



Neutral Citation Number: [2021] EWHC 198 (QB)

**IN THE HIGH COURT OF JUSTICE**  
**On appeal from the COUNTY COURT at Dartford**  
**Order of HHJ Simpkins dated 3<sup>rd</sup> February 2020**  
**County Court case number: E16YJ778**  
**Appeal ref: QA-2020-000078**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: Thursday 4 February 2021

**Before :**

**THE HONOURABLE MRS JUSTICE COLLINS RICE**

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**Between**

**HASINA VAFA**

**Appellant and Defendant**

**- and -**

**YOGENDRA PATEL**

**Respondent and Claimant**

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**Mr Arfan Khan** (instructed through the **direct access scheme**) for the **Appellant**  
**Ms Katrina Mather** (instructed by **Bowling and Co Solicitors**) for the **Respondent**

Hearing date: 27<sup>th</sup> January 2021  
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**Approved Judgment**

## **Mrs Justice Collins Rice:**

### **Introduction**

1. Mr Patel had a tenancy of a property where he ran a retail business and post office. In 2013 he agreed to sell the tenancy and the business to Ms Vafa. She moved in and began to run the business before the formalities were completed. The transaction is still not at a final conclusion. The parties are in dispute about how much money remains outstanding between them.
2. Mr Patel began a case in the County Court in 2018 claiming money he said was owed to him by Ms Vafa under the terms of their agreement. Much litigation has since ensued. At this latest stage, after a renewed application for permission granted by Fraser J on specified grounds by order of 18<sup>th</sup> November 2020, and after a substantive oral hearing before me, I am to determine an appeal brought by Ms Vafa against the most recent County Court decision against her.
3. This is an appeal about the conduct of the litigation, not the merits of the underlying dispute as such. A number of County Court decisions are in the spotlight. But no judgments or approved transcripts were before me. All I had was a series of court orders, together with at least some of the material before the courts, and a certain amount of peripheral information about what happened at each stage, not all of it agreed. The parties agreed that all I can do in the circumstances is work with the best information available. For the reasons set out below, I have concluded that this has not proved an obstacle to determining the appeal.

### **Procedural History**

#### **(i) 5<sup>th</sup> July 2019 - District Judge Lightman**

4. Mr Patel began his case with particulars of claim dated 18<sup>th</sup> January 2018. Parallel or ‘mirror’ defences were filed by Ms Vafa and her guarantor (the second defendant in those proceedings). There was a case management hearing on 13<sup>th</sup> December 2018 at which it appears, from the terms of the order made, that the parties were represented by solicitors. The defendants were ordered to file and serve fully pleaded amended defences on pain of having them struck out and judgment in default entered. Directions were given as to disclosure and the exchange of witness statements, and as to pre-trial preparations. A trial window was set for 1<sup>st</sup> May-31<sup>st</sup> July 2019. Mr Patel filed a witness statement dated 5<sup>th</sup> February 2019 and his solicitor filed a witness statement dated 8<sup>th</sup> March 2019. These statements both set out an explanation of how the amount claimed to be due was owed to Mr Patel and why each witness was clear about the accuracy of the calculation. It appears that amended defences were filed, but that no evidence was filed by the defendants – to the deadlines imposed, or at all.
5. The matter came before District Judge Lightman for trial on 5<sup>th</sup> July 2019. Mr Patel and Ms Vafa’s guarantor attended by counsel. Ms Vafa did not attend and was not represented. From the order made by DJ Lightman dated 17<sup>th</sup> July 2019, two things are clear. Firstly, judgment was given in favour of Mr Patel, for the amount claimed, ‘against each defendant jointly and severally’. Secondly, DJ Lightman had exercised the discretion given to him by Civil Procedure Rule 32.10.

