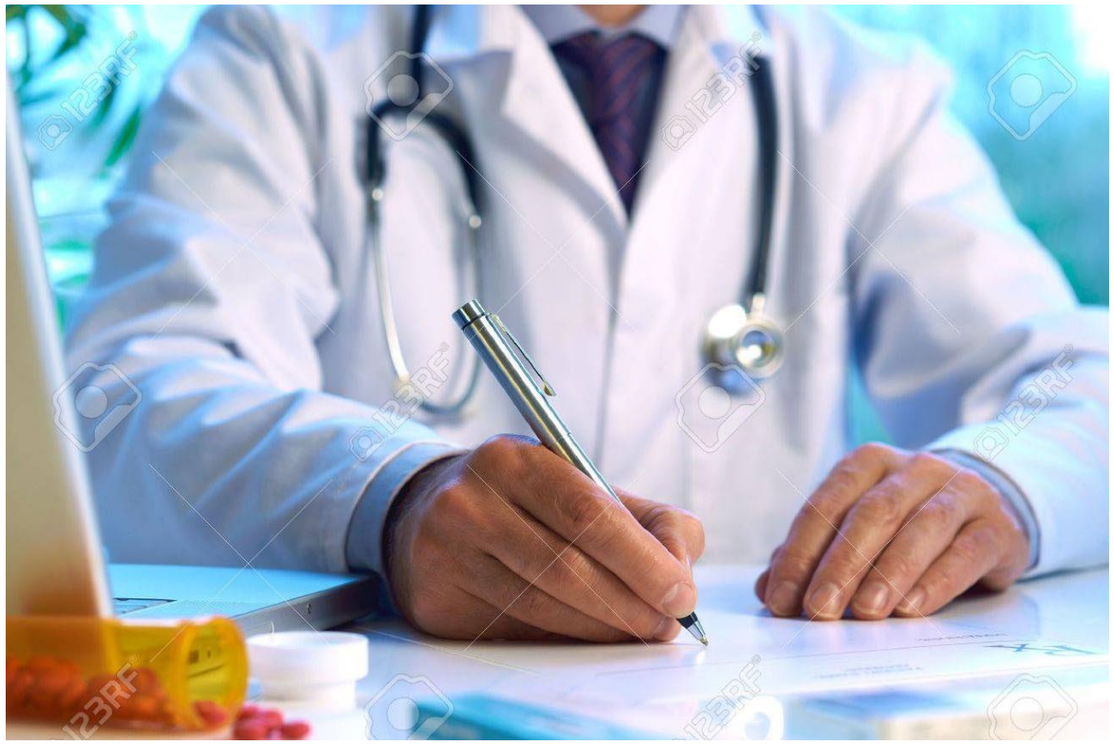


# An investigation – not what the doctor ordered?

**Alyson Reilly** and **Nora Wannagat** examine a recent ruling where the subject of a s236 investigation tried to adjourn on medical grounds.

Is a handful of doctors' notes enough to temporarily frustrate the powers of the Insolvency Act 1986 and avoid a court visit? One former shadow director and subject of a s236 application gambled that it was, but the court took a very different view. Below we look at *Paul Atkinson and Glyn Mummery* v. *Sanjiv Varma* (Unreported, 15 April 2019) and what factors are taken into consideration when an application for a medical adjournment is made for a private examination.

## Case background

The joint liquidators of an insolvent company had applied for a private examination under s236 Insolvency Act 1986 of the company's former *de facto* or shadow director Sanjiv Varma. He was to be questioned about his suspected involvement in the misapplication of company funds in the sum of £7m. The private examination was listed for 16 April 2019. However, on 11 April, Varma applied for an adjournment on medical grounds. He said that he had been living with diabetes for 25 years. In addition to blurry vision, he claimed was experiencing high blood pressure and chest pains. Varma's application was first heard on 12 April 2019 and then adjourned, allowing him the opportunity to further substantiate his medical evidence. On 15 April 2019 the hearing of his application resumed. He relied on two letters written by his GP, stating that the symptoms were caused by stress and recommending 'complete bed rest' for a week. He also relied on a letter from a cardiologist, who briefly explained the symptoms, Varma's heart rate and blood pressure, and that further tests had been ordered. It also recommended that he should avoid stress, adding that he should avoid court appearances or 'interactions with lawyers'.

> There is, to date, no reported case on medical adjournments of private examinations.

## The judgement on medical adjournments

Varma's application was dismissed, as the evidence he had provided was deemed insufficient.

There is, to date, no reported case on medical adjournments of private examinations. In exercising its discretion, the court applied the general principles on medical adjournments, as set out by Warby J in *Decker* v. *Hopcraft* [2015] EWHC 1170 (QB), [21]-[31]. In particular, these require careful scrutiny of the medical evidence. The court must also consider reasonable accommodations that could enable the applicant to participate in the hearing, as well as the nature of the hearing, the issues before the court, and the role of the applicant.







