Neutral Citation Number: [2022] EWCA Civ 960

Case No: CA-2022-000542

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
QUEENS BENCH DIVISION
Mr Justice Martin Spencer
[2021] EWHC 3461 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/07/2022

Before :

LORD JUSTICE COULSON
and
LORD JUSTICE WARBY

- -

Between :

Saleh Ibrahim Mabrouk	**Appellant**
- and -	
John Murray	**Respondent**

- -
- -

Samantha Kane (**Direct Access Barrister**) for the **Appellant**
Phillippa Kaufmann QC (instructed by **McCue Jury & Partners LLP**) for the **Respondent**

Hearing Date : 6 July 2022

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Approved Judgment

This judgment will be handed down remotely by circulation to the parties' representatives by email and released to the National Archives. The date and time for hand-down is deemed to be 10.30am on 12 July 2022

LORD JUSTICE COULSON and LORD JUSTICE WARBY:

1. This is the judgment of the court, to which we have both contributed. Although it arises out of an application for permission to appeal, we give permission for the judgment to be reported.

1. INTRODUCTION AND FACTUAL BACKGROUND

2. This application arises out of the murder of WPC Yvonne Fletcher outside the Libyan Embassy in St. James Square on 17 April 1984. The respondent ("Mr Murray") was a friend and colleague of WPC Fletcher and was working with her on that day. Although he was fortunate not to be hit when those inside the Embassy turned machine guns on the police and protestors outside, the shooting and death of WPC Fletcher had a profound effect on him. He suffered profound post-traumatic stress disorder, and recurrent major depressive disorder.

3. The appellant ("Mr Mabrouk") was found to have been a very senior pro-Gaddafi official within the Libyan Embassy in 1984. Although he had been arrested by the time of the shooting, there was compelling evidence from more than one witness that he had said to a Mr Sullivan (an employee of the Metropolitan Police who was preparing the barriers in the Square on the morning of 17 April 1984 in advance of the protests): "We have guns here today. There is going to be fighting and we aren't going to have responsibility for you or the barriers". This was consistent with a considerable quantity of other evidence about threats made by Libyan officials (including Mr Mabrouk) prior to the protests, warning of guns, shooting and violence. That evidence led Martin Spencer J ("the judge") to conclude that the shooting was "not merely a spur-of-the-moment decision, or rash mistake, but was deliberate and pre-meditated" [64].

4. Many years later, Mr Mabrouk was on bail whilst he was the subject of a police investigation in the UK concerned with his involvement in the murder of WPC Fletcher. On 17 May 2017, his solicitors, The Stokoe Partnership, wrote to him to say that the Metropolitan Police had decided not to proceed with the criminal case against him. However, as they noted, the police statement implied that they had evidence against Mr Mabrouk which unfortunately they could not use. As his solicitors expressly advised him, "that is a long way away from saying that there is no evidence to suggest you were involved."

5. Mr Mabrouk claims that he left the UK on the 11 July 2018. Be that as it may, it appears that it was only on 9 January 2019 that the Home Office wrote to him to tell him that he was excluded from the UK "on the grounds that your presence here would not be conducive to the public good, due to your suspected involvement in war crimes and crimes against humanity in Libya."

6. On 16 November 2018, Mr Murray commenced civil proceedings against Mr Mabrouk. The claim was based on the tort of assault and/or battery, and Mr Mabrouk was said to be liable in accordance with the principles of joint liability. The claim form made clear that the claim was brought for vindicatory purposes and that, as a result, the damages claimed were limited to £1.

7. The Stokoe Partnership went on the record as Mr Mabrouk's solicitors. On 29 April 2019, they served an Acknowledgment of Service. They then embarked on lengthy correspondence with Mr Murray's solicitors, McCue Jury & Partners, seeking an extension of time for the service of Mr Mabrouk's defence. Although they remained on the record until December 2019, no formal defence was ever served on behalf of Mr Mabrouk.

8. On 6 August 2019, when The Stokoe Partnership was still acting on behalf of Mr Mabrouk, a three-page document entitled "Application to strike out the claim" was produced by or on behalf of Mr Mabrouk and sent to McCue Jury & Partners and the court. This document reflected an earlier letter from Mr Mabrouk to the court, dated 12 July 2019 (which McCue Jury & Partners had not seen until the present application), which described Mr Murray's claim as "fraudulent" and "a waste of court time". The "Application to strike out the claim" denied the claim brought by Mr Murray on the basis that: i) Mr Mabrouk was already under arrest by the time of the shooting; and ii) no criminal charges had subsequently been brought against him. The document went on to ask for the claim "to be struck off on the basis of lack of merit". It (incorrectly) claimed that Mr Mabrouk did not have a solicitor, and instead provided an email address to which all correspondence should be emailed.

