Neutral Citation Number: [2024] EWHC 1829 (Ch)

Appeal Ref: CH-2023-000238

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

CHANCERY APPEALS (ChD)

ON APPEAL FROM THE ORDER OF DEPUTY MASTER HENDERSON DATED 17 OCTOBER 2023 (CASE REFERENCE PT-2021-001042)

Rolls Building
Fetter Lane
London, EC4A 1NL

18 July 2024

Before :

NICOLA RUSHTON KC

(Sitting as a Deputy High Court Judge)

- -

Between :

MR JUNIOR SOBOWALE

Appellant/Defendant

- and -

LENDINVEST CAPITAL S.A.R.L.

Defendants

- -
- -

Mr Muhammad Imtiaz (Direct Access) for the **Appellant**
Mr Andrew Morrell (instructed by **Brightstone Law LLP**) for the **Respondent**

Hearing date: 25 June 2024

- -

Approved Judgment

This judgment was handed down remotely at 10 a.m. on 18 July 2024 by circulation to the parties or their representatives by email and by release to the National Archives.

NICOLA RUSHTON KC:

1. This is an appeal by the Defendant, Mr Junior Sobowale, against an order of Deputy Master Henderson of 17 October 2023 by which he:

   i) Dismissed Mr Sobowale's application signed by his solicitors on 15 October 2023 seeking permission to give evidence remotely ("**the Remote Application**");

   ii) Dismissed Mr Sobowale's application signed by his solicitors on 14 October 2023 for relief from sanctions and for permission to rely on his witness statement filed on the same date ("**the Sanctions Application**");

   iii) Gave judgment for the Claimant, Lendinvest Capital S.A.R.L. ("**Lendinvest**") for £836,392 plus compound interest totalling £1,979,239.66 and continuing, in respect of its claim on Mr Sobowale's personal guarantee, and £175,709 plus compound interest totalling £164,225.77 and continuing, in respect of its claim against Mr Sobowale under a "costs overrun guarantee";

   iv) Ordered Mr Sobowale to pay Lendinvest's costs, subject to detailed assessment on the indemnity basis, with a payment on account of £68,000.

2. The judgments on both applications were given *ex tempore* by the Deputy Master, and I have been supplied with transcripts of the judgments and of the submissions which led up to them. Following his dismissal of the two applications, the Deputy Master continued with a trial of the claim, requiring Lendinvest to prove its case, at a hearing at which only Lendinvest was then represented. I have seen a copy of the bundle from the hearing below as well as an appeal bundle.

3. By way of background, the claim was a commercial one in which Lendinvest was suing Mr Sobowale on his personal guarantee of a secured bridging loan which Lendinvest had made to Mr Sobowale's property development company, Syncardia Homes (Ferndale) Limited. Lendinvest appointed receivers who sold the security, but there was a shortfall which formed the basis of the claim against Mr Sobowale.

4. The Defence alleged that the personal guarantee was defective and unenforceable and alleged bad faith against Lendinvest in terminating the loan and selling the security at what was said to be an undervalue. These allegations were all denied: Lendinvest's case was that this was a standard guarantee, properly executed by Mr Sobowale (and on which he received independent legal advice), and that the security was sold by the receivers (as the borrower's agents) for a fair market price. I note no valuation evidence had been put in by Mr Sobowale to support his allegation of a sale below market value.

5. Mr Sobowale's appeal notice was sealed on 21 November 2023. The grounds of appeal were:

   "GROUND 1

   1. The Defendant was called away at short notice to attend on his elderly Mother in Nigeria in circumstances where there were grave concerns for her health.

   a) In consequence of those circumstances, an application was made to allow the Defendant to attend a listed hearing on 17-18 October 2023 and alerting the Court to

the fact that the Defendant would be acting in the capacity of a litigant in person for want of funds to instruct Counsel.

b) That application was drafted and submitted by the Defendant's Solicitors in this jurisdiction almost a week prior to the listed hearing, on 13 October 2023, the relevant fee being paid from their PBA account on that day.

c) That application was refused.

2. Given that the guidance for remote attendance issued by the Lord Chief Justice must be considered where circumstances are, as here, that a participant would have to travel substantial distances to attend and where that requirement is complicated by the Defendant in this case being compelled by circumstances to attend on his mother in Nigeria, so negating his ability to attend; that decision was wrong pursuant to CPR 52.21 (3)(a) and was procedurally wrong pursuant to CPR 52.21 (3)(b).

GROUND 2

3. The Defendant was entitled to and should have been allowed to attend the hearing remotely from Nigeria as applied for, as to deny him the right to so attend is a denial of his human rights conveyed by Article 6 to Schedule 1 of the Human Rights Act 1988 in that without his attendance at that hearing he could not be, and was not given a fair trial and which was wrong pursuant to CPR 52.21 (3)(a).

GROUND 3

4. The court's decision [not] to grant relief from sanctions to allow the Defendant's witness statement both wrong wholly inconsistent with the decision in the same court to grant relief to allow the Claimant relief to adduce their witness statement late and should be overturned" [word in brackets apparently omitted from the Grounds.]

6. On 28 November 2023 Mr Justice Richards granted Mr Sobowale an extension of time for service of his appeal notice. He noted that the appeal notice was 13 days late, which he held was not a "*de minimis*" length of time, but he concluded (applying the three stage test in *Denton v TH White Limited* [2014] EWCA Civ 906 ("***Denton***"), as applied to applications for extension of time for appeals by *Dinjan Hysaj v Secretary of State for the Home Department and related appeals* [2014] EWCA Civ 1633 ("***Hysaj***")) that this did not involve a "*serious or significant*" breach of the rules. The Judge stated that he regarded the reasons for the delay as weak (Mr Sobowale's solicitors had filed the appeal notice in the wrong court) but it was in the interests of justice for Mr Sobowale to have his application for permission to appeal considered, since the breach had not resulted in litigation being conducted inefficiently or at disproportionate cost.