6. CPR 32.10 provides that if a witness statement for use at trial is not served in respect of an intended witness within the time specified by the court, then the witness may not be called to give oral evidence unless the court gives permission. Any application for permission to call such evidence has to be made by way of an application for relief from sanction, further to CPR 3.8 and 3.9. It is not apparent that such an application was made. But a court can exercise its discretion in this matter in any event. DJ Lightman had evidently exercised this discretion having heard counsel for the parties present (Mr Patel and Ms Vafa's guarantor), and in the absence of Ms Vafa or any representative, by refusing to allow the defendants to call oral evidence.
7. Ms Vafa did not pursue an appeal against DJ Lightman's judgment. No payment was made to Mr Patel. He took steps to enforce the judgment by way of obtaining an interim charging order, on 10<sup>th</sup> September 2019, against the guarantor's property.

**(ii) 13<sup>th</sup> December 2019 - Deputy District Judge McCloskey**

8. Ten days later, on 20<sup>th</sup> September 2019, Ms Vafa issued an application in the County Court asking for the interim charging order to be 'reconsidered' and for HHJ Lightman's judgment of 5<sup>th</sup> July to be 'set aside'. It did not explain why, but referred to a statement of case in support, a witness statement and 'evidence', but it seems that the copy served on Mr Patel's solicitors did not include that material. Then at 6.18pm on 12<sup>th</sup> December 2019, the evening before Ms Vafa's application was listed to be heard, it seems the guarantor's solicitors sent this material to Mr Patel's solicitors by email. The email confirmed that Ms Vafa was applying '*to set aside the judgment pursuant to the provisions of CPR 39.3(3) and order because it was a default judgment. She was not in attendance and was not represented by her solicitors and did not have notice of the hearing because she travelled out of the UK.*'
9. CPR 39.3(3) provides that a trial may proceed in the absence of a party, but, where a court goes on to give judgment or make an order against that party, the party who failed to attend may apply for the judgment or order to be set aside. An application must be supported by evidence. CPR 39.3(5) provides that a court may grant the application *only* if it finds that all of three conditions are satisfied: (a) the applicant acted promptly when they found out about the judgment or order made in their absence, (b) the applicant had a good reason for not attending the trial and (c) the applicant has a reasonable prospect of success at trial.
10. The material attached with the guarantor's solicitors' email included a statement of case addressing this three-part test. It said Ms Vafa had been out of the UK and in Afghanistan between 9<sup>th</sup> April and 28<sup>th</sup> August 2019 and had also moved to a new address; she had not received notice of the hearing. It said she first heard about the interim charging order from her guarantor on 16<sup>th</sup> September 2019 and had acted promptly. The material included a witness statement from Ms Vafa to this effect and disputing the evidence on which DJ Lightman had based his decision, to show she had a reasonable prospect of success if the proceedings were reinstated. It included a copy of her passport and a copy of her tenancy agreement. It also, according to Mr Patel's solicitors to whom it was sent, included photocopies of a small number of rather scrappy handwritten calculations and notes which are said to be relevant to the question of the sum owed between the parties.
11. DDJ McCloskey heard the application on 13<sup>th</sup> December 2019. It seems from the terms of the order that he heard Ms Vafa in person and Mr Patel's solicitor. He dismissed the application and awarded Mr Patel costs. The order noted a new address for Ms Vafa.
12. Mr Patel's solicitor noted by email later that day that the application had been dismissed on the basis that, even if the notice of the exact date of the trial had been sent to the wrong address, Ms Vafa had known about the May-July trial window, and should not have left the

country for the entire period without notifying Mr Patel and the court, and that she had also failed to give disclosure and serve evidence in accordance with the orders of the court made at the case management hearing. That account would be consistent with the application having been dismissed in accordance with CPR 39.3(5) on the ground that she did not have a good reason for not attending the trial. If so, then the court was bound to refuse the application whatever the prospects of success at a reinstated trial.

