Neutral Citation Number: [2020] EWCA Civ 824

Case No: C08Y591

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT BRADFORD
HIS HONOUR JUDGE GOSNELL

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/07/2020

Before :

LORD JUSTICE LEWISON
LORD JUSTICE POPPLEWELL
and
LADY JUSTICE CARR

- -

Between :

SAIMA FATIMA	**Appellant/Defendant and Part 20 Claimant**
- and -	
FAMILY CHANNEL LIMITED	**1st Respondent/Claimant and 1st Part 20 Defendant**
-and-	
MR TAHIR RIAZ	**2nd Respondent/ 2nd Part 20 Defendant**

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Adam C. Willoughby (instructed by **Stachiw Bashir Green Solicitors**) for the **Appellant**
Stuart Roberts (instructed by **Certus Solicitors LLP**) for the **Respondent**

Hearing date: 24 June 2020

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Approved Judgment

LADY JUSTICE CARR:

Introduction

1. This appeal raises an important point of principle, namely the interplay between an unsuccessful application to adjourn a trial under CPR Part 3.1(2)(b) and a subsequent application under CPR Part 39.3 to set aside a judgment against a non-attending party. CPR Part 39.3 provides materially as follows:

> "(3) Where a party does not attend and the court gives judgment or makes an order against him, the party who failed to attend may apply for the judgment or order to be set aside.
> (4) An application under paragraph…(3) must be supported by evidence.
> (5) Where an application is made under paragraph…(3) by a party who failed to attend trial, the court may grant the application only if the applicant-
> (a) acted promptly when he found out that the court had exercised the power to strike out or to enter judgment or make an order against him;
> (b) had a good reason for not attending the trial; and
> (c) has a reasonable prospect of success at the trial."

2. It is a second appeal by the Appellant ("Ms Fatima") against the order HHJ Gosnell ("the Judge") of 4 October 2019. By that order the Judge allowed the appeal of the Respondents ("FCL", "Mr Riaz") against the order of DJ Hickinbottom ("the District Judge") of 13 March 2019. The District Judge had granted Ms Fatima's application to set aside the judgment and orders entered against her by Mr Recorder Bebb QC ("the Recorder") on 17 January 2019.

Background facts and the trial before the Recorder

3. In January 2016 FCL commenced proceedings against Ms Fatima for the repayment of some £28,000 and/or damages and interest for allegedly unauthorised withdrawals by Ms Fatima from FCL's bank account whilst she was engaged as an administrative assistant by FCL in 2013 and 2014. Ms Fatima denied the claim and countered with a Part 20 Claim against FCL and Mr Riaz, the sole director of and a shareholder in FCL, alleging that Mr Riaz had raped and falsely imprisoned her, for which FCL was said to be vicariously liable.

4. The proceedings were stayed between December 2016 and May 2018 whilst police enquiries into the allegation of rape were ongoing. The matter was then listed for a three-day trial commencing 16 January 2019 and came before the Recorder.

5. Ms Fatima did not attend court that day. Rather, counsel on her behalf applied for an adjournment of the trial under CPR Part 3.1(2)(b), based on Ms Fatima's illness. Reliance was placed on two GP letters. First, there was a letter dated 27 December 2018 from Dr Ishfaq which stated:

> "This letter is to confirm that the Defendant was suffering from depression which is being managed by her GP. She was also suffering from insomnia, flashbacks and anxiety also, being treated with medication with regular GP follow-up as well as having counselling. She currently does not feel ready to go through with the court case."

6. A further letter dated 15 January 2019 from a different GP, Dr Clarke, stated:

> "The Defendant is suffering from severe anxiety and low mood and is really struggling. A large part of it is caused by her upcoming court appearance. She is terrified of facing the person that has accused her. On review of her today she is highly distressed by this process. She does not have any family or friends supporting her through this. I would advise her not to appear in court tomorrow due to her mental health and lack of support and would appreciate if you would make other arrangements for whatever part of the legal process she is required to take part in."

