



Neutral Citation Number: [2024] EWHC 2392 (KB)

Appeal ref: KA-2023-000103

IN THE HIGH COURT OF JUSTICE  
HIGH COURT APPEAL CENTRE  
ROYAL COURTS OF JUSTICE

ON APPEAL FROM THE HIGH COURT MASTERS  
ORDER OF MASTER YOXALL DATED 22 MAY 2023  
Claim no: QB-2022-001481

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 20/09/2024

**Before :**

**MRS JUSTICE HILL**

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**Between:**

**YAN DENG**

**Claimant/First Respondent**

**-and-**

**MENG ZHANG  
SHAOAN CHEN**

**Defendants/Appellants**

**-and-**

**RUI ZHAO**

**Defendant/Second Respondent**

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**Sarinjit Singh Bahia** (Solicitor) for the **First Respondent**  
**Taura Ambrazaityte** (Counsel, instructed by Nazar Mohammad, Counsel and Authorised  
Litigator) for the **Appellants**  
The **Second Respondent** did not appear and was not represented

Hearing date: 10 September 2024  
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## **Approved Judgment**

This judgment was handed down remotely at 10.30am on 20 September 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE HILL

**Mrs Justice Hill:**

### **Introduction**

1. By an application dated 26 March 2024 the First Respondent seeks to set aside an order made by Saini J on 20 March 2024. That order allowed the Appellant’s appeal against orders of Master Yoxall (sitting in retirement) dated 22 May 2023 relating to the First Respondent’s costs budget. The application is brought on the basis that the First Respondent was unaware of the appeal hearing.
2. The First Respondent is the Claimant in the underlying claim. He seeks damages for breach of his data protection rights, breach of confidence, misuse of private information and malicious falsehood by the Defendants in respect of personal data he provided for the purposes of obtaining a mortgage in relation to a property in Birmingham.
3. The Appellants are the First and Second Defendants to the claim. The Third Defendant to the claim, as Second Respondent to the appeal, has played no part in the appeal proceedings.

### **The procedural history**

*The CCMC and the appeal hearing on 20 March 2024*

4. A Costs and Case Management Conference (“CCMC”) in the claim took place before the Master on 22 May 2023. At paragraphs 10 and 12 of the order after the CCMC the Master permitted the First Respondent to rely on his Precedent H (costs budget form) dated 2 May 2023 and then dispensed with costs budgeting.
5. The Appellants appealed those aspects of the Master’s order. Their grounds of appeal assert that (1) the Master’s decision to grant the Claimant relief from sanction such that he could rely on the Precedent H was unsustainable and unjust because of serious irregularities in the proceedings; and (2) the Master erred in exercising his discretion to dispense with costs budgeting.
6. On 19 September 2023 Lavender J granted the Appellants permission to rely on witness evidence from their legal representative as to the serving and filing of the Precedent H

in issue. This was provided in the form of a witness statement from Dingyue Shi, their barrister and litigator, dated 20 September 2023 (“Shi 1”).

7. Shi 1 contended that the First Respondent had (i) sought to rely on a costs budget dated 2 May 2023 that had not been filed or served, but simply inserted into the CCMC bundle without notice to the other parties, after the 1 May 2023 deadline for service of costs budgets; (ii) only made an application for relief from sanctions in respect of the costs budget 34 minutes before the CCMC; and (iii) misled the Master into thinking that the 2 May 2023 budget had been filed and served when it had not been. Shi 1 also referred to communications with the court staff after the CCMC indicating that no costs budget had been filed by the First Respondent.
8. On 20 October 2023 the First Respondent was served with the appeal bundle.
9. On or around 21 November 2023 the First Respondent was served with an order I made on that day granting the Appellants permission to appeal and dispensing with the need for any further appeal bundle.
10. The First Respondent did not file a Respondent’s Notice or any written submission in relation to the appeal; nor did the First Respondent seek permission to rely on any evidence to challenge Shi 1.
11. On 22 December 2023 the court emailed the parties a notice of hearing indicating that the appeal would be heard on 20 March 2024.
12. On 20 March 2024 the appeal hearing took place before Saini J. The First Respondent did not attend. Saini J heard and allowed the appeal. He substituted paragraphs 10 and 12 of the Master’s order with an order to this effect:

“The Claimant is refused permission to rely upon his Precedent H Form dated 2 May 2023 and pursuant to CPR 3.14 is treated as having filed a budget comprising only the applicable court fees”.
13. Saini J was live to the possibility that the First Respondent might wish to apply to set aside or vary his order on the basis that he did not have notice of the appeal hearing. He directed that any such application be made by 27 March 2024.