13. It does not appear that Ms Vafa pursued an appeal against, or other direct challenge to, this order.

**(iii) 19<sup>th</sup> February 2020 – His Honour Judge Simpkins**

14. A week later, on 20<sup>th</sup> December 2019, Ms Vafa issued a further application to set aside the judgment of DJ Lightman. The application asked for another oral hearing. It was accompanied by a five-page document headed ‘particulars and grounds for setting aside / strike out and stay of judgment’.
15. This document sets out a certain amount of legal analysis and argument, including the citation of authorities. It opens with a request for the judgment to be set aside as Ms Vafa ‘was not present at the hearing on 5<sup>th</sup> July 2019 nor was she represented’. It continues with some propositions about ‘default judgment’ and the basis on which default judgment should be set aside. It says that before it can make a default judgment a court must be satisfied on the basis of evidence before it that there has been a loss of the amount awarded. It says that DJ Lightman entered judgment for the sum he did without the necessary proof. It takes issue with the pleading in Mr Patel’s claim form of 18<sup>th</sup> January 2018 as to the existence of a valid deed between the parties because the document’s signature had been witnessed by a solicitor, and a solicitor could not act as a witness. It objects that no ‘schedule of loss’ was provided and that Mr Patel’s pleadings did not disclose a proper cause of action which the County Court had jurisdiction to consider. It says that the calculations set out in Mr Patel’s witness statements include items that should have been pleaded as counter-claims. It says it was contrary to natural justice and to Ms Vafa’s entitlement under Article 6 ECHR to a fair trial. It says that under CPR 13, a judgment entered under CPR 12 must be set aside if irregular and if the court had had no jurisdiction to make it in any event. It says that in any event Mr Patel’s claim had not been properly served on Ms Vafa because it was unsealed. It said that all of these reasons, and the contents of Ms Vafa’s amended defence before the court, showed that she would have had a reasonable prospect of successfully defending Mr Patel’s claim if she had been present, she should be allowed to defend the claim ‘bearing in mind the principles of equitable set off’, and there was good reason to set aside the judgment. It asked for the judgment to be set aside pursuant to CPR 3.3(5)(a). It also asked for Mr Patel’s claim to be struck out under CPR 3.4(2). It asked for a stay of DJ Lightman’s judgment pending determination. It concluded with a statement that Ms Vafa believed the contents to be true (it does not appear to have been signed by her).
16. The application was also accompanied by a witness statement from Ms Vafa’s husband. This is dated 6<sup>th</sup> December 2019, and states that it was made for the purpose of Ms Vafa’s application listed for 13<sup>th</sup> December – that is, the hearing before DDJ McCloskey. Mr Vafa’s statement sets out that he had been responsible for handling the entire transaction between Mr Patel and Ms Vafa over the transfer of the business. It sets out his version of the transactions, and the money owed between the parties, which is different from that set out by Mr Patel in his original claim. It referred to handwritten notes of calculations which Mr Vafa said he had obtained (these are the notes which Mr Patel’s solicitors say was among the material sent to them by Ms Vafa’s guarantor on 12<sup>th</sup> December 2019 – see paragraph 10 above).

17. Mr Vafa's account of the money owed between the parties concludes with a statement that they do not owe the sum set out in Mr Patel's evidence and which formed the basis of DJ Lightman's judgment, and that, in all the circumstances, he believed that the judgment entered may have been obtained fraudulently and should be set aside in the interests of justice and fairness.
18. This application was referred to HHJ Simpkins. He made an order on 19<sup>th</sup> February 2020 stating that he had read it. He also said he had read the order of DDJ McCloskey of 13<sup>th</sup> December 2019 dismissing Ms Vafa's application to set DJ Lightman's order aside. He concluded from this that it appeared that the application before him was an attempt to re-litigate the earlier application on alternative grounds that should have been raised in the earlier application and that the application was an abuse of process. He ordered that Ms Vafa's application 'is struck out as an abuse of the process'. It is this order which is the subject of the present appeal.

### **The Grounds of Appeal**

19. Permission was given for this appeal to be argued on two grounds:

- (1) HHJ Simpkins was wrong to strike out the application notice on the basis that there was an abuse of process; and
- (2) he was wrong to strike out the application notice 'through an inadequate order on the basis that there was an abuse of process when it was procedurally irregular to do so without an oral hearing'.