7. The Recorder considered the authorities relating to adjournments for medical reasons, including *Decker v Hopcroft* [2016] EWCH 2962 at [24] which quotes from the well-known decision of Norris J in *Levy v Ellis-Carr* [2012] EWHC 63 (Ch); [2012] BIPR 347 ("*Levy"*) at [36]:

> "In my judgment [the additional evidence] falls far short of the medical evidence required to demonstrate that the party is unable to attend a hearing and participate in the trial. Such evidence should identify the medical attendant and give details of his familiarity with the party's medical condition (detailing all recent consultations), should identify with particularity what the patient's medical condition is and the features of that condition which (in the medical attendant's opinion) prevent participation in the trial process, should provide a reasoned prognosis and should give the court some confidence that what is being expressed is an independent opinion after a proper examination. It is being tendered as expert evidence. The court can then consider what weight to attach to that opinion, and what arrangements might be made (short of an adjournment) to accommodate a party's difficulties. No judge is bound to accept expert evidence: even a proper medical report falls to be considered simply as part of the material as a whole (including the previous conduct of the case)…."

8. He also considered *Solanki v Intercity Telecom Ltd* [2018] EWCA Civ 101; [2018] 1 Costs LR 103 ("*Solanki"*). He concluded that the medical evidence fell some way short of excusing Ms Fatima's attendance. Neither doctor stated that she was unfit to attend trial. She was clearly still able to give instructions to her solicitors and counsel. He expressed certain concerns:

> "…The Defendant has not attended today. Counsel is instructed to apply for an adjournment. He is instructed to apply to strike out the case but without being provided with any bundles of the evidence. He is not instructed in the trial. That is the Defendant's choice. She has had plenty of time to instruct solicitors and counsel to attend trial. I am bound to say that this conduct seems to me to be an attempt by the Defendant to force the Court's hand. At the moment I keep an open mind on this, but if it is, she would be mistaken if she thinks she can achieve that."

9. The Recorder referred to the serious nature of the allegations on both sides and stated that the action had gone on for "far too long". He ruled that he would start the trial on the following day after making arrangements for adjustments to be made to assist Ms Fatima in giving evidence.

10. Ms Fatima did not attend the next day, 17 January 2019, nor did anyone on her behalf. By this stage there was a letter of 16 January 2019 from Bradford Crisis and Sexual Abuse Service available. The letter stated that the Service had been working with Ms Fatima since 2016. The Recorder indicated that at face value this would mean that the trial would never happen. There was also a text message sent by Ms Fatima's husband to her solicitors indicating that Ms Fatima had been admitted to the Accident and Emergency Department of Bradford Royal Infirmary that day but with no further information. Enquiries made by court staff revealed that Ms Fatima was in hospital with chest pains, vomiting, headaches and hysteria.

11. The Recorder reconsidered his earlier ruling in the light of this additional information. His assessment of Ms Fatima's conduct overall was as follows:

> "In my view, the Defendant, by her conduct of the case, has disclosed that she has no real intention of attending trial. I rehearsed yesterday the history of the conduct of this case. She has instructed solicitors to act on her behalf to strike out the claim and, failing that, to seek an adjournment on ill health grounds. Given the issues in this case, failure to provide the solicitors with instructions and funds to represent her at the trial must have been ongoing for some time. This is no last minute unforeseen event…..Even today I have had no information that the Defendant wishes to act in person. All I have had is information seeking to explain why she is not at court."

12. He ruled that the medical evidence was insufficient to justify an adjournment. He took into account the interests of both sides. Whilst he bore Ms Fatima's interests in mind, FCL was entitled to resolution of its claim. It was four years since the events in question. The sooner the case was resolved, the better for all parties.

13. The Recorder thus decided to proceed in the absence of Ms Fatima. He struck out her defence and dismissed her Part 20 claims. He entered judgment in favour of FCL in the sum of £28,358, together with interest and costs.

The application to set aside

14. On 29 January 2019 Ms Fatima applied to set the order aside, as was her right under CPR Part 39.3. That application came before the District Judge on 13 March 2019 and was successful. The judgment and orders of the Recorder were set aside and directions given for the matter to proceed to trial.

15. In accordance with CPR 39.3(4), the application was supported by evidence in the form of a witness statement dated 31 January 2019 from Ms Fatima. She stated, amongst other things:

> "3…a. **The reason for my non-attendance at the Trial.** I have recently not been well. My GP has diagnosed me as suffering from
> severe anxiety. He issued a sick note on 15 January 2019 with that diagnosis [exhibited]. In consultation with me, he expressed the view that he did not feel that I was well enough to attend Court [letter of 15 January 2019 exhibited]. As a result of the 2nd Part 20
> Defendant's rape of me I have had to have counselling and therapy
> [letter of 16 January 2019 from Bradford Rape Crisis & Sexual Abuse Survivors Service exhibited]. In view of my physical and mental health I was advised by my former Solicitors to apply to adjourn the Trial. I understand, having been contacted by my solicitors, by telephone, at about 5pm on 16 January 2019, that my application was refused…as was a separate application…to strike out the Claimant's claim. I was told by my former Solicitors that the Judge had said that I would have to come to court for the remaining 2 days of the Trial. My former Solicitors also said that they would be coming off the Court record …..and would not be representing me. At about 3am on 17 January 2019 I started to suffer chest pains and I was admitted to the Bradford Royal Infirmary…by Ambulance at approximately 6am. My husband texted my former Solicitor.. at 6.21am [text exhibited]. I was not discharged from hospital until approximately 3pm the same day after being seen by a Consultant [discharge summary exhibited]. I, therefore, suggest that I had a good reason for not attending Court on 17 January, namely, I was in hospital at the time having been admitted by Ambulance in the early hours of that day. I was not discharged until 3pm. I did not attend Court the following day because I was not well enough to do so after being hospitalised the previous day. I was concerned that if I attended Court I would end up back in hospital or worse. As directed by the hospital, I saw my GP that day. He prescribed me with a cocktail of medication namely, lansoprazole, sertraline, naproxen, propranolol and zopicione [GP appointment

> confirmation and prescriptions exhibited]. After taking that medication, which affects my memory and makes me feel drowsy, I was in no fit state to do anything other than to go to bed, which I did…."

16. The statement also addressed the promptness of the application and the prospects of success of her defence and Part 20 claim.

17. In his judgment, the District Judge recorded the history of the matter and identified the appropriate test under CPR Part 39.3. He concluded that the promptness and merits requirements in CPR Part 39.3(5) were made out. The real question was whether Ms Fatima had a good reason for not attending trial. He said:

> "12. It is not appropriate to look at what occurred on 16 January to conclude that the Defendant would not attend on the second or third day of trial. The Recorder appropriately indicated that the Defendant should be given the assurance that every step will be taken to protect her mental health in the event that she attended the hearing."

18. He set out what those precautions would be (including a separate waiting room and screens), and said that Ms Fatima's indication on 16 January 2019 that she would not attend would not necessarily hold for the next day in the light of the new assurances. He went on:

> "13. The fact of the matter is that at the time that this hearing was taking place the Defendant was in hospital. She complained of chest pains early in the morning of the 17th and was effectively detained for a period that would have covered the time when the trial occurred. She patently could not attend the hearing other than after having absented herself from hospital which she had visited.
>
> 14. Counsel for the Claimant may well be frustrated as to the way in which this case has gone. However, he is no more doctor than I am and I think we must approach this application on the basis that the Defendant was genuinely affected and that she attended hospital for no malicious or malign reason and that she believed that she had something wrong with her in good faith, attending hospital for treatment. Her situation was such that one could well understand if she was upset, concerned, anxious and of low mood."

19. The District Judge also referred to the GP's letter of 15 January 2019 in which the GP advised Ms Fatima not to appear in court the next day. He concluded:

> "15…..I am driven to the conclusion that there was a good enough reason for not attending trial. She was at

> hospital at the material time and that in my book is a good reason for not attending. I do not think that the Recorder can have made a finding of fact properly so called because on the day he threw out the case he did not hear any evidence."

20. The District Judge considered that the application was made out and that the defence and Part 20 claim should be re-instated. He re-listed the matter for trial at the end of May 2019, making directions for special arrangements for Ms Fatima.

The first appeal to the Judge

21. FCL and Mr Riaz appealed the District Judge's decision. That appeal came before the Judge on 4 October and succeeded. The District Judge's orders were set aside.

22. In his judgment, having rehearsed the history of the matter and the parties' submissions, the Judge turned to his analysis. At [18] he commented that CPR Part 39.3:

> "presupposes in a way that there is new material because it allows the court to consider evidence not just which was before the original court but also evidence which can be put before the second judge which was not available to the first judge which might cause the second judge to reach a conclusion which the first judge did not, and I accept that in general terms that makes sense".

23. At [20] he held that the exercise for him on this appeal under CPR Part 52.21 was a binary one: either the District Judge was right or he was wrong. He was satisfied that the District Judge had had jurisdiction.