7. On 14 March 2024 Mr Justice Zacaroli (as he then was) granted Mr Sobowale permission to appeal on all grounds. His stated reasons were as follows:

"1. The first two grounds of appeal relate to the deputy Master's refusal to permit the appellant to give evidence remotely at the trial. As the deputy Master noted, there were a number of additional problems faced by the Appellant before he would be permitted to give evidence remotely, including the fact that he was in breach of an unless order

> relating to disclosure, and had failed to comply with the requirement to file a witness statement in time.
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> 2. The deputy Master's decision was a case management one, and an appeal against it faces a high hurdle. As the deputy Master noted, although the application was framed as one to "give evidence" remotely, the application notice stated that the appellant would be conducting his defence himself as he had been unable to secure counsel. While there appear to be sound reasons for the deputy Master's conclusion, given the seriousness of the consequences of his order, and - as the deputy Master noted - it is a strong thing to exclude a party from making representations at all - I consider that there is a real – as opposed to fanciful - prospect of success.
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> 3. The third ground of appeal relates to the decision to refuse the appellant relief from sanctions so as to rely on his witness statement. The reasons given by the deputy Master appear in themselves to be unimpeachable, but if the first two grounds are successful, then it may be that this infects the third ground as well (on the basis that the appellant's inability to attend remotely meant that he was unable to make submissions on the relief from sanctions application)."

8. The appeal came on before me for a hearing on 25 June 2024 at which Mr Sobowale was represented by counsel, Mr Muhammad Imtiaz, on a direct access basis. Mr Imtiaz told me that he had been first instructed on 21 June 2024. Lendinvest was represented by counsel Mr Andrew Morrell, instructed through solicitors Brightstone Law LLP. Mr Morrell had also appeared before Deputy Master Henderson.

9. Mr Sobowale has previously had solicitors, Brown & Co., and different counsel representing him. Brown & Co. started acting on 11 October 2023, shortly before the hearing before the Deputy Master, according to the notice of acting on the Court file. On 20 June 2024 Mr Sobowale filed a notice of change of legal representative, which stated that he would now be acting in person, providing a contact email address.

The applications

10. Brown & Co. filed and served the application notices for the Remote Application and the Sanctions Application. Although both notices bore the date 13 October 2023 (a Friday) on the front, as the Deputy Master noted in his order they were actually signed by Winston Brown of Brown & Co. on 15 and 14 October 2023 respectively. They therefore came before the Deputy Master for consideration on the first day of the trial, which had been listed for 2 days, Tuesday and Wednesday, 17 and 18 October 2023.

11. The application notice on the Remote Application sought "*Permission for the defendant to give evidence remotely from Nigeria*." In section 10 of the application notice, the solicitors stated by way of evidence (there being no other evidence in support):

> "We have been informed that the Defendant had to go to Nigeria as his elderly mother is very ill and there are concerns for her well-being. The Defendant will be unable to return to the United Kingdom to attend the in person trial but he can join the hearing remotely.
>
> Please also be advised that the Defendant has been unable to secure counsel he can afford and will therefore be conducting his defence himself."

12. As foreshadowed by this application, Mr Sobowale did not attend court in person on 17 October 2023. No solicitor or counsel attended on his behalf either, even though Brown & Co. were on the record. I note that previous counsel filed a document headed "Submissions on behalf of the defendant" and dated 15 October 2023, containing incomplete submissions and terminating with a statement that his client had amended his instructions so that fees agreed were not to be paid. Mr Morrell also informed me that Mr Sobowale's previous counsel has recently been disbarred (subject to an appeal).

13. The consequence of the Deputy Master's refusal of the Remote Application was therefore that the trial proceeded in the absence of either Mr Sobowale or any legal representative acting on his behalf. The Deputy Master was conscious of this and he stated at the conclusion of his judgment on that application that he was proceeding as if the defendant had not turned up for trial.

14. As to the Sanctions Application, the Notice of this application sought that:

> "1. The Defendant be granted relief from sanctions under CPR 3,9(2) and as a result
>
> 2. The Defendant be granted permission to rely on his witness statement filed on 14/10/2023".

15. The solicitors completed box 10 of that application notice with evidence as follows:

> "The claimant [sic] has up to now been acting as a litigant in person. The Defendant has agreed to a number of extensions to the deadline to exchange witness statements made by the Claimant's solicitor on a number of occasions. The defendant was without representation until recently, and his new Solicitors have assisted to prepare a detailed witness statement. It will be in keeping with the overriding objective, to allow the Defendant to rely on his witness statement. There is no prejudice to the claimant, and in fact both the Claimant and the court will be assisted by allowing the Defendant to rely on his witness statement."

16. There was no other evidence in support of the Sanctions Application, aside from the proposed witness statement of evidence for the trial from Mr Sobowale, which was signed by him on 13 October 2023 and included with the application.

The judgments below

17. Since no one appeared for Mr Sobowale at the hearing on 17 October 2023, the only representations received by the Deputy Master in support of those applications were as contained in the application notices. Both applications were opposed by Mr Morrell for Lendinvest, in oral submissions (of which I have the transcript). Although the Remote Application was the second in time, the Deputy Master dealt with it first because it appeared that Mr Sobowale might want to make representations himself on the Sanctions Application if he was permitted to attend remotely. Mr Morrell submitted that it was unclear if Mr Sobowale was purporting to act in person, and it was for his solicitors (who were not in attendance) to arrange any representation. However it is apparent from the transcript that the Deputy Master would have permitted Mr Sobowale to address the court, despite the fact he had solicitors on the record, if he had been present.

18. The Deputy Master was clearly proceeding on the basis that Mr Sobowale was in Nigeria and so could not be present in person. He also noted that he did not have information as to how the court should contact Mr Sobowale, and was overtly considering the possibility of adjourning the hearing to 2pm to set up a hybrid hearing so Mr Sobowale could address him. In opposing the application Mr Morrell submitted that while it was said that Mr Sobowale's elderly mother was very ill, no evidence had been provided in support of that assertion, which he submitted was similar to an application to adjourn for medical reasons, which would have had to have been supported by medical evidence. Mr Morrell also submitted that given the large sums at stake, and the fact Mr Sobowale had known about the trial for a considerable time, the evidence in the application notice was insufficient to justify granting the application.