### **Analysis**

#### **Ground (1) – Error in finding abuse of process**

20. Counsel before me agreed about what the relevant law says is the correct approach a judge should take when considering if an application is an abuse of process. It is a broad, merits-based approach. There is a quantity of case law refining that test, including in its application to interlocutory decisions, to some of which I was taken. But the parties agreed that the essence of what I have to do is to consider as much of the account of this litigation, set out above, as appears relevant, and decide whether I agree with HHJ Simpkins that Ms Vafa's application of 20<sup>th</sup> December 2019 was an abuse of process or not.
21. What Mr Khan, Counsel for Ms Vafa, who did not appear in the proceedings below, says is that this is exactly what HHJ Simpkins did not do. He did not take a broad, merits-based approach and he did not apply the correct test. He simply assumed, just by looking at DJ McCloskey's order, that this was the same application all over again – or, to the extent that it was any different, it contained only matters that could and should have been raised before. He did not properly consider the points made in the application and give Ms Vafa a chance to expand on them. There was material there, not previously before a court, suggesting that DJ Lightman's decision was defective. He had entered a judgment against Ms Vafa in default of her appearance and therefore did so in the absence of key evidence she could have provided. That made the judgment unfair, unsafe, and, Mr Khan argued before me, susceptible to being set aside. Mr Vafa should have had the merits of that argument properly considered by HHJ Simpkins, and it was not.

22. I have read Ms Vafa's application of 20<sup>th</sup> December 2019 and Mr Vafa's witness statement of 6<sup>th</sup> December 2019 with care. I have listened to what Mr Khan says about them, and reflected since, with equal care. I take his points in turn.

**(i) The status of DDJ Lightman's judgment**

23. First, he says that, as a matter of law, Ms Vafa was right to say in her last application that DJ Lightman's decision had the character of a default ruling, made without the benefit of Ms Vafa's evidence and without cross-examination, and that he simply did not have a proper evidential for reaching a decision which should be considered final and unsusceptible to being set aside in the present circumstances. He drew my attention to the authorities on setting aside, and on the higher threshold for finding abuse of process, in cases involving interlocutory rulings. He said that this was the right characterisation of DJ Lightman's decision – it had the character of default, was therefore interlocutory in nature, and it was susceptible to being set aside as such. And that characterisation should be followed through by applying the higher threshold for considering abuse of process in a second application.

24. I disagree. We spent a lot of time at the hearing of this appeal in the White Book. I see no basis for questioning DJ Lightman's characterisation of his own decision as a final judgment on the merits of Mr Patel's case. It was not a default judgment as defined in CPR12.1. That is a judgment without trial where a defendant has failed to file a defence. Here, Ms Vafa filed an amended defence in accordance with the case management directions and the case proceeded to trial. Part 12 of the CPR is irrelevant to this case. Part 13, which deals with setting aside judgments entered under Part 12 is also irrelevant.

25. The power to set aside under CPR 3.3(5) is irrelevant. That applies to the making of (interlocutory) orders by a court on its own initiative, not to judgments determining the outcome of a trial.

26. Nor was DJ Lightman's decision a summary judgment under part 24 of the CPR. Summary judgment is a decision on a claim or issue without a trial. It is available where a court considers a party has no real prospect of succeeding on, or defending, a claim and there is no other compelling reason for it to go forward to trial. Mr Patel's claim went to trial. DJ Lightman made a decision based on the evidence before him. He had at least two pieces of evidence before him which persuaded him to do that – the witness statements of Mr Patel and his solicitor. It seems that he also had before him Counsel for Ms Vafa's guarantor who had an opportunity to challenge the evidence. In any event, he decided on the merits of the whole case, on the evidence put before him.

27. Of course, what he did not have before him was any further evidence that Ms Vafa might have been able to give him. There are two reasons for that. First, Ms Vafa did not file any, notwithstanding the case management order. Second, she did not attend. Neither is necessarily the end of the matter, but it all depends on the reasons why. The CPR make specific and careful provision for the handling of such circumstances so as to maintain fairness between the parties.