The medical evidence provided by Varma fell short of what was required in *Decker* v. *Hopcraft*, which gave guidance as follows:

Where a litigant in person makes an application to adjourn on medical grounds for the first time, the court should be slow to dismiss this application. However, there are qualifications to this:

- The court has discretion, and no one can force the decision on it.
- The court must scrutinise the medical evidence before it carefully. The evidence must identify the medical attendant and give details of his familiarity with the patient's medical condition. It should detail all recent consultations. It must identify not only what the patient's medical condition is, but also which features of that condition prevent participation in the hearing process. A patient's inability to work does not automatically mean they cannot attend court.
- A recent prognosis is required.
- The evidence should 'give the court some confidence that what is being expressed is an independent opinion after a proper examination'.
- Even if it meets these criteria, it is treated as expert evidence and no judge is bound to accept expert evidence.

> In the present case, the medical evidence simply consisted of a recommendation. No serious risk to Varma had been properly identified.

- There is not always a straightforward yes or no answer to whether a litigant can participate in the hearing. Reasonable accommodations may enable someone who is in ill health to participate effectively. The court needs evidence on whether or not this can be done.
- The question of whether effective participation is possible depends not only on the medical condition of the applicant, but also on the nature of the hearing, the nature of the issues before the court, and the role of the party concerned.
- Where it appears to the court that one side is bound to succeed, it is less likely that proceeding will represent an injustice to the litigant.

In the present case, the medical evidence simply consisted of a recommendation. No serious risk to Varma had been properly identified. Further, suitable accommodations could be made for him; he would have the opportunity to monitor his blood sugar, take regular breaks and consider the questions put to him calmly.

## Lessons for IPs

Private examinations can be an extremely useful (and comparatively cost-effective) information-gathering tool. However, where the examinee is concerned that their answers may unearth some wrongdoing on their part, they will have a strong motivation to avoid attending. IPs should be alert to the possibility that such an examinee may apply for a medical adjournment, sometimes on spurious grounds.

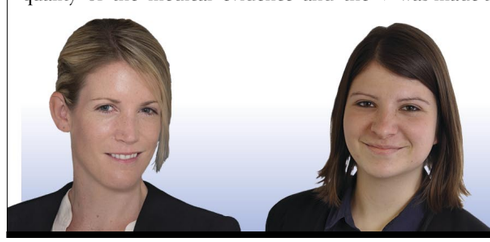
One of the factors in *Decker* v. *Hopcraft* is the nature of the hearing. Private examinations differ from many other hearings in that they may be conducted without any underlying litigation, and the examinee is compelled to participate in the process in a way that ordinary civil litigants are not. Non-attendance is a contempt of court and may lead to a custodial sentence: *Griffin* v. *Robinson* [2013] EWHC 4624 (Ch). These factors may militate in favour of granting an application for a medical adjournment more readily.

In resisting such an application, IPs should pay particular attention to the quality of the medical evidence and the requirements in *Decker* v. *Hopcraft*. Mere recommendations to avoid stress will be insufficient, even where they specifically refer to court appearances. By their very nature, it is unavoidable that private examinations are likely to be stressful for participants (especially where there is a suspicion of wrongdoing on their part). IPs should also be ready to suggest accommodations that can be made to reduce any medical risk to the examinee. The examination itself will be overseen by the judge and this, in itself, is a safeguard to the examinee's wellbeing. It is helpful, in resisting an application, if the IP can show the court that information sought must be obtained sooner rather than later. The court is likely to engage in a balancing exercise. In the present case, the court was concerned not only that the symptoms were largely 'self-reported' but also that the examinee ought to show that (in the case of diabetic symptoms) the illness was not caused by his own failure to manage his condition.

> IPs should pay particular attention to the quality of the medical evidence and the requirements in *Decker* v. *Hopcraft*.

Where, on the other hand, the examinee has sufficient evidence to meet the *Decker* criteria and time is not of the essence, an adjournment should be considered to save time and costs.

Finally, where an examinee has attempted to avoid the private examination on spurious grounds, IPs may be entitled to seek costs against him. In the present case, after his application for an adjournment failed, Varma admitted himself as a walk-in patient to the local hospital the next day (the day of the private examination itself). By default, an order was made adjourning the examination and requiring him to provide evidence showing his condition was not self-induced and genuinely precluded him from attending the examination. When Varma failed to provide satisfactory medical evidence as ordered, a cost order was made against him. □



**ALYSON REILLY** is a partner at gunnercooke.

**NORA WANNAGAT** is a pupil at 9 Stone Buildings.