9. On 20 March 2020, with The Stokoe Partnership no longer on the record, McCue Jury & PArtners emailed Mr Mabrouk at the email address which he had provided, dealing with various aspects of the ongoing civil litigation. There was no reply. On 14 August, they emailed him again, informing him of a directions hearing before Master Davidson the following week. At that hearing on 20 August 2020, the Master gave permission for the email address which Mr Mabrouk had provided to be used for service and communication. He also ordered that the document entitled "Application to strike out the claim" should stand as Mr Mabrouk's defence.

10. On 14 September 2020, there was a reply to McCue Jury & Partner's email of 14 August, although it came from a different email address. This was in the form of a letter from Mr Mabrouk. He said that he was not a UK resident and "cannot and do not accept service of any proceedings or documents to the address you have used". He claimed that, because McCue Jury & Partners had failed properly to serve documents, "your application should be withdrawn". That assertion was of course incorrect: McCue Jury & Partners had complied with the Master's directions.

11. On 17 September 2020, McCue Jury & Partners replied, noting that the email of 14 September had come from a different email address to the one previously provided. Further email exchanges took place in September and October 2020. It was said that the new email address belonged to Mr Mabrouk's son.

12. On 26 March 2021, McCue Jury & Partners informed Mr Mabrouk, again by way of the various email addresses that they possessed, that the trial had been fixed for October 2021. There was no reply. On 5 October 2021 they emailed again, this time explaining how provision could be made for Mr Mabrouk to give evidence at the forthcoming trial by way of videolink. There was again no reply. Paragraph 15h. of the skeleton argument provided by Ms Kane in this appeal implies that Mr Mabrouk saw those emails at the time; certainly it is not said there, or anywhere else in the documents provided on behalf of Mr Mabrouk, that he did not see them. Nor is any other explanation offered as to why he did not respond to them.

13. The trial took place before the judge in October 2021. His judgment was dated 16 November 2021 ([2021] EWHC 3461 (QB)). As to the position of Mr Mabrouk, the judge said this:

> "4…First, however, I should refer to the fact that the defendant, Mr Mabrouk, has not taken part in these proceedings. The claim form was issued on 16 November 2018 when the defendant was still resident in this country. However on 9 January 2019 the defendant was excluded from the UK on the grounds that his presence here would not be conducive to the public good due to his suspected involvement in war crimes and crimes against humanity in Libya. The Particulars of Claim were served on the defendant in April 2019 and on 29 April 2019 he served an acknowledgement of service indicating that he intended to defend the claim. On 6 August 2019 he sent a letter to the court denying being involved in the murder of Yvonne Fletcher. He stated that he was in Libya and in the interests of justice would not be able to defend himself without being present in the UK. He asked for the claim to be struck out on the basis of lack of merit. By an order dated 20 August 2020, Master Davison ordered that the defendant's letter of 6 August 2019 should stand as his defence and also that service of documents should be effected by them being sent to the defendant's email address from which he had been corresponding and had been responsive. By letter dated 26 March 2021, the claimant's solicitors informed the defendant that the trial would take place for three days from 10 November 2021 and in a further letter dated 5 October 2021, the claimant's solicitors reminded the defendant of the forthcoming trial and stated:
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> *"If the trial does proceed on an in-person basis, and you do not wish to attend the trial in person, you may be entitled to request to attend by video-link. Should you wish to do so, please let us know by Friday 15 October and we will make the necessary arrangements with the Court."*
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> However, the Defendant did not respond to either of the letters of 26 March or 10 November, and the conclusion which I draw is that he has chosen to play no part in this trial. I therefore considered that he was voluntarily absent and that the trial could fairly proceed in his absence, and that is what has happened. I should observe, however, that I have been acutely conscious of the fact that the evidence which Miss Kaufmann QC has presented at this hearing has not been the subject of challenge, that the witnesses called have not been subjected to cross-examination, and that it has therefore been appropriate at times to view the evidence with a critical eye, particularly bearing in mind that we have been considering events from over 37 years ago. I have also taken the view that statements made contemporaneously are much more likely to be accurate than, for example, statements made for the purposes of this trial."

14. In his careful judgment, the judge found that the shooting towards Mr Murray was an assault, and that he was also entitled to recover damages for the injury he suffered as a direct consequence of the battery caused to WPC Fletcher: [50]. He considered Mr Mabrouk's liability for that assault and battery by reference to common design liability between [51] – [74], and concluded that there was a coordinated plan to fire

on the protestors; that Mr Mabrouk assisted in the facilitation of that common design; and that he was therefore liable in tort to Mr Murray. He also upheld the alternative case on a procurement liability basis: [75].