**(ii) Absence of a witness or party from trial**

28. First, CPR 32.10 provides that a court must not rule out the prospect of a witness being allowed to give oral evidence even if they have not given a court the trial evidence they have been directed to provide. DJ Lightman was clearly aware of that. He could have adjourned the trial if he had concerns about the fairness of proceeding without Ms Vafa's evidence. He apparently decided not to do so.
29. Of course, Ms Vafa was not before the court to give oral evidence in any event. But CPR 39.3 provides for that. It is the court's decision in the first place whether or not to proceed with a trial in the absence of a party. DJ Lightman decided to do so. CPR 39.3 recognises that, sometimes but not always, that may lead to injustice. The rule provides that the balance is in favour of accepting the trial judge's decision, unless the absent party can later establish each of three things: a good reason for not attending trial, prompt action on discovering about the judgment, and a reasonable prospect of success should the trial judgment be set aside and the proceedings restored.
30. Other than pursuing an appeal, that is the route Ms Vafa entirely properly went down, in her application before DDJ McCloskey. She had a full opportunity to explain to him why she had missed the trial. It appears that she did not persuade him in all the circumstances that she had a good reason for not attending. DDJ McCloskey's decision has not itself been directly challenged.
31. Where an absent party can show that they were not aware of a trial date, that may be a 'good reason' or it may not; it all depends on the facts and circumstances. It appears that Ms Vafa was aware of the trial window. It was not suggested before me that she was not. It does not appear to have been convincingly explained at any stage in these proceedings why she left the country *for the entire period of the trial window* without telling the court and Mr Patel, and without arranging to be represented. It was not explained before me either. At no stage therefore has sufficient 'good reason' been put forward for failure to attend the trial, or to notify either Mr Patel or the court, of intended or actual absence. No good reason appears in the materials before HHJ Simpkins. No good reason was before me.
32. That would have been the end of the matter, in so far as the law provides for challenge to a judgment after trial where a party and their evidence did not appear. Ms Vafa does not agree with the account of the money owed set out in Mr Patel's claim, and does not agree with the judgment of DJ Lightman. Detailed arrangements were made to enable her to put her side of the story at trial. She did not take the opportunities she was given at the time, and has not met the tests established in law for setting aside an unappealed judgment made on the evidence before the judge at trial.
33. That would also have been the end of the matter before me on Ground (1) of this appeal. A broad merits-based approach to the question of whether the application before HHJ Simpkins was an abuse of process, given the decision of DDJ McCloskey, would have started with the fact that – ignoring the irrelevant material relating to the setting aside of default judgments, interlocutory orders and orders made of a court's own initiative – the application was making a case based on the argument that had Ms Vafa been present at the trial before DJ Lightman she would have had a good prospect of defending the claim (in law and evidence). Without a good reason for failure to attend, an application to set aside on that basis is bound to fail (CPR 39.3(5)). No good reason was before HHJ Simpkins, and no explanation was given for raising *that* matter a second time, when it had been

considered before DDJ McCloskey. To that extent the application was a clear abuse of process, not only by raising the same issue but by not advancing it in any way.

34. For the avoidance of doubt, there is no arguable basis on the materials before HHJ Simpkins or me for challenging DJ Lightman's judgment on jurisdictional grounds. However the application – and before me Mr Khan – put two other issues in the frame. The first was new material. The second was alleged fraud. I turn to them next.