19. The Deputy Master said expressly that even if the application was only to give evidence remotely, the overriding objective might require him to consider whether to give Mr Sobowale the opportunity to make submissions remotely, even if he did not give him permission to give evidence remotely (noting that whether Mr Sobowale was permitted to give evidence at all was also the subject of the Sanctions Application).

20. The Deputy Master then gave a short, reasoned *ex tempore* judgment refusing the Remote Application, in the following terms (so far as material):

> "1. This is a very short judgment on the question of whether I should, substantially of my own initiative, adjourn the trial of this matter in order to give the defendant the opportunity to attend and make representations remotely.
>
> 2. The most recent critical document in this context is an application notice which on its front page, in a box at the top, says it is dated "13 October 2023." It bears the court stamp of "15 October 2023" and when one goes down to the statement of truth at the end it is signed by "Mr Winston Brown, of Brown & Co Solicitors" (the solicitors who are on the record for the defendant) and the date there typed in is "15 October 2023." 15 October 2023 was Sunday. Today is Tuesday, 17 October.
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> 3. The defendant has been fully aware of the order of Deputy Master Bowles of 24 May 2023 which contained an 'unless' order in respect of disclosure. Following on from that, on 26 May 2023 notice of the trial date was given: 'The trial has been fixed for Tuesday, 17 October 2023 at 10.30, with a time estimate of two days'...
>
> 4. The claimant's solicitors were required to pay a trial fee and that was, in a sense, that until, as I say, one gets to the application notice - which I have mentioned - which is: "An application for permission for the defendant to give evidence remotely from Nigeria."
>
> 5. Well, in order to get to that stage the defendant has various hurdles to overcome. First of all, he has to establish that he is not debarred from defending the case at all, in accordance with the order of Deputy Master Bowles - which I mentioned - which was an 'unless' order in relation to disclosure or, alternatively, to have relief from the sanction of the 'unless' order.
>
> 6. Before he can even have the ability to give evidence at all he will have to put in a witness statement giving such evidence as he gives (or may wish to give) and he would

need permission to do that well out of time, particularly having regard to the fact that it might cause the hearing of the trial to be substantially delayed.

7. I have not yet dealt with a second application, which the defendant, through his solicitors Brown & Co, has made, which is for relief from sanctions and permission to rely on the witness statement. But that application, again, has been made very recently. The date on the front is "13 October." The date below the signature block of "Mr Winston Brown" is "14 October," which was Saturday past.

8. I have heard submissions from Mr Morrell (of counsel) on behalf of the claimant to the effect that I should not adjourn, that I should not even adjourn just until 2 o'clock to make this a hybrid hearing.

9. My initial thoughts were that that might be a just and proper thing to do because, despite all the difficulties which it appears on the face of the paperwork that the defendant faces, it is a strong thing to cut him out from making representations at all. However, I think that the practical answer to that is that there has been no formal application (or indeed even an informal application) to convert this hearing to a hybrid hearing to enable the defendant to appear remotely.

10. The only application is the application notice I have mentioned for permission for the defendant to give evidence remotely from Nigeria which contains the hint in box 10 that the defendant will not be available to appear in person.

11. Ultimately I have been persuaded by Mr Morrell that not only does that not amount to an application for a remote hearing, but is not a reason for my adjourning this hearing even until 2 o'clock because the defendant has - as I said earlier - solicitors on the record (Brown & Co). They seem to be perfectly capable of producing application notices, producing a witness statement apparently dealing with the substance of the matter, and still to be doing that at, I think it was, 5 o'clock yesterday evening in terms of service on the claimant. Therefore, it seems to me that, despite the hint in box 10 of the application notice that the defendant might wish to appear in person, there is no such application.

12. I think it right and just in the circumstances of this case to proceed in the way that one would simply proceed if a defendant had not turned up for a trial having had notice of it. I, therefore, will not be adjourning the matter and we will proceed on with the trial…"

21. The Deputy Master then turned to the Sanctions Application. Mr Morrell's submission was that Mr Sobowale's witness statement was 222 days late and that while Lendinvest also required relief, its statement was only 2 days late. The background to this is that by an order of 24 May 2023 ("**the May 2023 Order**"), Deputy Master Bowles had, among other things, granted relief from sanction to Lendinvest for failing to serve its witness evidence in time, and had granted it an extension to 8 September 2023. (It appears there was a further agreed extension to 6 October 2023, but I have not had sight of that.) However no equivalent extension for witness statements had been granted to Mr Sobowale by the May 2023 Order, apparently because this was not requested by his counsel, who was present at that hearing. The relevant order so far as Mr Sobowale was concerned was therefore an order of Deputy Master Nurse of 28 November 2022, which had extended time for witness statements for both parties to 6 March 2023.

22. Mr Morrell's submissions to the Deputy Master were that the Sanctions Application failed to provide any real material to meet the 3-stage test in *Denton*, so the application should be refused and the proposed statement excluded. Mr Sobowale was of course not present or represented.

23. The Deputy Master's *ex tempore* judgment on the Sanctions Application was as follows (so far as material):

> "1. On the application notice bearing on its front the date '12 October 2023' and below the signature block the date '14 October 2023', which application notice was signed by Mr Winston Brown, of behalf Brown & Co, on Saturday, the 14th and the date today is Tuesday, 17th. The application is that the defendant be granted relief from sanctions under CPR 3.9(2) and, as a result, be granted permission to rely on a witness statement filed on 14 October 2023.
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> 2. The difficulty for the defendant with this application is that the witness statement was originally due in February but, even with any sensible extension of time which might have been given to match the claimant's desire for extensions of time for serving a witness statement, the witness statement was due in a long time ago, certainly a lot earlier than in substance and in accordance with the rules, the day before the trial. The witness statement was served or dated on the Saturday. At the very earliest that would amount, as far as the rules are concerned, to filing and service on Monday (yesterday). That is way out of time.
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> 3. It seems to me that that is a serious breach within the Denton guidelines. It is potentially "significant" - although I have not read the witness statement - as throwing out the trial date if I were to look at it, but it is certainly serious.
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> 4. What are 'the reasons for the delay'? (the second head of the Denton tests). They are not really of any substance except for the fact that the defendant has up to now been acting as a litigant in person. The defendant was without representation until recently. The problem for the defendant with that is, as well-known on the authorities - or should be well-known by any competent solicitor, and the defendant now has a solicitor acting for him - the fact that a party is a litigant in person is no excuse for not complying with the rules and so there does not seem to me to be any good reason for the failure to comply with the requirements of the rules and the orders that have been made as to service of the witness statement.
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> 5. One then looks at 'all the circumstances of the case'. It seems to me that that makes things worse, rather than better, for the defendant because there has been a long period of time when he could have put in a witness statement.
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> 6. Furthermore, when one goes back and looks at his pleaded defence there are certain allegations made in it which, if sufficiently particularised and supported by evidence, might conceivably give rise to some sort of defence to the claim which is being made. But it is – to put it politely - a low quality pleading and the witness statement would only be admissible without also amending the pleading if it supports the allegations in the pleading. I do not know whether it does or it does not, but it cannot effectively remedy defects in the pleading. It seems to me that that is a further circumstance which I can take into account in deciding whether or not to exercise my discretion to give relief from sanctions.