15. Following the trial, the order allowing Mr Murray's claim was dated 22 November 2021, which was the date that the judgment was formally handed down. The time for any appeal against that order expired on 13 December 2021, 21 days after the decision (CPR 52.12(2)(b)), no extension having been sought from or granted by the judge. It appears that Mr Mabrouk was well aware of the judgment before that date (see paragraph 26 below). However, the application for permission to appeal was not made until 30 March 2022, in a document entitled "Request for out of time appeal".

16. Voluminous material in support of and resisting the application for permission to appeal has been provided by both sides. By reason of the quantity and nature of that material, and some of the issues raised therein, the application for permission to appeal was 'called in' for an oral hearing. Although that led to the introduction of yet further material, none of it went to what we consider to be the obvious starting point for this application, namely CPR 39.3. That rule, and certain authorities, were drawn to counsel's attention the week before the hearing of the application for permission to appeal.

17. The application made by Mr Mabrouk was vague about the relief which he sought. Ms Kane was asked about that at the hearing on 6 July. Originally, she said that she wanted the judge's order quashed, in order to bring the claim to an end. As we pointed out, that could not be appropriate here; this is miles away from the sort of case like *Carnduff v Rock* [2001] EWCA Civ 680; [2001] 1 WLR 786, cited by Ms Kaufmann, in which the court concluded at [40] that "the present claim [a claim for fees by a police informant] cannot and should not be litigated". Once the point was debated, Ms Kane did not suggest that this was a similar situation. Instead, she sought an order which quashed the judge's order of 22 November 2021, and ordered a retrial.

18. We are grateful to both Ms Kane and Ms Kaufmann for their submissions, in particular those made at the oral hearing on 6 July 2022. At the end of that hearing, we announced that permission to appeal would be refused and that, to the extent that it was necessary to treat the application as an application under CPR 39.3, that application would also be refused. We said that we would provide our reasons for that decision in writing. This judgment sets out those reasons.

2. CPR 39.3

19. CPR 39.3 provides as follows:

> "**39.3**—(1) The court may proceed with a trial in the absence of a party but—
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> (a)if no party attends the trial, it may strike out the whole of the proceedings;
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> (b)if the claimant does not attend, it may strike out his claim and any defence to counterclaim; and
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> (c)if a defendant does not attend, it may strike out his defence or counterclaim (or both).

> (2) Where the court strikes out proceedings, or any part of them, under this rule, it may subsequently restore the proceedings, or that part.
>
> (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 (2) or paragraph (3) for an order to restore proceedings must be supported by evidence.
>
> (5) Where an application is made under paragraph (2) or (3) by a party who failed to attend the trial, the court may grant the application only if the applicant—
>
> (a)acted promptly when he found out that the court had exercised its 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."

20. The first point to note is that r.39.3 pre-supposes that a civil trial may have taken place in the absence of one of the parties. Indeed, it assumes that that has happened. It goes on to provide a complete code as to what a party should do when he or she seeks to set aside the judgment on the ground that he or she did not attend the original trial. A party in the position of Mr Mabrouk has to satisfy each of the three limbs of the test at r.39.3(5).

21. In *Bank of Scotland v Pereira* [2011] EWCA Civ 241; [2011] 1WLR 2391, Lord Neuberger MR expressly considered the interplay between the appeal process and r.39.3. He said:

> "37. First, 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 requirements 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) as Jack J pointed out. 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). This is not to suggest that in *Boutique Basilique* [2008] EWCA Civ 754 the court proceeded on a mistaken basis. If a defendant seeks to appeal without first making a CPR 39.3 application, when she could have made such an application, the appellate court could still entertain her appeal, although particularly following our judgments in this case, it will normally require unusual facts before it should do so…
>
> 46. However, it would be very different where the defendant's application to adduce new evidence, or to have a retrial, is essentially based on the fact that she did not attend the trial. If she has already failed in her CPR 39.3 application, it seems to me that to allow her to appeal against the trial judge's order on such a ground would involve letting her in through the back door

> after having firmly locked the front door. The policy behind CPR 39.3, as interpreted in *Regency Rolls* [2000] EWCA Civ 379, is to prevent a defendant from seeking a retrial if she did not attend the trial, unless the three requirements in CPR 39.3.5 are satisfied. Where her CPR 39.3 application has been refused because she has failed to satisfy one or more of those requirements, it seems to me that it would be wrong in principle for an appellate court to grant her a retrial on grounds which, in reality, amount to no more than her having been absent from, and therefore not having given evidence at, the trial."