24. He asked himself rhetorically what would happen if the facts before the "second" judge were identical to the facts before the "first" judge. At [26] he said:

> "…It seems to me that, if the court reaches the conclusion that the facts available to the first judge were available to the second, notwithstanding that the test may be slightly different, the overall test is still fairness and the overriding objective, and if the facts are identical, the second judge, for reasons of judicial comity more than anything else and for consistency, should follow the decision of the first judge, even perhaps in his heart of hearts if he thinks he might have reached a different conclusion."

25. At [27] the Judge repeated that, if the material was the same, the District Judge should have followed the Recorder's decision "for reasons of consistency and judicial comity". Thus the Judge stated that the District Judge should therefore have followed the decision of the Recorder. At [28] he commented that it struck him that it was "a little like an application to vary another judge's decision". He gave the example of a decision to vary a previous judge's decision to refuse expert

evidence for which a change of circumstances would be needed if the application were to succeed. At [29] he went on:

> "It strikes me that, in order for the application before [the District Judge] to succeed, there had to be a change in circumstances in that something had to be put before [the District Judge] which had not been before [the Recorder] which would have or might have caused him to reach a different conclusion. Obviously, if the application had been made to [the Recorder] he could have said for himself whether it would have made a difference."

26. The Judge stated that he would not have granted the appeal purely because the District Judge failed to adjourn to obtain the transcripts of the Recorder's judgments but he bore in mind that he now had the transcripts. The only new evidence available was Ms Fatima's statement. Her statement basically gave no more than the information already before the Recorder. Its implication is that she would like to attend a trial, and he accepted that. But it did not say in terms that she had any intention in attending court on 17 January 2019. The Judge discounted the value of any of the other additional material, concluding that "[the District Judge] had no additional material on which to make his decision than [the Recorder] did". If the District Judge had had the transcripts, he would not have made the decision that he did.

27. In the final substantive paragraph of his judgment, the Judge summarised his position thus:

> "For the reasons I have indicated, my view is that a judge on a 39.3 application should not overturn the decision of a trial judge in circumstances where the evidence before the second judge carrying out the 39.3 exercise is identical to that of the trial judge and, whilst the test may well be different, the overriding test is fairness and the overriding objective and, in my view, it was not open to [the District Judge] to set aside the decision of [the Recorder] in the circumstances he found himself on 13 March."

The parties' respective positions on this appeal in summary

28. On behalf of Ms Fatima, Mr Willoughby submits that the Judge was wrong to hold that, absent a change of circumstance or new material, the duty of the judge hearing the application to set aside is to follow the decision of the trial judge. The Judge should have considered whether the District Judge's decision was wrong under CPR Part 39.3(5). Instead, he treated the appeal effectively as an appeal against the Recorder's decision. Mr Willoughby emphasises that he does not in fact in any way criticise the Recorder's decision not to adjourn the trial, nor does he need to.

29. The central submission for Ms Fatima is that CPR Part 39.3 sets out a specific and independent mechanism for a party who was absent at trial and against whom a

judgment is entered to apply to set it aside. There are clear distinctions between an appellate mechanism and an application under CPR Part 39.3(3). It is wrong to suggest, as FCL and Mr Riaz do, that the District Judge was in some way bound by a finding of the Recorder to the effect that there was no good reason for Ms Fatima's non-attendance at trial. Equally, there is no requirement for a material change of circumstance in order for an application under CPR Part 39.3(3) to succeed.

30. It is also submitted that the Judge was also wrong to approach the application to set aside on the basis that the overriding test was "fairness and the overriding objective". Too much weight is said to have been given to the overriding objective. In addition, it is said that the Judge failed to consider properly the additional material that was before the District Judge (and which had not been before the Recorder), namely the witness statement from Ms Fatima dated 31 January 2019 explaining the reason for her absence on 17 January 2019 in particular and her hospital attendance record.

31. Mr Roberts for FCL and Mr Riaz submits that the Recorder was entitled to rule in the way that he did. Implicit in his decision was the finding that Ms Fatima had no good reason for failing to attend the trial. It was therefore wrong of the District Judge to overrule the Recorder's findings. Not only were they decisions of a higher court, there was no legal or factual basis for doing so. The District Judge did not have transcripts of the Recorder's judgments and should have adjourned the hearing in order to obtain them. Had he seen the transcripts, the District Judge would have understood that the Recorder "in effect" found that there was no good reason for Ms Fatima's failure to attend trial. There was no additional evidence of any substance before the District Judge. Ms Fatima's witness statement of 31 January 2019 added nothing to the sum of what the Recorder had known, namely that Ms Fatima was in hospital with chest pains. The District Judge was bound by the factual findings of the Recorder in respect of which there was no appeal. Mr Roberts makes it clear, as he did to the District Judge, that FCL and Mr Riaz do not for a moment believe that Ms Fatima ever intended to attend trial or that she was ill: he submits, for example, that there is no proven physical cause for her chest pains on 17 January 2019.