> 7. Another circumstance is one which I have adverted to in the judgment I gave a few minutes ago in relation to whether or not I should adjourn the matter and that is the peculiarity that the defendant has solicitors acting on the record. He has even, through those solicitors, put in a partial - partial in the sense of a part of - skeleton or written submissions signed by counsel which does not address this question of relief from sanctions.
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> 8. As I said earlier, it seems to me that those circumstances really compound, rather than explain or give good excuse, for the failure to have served on time and, indeed, a very significant breach.
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> 9. The rules are there to be obeyed. This defendant has had ample time and opportunity to comply with them. He has not done so.
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> 10. It seems to me, applying the Denton tests and for the reasons I have given, that relief from sanctions should not be granted. I therefore dismiss the application for relief from sanctions and, consequently, I also dismiss the associated application within the application notice for permission to rely on the witness statement."

24. After hearing this judgment, Mr Morrell raised with the Deputy Master the possibility that Mr Sobowale might have been confused by the fact that an extension had been granted to Lendinvest, and believed that the extension also applied to him. The Deputy Master therefore gave a short supplementary judgment as follows:

> "11. In the course of the judgment I have just given I was slightly vague about the dates. The reason for that was that I was aware that time had been extended for the claimant's witness statement but had not in fact been extended by order in respect of the defendant's witness statements.
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> 12. However, Mr Morrell has, very properly, drawn my attention to the fact that on the correspondence, as he understands it, there is a possibility that the defendant might have thought that the extension for the claimant's evidence also applied to his evidence, in which event the defendant's evidence would have been due on 6 October. It would follow, therefore, that if that was right the breach in terms of number of days was not as significant as I might have indicated in my judgment.
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> 13. However, it was still of some significance - and indeed of substantial significance in relative terms - because it was not actually served until 16 October, so it was still 10 days late, which, in the context of the a two-day trial and with it being served one day before the trial started, remains, in my view, a highly significant breach and therefore the factual matter which Mr Morrell has properly drawn to my attention does not affect the outcome of my judgment.
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> 14. I still think that there was a significant breach. No good reason has been given for it and, in all the circumstances, it seems to me that the proper course is not to allow this application."

25. There was one further preliminary matter which the Deputy Master considered which is relevant. This is that the May 2023 Order also contained an unless order, which required Mr Sobowale to comply with an earlier order for disclosure. Paragraph 1 of the May 2023 Order provided that by 4pm on 21 June 2023 Mr Sobowale was to carry out a reasonable

search, and make and serve on Lendinvest a disclosure list with a disclosure certificate stating what documents were in his possession or control; to the extent they were not, the reason for this and what to the best of his knowledge had happened to them; and whether, to what extent and on what basis he claimed a right to withhold inspection of any document in his possession or control. Paragraph 3 of the order then provided:

> "Unless the Defendant complies with paragraphs 1 and 2 herein, the Defence shall stand struck out and the Claimant shall be at liberty to seek Judgment forthwith for the pleaded sums, interest and costs, with such costs to be subject to detailed assessment on the indemnity basis if not agreed."

26. After the dismissal of the two applications, Mr Morrell consequently submitted that Mr Sobowale's Defence had been struck out and Mr Sobowale was debarred from defending because he had failed to comply with this unless order. Mr Sobowale had served two lists in purported compliance with this order, one (within time) on 21 June 2023 and one (2 weeks late) on 5 July 2023. Mr Morrell's submission was that neither complied with the terms of the order. Furthermore, there was no application for relief from sanctions by Mr Sobowale in respect of the consequent strike out of his Defence and his debarring from defending.

27. The Deputy Master gave a further judgment on this issue, in which he concluded that:

    i) The list served on 21 June 2023 was inadequate in a number of respects, in that it did not deal with several of the requirements in the May 2023 Order. It also did not include a disclosure certificate.

    ii) The list served on 5 July 2023 did not lack specificity in the same way, and it could have amounted to sufficient compliance but for the facts that (a) it did not include a disclosure certificate either and (b) it was 2 weeks late.

    iii) There was therefore a failure to comply with the May 2023 Order and so the defence stood struck out and Mr Sobowale was debarred from defending.

28. The Deputy Master thereafter concluded that Lendinvest would need to prove its case through trial, but with the Defence struck out.

29. As Mr Morrell pointed out before me, none of the Grounds of Appeal challenge the conclusion that the Defence was struck out, or assert that any relief should have been granted in this respect. Accordingly, even if the appeal against the dismissal of the Sanctions Application is successful on its own terms, the position would remain that the Defence has been struck out and Mr Sobowale would be debarred from defending the claim (including relying on any witness statement or other evidence). I note that the preamble to the Deputy Master's order following trial includes the following:

> "AND UPON it appearing to the Court that the Defendant has failed to comply with paragraph 1 of the Order of Deputy Master Bowles dated 24th May 2023, with the consequence that the defence is struck out pursuant to paragraph 3 of that Order."

30. I reject the assertion in Mr Imtiaz's skeleton argument that Mr Justice Zacaroli granted any permission to appeal in relation to the strike out of the Defence. None of the Grounds of Appeal relate to this, and the permission is quite clearly given in respect of the

dismissal of the Sanctions Application and the Remote Application specifically and not anything wider.