22. In the present case, no formal application has been made under r.39.3, either to the judge or to this court. Ms Kane accepted that r.39.3(5) provided the applicable framework for her application; Ms Kaufmann was also happy to address the three-part test that it provides. Although Ms Kaufmann wondered whether the rule was designed to deal with the particular difficulties thrown up by this case, as we explain below, we are confident that it does.

23. Accordingly, we first address the position under r.39.3, and to treat the application for permission to appeal as an application under that rule. We do so, as per *Pereira*, applying precisely the same criteria that the trial judge would have applied at r.39.3(5) if the application had been made to him (as it should have been). In addition, because an application under r.39.3 is also an application for relief from sanctions (see Civil Procedure 2022, at paragraph 39.3.7.4), we go on to consider the principles in *Denton v TH White Limited* [2014] EWCA Civ 906; [2014] 1 WLR 3926. Those principles apply in any event because the application for permission to appeal was made after the 21 day time limit had expired. Finally we also consider the three Grounds of the proposed appeal.

3. RULE 39.3(5)(a): DID MR MABROUK ACT PROMPTLY?

24. Rule 39.3(5)(a) requires Mr Mabrouk to demonstrate that he acted promptly when he found out that the court had entered judgment against him. This has been interpreted as meaning "acting with all reasonable celerity in the circumstances": see *Regency Rolls Limited v Carnall*, 16 October 2000, unreported, CA, noted in Civil Procedure 2022, at paragraph 39.3.7.1. Although they are not in any way prescriptive, the authorities suggest that an acceptable delay will usually be measured in weeks after the relevant judgment or order, rather than months. Thus an application to set aside made 6 weeks after trial was deemed to have been made promptly in a complex case with a good deal of documentation (*Watson v Bluemoor Properties Limited* [2002] EWCA Civ 1875), but in the more straightforward case of *Regency Rolls*, a 4 week delay meant that the application was found not to have been made promptly.

25. In our view, Mr Mabrouk did not act "with all reasonable celerity" in the present case. There are a number of reasons for that conclusion.

26. First, Mr Mabrouk has been careful *not* to say precisely when he found out about the judgment against him. Instead, he said at paragraph 5 of his statement of 3 May 2022 that he approached Ms Kane "following the media coverage of the judgment". However, it is reasonable to infer - and we do so infer – that, as with almost all media coverage of judgments in the Queen's Bench Division, such coverage would have been at the time of, or very shortly after, the handing down of the judgment on 22

November 2021. Yet his application for permission to appeal was not made for another 4 months.

27. Secondly, no proper chronology has been provided as to that period of in excess of 4 months, and no attempt has been made to explain how and why, on the evidence, it could be said that Mr Mabrouk, having found out about the judgment because of the media coverage, acted with all reasonable celerity during that period. The absence of any narrative, identifying specific dates on which it is said that particular events occurred (or should have occurred) in the run-up to 30 March 2022, that might go some way to explaining the delay, is significant.

28. That leads on to the third point. There is a general assertion that access to the internet and electricity supply is sporadic in Libya, and that this provides some excuse for the delay. But there is no evidence which makes good this assertion, and no attempt to link any internet or power outages in Libya with the delay that occurred between 22 November 2021 and 30 March 2022. Moreover, given the extent to which, according to the evidence attached to Mr Jury's statement, Mr Mabrouk appears liberally to use Youtube and his mobile phone in Libya, we are doubtful about the veracity of these generalised assertions.

29. Fourthly, it is important to remember that this is not one of those cases where an individual or a company only discovers that they are the subject of civil proceedings when they see the judgment. On the contrary, Mr Mabrouk was aware, from the outset of these proceedings in 2018, that Mr Murray was pursuing a civil claim against him, seeking to make him complicit in the murder of WPC Fletcher. He had solicitors for the first part of that litigation process, and engaged with the other side's solicitors by way of email for some time after those solicitors stopped acting for him. Since he was aware, or should have been aware, that his various attempts to have the claim struck out had failed, he should have participated in the original trial (as explained in greater detail below). On any view, he had every reason to act with all possible speed when he discovered that the claim against him had been upheld. Yet he failed to do so.

30. Neither is this case particularly document-heavy or complex. Mr Mabrouk has known that he faced Mr Murray's claim for 4 years, whilst the murder of WPC Fletcher has hung over him, in one way or another, for 38 years. The basis of Mr Murray's claim has never changed. So Mr Mabrouk did not need 4 months, or anything like it, to understand what the judge had found, and to respond accordingly.