32. In the alternative, it is submitted that if it was open to the District Judge to consider whether or not there was a good reason, he was wrong to find that there was and exercise his discretion to set aside the Recorder's judgment and orders. The Judge was correct to rule that, in the absence of any change of circumstance, the application under CPR Part 39.3 should be dismissed. This was the appropriate result on an application of the overriding objective and in accordance with the principle of judicial comity and finality.

33. Fundamentally, Mr Roberts submits that the Judge was correct to hold, on grounds of judicial comity and under the overriding objective, that the interface between applications to adjourn under CPR Part 3.1(2)(b) and to set aside under CPR Part 39.3 would not operate satisfactorily if the application to set aside could succeed in the absence of any new material or change of circumstance.

Analysis

34. On this second appeal, the question is whether or not the intermediate court, here the Judge, was entitled to interfere with the decision of the first instance judge, here the District Judge.

35. The general approach to be adopted in relation to applications under CPR Part 39.3(3) was confirmed in *Bank of Scotland v Pereira* [2011] EWCA Civ 241; [2011] 1 WLR 2391 ("*Pereira"*). There Lord Neuberger MR stated:

> "24. First, the application to appeal Judge Ellis's refusal under CPR 39.3 to set aside the Order. An application to set aside judgment given in the applicant's absence is now subject to clear rules. As was made clear by Simon Brown LJ in *Regency Rolls Ltd v Carnall* [2000] EWCA Civ 379, the court no longer has a broad discretion whether to grant such an application: all three of the conditions listed in CPR 39.3(5) must be satisfied before it can be invoked to enable the court to set aside an order. So, if the application is not made promptly, or if the applicant had no good reason for being absent from the original hearing, or if the applicant would have no substantive case at a retrial, the application to set aside must be refused.
>
> 25. On the other hand, if each of those three hurdles is crossed, it seems to me that it would be a very exceptional case where the court did not set aside the order. It is a fundamental principle of any civilised legal system, enshrined in the common law and in article 6 of the Convention for the protection of human rights and fundamental freedoms that all parties in a case are entitled to the opportunity to have their case dealt with at a hearing at which they or their representatives are present and are heard. If the case is disposed of in the absence of a party, and the party (i) has not attended for good reasons, (ii) has an arguable case on the merits, and (iii) has applied to set aside promptly, it would require very
> unusual circumstances indeed before the court would not set aside the order.
>
> 26. The strictness of this trio of hurdles is plain, but the rigour of the rule is modified by three factors. First, what constitutes promptness and what constitutes a good reason for not attending is, in each case, very fact-sensitive, and the court should, at least in many cases, not be very rigorous when considering the applicant's conduct; similarly, the court should not pre-judge the applicant's case, particularly where there is an issue of fact, when considering the third hurdle. Secondly, like all other rules, CPR 39.3 is subject to the overriding

> objective, and must be applied in that light. Thirdly, the fact that an application under CPR 39.3 to set aside an order fails does not prevent the applicant seeking permission to appeal the order. It is not very convenient, but an applicant may be well advised to issue both a CPR 39.3 application and an application for permission to appeal at the same time, or to get agreement from the other party for an extension of time for the application for permission to appeal.
>
> 27. An appeal against a judge's decision under CPR 39.3 to refuse (or indeed to allow) an application to set aside a judgment does not, at least normally, involve challenging a discretion. However, an appellate court should be slow to overturn a decision of this nature, unless satisfied that the judge went wrong in principle. The decision will often involve making findings of fact, and while the findings will normally be based on written evidence only, an appellate court should never lose sight of the principle that the first instance tribunal is the primary finder of fact. In so far as the decision involves a balancing exercise, an appellate court should pay proper respect to the judge's views. Another way of making essentially the same point is that the appellate court normally has a reviewing, as opposed to a rehearing function in such a case, and can therefore only interfere if satisfied that the judge was wrong."