**(iii) Evidential issues and fraud**

35. Some weight is placed on Mr Vafa's witness statement of 6<sup>th</sup> December 2019 being important new evidence. This was not the principal argument before me. But I consider it on its merits, from the point of view of reflecting on whether it means that the second application was not, after all, an abuse of process.
36. There are a number of problems with this argument. The first is that Mr Vafa's witness statement predates, and was prepared for, the hearing before DDJ McCloskey. If it was before DDJ McCloskey, it was not new at all. I had a second witness statement from Mr Vafa, dated 25<sup>th</sup> January 2021, suggesting that it was not, because his solicitors forgot to include it with the papers before DDJ McCloskey. That was of course an oral hearing, where any omission could have been dealt with had the material appeared relevant. Mr Vafa's explanation does not appear in the papers put to HHJ Simpkins. In any event, the judge would have been entitled to consider it a matter which ought to have been dealt with earlier in the absence of any better explanation than that which is now before me. It appears to me from all the materials I have that either this material was before DDJ McCloskey or it should have been.
37. The second is that Mr Vafa's evidence is substantially taken up with setting out Ms Vafa's side of the money issues – what she would have said had she been before DJ Lightman. But no explanation appears as to why this evidence was not prepared and served in accordance with the case management decisions, and therefore made available for trial. It could have been relevant even in Ms Vafa's absence. That explanation is an important missing piece of the puzzle, since much of the witness statement relates matters which happened before the trial – in some cases long before. That would suggest this is not 'new' evidence, it is simply late evidence with no explanation for its lateness.
38. There seems to have been some debate about whether this is the first time the handwritten notes (referred to above) had been drawn to the attention of a court. Mr Vafa's second witness statement suggests they were not before DDJ McCloskey but the explanation he gives leaves room for doubt about that. Even if the handwritten notes were completely new at this stage, they appear on their face to date from 2013. Their precise significance is not clear either. Mr Vafa's statement sets out a side of the story which is different from that put to DJ Lightman by Mr Patel. But it is just that – a different account of the chronology and the calculation of the amount owed. Whether it would have prevailed against Mr Patel's evidence at trial, and what role if any the handwritten notes would have played, is unclear. They appear to be acknowledgments of indebtedness by Mr Patel, but they do not speak for themselves, and no doubt Mr Patel would have had his own version of their significance. This is not the sort of evidence which reframes the judgment and deprives it of the sustainability of its evidence base. The trial judge would simply have had to decide which account was the more plausible.



39. The third point is that, on its face, Mr Vafa's statement of 6<sup>th</sup> December 2019 is rather startling evidence. It says that he, rather than Ms Vafa, was the one directly responsible for the negotiations and the conclusion of the transfer of the business from Mr Patel to Ms Vafa. He says she had been nominated as the owner of the business in support of an immigration application and to show she would not need recourse to public funds. This account is now amplified in Mr Vafa's 25<sup>th</sup> January 2021 witness statement. He says he has been dealing with Ms Vafa's legal and financial affairs throughout the course of this litigation. He says this is because she does not speak fluent English and because she 'is a strict Muslim, who relies on me, as her husband, to conduct her daily affairs'. This account of course raises many questions of potential relevance to this appeal, not the least of which goes to the part Ms Vafa would have played in the proceedings before DJ Lightman even if she had attended. How far was she in fact engaged with the entire transaction in dispute at all? What evidence could she have given as a mere nominee? What was Mr Vafa's part in the course of events this litigation has taken and the issues which are now before me on appeal (including Ms Vafa's absence from the trial and failure to file evidence)? If there is some explanation in Mr Vafa's role in the story for the questions successive courts have been addressing in these proceedings it is entirely opaque, and his evidence creates a great many more questions than answers.
40. The final point which Mr Khan suggests should be taken into account on the issue of abuse of process is the possibility of fraud. The only material before me about this is a bare assertion by Mr Vafa at the end of his first witness statement. Fraud is neither pleaded nor evidenced. The most that is set out, even taking Mr Vafa's evidence at face value, is some discrepancy between the Vafas' side of the story and Mr Patel's. That could and should have been sorted out at trial. It does not begin to rescue Ms Vafa's second application from a finding of abuse of process.

**(iv) Conclusion on Ground (1)**

41. In all of these circumstances, and for the reasons given, I conclude that Ground (1) of this appeal must fail. Ms Vafa's application of 20<sup>th</sup> December 2019 was at its heart an attempt to relitigate the application made under CPR 39.3 and determined by DDJ McCloskey because it relied on Ms Vafa's absence from the trial and before DJ Lightman, and the evidence she could have given there, without showing a good reason for non-attendance. In such circumstances, it was a collateral attack on DDJ McCloskey's decision and was in any event bound to fail on its merits. There is no sustainable argument for impugning DJ Lightman's decisions on the basis of developments or evidence since the trial, and no explanation for the failure of Ms Vafa to submit that (or any) evidence in time for it to be considered at trial. There is a wholly insufficient basis to reopen the matter on grounds of potential fraud. These are the key components of the broad merits-based approach which the relevant law on abuse of process requires to be applied to the facts and circumstances of this case. I have applied that approach and reached the same conclusion as HHJ Simpkins.