31. Finally there is a suggestion that he was hampered by impecuniosity due to sanctions during this 4 month period and so could not obtain the services of a lawyer. We deal with (and reject) the impecuniosity allegation in the next section of this judgment. For now, it is sufficient to note that any sanctions that were in force had come to an end in November 2021, at about the time of the judgment, and so could not have been a reason for delay. There is certainly no evidence to the contrary. Moreover, "the inability to pay for legal representation cannot be regarded as providing a good reason for delay": see *R (Hysaj) v Home Secretary* [2014] EWCA Civ 1633; [2015] 1 WLR 2472 at [43].

32. For these reasons, therefore, we conclude that Mr Mabrouk did not act promptly in accordance with r.39.3(5)(a).

4 RULE 39.3(5)(b): DID MR MABROUK HAVE A GOOD REASON FOR NOT ATTENDING THE TRIAL?

33. Paragraph 39.3.7.2 of Civil Procedure 2022 states that the phrase "good reason" is a sufficiently clear expression of the standard of acceptability to be met. We agree: no gloss is required. The mere assertion that a party was unaware of the hearing date is unlikely to be sufficient to constitute a good reason. The general rule is that the court must be satisfied that the inability of a litigant to be present is genuine, and the onus is on the party who did not attend to prove that: see *Teinaz v Wandsworth LBC* [2002] I.C.R. 1471.

34. Mr Mabrouk has failed to satisfy us that he was genuinely unable to participate in the trial. Indeed, for the reasons set out below, we consider that, not only did he have no proper reason for non-attendance, but his non-attendance was deliberate.

35. At the commencement of these proceedings, Mr Mabrouk was represented by solicitors. It appears that, when his three attempts to have the claim struck out or to persuade McCue Jury & Partners to abandon the claim failed (in July and August 2019, and again in September 2020), and his solicitors came off the record, he decided to ignore the proceedings altogether and, as the judge said at [4], he thereafter deliberately chose not to take any part in them. We conclude that, on the evidence before him, the judge was right to reach that conclusion. Further, no new evidence has been provided as part of this application which could lead us to take a different view. The only document not previously supplied, namely the letter of 12 July 2019 (paragraph 8 above) was written when The Stokoe Partnership were still on the record, and contains nothing of significance that was not in the "Application to strike out the claim".

36. Two specific reasons are now proffered to explain Mr Mabrouk's non-attendance at the trial. The first is the assertion that he could not participate in the trial because he could not attend in person, having been excluded from the UK. The second is his alleged impecuniosity, which meant that he could not pay to be represented. On analysis, neither of these reasons have been established.

37. There is nothing in Ms Kane's submission that the trial required Mr Mabrouk's presence in person and/or that he was somehow entitled to attend the trial in person. This was not a criminal trial but a civil action, concerned with events that might potentially be criminal: see the distinction drawn in *Engel v Netherlands* (1976) 1 E.H.R.R. 647 and *Ozturk v Germany* (1984) 6 E.H.R.R. 409. *Gryaznov v Russia* (Application No 19673 03, 12 September 2012) states at [45] that "Article 6 of the Convention does not guarantee a right to personal presence before a civil court…". So although the letter of 12 July 2019 reiterates Mr Mabrouk's desire to attend the trial in person, that was a wish to achieve the impossible (since he was banned from the UK). His Article 6 rights were not infringed because there were other ways in which he could properly participate in the civil trial.

38. Even before the pandemic made the use of remote hearings more widespread, it was the law that parties to civil litigation could, if they so wished, attend by way of videolink rather than in person. That rule extends to fugitives from justice: see, for example, *Polanski v Conde Naste Publications Limited* [2005] UKHL 10; [2005] 1

WLR 637. It therefore extended to Mr Mabrouk. The civil law treats equally those attending a civil trial in person and those who attend by way of videolink.

39. Indeed, Mr Mabrouk's ability to attend the trial by way of videolink was always recognised by McCue Jury & Partners. It was for that reason that, in their email of 5 October 2021, they expressly referred to videolink as an option and asked him to indicate whether or not he would wish to attend using that process because, if he did, they said they would make the necessary arrangements. He did not reply to that email, but again that was his choice. In any event, the ability to attend by videolink was something which, as a party to this claim, Mr Mabrouk was obliged to sort out for himself; it was not incumbent on McCue Jury & Partners to make such offers, although it was doubtless wise for them to do so.

40. Ms Kaufmann was concerned that, if the judge had been wrong to conclude that Mr Mabrouk's non-attendance at the trial was voluntary, there was no scope under r.39.3(5) to consider her subsidiary submissions, which were that, since this was a civil trial, he had no right to attend in person, and that he received a fair trial anyway. That concern does not arise on the facts of this case because of our finding that his non-attendance was indeed voluntary. But even if the judge had been wrong to reach that conclusion, we do not consider that r.39.3(5) is limited in the way that Ms Kaufmann suggested. Mr Mabrouk did not have a *right* to attend in person (because this was a civil trial); he did not have the *ability* to attend in person (because he had been excluded from the UK); but he did have the right *and* the ability to attend by way of videolink. It was Mr Mabrouk's choice not to take up that option.

