to me clearly to have assessed either the value of the case for the purposes of the allocation rules or the normal track to which the case would be allocated.

46. Now, there is a suggestion, I think, in paragraph 5 that the learned Deputy District Judge regarded the value of the case as being just in excess of the normal limits of the small claims track, which would suggest that the normal track would be the fast track. Paragraph 6 may be consistent with that, but does not reach any particular conclusion. Paragraph 7 tends towards suggesting that the normal track would be the small claims track. At paragraph 18, from the Rule that is being referred to there, I think there may be an implication that the

learned Deputy District Judge was assessing the normal track for this claim as being the fast track. There is, however, no clear conclusion.

47. What this case required was the judge's assessment of the realistic value of the case on the claimant's case, not simply accepted every assertion made by the claimant as to that, but what the claimant might realistically hope to achieve if her evidence was accepted and, thereafter, a categorisation of the normal track.

48. Having done that, the judge's role was then to analyse the factors under rule 26.13 to see whether that starting point of the normal track was the correct end result or whether a different result should be reached. Although the learned Deputy District Judge made certain comments about the value of the case and then made a number of valid points about the various factors referred to under Rule 26.13, the learned judge did not, in my view, adequately or at all follow that structured decision making process that is required in this case.

49. When I consider those various matters, it appears to me, first of all, that the only correct decision that the learned Deputy District Judge could have made in this case at allocation was that the normal track in this matter was the fast track. That is because there was a claim for specific performance which I do not think could simply be cast aside as not being a potentially valid claim, and indeed, in fairness to the learned Deputy District Judge, he does not entirely dismiss the possibility of a specific performance claim in paragraph 9, although the judge again did not deal with that question very fully. Then, moving onto the value of the claim the, in my view, only justifiable assessment of the realistic value of the claim in terms of the costs of repairs was in excess of £1,000. I think to reach that conclusion one does not need to go further than the fact that the appellant's expert report, if accepted, would justify such inclusion and, indeed, without a considerable degree of very careful reasoning, the respondent's expert report tends to suggest the costs of the repairs would be in excess of £1,000. I also think that the learned Deputy District Judge was wrong, if this is what the judge did, to assess the realistic value of the claim for damages at less than £1,000. That is predicated on a particular percentage rent reduction of 10 per cent being awarded. Mr Hogan is right that in such cases there is a range of percentage reduction which a judge can adopt. It may be, as I observed to Mr Hogan in submissions, that, having heard all the evidence in this case at trial, the judge would reach the view that 10 per cent or thereabouts is right, but I do not think it can be said that that is the limit of the realistic value of the case at this stage. I think it would be perfectly proper for the appellant and reasonably arguable on the part of the appellant to say the percentage should be somewhat higher than that. Certainly, it would only have to be a very little bit higher than that to justify an award of in excess of £1,000.

50. So I am of the view that the only correct decision for the learned Deputy District Judge was to categorise the normal track for this case as the fast track. The learned Deputy District Judge either erred in not doing so or, if that is the basis on which he or she was proceeding, he or she then erred by not taking that as the starting point rather than, as the learned Deputy District Judge did, just saying that the questions of value were only one consideration rather than the sole determining factor. The learned Deputy District Judge should have approached this firmly on the basis that the starting point is fast track allocation and then reasoned by reference to the various factors in Rule 26.13 as to whether or not the end point should be a fast track allocation.

51. When considering that further question, in my judgment, the only correct conclusion ought to have been that the matter remain on the fast track. I do not think in this regard anyone really needs to go any further than the guidance given in the case of *Lee* and the

Protocol to which Mr Hogan has referred me. The clear structure of the Protocol and, indeed, the allocation rules in housing disrepair claims is that if the claim is a justifiable claim which ought to be on the fast track, then costs should follow. It seems to me in a case like this where the normal track would be the fast track, if this claim is justifiable it would be quite unjustifiable, in my view, to allocate the matter to the small claims track and thereby remove the potential for recovery of costs which is contemplated by the Pre-action Protocol.

52. When one considers the various factors referred to by the learned Deputy District Judge, a number of the points that the learned Deputy District Judge made are correct points. The reality is, this is not a particularly complex claim. There is only a couple of parties to the litigation and it is not of a wider importance and there is only going to be limited oral evidence in the case. The reality is, though, those points would be true whether or not this claim was dealt with under the small claims track or the fast track, and they are not points which really in any precise or cogent way points towards this matter being allocated to the small claims track if the normal track is the fast track.

53. So, for those reasons, I am satisfied that the learned Deputy District Judge approached the matter wrongly in terms of principle and reached a decision outwith the range of reasonable decisions for the judge in his or her shoes. So I, therefore, will allow this appeal under ground 1 of the grounds of appeal. I would allow it under ground 2 for largely the reasons I have already expressed.

54. I do not think I need to go any further than that. I should say by reference to ground 3 that I was not persuaded that the learned Deputy District Judge ought to have addressed or addressed differently any question of vulnerability in this case on the part of the appellant. The reality is, the question of vulnerability was not put before the judge in any square or fair way by the appellant at the hearing below. There is no clear assertion in the written submissions that the appellant was vulnerable and there certainly are no points made about it in the oral submissions. The only vulnerability in this case is the age of the appellant, which, in itself, is advanced, but if age were the only factor, it is not advanced so as to be any kind of tipping point in the way in which the discretion should be exercised in this case.

55. I should also say, procedurally, and I meant to say earlier on in this judgment, that whereas the respondent has put before me a recent witness statement, that it has filed in the small claims track litigation, I exclude that from my consideration because it was not before the learned Deputy District Judge and there is no reason for me to admit it into evidence here, and even if I am wrong about that, it would have made no difference to the decision that I have made for the reason that I have already expressed.

56. So, in those circumstances, I will set aside the learned Deputy District Judge's order and we will now deal with the case management afresh.

This transcript has been approved by the Judge