The parties' submissions on the appeal

31. The Grounds of Appeal and skeleton originally filed in support were prepared by Mr Sobowale's previous counsel. As I have already indicated, before me Mr Sobowale was represented by Mr Imtiaz, who had also put in a fresh skeleton argument. Mr Imtiaz's submissions in support of the appeal were that:

    i) Since the hearing had proceeded in the absence of Mr Sobowale, the appeal should be considered as analogous to an application for a retrial under CPR 39.3(5), which applies where a trial has taken place in the absence of one of the parties, applying the test therein.

    ii) He submitted that the three limbs of CPR 39.3(5) were satisfied, in that he said:

        a) The appeal notice had been issued promptly, even though an extension of time was required. Mr Sobowale had submitted his appeal on 7 November 2023 (even though it was not actually sealed until 21 November 2023, due to the error by his solicitors as to the correct court);

        b) There was a good reason for Mr Sobowale's failure to attend the trial in person, in that his elderly mother was very ill and he had needed to visit her, and he had offered to attend remotely;

        c) His proposed defence, as supported by his witness statement, had a realistic prospect of success. In particular Mr Sobowale had raised allegations of bad faith in selling the security below market value, and this and the allegations that he had not been properly advised on his personal guarantee could only be properly explored through giving evidence at trial.

    iii) The Deputy Master had erred in proceeding with the trial on the basis that no application had been made to permit the hearing to be conducted remotely (or as a hybrid hearing), as opposed to Mr Sobowale merely giving evidence remotely. Mr Sobowale, acting in good faith, had proposed an alternative solution which would not have involved delaying the trial.

    iv) The Deputy Master was fully aware that Mr Sobowale had travelled to Nigeria due to an emergency and had effectively requested a remote hearing. He should therefore have exercised his case management powers under CPR 3.1(2)(b), which permit the court among other things to "*hold a hearing and receive evidence by telephone or by using any other method of direct oral communication*" and proceeded by way of a hybrid hearing.

    v) The Deputy Master had therefore effectively deprived Mr Sobowale of his basic right to a fair trial.

    vi) As to the Sanctions Application, it was unfair that the Deputy Master had effectively treated Lendinvest more favourably than Mr Sobowale in granting the former but not the latter relief from sanctions when they were in a similar position.

Also, if Mr Sobowale had been permitted to attend remotely, he might have also been granted relief.

32. In his skeleton and oral arguments in reply, and in arguing that the appeal should be dismissed, Mr Morrell in summary submitted that:

i) If CPR 39.3 was the correct test, then Mr Sobowale was unable to satisfy it in that:

a) The application was not made promptly: it was 13 days outside the appeal deadline and more than 4 weeks after the hearing.

b) There was no good reason for his non-attendance and insufficient evidence to support the asserted reason.

c) The defence was weak and had no realistic prospect of succeeding.

ii) The Remote Application was a confusing one with which the Deputy Master had engaged carefully, and the decision to refuse it was a reasonable one in the context of the case more widely, including the other procedural failures and the lack of clarity as to Mr Sobowale's defence.

iii) It is not the case that if one party is unable to attend trial then it will be unfair for it to proceed and it must be adjourned regardless of the inconvenience to the other party, and this is not the effect of the decision in *Bilta (UK) Ltd (in liquidation) v Tradition Financial Services Ltd* [2021] EWCA Civ 221 ("***Bilta***"). The position is much more nuanced, and in any event:

a) It was not clear that Mr Sobowale was applying for any adjournment;

b) There was no medical evidence adduced as to Mr Sobowale's mother's condition: if this was relied on, the guidance given in *Levy v Ellis-Carr* [2012] EWHC 63 (Ch) would have had to have been followed, which it was not.

c) There was no information as to the capacity in which Mr Sobowale was intended to attend remotely, how he was to attend or why he could not;

d) These were substantial commercial proceedings, and given the availability of flights between Lagos and London, the explanation as to why he could not have attended was completely inadequate.

iv) The decisions to refuse the Remote Application and the Sanctions Application were discretionary decisions, and were within the range of reasonable discretion. They were strong decisions, but the Deputy Master had been well aware of their seriousness when making them.

v) Mr Sobowale had had solicitors on the record and could have been represented by solicitor and counsel even if he was not in the country. His claims of impecuniosity were inconsistent with the fact that his ticket evidenced that he had flown Business Class to Nigeria. In any event the fact a litigant is acting in person does not mean they do not have to comply with the court rules.

vi) In determining the Sanctions Application the Deputy Master had properly directed himself to and applied *Denton*. His decision was indeed unimpeachable. The lower court had had a wide discretion and this decision was well within it. Further, the fact Mr Sobowale had acted in person was irrelevant and in any event he had had solicitors on the record by the time of the trial. There was no comparison between Lendinvest's position and Mr Sobowale's in respect of their late service of witness evidence and in any event Mr Sobowale's position had to be considered independently of Lendinvest's.

vii) Even if the Sanctions Application had been granted, this would have made no difference because the defence had already been struck out.

The law

33. In my view the starting point is the decision of the Court of Appeal in *Bank of Scotland v. Pereira and others* [2011] EWCA Civ 241; [2011] 1 WLR 2391 ("***Pereira***"), which the parties agreed is a key authority. In that case the Master of the Rolls, Lord Neuberger set out at [36] – [47] 6 points to act as guidelines where a party has not attended or been represented at trial, so that CPR 39.3 would in principle apply, but that party has also, or has only, sought to appeal the dismissal of their case. As I have indicated, on behalf of Mr Sobowale, Mr Imtiaz submitted that the principles in CPR 39.3 apply even though Mr Sobowale has only appealed, and Mr Morrell was content to respond on that basis.

34. CPR 39.3 sub-paragraphs (3) to (5) provide that:

> "(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) 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."

35. The Master of the Rolls' first point in *Pereira* [37] is that where a defendant is seeking a new trial on the grounds that they did not attend, then even though they may have other grounds of appeal, they should normally proceed under CPR 39.3. If a defendant seeks to appeal without first making an application under CPR 39.3, then the appellate court can still entertain their appeal, but it would normally require unusual facts.