*Events after the appeal hearing*

14. On 26 March 2024 the First Respondent brought this application. It was supported by a brief statement from the First Respondent’s solicitor, Sarinjit Singh Bahia, of the same date (“Bahia 1”). This asserted that Mr Bahia “had received no notice of the Appeal hearing from the Court, the Appellant’s Solicitors or the Second Respondent’s Solicitors”.
15. The Appellants provided a statement in response from Mr Shi dated 27 March 2024 (“Shi 2”). This exhibited the email from the court to the parties dated 22 December 2023, giving notice of the hearing, and showing that Mr Bahia was copied into the email.
16. Shi 2 also pointed out that (i) the email address in question was the only one provided for correspondence and service on the notice of change of legal representative filed and

served on the First Respondent's behalf on 26 August 2022; (ii) the First Respondent's solicitors had indicated in correspondence that Mr Bahia was the sole litigator in the practice and had conduct of the matter; (iii) the email address appeared to be Mr Bahia's personal email address; and (iv) there had been no other complaints about the First Respondent's solicitor not receiving orders/notices or documents from the parties or the court by email.

17. The trial of the claim is due to take place in October 2024. With that in mind, on 25 June 2024 Saini J gave directions to ensure that this application could be resolved in September 2024.
18. Saini J ordered the Appellants to provide any further evidence by 9 July 2024. They did not consider it necessary to do so, in light of Shi 2.
19. Saini J also afforded the First Respondent the opportunity to provide any further evidence by 23 July 2024. The First Respondent provided no evidence in accordance with this order.
20. On 12 August 2024 the application was listed for 10 September 2024.
21. Despite the fact that the hearing had been listed taking into account the parties' availability, on 22 August 2024 the First Respondent made an application to re-list the hearing for at least 14 days after 10 September 2024. Box 10 of the application notice indicated that no witness statement was being provided in support of the application due to "[p]ressing work commitments" but that one would be provided on 27 August 2024. It does not appear that any such statement was ever provided.
22. The re-listing application was listed for 30 August 2024. The First Respondent then sought to have the re-listing application itself re-listed, again based on "prior work commitments".
23. The Appellants provided a further witness statement from Mr Shi dated 28 August 2024 ("Shi 3") opposing the re-listing application. This stated that:

"These were not the only occasions where the alleged busy work commitment of Claimant / [First] Respondent's solicitors affected these proceedings. The Defendants were laboured with the preparation of the CCMC bundle for a similar reason...

...The Defendants / Appellants contend the repeated requests for re-listing are examples of egregious attempts to prejudice them in their efforts to enable the proceedings to progress at an expeditious and proportionate pace in accordance with the overriding objective".
24. By order dated 30 August 2024 Murray J dismissed the re-listing application. Ms Ambrazaityte indicated in submissions that the First Respondent had withdrawn the re-listing application the day before the hearing. Murray J ordered the First Respondent to pay the Appellants' costs of the application in the sum of £3,009.60.
25. The First Respondent's application to set aside Saini J's 20 March 2024 order therefore remained listed for 10 September 2024.

26. Although the 10 September 2024 hearing was for the determination of his application, the First Respondent prepared no bundle for the hearing. Instead, the Appellants did so.
27. Saini J had ordered both parties to exchange Skeleton Arguments 7 clear days before the hearing. The First Respondent did not comply with this order or provide any apology or explanation to the court or Appellants for not doing so. The Appellant provided a Skeleton Argument.
28. On 9 September 2024, and so the working day before the hearing of the application, the First Respondent served a further statement from Mr Bahia (“Bahia 2”). The Appellants opposed that statement being taken into account on the application: see [37]-[54] below.