**Ground (2) – Unjust because of procedural irregularity in deciding on the papers**

42. Mr Khan says that it was fatally irregular for HHJ Simpkins to have considered Ms Vafa's application on the papers. He says that this is a distinct ground, independent of the fate of Ground (1). Ms Vafa was denied a right to a fair trial. On a question of abuse, a court must take a broad, merits-based approach and bring an intense focus on the facts of a particular case. That sort of intense focus is impossible on the papers alone.

43. A number of points arise. It hardly needs saying that the right to a fair trial – even on a question of abuse of process - does not always require an oral hearing. It is accepted that HHJ Simpkins had a discretion to deal with this application without a hearing if he did not consider that one would be appropriate (CPR 23.8). The question is whether it was fair to do so in this case.
44. I am satisfied that it was. It was fully discernible from the papers before HHJ Simpkins first, that whatever Ms Vafa's prospects of success at any reinstated trial, the application on *that* basis depended on establishing a good reason for her absence under CPR 39.3; second, that the issue of good reason for absence had been disposed of by DDJ McClosky; third, that the legal arguments about setting aside default and interlocutory decisions and 'own motion' orders, and raising jurisdictional issues, were irrelevant; fourth, that the evidential matters raised were directed to material predating the trial without any explanation offered for their failure to be deployed earlier; fifth, that there was nothing in the materials before him capable of vitiating the judgment on grounds of (subsequently discovered) fraud; and sixth, that there was nothing else on the materials before him capable of impugning the judgment of DJ Lightman. That sufficed for a finding of abuse of process. An oral hearing would have been entirely counterproductive in prolonging the abuse of process.
45. A case based on what, *in addition or alternatively* to her written application, Ms Vafa might have been able to say at an oral hearing before HHJ Simpkins will not do. She decided what matters to set out in her application and HHJ Simpkins was entitled – indeed obliged – to make a decision on her case as she presented it.
46. In any event, I do not accept that there is anything in this second ground of appeal which survives the hearing and determination of this appeal on the first ground. I have focused intensely on the facts of this case (notwithstanding the absence of any judgments or transcripts) and adopted the broad merits based approach to the entire matter as invited by the parties. I have looked at all the materials put forward on Ms Vafa's behalf, including some very late materials, and Ms Vafa has had the benefit of Mr Khan's far-ranging submissions before me, which I have taken fully into account as I have thought relevant, not least where I have in the end disagreed with him. There is no surviving argument from injustice of process. This ground also must fail.

## **Conclusion**

47. For the reasons I have given, this appeal is dismissed.
48. I am not in any doubt that there are two sides to the story of the business transfer and the money owed between Mr Patel and Ms Vafa. Ms Vafa missed the opportunities the law provides for putting forward her side – not just by missing the trial and not giving any of the judges who have been involved in this case a good enough reason, but by not putting in any witness statements to support her case until far too late and not explaining why.
49. There are two sides to this appeal too. The relevant law requires that I focus on Ms Vafa's side in testing whether to disturb the decisions that other judges have come to. I have noted that there may be reasons why she has found it difficult to engage with this litigation from the outset, and that there is much about the whole story that remains unclear. But for litigation to be fair, it must be fair to both parties.

50. Fairness in litigation is guaranteed not just by judges listening carefully to both sides of a case and applying the relevant law, but by judges, and all the parties involved, observing the rules that keep a balance of fairness between the two sides of any argument while a case is under way. The rules of litigation are detailed, and they are important. They allow for both sides to understand what is being said against them and to have a fair opportunity to respond. They also make very careful provision indeed for when matters can be looked at again and when decisions are final. It is important that if a court has gone wrong matters can be put right. But it is also important that if a court has not gone wrong, that is respected. A successful party who has complied with the rules is ultimately entitled to rely on the decision of a court without that being constantly questioned. A disappointed party is ultimately required to accept that, however strongly they may continue to feel entitled to the result they wanted, the rules of litigation and any discretion judges are entitled to exercise in the interests of fairness to *both* sides have given a different result.