36. The second point [38] is that if the defendant concludes that they would not be able to satisfy the requirements of CPR 39.3(5), they can still seek to appeal against the trial judge's decision if they consider they have other grounds to do so. In that sense CPR 39.3

is merely another course given to a defendant who was unable with good reason to attend trial, although they may well face greater difficulties in doing so than one who did attend.

37. Third (among other things), if the defendant unsuccessfully applied for an adjournment, the fact they have not made or have failed in an application under CPR 39.3 does not preclude them from arguing on an appeal that the trial judge erred in refusing the adjournment [41]. The fourth point is not relevant to the present appeal, since it only relates to cases where an unsuccessful rule 39.3 application was made to the lower court.

38. Fifth (among other things), where a defendant is applying on appeal to adduce new evidence or for a retrial essentially on the basis that they did not attend trial, but they have also failed in an application under CPR 39.3, then allowing an appeal on such a ground would be wrong in principle. The policy behind CPR 39.3 is to prevent a defendant seeking a retrial if they did not attend trial, unless they can satisfy that provision [46].

39. Sixth, equally if a defendant seeks to appeal without making any application under CPR 39.3, but applies on appeal to put in new evidence or for a retrial, similar considerations will apply [47], i.e. it would be wrong in principle to allow an appeal on such a basis if an application under rule 39.3 would have failed. However, since there will have been no determination of whether the requirements of rule 39.3(5) are satisfied, the appellate court may have to make that decision for itself.

40. In considering the appeal against the decision to refuse permission for Mr Sobowale to give evidence remotely, both parties referred me by analogy to the case-law on deciding whether to grant an adjournment where the effect of refusal will essentially be to prevent that party from appearing or properly presenting their case.

41. The leading authority on the principles to apply when considering an application for an adjournment in particular on the basis of the illness of a party or key witness, is *Bilta*, to which both counsel referred me. At [30] Nugee LJ (with whom the other Lords Justice agreed), giving the lead judgment, summarised the position as follows:

> "… the guiding principle in an application to adjourn of this type is whether if the trial goes ahead it will be fair in all the circumstances; that the assessment of what is fair is a fact-sensitive one, and not one to be judged by the mechanistic application of any particular checklist; that although the inability of a party himself to attend trial through illness will almost always be a highly material consideration, it is artificial to seek to draw a sharp distinction between that case and the unavailability of a witness; and that the significance to be attached to the inability of an important witness to attend through illness will vary from case to case, but that it will usually be material, and may be decisive. And if the refusal of an adjournment would make the resulting trial unfair, an adjournment should ordinarily be granted, regardless of inconvenience to the other party or other court users, unless this were outweighed by injustice to the other party that could not be compensated for."

42. In addition, Peter Jackson LJ said at [67]:

> "… There are two aspects to an application to adjourn: assessing the facts and exercising the discretion. Here, the facts supporting the application were not in dispute and the appeal concerned the exercise of discretion. But in every case, the court will

first need to assess the facts behind the application, and where a litigant fails to substantiate the reason for an adjournment, the outcome of the exercise of discretion will scarcely be in doubt."

43. At [45] Nugee LJ considered the decision of the Court of Appeal in *Terluk v Berezovksy* [2010] EWCA Civ 1345 ("***Terluk***") (to which I was also referred), and in particular the observations of Sedley LJ at [18] that:

> "Our approach to this question is that the test to be applied to a decision on the adjournment of proceedings is not whether it lay within the broad band of judicial discretion but whether, in the judgment of the appellate court, it was unfair… This "non-Wednesbury" approach… also conforms with the jurisprudence of the European Court of Human Rights under article 6 of the Convention – for we accept without demur that what was engaged by the successive applications for an adjournment was the defendant's right both at common law and under the ECHR to a fair trial."

And at [20] that:

> "We would add that the question whether a procedural decision was fair does not involve a premise that in any given forensic situation only one outcome is ever fair. Without reverting to the notion of a broad discretionary highway one can recognise that there may be more than one genuinely fair solution to a difficulty. As Lord Widgery CJ indicated in Bullen, it is where it can say with confidence that the course taken was not fair that an appellate or reviewing court should intervene. Put another way, the question is whether the decision was a fair one, not whether it was 'the' fair one."

44. The case of *Teinaz v. Wandsworth London BC* [2002] EWCA Civ 1040 ("***Teinaz***"), which was considered in *Bilta* and to which the parties here also referred me, was one where there had been an application to adjourn a hearing on medical grounds concerning one of the parties. At [20] – [21] Peter Gibson LJ said this (as quoted in *Bilta*):

> "20. … Although an adjournment is a discretionary matter, some adjournments must be granted if not to do so is a denial of justice. Where the consequences of the refusal of an adjournment are severe, such as where it will lead to the dismissal of the proceedings, the tribunal or court must be particularly careful not to cause an injustice to the litigant seeking an adjournment. As was said by Atkin LJ in *Maxwell v Keun* [1928] 1 KB 645, 653 on adjournments in ordinary civil actions:
>
> > 'I quite agree that the Court of Appeal ought to be very slow indeed to interfere with the discretion of the learned judge on such a question as an adjournment of a trial, and it very seldom does so; on the other hand, if it appears that the result of the order below is to defeat the rights of the parties altogether and to do that which the Court of Appeal is satisfied would be an injustice to one or other of the parties, then the court has power to review such an order, and it is, to my mind, its duty to do so.'
>
> 21. A litigant whose presence is needed for the fair trial of a case, but who is unable to be present through no fault of his own, will usually have to be granted an adjournment, however inconvenient it may be to the tribunal or court or to the other parties. That litigant's right to a fair trial under article 6 of the European Convention on Human Rights demands nothing less. But the tribunal or court is entitled to be satisfied that the

> inability of the litigant to be present is genuine, and the onus is on the applicant for an adjournment to prove the need for such an adjournment."