36. At [37] Lord Neuberger MR went on:

> "….where the defendant is seeking a new trial on the ground that she did not attend the trial, then even though she may have other possible grounds of appeal, she should normally proceed under CPR 39.3, provided she reasonably believes that she can satisfy the three requirement of CPR 39.3. the fact that she wishes to raise other arguments for attacking the trial judge's decision should not preclude her proceeding under CPR 39.3, because that is the specific provision which applies if she did not appear at the trial (and gives her a potential right to a new trial)…. Further, if she has a retrial, the other arguments which she wishes to raise could be raised at the retrial (and they may be considered by the judge who hears her CPR 39.3 application)."

38. The courts have rightly shied away from seeking to define what is and is not a "good reason" (see for example *Brazil v Brazil* [2002] EWCA Civ 1135; [2003] CP Rep 7 at [12]). The court has to consider each case in light of all the relevant factors for non-attendance and, looking at the matter in the round, determine whether the reason is sufficient for the court to exercise its discretion in favour of

the defaulting party. But in *Estate Acquisition and Development Ltd v Wiltshire* [2006] EWCA Civ 533; [2006] CP Rep 32 ("*Estate Acquisition"*) Dyson LJ (as he then was), like Lord Neuberger MR, warned against the dangers of construing "good reason" too narrowly in the context of Article 6 of the European Convention Human Rights. At [25] he stated:

> "I recognise that it is undesirable to seek to define a "good reason" within the meaning of CPR39.3(5)(b). But as Mummery LJ pointed out at para 12 of *Brazil*'s case, it is necessary to interpret CPR 39.3(5)(b) (as all other rules) so as to give effect to the overriding objective of deciding cases justly (see CPR Part 1.2(b)). Moreover, it must be interpreted so as to comply with article 6 of the European Convention on Human Rights (right to a fair hearing). I refer to the judgment of Brooke LJ in *Goode v Martin* [2001] EWCA Civ 1899, [2002] 1 WLR 1828 para 35. In my view, it is necessary to have both article 6 and the overriding objective in mind when interpreting and applying the phrase "good reason". It should not be overlooked that the power to set aside an order made in the absence of the applicant may only be exercised where all three of the conditions stated in CPR 39.3(5) are satisfied. In addition to the need to show a good reason for not attending, the applicant must have acted promptly and that he has a reasonable prospect of success. If the phrase "good reason" is interpreted too strictly against an applicant, there is a danger that the interpretation will not give effect to the overriding objective and not comply with article 6."

39. In *TBO Investments Ltd v Mohun Smith and another* [2016] EWCA Civ 403; [2016] 1 WLR 2919 ("*TBO Investments")* at [26], Lord Dyson MR had the opportunity to address head on the question of whether there was any material distinction between an application under CPR Part 39.3 and an application for an adjournment of a trial. He considered the *Pereira* guidance (and his earlier judgment in *Estate Acquisition)* on the one hand, and the authorities dealing with the sufficiency of medical evidence required to justify an adjournment (*Levy* at [36] (set out above) as approved by this court in *Forrester Ketley v Brent* [2012] EWCA 324) on the other. He stated (at [24]) that, in making a decision on an application under CPR Part 39.3, the judge must have regard to the guidance given in *Pereira* and *Estate Acquisition* to seek to give effect to the overriding objective of dealing with cases "justly" and to comply with Article 6. He also emphasised (at [25]) that nothing that he was saying within the judgment should be interpreted as casting doubt on the guidance given in *Levy.* Generally, the court should adopt a rigorous approach to scrutinising the evidence adduced in support of an application for an adjournment on the grounds that a party or witness is unfit on medical grounds to attend trial.

40. However, at [26] and [29] he went on as follows:

> "26. But I accept the submission...that there is a material distinction between an application under rule 39.3(3) and an application for an adjournment of a trial. If the court refuses an adjournment, there will usually be a trial and a decision on the merits, although the unsuccessful applicant will be at a disadvantage, possibly a huge disadvantage, by reason of the absence of the witness or the party himself. Despite their absence and depending on the circumstances, it may still be possible for the disadvantaged claimant to prove the claim or the disadvantaged defendant to resist it. I accept that, in some cases, the refusal of an adjournment will almost inevitably lead to the unsuccessful applicant losing at trial. That is a factor that must be borne in mind when the court exercises its discretion in deciding whether or not to grant an adjournment. But if the application to set aside a judgment under rule 39.3(3) fails, the applicant will have had no opportunity whatsoever to have an adjudication by the court on the merits. This difference between an application under rule 39.3(3) and an application for an adjournment of the trial is important. Although it has not been articulated as the justification for generally adopting a more draconian approach to an application for an adjournment than to an application under rule 39.3(5), in my view it does justify such a distinction. It follows that the judge should have applied the P*ereira* guidance rather than the guidance in so far as there is a difference between the two…….
> 29…for the reasons given in *Pereira and Estate Acquisition* and which I have elaborated above, the court should not generally adopt too rigorous an approach in its assessment of the evidence adduced in support of an application under rule 39.3(3)."