### **The legal framework**

29. The CPR contains several provisions addressing the setting aside of orders obtained in a party’s absence. CPR 23.11(2) gives the court a specific power to re-list an application that is determined in the absence of one of the parties, of its own initiative or on application by the party. CPR 39.3(2) and (3) similarly provide that if proceedings are struck out after the failure of a party to attend a trial, the court may restore the proceedings and the party who failed to attend may apply for the judgment or order to be set aside.
30. Neither of these provisions apply directly here: the Appellants’ appeal was not an application under CPR 23, and there is specific authority suggesting that CPR 39.3 does not apply to appeal hearings: *Howard v Stanton* [2011] EWCA Civ 1481.
31. Rather, the power to set aside Saini J’s order is most obviously the general power in CPR 3.1(2)(m) to “take any other step or make any other order for the purpose of managing the case and furthering the overriding objective”. The White Book at 39.3.1 gives examples of the use of CPR 3.1(2)(m) in scenarios where a party has failed to attend a hearing beyond those in CPR 23.11 and CPR 39.3.
32. Neither party took me to any specific legal principles governing the use of CPR 3.1(2)(m) in this scenario, nor am I aware of any. However, a party failing to attend an appeal is broadly analogous to a party failing to attend the hearing of an application or a trial. On that basis I consider that some assistance can be drawn from the principles applicable to the powers in CPR 23.11 and CPR 39.3 which address those scenarios.
33. The CPR 23.11(2) discretion to re-list an application is a power to be “exercised sparingly” and having regard to the overriding objective; and the merits will be an important factor if either party can satisfy the test for summary judgment: *Yeganeh v Reese* [2015] EWHC 2032 (Ch) (David Halpern QC, sitting as a Deputy Judge of the Chancery Division) at [28]. The first of these principles was derived from *MA Lloyd & Sons Ltd v PPC International Ltd* [2014] 2 Costs LR 256, where Turner J held that the power is likely to be exercised sparingly “in light of the specific regard which the court must...have for the need, where reasonably practicable, allot to any given case an appropriate share of the court’s resources”.
34. Under CPR 39.3(5) the powers under CPR 39.3(2) and (3) can only be exercised 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. In *Bank of Scotland v Pereira* [2011] EWCA Civ 241, the Master of the Rolls held that “what constitutes a good reason for not attending is, in each case very fact-sensitive”; and that “like all other rules CPR 39.3 is subject to the overriding objective, and must be applied in that light”.

35. The White Book at 39.3.7.2 provides as follows in relation to whether a person had a good reason for not attending the trial:

“The court must be satisfied that the reason for not attending is genuine and honest (see *Mabrouk v Murray* [2022] EWCA Civ 960). However, that in itself is not sufficient to make a “good” reason. There are no fixed reasons that are good or bad and an over-analytical approach is inconsistent with the overriding objective of the CPR. The ordinary English meaning of the phrase “good reason” is a sufficiently clear expression of the standard of acceptability to be supplied. If a defendant says that they were ignorant of a hearing, it is normally necessary to ask why that was so. The mere assertion that a party was unaware of the hearing date is unlikely to be sufficient to constitute a good reason. It is usually relevant to inquire whether the party was aware that proceedings had been issued and served. Once a party is aware that proceedings have been served, they have to be taken to expect to receive communications personally from the opposing party and/or the court. That includes notifications of hearing dates. If there is no system in place for ensuring that such communications are received, they are unlikely to be able to rely on the absence of such a system to say that there was a good reason for not attending the hearing... 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”.

36. An application under CPR 39.3(3) to set aside a judgment or order is an application for relief from sanction within the meaning of CPR 3.9. The tests for the application of CPR 39.3 laid down in *Denton & Ors v T H White Ltd & Ors (Practice Note)* [2014] EWCA Civ 906, [2014] 1 WLR 3926 are therefore engaged, namely:

“A judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the “failure to comply with any rule, practice direction or court order” which engages rule 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate “all the circumstances of the case, so as to enable [the court] to deal justly with the application including [factors (a) and (b)]”: see *Denton* at [24] and [25]-[38] for a more detailed consideration of each of the stages.