45. In respect of the quality of medical evidence required on such an application, Peter Gibson LJ went on to say at [22]:

> "22. If there is some evidence that a litigant is unfit to attend, in particular if there is evidence that on medical grounds the litigant has been advised by a qualified person not to attend, but the tribunal or court has doubts as to whether the evidence is genuine or sufficient, the tribunal or court has a discretion whether or not to give a direction such as would enable the doubts to be resolved. Thus, one possibility is to direct that further evidence be provided promptly. Another is that the party seeking the adjournment should be invited to authorise the legal representatives for the other side to have access to the doctor giving the advice in question. The advocates on both sides can do their part in assisting the tribunal faced with such a problem to achieve a just result. I do not say that a tribunal or court necessarily makes any error of law in not taking such steps. All must depend on the particular circumstances of the case. I make these comments in recognition of the fact that applications for an adjournment on the basis of a medical certificate may present difficult problems requiring practical solutions if justice is to be achieved."

46. Nugee LJ in *Bilta* also considered the Court of Appeal decision in *Dhillon v Asiedu* [2012] EWCA Civ 1020 ("***Dhillon***"), in which an adjournment was sought on the first day of trial on the grounds that the defendant lacked capacity and her litigation friend had had insufficient time to prepare. There had been a long history of adjournments and extensions of time, and the defendant was debarred from adducing any further witness evidence. The Court of Appeal upheld the trial judge's decision that the defendant was largely responsible for any difficulties, having failed to comply with numerous orders at a time when she did have capacity and had had plenty of time to prepare her case, so that ultimately the decision not to adjourn was fair.

47. Finally, both counsel placed particular reliance on the case of *Mabrouk v. Murray* [2022] EWCA Civ 960, which was a fully contested application for permission to appeal in a case where the trial had taken place in the absence of either the defendant (who was barred from entering the UK) or any solicitor or counsel on his behalf. However, he had been offered the option of attending by video link and had ignored (intentionally, as the judge found) correspondence relating to arrangements for the trial. He then sought permission to appeal.

48. The Court of Appeal considered, applying *Pereira,* that it was essentially an application based on his absence at trial and so the application for permission should be determined by reference to the principles in CPR 39.3(5) (no application to set aside having been made). They went on to conclude that (a) the application had not been made promptly, in that the application for permission to appeal had been made 4 months after the trial, and an application for an extension of time had been needed; (b) the two reasons given for his non-attendance (being barred from the UK and alleged impecuniosity) were not good ones because he could have attended by video-link and/or been represented, and impecuniosity was irrelevant in principle, applying *Hysaj*; and (c) there was no detailed defence and no attempt to grapple with the detailed findings of the judge. The Court also went on to consider the principles in *Denton* and considered these not to have been satisfied either.

Decision on the appeal

49. In the present case, my view is that, applying the principles in *Pereira*:

    i) The appeal against the decision on the Remote Application not to allow Mr Sobowale to give evidence or appear remotely is analogous to a decision to refuse an adjournment, for the purposes of point 3 in *Pereira*. Accordingly, I should consider this as a free-standing ground of appeal (on which permission has been granted), separate from any consideration of the test in rule 39.3(5).

    ii) The trial proceeded in the absence of Mr Sobowale, but there has been no application under CPR 39.3. Insofar as the appeal is grounded on the fact he did not attend or give evidence, then applying point 6, I should determine it by reference to the principles in CPR 39.3(5), assuming this is covered by the grounds of appeal on which permission has been granted. This is the same approach as was taken by the Court of Appeal in *Mabrouk*, albeit there it was an application for permission to appeal.

50. The decision to refuse the Remote Application was comparable to an application to adjourn a trial on the basis of the illness of a party in the sense that the effect of refusal was that the trial proceeded in the absence of the defendant and of any legal representative on his behalf. Further, the Deputy Master was aware that this would be the effect, since the application notice said that Mr Sobowale had been unable to secure counsel and so was going to have to represent himself, and the Deputy Master referred in his judgment to the fact that he was effectively proceeding as if the defendant had not turned up for trial.

51. It follows from this that I should not approach the appeal against the decision on the Remote Application simply as being a discretionary decision where one should consider whether it fell within the broad range of decisions reasonably open to the Deputy Master. Rather, applying *Bilta* and *Terluk*, I must decide whether the outcome was fair or unfair, bearing in mind that there may be more than one outcome which would have been fair. This is also necessary because the right to a fair hearing in Article 6 of the Human Rights Act 1998 is engaged, for the reasons explained in *Terluk*, quoted above.

52. Further, as summarised by Peter Jackson LJ in *Bilta*, this is a two stage process: assessing the factual basis for the application, and whether the party making the application had substantiated their position, and then the exercise of discretion based on those facts.

53. In addition, however, I consider that a decision whether to permit a party to attend or give evidence remotely is qualitatively different for these purposes from a decision whether to accede to an application to adjourn the trial, in that the potential prejudice to the claimant, and the wasted expense and inconvenience to other court users are all far less, if not negligible, if the applicant is permitted to attend and/or give evidence remotely rather than in person. (It was not suggested that this was the type of case where it would have been unsatisfactory for Mr Sobowale to give evidence other than in person.) In my view this significantly affects the balancing act to be carried out, so that in many cases it would simply be unfair and a breach of Article 6 rights to refuse permission to appear and/or give evidence remotely where this would have the effect of shutting that party out from appearing at all.

54. The Deputy Master did not of course have the benefit of any of the citation of authority which has been made to me, and there is one respect in which I consider his reasoning potentially problematic when considered against these authorities. Although he referred to having the power of his own initiative to adjourn the trial to 2pm to permit Mr Sobowale to attend remotely and make representations, he nevertheless refused the Remote Application on the basis that there was no application before him for a remote hearing or for Mr Sobowale to represent himself. There is force in Mr Imtiaz's submission that the Deputy Master did not sufficiently consider his case management powers under CPR 3.1(2)(b) which permitted him, of his own initiative, to hold a hearing or receive evidence by video. The test, on the authorities, is whether the resultant hearing would be fair. Interpreting the application restrictively, when the overall effect of refusing to permit Mr Sobowale to attend remotely was clearly going to be to exclude him from attending altogether, risked unfairness. I consider that the Deputy Master should have considered more broadly whether to permit Mr Sobowale to attend remotely, and not have effectively treated the situation as one where he had just failed to turn up.