41. Furthermore, despite his non-participation in the trial, we are entirely satisfied that Mr Mabrouk received a fair trial. A study of the judgment demonstrates the care with which the judge tested every key element of his reasoning. He gave particular credence to that evidence which was noted or recorded contemporaneously. Some of the evidence was hearsay, and none of it had been directly tested, but the judge was alive to those issues and properly directed himself about them in [4], set out at paragraph 13 above. Crucially, Ms Kane was unable to point to any specific finding made by the judge which she said had been unfairly arrived at.

42. As to Mr Mabrouk's alleged impecuniosity, this was not put on the basis that he lacked the means to pay for representation but on the footing that he was and is the subject of UK financial sanctions. But, as Mr Jury's witness statement made plain, there was no evidence that Mr Mabrouk has been under any form of UK financial sanctions. Like much else in his application, that is a bare assertion by Mr Mabrouk, not supported by any material and undermined by Mr Jury's researches. In addition, until March 2020, Mr Mabrouk co-owned with his wife a property in Reading. On 18 March 2020 (namely after the commencement of these proceedings, and when he was therefore at least potentially liable for damages and costs) Mr Mabrouk transferred the property into the sole name of his wife. Again, therefore, that does not support the contention that Mr Mabrouk did not attend the trial because he was impecunious; instead, it suggests someone taking all necessary steps to preserve their assets in case the outcome of the trial was unfavourable.

43. It appears that Mr Mabrouk may have been the subject of sanctions in Libya. But the detail of those are unexplained, and there is nothing to suggest that they somehow contributed to his non-attendance by way of videolink at the trial. As noted at

paragraph 31 above, they had come to an end by the time of the trial and the judge's judgment.

44. Two other points should be made about Mr Mabrouk's alleged impecuniosity. First, it is irrelevant in principle: see *Hysaj*. Secondly, there is the potential availability of legal aid. Ms Kane submitted in her skeleton argument that Mr Mabrouk "was not entitled to legal aid". If that was meant to suggest that he had actually applied for legal aid in these proceedings and been refused, we noted at the hearing on 6 July that no documents relating to any such application have been disclosed. If Mr Mabrouk was refused legal aid (or if he had been advised that he was not entitled to it), that could only have been because either he did not have a substantive defence to the claim, or he had his own financial resources. Whatever the answer, it does not advance Mr Mabrouk's position under r.39.3(5)(b).

45. When considering the 'good reason' limb of the test, it is appropriate to stand back and consider what – if anything - has changed between the period prior to the original trial in 2021 (when Mr Mabrouk was not represented and did not participate) and the period in the future when the retrial envisaged by Ms Kane takes place. She referred to the fact that, at the retrial, she or someone else could represent Mr Mabrouk *pro bono*. But she accepted that, if Mr Mabrouk had made the necessary arrangements, that could have happened at the original trial. She also submitted that Mr Mabrouk could appear by way of videolink at the retrial, possibly in a third country like Tunisia, where the infrastructure was better. But again Mr Mabrouk could and should have ensured that that happened at the original trial. So nothing has changed: all the things that will be necessary for an effective retrial could and should have been put in place by Mr Mabrouk for the original trial.

46. For these reasons, we conclude that the second limb of the test at r.39.3(5)(b) has not been made out.

5. RULE 39.3(5)(c): DOES MR MABROUK HAVE A REASONABLE PROSPECT OF SUCCESS AT ANY RETRIAL?

47. The final matter which Mr Mabrouk is required to demonstrate under r.39.3(5) is that he has a reasonable prospect of success at any retrial. The general test for 'reasonable prospect of success' is well known: it means "a defence which carries some degree of conviction" (*Tinkler v Elliott* [2012] EWHC 600 (QB)); whether the defence has a "realistic" as opposed to a "fanciful" prospect of success: see *Swain v Hillman* [2001] 1 All ER 91.

48. However, it must be remembered that this is not a case where a party is seeking to set aside an order made after an interlocutory hearing. Mr Mabrouk is seeking to set aside a final judgment, reached after a trial, in order to have a retrial on precisely the same issues. In such circumstances, we would expect a litigant in Mr Mabrouk's position to have worked through the judge's judgment, so as to explain in proper detail how and why a particular finding is wrong. The court will require something more than a general assertion of error before it considers opening up a detailed judgment and ordering a retrial; in this context, "a reasonable prospect of success" must denote a real argument, usually by reference to material that was not available to the judge, that one or more of the judge's key findings was erroneous.