## **The admissibility of Bahia 2**

*The contents of the statement*

37. It was necessary to consider the contents of Bahia 2 *de bene esse* in order to decide whether to admit it on the application.
38. The first substantive part of Bahia 2 (paragraphs 1-10 and 22) addressed the issue of whether the First Respondent had been given notice of the appeal hearing.
39. Mr Bahia accepted that the court had, in fact, communicated the date of the hearing to his firm by email sent at 12.10 pm on 22 December 2023. However, he stated that:
- “Inadvertently, I did not read the email sent by the court on the 22<sup>nd</sup> December 2023. The office had closed for the Christmas break on the 21<sup>st</sup> December 2023 and reopened on 3<sup>rd</sup> January 2024.
- The first occasion...I became aware of the email was when it was drawn to my attention by the Appellants’ Solicitors post the filing of the Application Notice dated 26<sup>th</sup> March 2024”.
40. Mr Bahia apologised to the court for not attending the appeal hearing and for the fact that Bahia 1 had incorrectly submitted that he had not received notice of the hearing. In submissions he told me that on receipt of the first of Saini J’s orders, he and his assistant had searched the inbox and had not located the 22 December 2023 email. He said that Bahia 1 was therefore correct when it was submitted. He said that it was only a further search prior to the hearing before me that had identified the email, although it was not clear when that search had taken place.
41. The second part of Bahia 2 (paragraphs 11-21) responded to the Appellants’ grounds of appeal. It provided evidence about the process by which Mr Bahia had provided the different costs budgets and about the conduct of the hearing. It asserted that a note of the hearing that had been prepared by the Appellants (as the recording had failed) and approved by the Master was not accurate.
42. Pausing there, in oral submissions Mr Bahia argued that the response to the appeal set out in Bahia 2 was not exhaustive and that if Saini J’s 20 March 2024 order was set aside, the Appellants would seek to put in a further response to the appeal.
43. I struggle to see how such a course would be consistent with the overriding objective. The First Respondent had been served with the Appellants’ appeal bundle, and the grant of permission, but had not sought to place any Respondent’s Notice or written response before the court hearing the appeal, despite many months having passed. The opportunities to do so presented by Bahia 1, or the many months since then, have not been taken. A further hearing relating to the appeal would not only lead to further costs, but also delay. Moreover it would increase the possibility that the appeal proceedings would not be resolved before the trial, contrary to Saini J’s directions. Ms Ambrazaityte was clear that the Appellants were content for all the issues to be resolved at the hearing before me, i.e. that if the application to set aside Saini J’s 20 March 2024 order succeeded, I should proceed to determine the appeal afresh.

*The arguments and decision on the admissibility of Bahia 2*

44. Mr Bahia accepted that Bahia 2 had been filed well beyond the 23 July 2024 deadline set by Saini J. In oral submissions (no application for an extension of the time or for

relief from sanctions having been made), he said that this was due to the pressure of work. He argued that the First Respondent should be granted permission to rely on it. The first part simply reiterated the factual position that was known to all parties. The second part would enable his client to respond properly to the appeal if Saini J's order was set aside.

45. Ms Ambrazaityte argued that none of Bahia 1 should be admitted; alternatively that only the first part should be. In respect of the second part, she took me to correspondence showing that the First Respondent had been given the opportunity to comment on the draft note of the hearing before the Master but had not engaged with that process. The note had then been sent to the Master and approved with some corrections. She argued it was unfair and prejudicial the Appellants for the First Respondent to challenge it now.
46. Having applied the three-stage *Denton* test I consider it appropriate to admit Bahia 2 on the application.
47. I accept that the very late service of Bahia 2 is a serious or significant breach of Saini J's 25 June 2024 order. It involved the First Respondent providing evidence the day before the hearing that should have been available some seven weeks before it.
48. I also accept Ms Ambrazaityte's submission that no good reason was advanced for why it was provided so late. It is well recognised that merely overlooking a deadline, whether on account of overwork or otherwise, is unlikely to be a good reason for not complying with an order: see *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537, [2014] 1 WLR 795 at [41], cited with approval in *Denton* at [12] and [30] and set out in full at [62] below.
49. However, the first part of Bahia 2 is relatively brief. Effectively, all it does is show that the First Respondent now accepts the position as advanced by the Appellants in terms of the 22 December 2023 communication from the court. The admission of this evidence does not prejudice the Appellants in any way. If anything it narrows the issues between the parties and assists the Appellants. It is important evidence on the central issue on the application, namely whether the First Respondent had received notice of the appeal hearing. Accordingly, evaluating all the circumstances of the case, I consider it necessary to admit the first part of Bahia 1 to enable me to deal justly with the application.
50. The second part of Bahia 1 is more complex. It is likely that when he granted the First Respondent permission to rely on further evidence, Saini J had in mind further evidence on the issue of notice of the appeal hearing rather than evidence responding to the grounds of appeal. On that basis there is a reasonable argument that the First Respondent did not have permission to rely on this type of evidence at all (even if it had been served within the deadline set by Saini J). However the order is not explicit and I am content to give the First Respondent the benefit of the doubt on this issue.
51. As to the issue of prejudice to the Appellants by admitting the elements of Bahia 2 that addressed the note of the hearing, in fact, the area of disagreement on the note was very limited. Bahia 2, paragraph 19 asserts that the note omits the fact that the First Respondent's counsel told the Master that the 2 May 2023 budget was signed. However the central issue between the parties before the Master and on appeal was not whether it had been signed but whether it had been properly finalised and served. I do not



therefore consider that the Appellants are unduly prejudiced by this evidence being admitted.