41. In a concurring judgment Macur LJ stated (at [39]):

> "….Specifically on the issue of "good reason" for non-attendance at trial, it is apparent that the judge was wrong in that he did not adopt a "less rigorous" approach when evaluating the sufficiency of the reason given for Mr Robinson's non-attendance in the context of the application to set aside as per *Pereira* and *Estate Acquisition.*"

42. This court expressly approved of and adopted this approach in in *Emojevbe v Secretary of State for Transport* [2017] EWCA Civ 934 ("*Emojevbe*") at [21(ii)]).

43. In *Gentry v Miller and another* [2016] EWCA Civ 141; [2016] 1 WLR 2696 ("*Gentry*") the Court of Appeal held that CPR 3.9 and the principles in *Mitchell v News Group Newspapers Ltd* [2013] EWA Civ 1537; [2014] 1 WLR 795, as

explained in *Denton v TH White Ltd* [2014] EWCA Civ 1298; [2014] 1 WLR 3926 ("*Denton"*), applied to an application to set aside a judgment or order under CPR Part 39.3 (see [23] and [28]). The three stages identified in *Denton* are well known: under CPR Part 3.9 the court is required to consider first the seriousness and significance of the breach; secondly, the reason for the default; thirdly, all the circumstances of the case, so as to enable the court to deal justly with the application, including the need for litigation to be conducted efficiently and at proportionate cost and to enforce compliance with rules, practice directions and orders. In *Gentry* Vos LJ explained:

> "28…..The court must first consider the three mandatory requirements of CPR Part 39.3(5), before considering the question of whether relief from sanctions is appropriate applying the *Denton* tests. Again, the sanction from which relief is sought is the order granted when the applicant failed to attend the trial, not the delay in applying to set aside the resulting judgment. The promptness of the application is a pre-condition under CPR Part 39.3(5)(a) and is considered as part of all the circumstances under the third *Denton* test."

44. As was stated in *Siamak Balenagni v Mostafa Sharifpoor* [2020] EWHC 1571 (QB) at [39], the remaining discretion, after satisfaction of the three questions in CPR Part 39.3(5), is sufficient to incorporate the *Denton* principles arising under CPR Part 3.9.

45. From the above, the following relevant conclusions can be drawn.

46. First, is clear that an application under CPR Part 39.3(3) is not an appeal of any sort (or, for that matter, an application to vary the previous decision not to adjourn and/or proceed in the absence of a party). It can be pursued instead of, or in appropriate circumstances alongside, an appeal: see *Pereira* at [26] and [37] (set out above).

47. Secondly, CPR Part 39.3(3) to (5) provide for a specific procedural remedy with its own self-contained code of applicable principles, albeit subject, on the question of ultimate discretion, to a consideration of CPR 3.9 (which reflects the overriding objective) and the *Denton* principles.

48. Thirdly, there is a material distinction between an application for adjournment of a trial and an application to set aside a judgment under CPR39.3(3), the latter justifying a less draconian approach: see *TBO Investments* at [26] (set out above) and followed in *Emojevbe* at [21(ii)]. The approach to the question of whether or not there is a good reason for non-attendance is different (and more generous to the applicant) under CPR Part 39.3(3)) than it is on an application to adjourn.

49. For these reasons, the hearing of an application under CPR Part 39.3(3) involves a separate exercise of discretion which is unfettered by any previous exercise of discretion on an adjournment application.

50. Finally, an appellate court will be slow to overturn a judge's decision under CPR Part 39.3 to refuse or allow an application to set aside, unless satisfied that the

judge was wrong in principle: see *Pereira* at [27] and also *TBO Investments* at [24].

51. It follows from the above that the Judge's reasoning was flawed. There is no principle of consistency or judicial comity which requires the judge hearing the application under CPR Part 39.3(3) to follow the trial judge and the Judge was wrong to hold otherwise (as he did at [26] and [27]). It is open to the judge hearing the application under CPR Part 39.3(3) to reach a different decision on the same facts.