49. As demonstrated below, Mr Mabrouk has wholly failed to meet this third element of the test.

50. First, there is the absence of any detailed defence. As we have said, there was no detailed defence in the litigation, despite the Acknowledgement of Service, the continuing presence of his solicitors in its early months, and their attempts in 2019 to obtain an extension of time for the service of such a document. Neither is there any such document in the Appeal Bundle submitted by Mr Mabrouk. He was granted an extension of time until 20 May 2022 to provide that Bundle. In a case like this, front and centre in any such Bundle, one would have expected to see Mr Mabrouk's detailed defence. That would contain the sort of material to which we have referred in paragraph 48 above. But no such defence has been produced. We consider that the continued absence of any proper defence document, 4 years after the commencement of this litigation, is very telling.

51. Secondly, Mr Mabrouk's defence, so far as it is possible to glean from the other material provided, relies on bare denials and assertions. That is nowhere near enough to meet the hurdle in r.39.3(5)(c). The only particular point that is made on his behalf is that he was not in the Embassy at the time of the shooting because he had already been arrested. But the judge dealt carefully with that aspect of the case at [51] – [71], and explained in detail how and why, despite his physical absence at the moment of the shooting, the finding of joint liability against Mr Mabrouk was established on the evidence. There is nothing to suggest that the judge's detailed assessment of the evidence in these paragraphs was even arguably wrong.

52. In our view, this point encapsulates Mr Mabrouk's difficulties. He has never demonstrated how or why he has a defence to this claim, and has not begun to grapple with the detailed findings and careful analysis in the judgment which he wishes to overturn. He has not demonstrated that he has any prospect of success at a retrial, let alone a reasonable prospect of success. Listening to Ms Kane's frank submissions at the hearing, it was hard not to conclude that Mr Mabrouk had ignored Mr Murray's claim and hoped that it would go away. He only started worrying about it when the judgment was handed down and was afforded some publicity. He then thought that he needed to do something about it, and now wishes to turn the clock back many years and start again, with a defence that he has not (beyond denials and assertions) yet formulated. However, the law does not work that way.

53. For these reasons, we consider that Mr Mabrouk has not made out the third limb of the test at r.39.3(5)(c). That means that he has failed to establish any, let alone all three, of the elements identified in r.39.3(5). In accordance with *Pereira*, the application for permission to appeal must therefore fail. It is, however, instructive to go on to consider both the *Denton v White* principles and the Grounds of the proposed appeal.

6. THE APPLICATION OF *DENTON V WHITE* PRINCIPLES

54. We apply the principles in *Denton v White* relating to relief from sanctions to both the application to set aside the order of 22 November 2021, and the delay in making that application after 22 November 2021. There are three questions: Is the breach serious and significant? Are the reasons for it good and sufficient? Should relief be granted having regard to all the circumstances of the case?

55. As to the application to set aside the judge's order of 22 November 2021, the relevant breach was Mr Mabrouk's failure to comply with the earlier directions of the Master and participate in the original trial. We have already said that, in our view, there was no good reason for Mr Mabrouk's non-participation: see paragraphs 33-46 above. That was therefore a serious and significant breach. Furthermore, we consider that the delay between 22 November and 30 March was also serious and significant: see paragraphs 24-32 above. A party who has not attended the trial and seeks an order setting aside a judgment is obliged to act promptly. In many circumstances, that may mean acting more quickly than is prescribed by the applicable time limit for an appeal (21 days). It is very difficult to see how it could encompass a failure even to comply with that time limit.

56. The reasons for the breaches are neither good nor sufficient. We have concluded that Mr Mabrouk's original non-participation in the trial was deliberate and thus inexcusable. But even once he became aware of the judgment, he failed to do anything about it for over four months which delay, as we explain in paragraphs 24-32 above, was unjustified.

57. Finally there is nothing in all the circumstances that would make it just to relieve Mr Mabrouk from the ordinary consequences of his breaches. On the contrary, as we explain below (endeavouring to keep any repetition to a minimum), we consider that the three Grounds of the proposed appeal are hopeless.

7. GROUNDS OF PROPOSED APPEAL

6.1 Ground 1

58. It is said that the judge was wrong to conclude that Mr Mabrouk had chosen to play no part in the trial.

59. We reject that argument for the reasons set out at paragraphs 33-46 above. Indeed, we consider that the judge was not only entitled to reach that conclusion, but that no other conclusion was available to him. No material supplied since the trial alters that position. Accordingly, we would reject Ground 1 of the proposed appeal as unarguable.

