

# It's up to the parties to frame the claim: Court of Appeal overturns decision where Judge became "third man" to the proceedings

Written by **MARIA COLE**



**The Court of Appeal of England and Wales overturned a High Court decision where the Judge held a warranty had been breached on a basis which differed substantially from how the claim had been notified, pleaded and argued.**

## Introduction

The premise for our system of justice is that the parties know the case that is being argued before the decision maker. If a claimant tries to run a different case at hearing from that pleaded they take a huge risk and may be required to make a formal application to amend their pleadings, which might not succeed.

The framing of a notice or claim is a technical business that requires attention to detail and is often complex. A false move and your notice will be invalid. Parties include

or exclude issues for strategic reasons in the knowledge that the failure to include an issue can result in a party 'whistling Dixie' for a perfectly valid head of claim. Enormous resource is expended in responding to notices and claims. Evidence is gathered. Witnesses are briefed and experts instructed.

So, when a judge decides of their own accord to get in on the action and reframe the claim, and effectively become a "third man" to the proceedings, it's understandable the parties might be none too

pleased, especially the losing party. The following is one such case.

## Background

The case in question related to an amended share purchase agreement (the **SPA**) pursuant to which the defendants, who were the directors and shareholders of a company, had agreed to sell to the first claimant the issued shares in that company.<sup>1</sup> The first claimant subsequently assigned its rights and benefits under the SPA to the second claimant.

<sup>1</sup> *Decision Inc Holdings Proprietary Limited v Garbett and El-Mariesh* [2023] EWCA Civ 1284.

## It is for the parties to plead the issues in a claim

→ In this decision, the Court of Appeal granted an appeal where a High Court judge had improperly become a “third man” to the proceedings by reframing the pleaded case.



A Deputy High Court Judge (the **Judge**) concluded that the defendants were liable to pay the second claimant £1.31 million in damages for breach of a prospects warranty contained in the SPA. The defendants challenged that decision in the Court of Appeal (the **Court**). There were several issues raised on appeal, including the interpretation of warranties relating to the company’s financial position and compliance with contractual notice provisions. However, of interest here is the issue of the Judge’s order for damages. The defendants sought the order be set

aside by the Court on the basis that the breach of warranty which the Judge held had taken place did not reflect a claim pleaded or argued by the claimants.

In deciding whether to set the order aside, the Court looked at whether it was open to the Judge to take the course he did. The Court set out the role and function of a Judge and how a Judge can end up becoming a “third man” to the proceedings with the unfair and prejudicial result that a judgment is issued upon a basis that differs from that advanced and argued by the parties.

### The Judge’s key departure from the case advanced by the claimants

Regarding the prospects warranty in question, the notice of claim and pleadings contained no suggestion that the actual *prospects* in October 2018 should be compared with what could reasonably have been expected at that date. Instead, they contrasted forecast revenue with actual revenue recorded in 2017. At no stage was it suggested that *prospects* should be identified with EBITDA (or ‘Earnings Before Interest, Tax, Depreciation and Amortisation’). Yet that was the course the Judge

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decided to take and upon which he decided the claim.

### The “third man theory” and its pitfalls explained

The Court asked itself if it was open to the Judge to have taken the course he did. In answering that question, it first set out case law about the “third man theory”,<sup>2</sup> and recorded:

In *Al-Medenni*, the trial judge had found for the claimant on the basis of what was termed “the third man theory”, which had been neither pleaded nor explored with witnesses. Dyson LJ ... concluded ... that, “[b]y making findings for which the claimant was not contending, ... the judge crossed the line which separates adversarial and inquisitorial systems”.

The Court then noted that in the *Al-Medenni* judgment, Lord Justice Dyson explained that it is not open to a judge to make a finding on a different basis to the issues as pleaded and argued and the reasons for this (at [21]):

In my view the judge was not entitled to find for the

claimant on the basis of the third man theory. It is fundamental to our adversarial system of justice that the parties should clearly identify the issues that arise in the litigation, so that each has the opportunity of responding to the points made by the other. The function of the judge is to adjudicate on those issues alone. The parties may have their own reasons for limiting the issues or presenting them in a certain way. The judge can invite, and even encourage, the parties to recast or modify the issues. But if they refuse to do so, the judge must respect that decision. One consequence of this may be that the judge is compelled to reject a claim on the basis on which it is advanced, although he or she is of the opinion that it would have succeeded if it had been advanced on a different basis. Such an outcome may be unattractive, but any other approach leads to uncertainty and potentially real unfairness.

In looking at what had occurred at

the hearing, the Court found that the approach the Judge took to the prospects warranty *differed radically* from any approach advanced by the claimants. It said that the defendants were not forewarned even during closing submissions and questioning from the Judge of what he had in mind.

The result was the Court found that the defendants *did not have a fair opportunity to address the basis on which the Judge later held the Prospects Warranty to have been breached* and the defendants succeeded on this point of appeal.

### Conclusion

It is up to the parties to identify the issues that they wish to have addressed, in order for them to have the opportunity to prepare and present their case, and respond to points made.

Judges may have their own theory about an issue but it is not open to them to recast the case and then decide it on that basis. Judges must accept that it is for the parties to frame the claim and for judges to adjudicate it on the issues as decided by the parties. Basically, everyone needs to stick to their own knitting.

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2 *Al-Medenni v Mars UK Ltd* [2005] EWCA Civ 1041; *UK Learning Academy Ltd v Secretary of State for Education* [2020] EWCA Civ 370; *Satyam Enterprises Ltd v Burton* [2021] EWCA 287; *Ali v Dinc* [2022] EWCA Civ 34; and *Sara & Hossein Asset Holdings Ltd v Blacks Outdoor Retail Ltd* [2023] UKSC 2.

### About the author

**Maria Cole** works as a Knowledge Manager in The ADR Centre’s Knowledge Management Team, including working with NZDRC and NZIAC. She was previously a civil litigation barrister for over a decade. During that time she worked on several multi-million dollar development disputes and was involved in arbitrations and mediations.