52. I doubt in fact that the Judge would have taken the approach that he did, had he been referred to the relevant authorities of *TBO Investments* and *Emojevbe* in particular. Whilst the Recorder considered the judgment in *Solanki* (which addresses applications under CPR 39.3 as well as applications to adjourn for medical reasons and at [38] cites extensively from *TBO Investments*), the Judge does not appear to have done so.

53. There is no proper analogy to be drawn with case management decisions on expert evidence requiring a change of circumstances, as the Judge did at [28] and [29]. The change of circumstances rule is based on the principle identified in *Chanel Ltd v FW Woolworth & Co Ltd* [1981] 1 WLR 485 that a party must bring forward in argument all points reasonably available to him at the first opportunity; and that to allow him to take them serially in subsequent applications would permit abuse and obstruct the efficacy of the judicial process by undermining the necessary finality of unappealed decisions. There is no analogy with the present case. For similar reasons there is nothing in the submission for FCL and Mr Riaz that the District Judge was bound by a finding of fact by the Recorder that the Appellant did not intend to attend on 17 January 2019. There was no need for the District Judge to adjourn the application before him in order to obtain transcripts of the Recorder's rulings. It was for the District Judge to draw his own conclusions from the evidence before him. He was entitled to conclude that Ms Fatima's stance on the previous day would not necessarily hold for the next day because she might have taken account of the protective measures which the Recorder had indicated that he would put in place.

54. This approach in no way offends the principle of finality. Putting to one side the fact that the evidence before the District Judge was much fuller than that before the Recorder (which consisted essentially of a bare text message indicating that Ms Fatima was in hospital), an application to adjourn a trial and an application under CPR Part 39.3 are different and discrete applications involving, as set out above, different tests.

55. Since the Judge was conducting an appeal by way of review under CPR Part 51.21 and the decision under appeal was the exercise of a discretion, he should not have interfered with its exercise in the absence of error of law or it being outside the wide ambit permissible. He erred in his approach at [20] that it was a binary decision whether the District Judge was right or wrong.

56. There was no error of law by the District Judge and the exercise of his discretion was well within the range of decisions properly open to him. It was conceded before him both that Ms Fatima had made the application promptly and had reasonable prospects of success at trial. The only issue was whether or not she had a good reason for not attending the trial and, if she did, whether the Recorder's

judgment and orders should be set aside. It was fully open to the District Judge to conclude that Ms Fatima had had a good reason for not attending for the reasons that he gave and to exercise his discretion to set aside the Recorder's judgment and orders. It is clear (from [13]) of his judgment that he took into account Ms Fatima's witness statement in reaching his conclusion that there had been a good reason for her non-attendance at trial. The Judge's observation (at [32]) that it was "disappointing" that Ms Fatima had not stated in terms that she had any intention in attending court on 17 January 2019 was not well-made. The witness statement, fairly read, made it clear that "the reason for [her] non-attendance" was her medical condition. It stated in terms that she did not attend court on 18 January 2019 because she "was not well enough to do so after being hospitalised". As already indicated, the witness statement on any view provided a much fuller picture to the District Judge than that presented before the Recorder. Despite the attack by FCL and Mr Riaz on Ms Fatima's credibility, certainly in the absence of any application to cross-examine or direct evidence to undermine her position, the District Judge was entitled to reject that attack and approach the application as he did, on the basis that Ms Fatima was genuinely affected and attended hospital in good faith for treatment.

57. I note that on the question of ultimate discretion, the District Judge does not appear expressly to have considered the three stages identified in *Denton*. However, no ground of appeal in this regard was raised either before the Judge or this court. In any event, consistent with [25] of *Pereira*[1], in circumstances where the three conditions in CPR Part 39.3(5) are satisfied, it will be a very unusual case where a consideration of the *Denton* principles will lead to anything other than a setting-aside.

58. For these reasons, I would allow the appeal and restore the District Judge's decision.

Popplewell LJ:

59. I agree.

Lewison LJ:

60. I also agree.

[1] Whilst there was no express separate consideration of CPR Part 3.9 in *Pereira*, Lord Neuberger MR referred in terms (in [25]) to the fact that, like all other rules, CPR Part 39.3 is subject to the overriding objective and must be applied in that light.