52. Further, the legal framework makes clear that the merits of the appeal in question can be relevant to an application of this nature: see [33]-[34] above. There is no document other than Bahia 2 indicating the First Respondent's position on the merits of the appeal.
53. I therefore concluded that it was appropriate in all the circumstances to admit the second part of Bahia 2 as well as the first.
54. The First Respondent is therefore granted permission to rely on Bahia 2 and relief from sanctions for failing to file and serve it in time.

### **The merits of the application**

#### *Submissions*

55. Mr Bahia advanced the application on a concise basis. He accepted in Bahia 2 that he had not read the 22 December 2023 email from the court informing his firm of the appeal hearing. He apologised for this. He added that he had received no further communication from the court or the Appellants about the appeal hearing between 22 December 2023 and the date of the hearing before Saini J on 20 March 2024. Ms Ambrazaityte accepted that this was correct. He contended that fairness required that his clients have the opportunity to be heard on the appeal. He submitted that there was merit in the arguments that they wished to advance: in essence, this was an experienced Master who had not been misled, and who was entitled to make the order he did.
56. Ms Ambrazaityte argued that Mr Bahia's failure to read the 22 December 2023 email from the court giving notice of the hearing was part of a much wider pattern of non-compliance with court orders and poor conduct by the First Respondent. This included the conduct of the CCMC and the conduct of the appeal. She again relied on the "overwork" principle from *Mitchell* cited at [48] above. Further, she argued that the First Respondent had no reasonable prospects of successfully defending the appeal: it was unfair for the Master to have granted relief from sanctions on an application made just minutes before the CCMC; and it was clear that the 2 May 2023 costs budget had not been filed and served such that the Master was wrong to permit the First Respondent to rely on it.

#### *Analysis and conclusions*

##### *(i): Promptness*

57. I accept that the First Respondent acted promptly in making this application, when he found out about Saini J's 20 March 2024 order (albeit that the order itself directed that he make such an application within 7 days). Accordingly had this been an application under CPR 39.3(5) the First Respondent would have satisfied the first limb of the test.

##### *(ii): The reason for the First Respondent not attending the appeal hearing*

58. The second limb of the CPR 39.3(5) test requires consideration of whether the applicant had a good reason for not attending the hearing, a "very fact-sensitive" decision, per *Bank of Scotland*: see [34] above.

59. I am satisfied that Mr Bahia has provided “genuine and honest” evidence that he was unaware of the appeal hearing. However, applying the guidance in the White Book at 39.3.7.2 (see [35] above), that in itself is not sufficient to make a “good” reason: it is necessary to ask why that was. The answer is, on Mr Bahia’s evidence, that he did not read the 22 December 2023 email from the court giving notice of the hearing.
60. It is perhaps unusual for a hearing to take place that has generated nothing more than one email between the parties and court, but that is what happened here. It might seem harsh to be critical of a solicitor for missing one email, but I am satisfied that such criticism is appropriate on the specific facts of this case for the following reasons.
61. First, there is a clear theme in the paperwork that Mr Bahia is overworked: indeed he has prayed this in aid on several occasions in correspondence and in applications. Although he did not advance this in terms as the reason for his failure to read the 22 December 2023 email from the court, it is the likely reason.
62. However the Court of Appeal was clear in *Mitchell* at [41] that overwork alone is unlikely to assist a solicitor in obtaining relief from sanctions:
- “41...mere overlooking a deadline, whether on account of overwork or otherwise, is unlikely to be a good reason. We understand that solicitors may be under pressure and have too much work. It may be that this is what occurred in the present case. But that will rarely be a good reason. Solicitors cannot take on too much work and expect to be able to persuade a court that this is a good reason for their failure to meet deadlines. They should either delegate the work to others in their firm or, if they are unable to do this, they should not take on the work at all. This may seem harsh especially at a time when some solicitors are facing serious financial pressures. But the need to comply with rules, practice directions and court orders is essential if litigation is to be conducted in an efficient manner. If departures are tolerated, then the relaxed approach to civil litigation which the *Jackson* reforms were intended to change will continue...”.
63. Second, Mr Bahia was aware that the appeal had been issued and served and that permission had been granted. Thus per the White Book at 39.3.7.2, he should have been expecting to receive communications from the court, including notifications of hearing dates. The email address in question was the one he had provided for that specific purpose.
64. Third, there was no evidence placed before me of any robust system to ensure that emails sent to that address were read and acted upon other than by Mr Bahia personally doing so. Although he referred to the role of his assistant it was far from clear whether this person also checked his email account and if so why they had also missed the email. This appears to be an inherently risky system. The White Book at 39.3.7.2 is clear that if solicitors have no system in place for ensuring that court communications are received, they are “unlikely to be able to rely on the absence of such a system to say that there was a good reason for not attending the hearing”. In my assessment, that is the position here.
65. Fourth, Mr Bahia’s failure to read the court’s 22 December 2013 email needs to be seen in the context of the repeated examples of the First Respondent’s non-compliance with