6.2 Ground 2

60. It is said that, in the circumstances that occurred, Mr Mabrouk was denied the right to defend himself in person.

61. That submission is flawed for a number of reasons. He chose to absent himself from the trial; he was not denied any applicable right by the judge. Furthermore, he never had a right to appear in person because this was a civil case (see paragraph 37 above). He could have attended by way of videolink (*Polanski*) but chose not to do so.

62. There is a related complaint under Ground 2 that the procedure adopted by the judge was unfair to Mr Mabrouk because he was not present in court. Three specific matters are raised.

63. First, it is said that it was unfair for Mr Mabrouk to be the subject of what is said to have been, to all intents and purposes, a murder charge, in circumstances where his

liability was assessed by reference to the civil, rather than the criminal, standard of proof.

64. That submission is misconceived. Mr Mabrouk was facing a civil claim for assault and/or battery. That was not a murder charge and therefore the judge was not conducting "a murder trial by the back door" as Ms Kane described it. There is nothing wrong in principle with a finding to the civil standard that indicates the defendant's complicity in murder, in circumstances where the underlying claim is civil rather than criminal: see, for example, *Raja v Nicholas Van Hoogstraten* [2005] EWHC 2890 (Ch), and *Hourani v Thompson* [2017] EWHC 432 (QB). In a civil case, whatever the background, the standard of proof is always the balance of probabilities: see *Re B (Children)* [2008] UKHL 35; [2009] 1 AC 11, in particular at [13] and [70].

65. Secondly, a complaint is made that the judge did not address the limitation position. There are again a number of answers to that. For limitation to arise as an issue, it must be a point specifically pleaded by the defendant: see Donaldson LJ in *Ronex Properties v John Lang Construction Limited* [1983] 1 QB 398 at 404. That is encapsulated in CPR 16 PD13.1 ("the defendant **must** give details of the expiry of any relevant limitation period relied on"). Mr Mabrouk never at any time took or pleaded a limitation defence, either during the period when he was represented by solicitors, or thereafter. It is not a point made in the "Application to strike out" document, which was ordered to stand as his defence. There was therefore no limitation issue to be decided by the judge.

66. In any event, Ms Kaufmann, in her skeleton argument for the trial, expressly addressed the limitation position. Although she correctly explained how and why it was not in issue (because it was not a point taken by Mr Mabrouk), she went on to set out Mr Murray's position: that the claim was in time because it had been presented less than 3 years after Mr Murray became aware of the identity of Mr Mabrouk. Reference was expressly made in the skeleton argument before the judge to s.11(4) and 14(1) of the Limitation Act 1980. Although she did not do so, Ms Kaufmann could also have referred in this connection to s. 33 of the Limitation Act and the decision of the House of Lords in *A* v *Hoare* [2008] UKHL 6; [2008] 2 All ER 1 (the "lottery rapist" case). When that case was sent back to the High Court for determination on the discretion point, it was held that the claim was not statute-barred: see [2008] EWHC 1573 (QB).

67. For those reasons, whilst limitation did not formally arise as an issue, in the proper discharge of her duties as counsel in a case involving a litigant in person, Ms Kaufman expressly addressed the point in her submissions to the judge. There was therefore nothing unfair about the way in which limitation was dealt with. Nor has there been any attempt on Mr Mabrouk's side of the case to engage with ss 11, 14 and 33 of the 1980 Act.

68. Thirdly on the question of fairness, Ms Kane endeavoured to criticise the evidence on which the judge relied. In our view, those criticisms are not open to Mr Mabrouk, as a result of his failure to get over any of the three hurdles in r.39.3(5). They were in any event far too general. They wilt in the face of the judge's careful analysis of that evidence, which Ms Kane – through no fault of hers - was simply not in a position to refute: see paragraph 41 above.

69. Accordingly, we would reject Ground 2 of the proposed appeal.

6.3 Ground 3

70. Ground 3 of the proposed appeal complains that a trial *in absentia* is contrary to law.

71. With respect, that submission, with its references to European criminal cases, is misconceived. It wholly overlooks both CPR 39.3 and the code it provides for the very situation of a party who has not participated in the trial; and the authorities cited in paragraph 37 above, to the effect that a trial of a civil case *in absentia* is not contrary to law. There is therefore nothing in Ground 3 of the proposed appeal.

72. For these reasons therefore, we separately reject each of the three Grounds of the proposed appeal. In our view, none of them are remotely arguable.

8. CONCLUSIONS

73. For these reasons, therefore, we conclude that the proposed appeal had no prospect of success. We therefore refused to grant permission to appeal at the close of the hearing on 6 July. We also expressly indicated that we had considered the application necessarily made under or by reference to r.39.3, and that we refused that application too, and for the same reasons.