court orders and the disorganised and unhelpful conduct of the claim overall, including of this application. In my judgment the characterisation of the First Respondent's conduct of this claim set out in Shi 3 (see [23] above) and by Ms Ambrazaityte (see [56] above) to this effect are entirely accurate. I add for completeness that Mr Bahia did not comply with the court deadline for providing amendments to this draft judgment or any applications for consequential orders.

66. Accordingly, considering all of the relevant factors for non-attendance and, looking at the matter in the round, I do not accept that the reason the First Respondent did not attend the appeal hearing was a good reason. It is not, therefore, persuasive in deciding whether to exercise the discretion to set aside Saini J's 20 March 2024 order.

*(iii): The merits*

67. As to the merits of the appeal, the evidence from Mr Shi clearly shows that the First Respondent did not properly file and serve the costs budget dated 2 May 2023. The court records make clear it was not filed. Mr Shi's evidence and correspondence shows that it was not properly served on the Appellants. He has also appended correspondence from the Third Defendant's counsel to similar effect.
68. Accordingly there is a very good argument that the Master was in fact misled in being told both by Mr Bahia in his evidence in support of the relief from sanctions application, and by the First Respondent's counsel at the CCMC (no doubt acting on instructions), that it had been both filed and served. This is plainly capable of amounting to a material irregularity that permeated the decision to grant relief from sanctions and the decision to dispense with costs budgeting.
69. The weakness of the First Respondent's position on the merits of the appeal is a further reason against the exercise of discretion, applying the second aspect of the *Yeganeh* guidance and the third limb of the CPR 39.3(5) test.

*(iv): The overriding objective*

70. The first aspect of the *Yeganeh* guidance, drawn from *MA Lloyd & Sons Ltd*, makes clear that regard must be had to the overriding objective and the need, where reasonably practicable, to allot any given case an appropriate share of the court's resources. The issue of the First Respondent's costs budget has already, in my judgment, comfortably exceeded the allocation of court resources that it deserves, in light of the procedural history set out above.

*(v): The Denton tests*

71. Applying the *Denton* tests, the failure to attend the appeal hearing was serious and significant; it occurred for a reason that was not a good reason; and all the circumstances of the case do not require that relief be granted (in the form of setting aside Saini J's 20 March 2024 order) for the appeal to be dealt with justly, for all the reasons set out at [58] to [70] above.

*Overall conclusion*

72. For all these reasons I am satisfied that it is not appropriate to exercise the discretion to set aside Saini J's 20 March 2024 order: other than promptness, my analysis of each of the other factors and tests set out above mitigates against granting the order sought by the First Respondent. This is especially so given that the CPR 23.11(2) discretion, which is broadly analogous, is one to be exercised "sparingly": see [33] above.

### **Conclusion**

73. Accordingly I grant the First Respondent permission to rely on Bahia 2 on the application, but dismiss the application on its merits.
74. The order Saini J made therefore stands. The Claimant is refused permission to rely upon his Precedent H Form dated 2 May 2023 and pursuant to CPR 3.14 is treated as having filed a budget comprising only the applicable court fees.
75. In my draft judgment I invited brief written submissions from the parties with respect to costs, indicating my provisional view that there was no good reason to depart from the general rule set out in CPR 44.2(2)(a) that the unsuccessful party will be ordered to pay the costs of the successful party. Application of that rule would be to the effect that the First Respondent would be ordered to pay the Appellants' costs of the application.
76. Mr Bahia did not make any such submissions but informed the court that the First Respondent is changing representatives. I therefore direct that the First Respondent provides submissions on costs within 14 days of the date of this judgment.