55. However, I remind myself that this was a two stage process. First Mr Sobowale had to make out the factual basis for his application. Mr Morrell emphasises that it was based solely on a hearsay statement from Brown & Co. that Mr Sobowale's elderly mother in Nigeria was very ill and there were concerns for her wellbeing. His mother was not a party or witness and Mr Morrell objects that if reliance was to be placed on her medical condition as a reason for not attending in person, Mr Sobowale should have produced some medical evidence in support, analogous to the evidence which would have been required for an application for an adjournment on grounds of ill health.

56. This was not an application for an adjournment on the first day of trial, with all the disruption and inconvenience which that would have caused; it was merely an application to attend and give evidence remotely, and so I do not accept that equivalent medical evidence was essential. However the "evidence" essentially amounted to no more than an assertion by the solicitors, which was not supported by any witness statement or supporting detail from Mr Sobowale himself. In my view a significantly better explanation was needed from Mr Sobowale as to the nature and effect of his mother's illness and why this prevented him from flying back even for a short period for the trial, which was of a multi-million pound commercial claim. The sheer thinness of the evidence in support is material to whether it was unfair for the Deputy Master not to grant the application, because it goes to whether the factual basis for the application was made out.

57. Also material is the fact that Mr Sobowale did have solicitors on the record. No explanation has been given at any stage, whether to the Deputy Master or subsequently, for why they did not send a representative to the hearing, even though they remained on the record, including later filing the notice of appeal.

58. Another material factor is that, as the Deputy Master noted, no effective way of contacting Mr Sobowale had been provided by his solicitors, on the application notice or otherwise, and they had taken no steps to set up the proposed video hearing. As the party applying for permission to give evidence by video, it was Mr Sobowale's (and his solicitors') responsibility to make the arrangements for this to take place, including providing confirmation that Nigeria was a state which did not object to evidence being given by video from within its jurisdiction (see paragraphs 4 and 8 of Annex 3 (Video Conferencing Guidance) to CPR Practice Direction 32). By failing to do any of these

things, Mr Sobowale and his solicitors made it practically speaking very difficult for the Deputy Master to have acceded to the application. At the hearing before me Mr Imtiaz was unable to give me any answer as to how the remote hearing could have been set up if the Deputy Master had granted the application, although he was able to clarify that Nigeria is a state which permits its own citizens and residents to give evidence or appear remotely in the English courts from within Nigeria, and so could not have objected to a UK citizen doing so.

59. Finally, I consider it material that, as the Deputy Master subsequently confirmed, Mr Sobowale's Defence had been struck out and he was debarred from defending, and no application for relief from sanctions had been made against that automatic strike out. Nor, as I have noted, is this challenged in the grounds of appeal. Accordingly, Mr Sobowale would not have been permitted either to defend the claim or (even if his Sanctions Application had been successful) to give evidence, even if the Remote Application had been granted.

60. In those circumstances, I conclude that the factual basis for the Remote Application was not made out by Mr Sobowale, and that it was fair for the Deputy Master to refuse that application and to proceed with the trial in the absence of Mr Sobowale either in person or remotely, or through legal representation, and for the same reasons this did not constitute a breach of Mr Sobowale's Article 6 rights.

61. I turn then to consider the appeal through the prism of rule 39.3(5), since the effect was that the trial proceeded in Mr Sobowale's absence. To be entitled to an order for a retrial, Mr Sobowale would have to satisfy all 3 heads of rule 39.3(5) on this appeal. Since he did not in fact make such an application, he did not submit any further evidence in support upon which he can rely.

62. Sub-rule (a) requires that Mr Sobowale acted promptly when he found out that the court had exercised its power to enter judgment against him. Mr Morrell submits that Mr Sobowale cannot satisfy this requirement because he did not submit his appeal within the 21 day time limit for appealing and needed an extension of time. Mr Imtiaz's submission is that Mr Sobowale did act promptly in that he did submit his application for permission to appeal within 21 days; the problem was that his solicitors submitted it to the wrong court. There is no suggestion that Mr Sobowale did not know about the judgment against him very shortly after it was made.

63. My conclusion is that Mr Sobowale does satisfy sub-rule (a). It is in my view relevant that his appeal notice was physically submitted on 7 November 2023, within 3 weeks, which would have been in time if it had been submitted to the correct court. Further, applying the *Denton* test, Richards J granted him an extension of time for his notice of appeal. Mr Sobowale was also out of the jurisdiction for at least part of this period. In context I consider that he therefore acted promptly.

64. As to sub-rule (b), I have no evidence beyond that which was before the Deputy Master. Mr Imtiaz submits that Mr Sobowale's departure to Nigeria four days before the trial because of a family emergency constitutes a genuine reason sufficient to satisfy this requirement. Further he submits that Mr Sobowale acted in good faith by proposing an alternative solution to avoid impeding the trial by requesting to attend remotely.

65. However, this submission faces the same difficulties which I have outlined above in concluding that the decision to refuse the Remote Application did not result in the trial being unfair. There was no real evidence in support of that application, to substantiate the assertion that this was why Mr Sobowale was unable to attend. Further he and his solicitors had failed to take the necessary steps to enable the court to set up a video hearing with him when he was abroad in Nigeria, including enabling him to be contacted. My conclusion therefore, on the evidence before me, which was also before the Deputy Master, is that this sub-rule is not satisfied.

66. Finally under sub-rule (c), Mr Sobowale must satisfy the court by evidence that he has a reasonable prospect of success at trial. However, Mr Sobowale's Defence stood struck out and he was debarred from defending, and there is no challenge to that conclusion. In my view he cannot satisfy sub-rule (c) in those circumstances. In addition, even on the merits, he wished to run an argument that the security had been sold at an undervalue, but had not sought to rely on any expert evidence as to the value of the security, which was a fundamental flaw in any such defence. This is ignoring, for these purposes, the fact that the Sanctions Application had been dismissed.

67. My conclusion therefore is that an application under rule 39.3 would not have been successful. Accordingly Mr Sobowale may not achieve by the back door of this appeal the retrial that he could not have obtained through the front door of such an application.

68. Turning finally to the Sanctions Application, this head of appeal must now be considered against the background that I have held that the appeal against the dismissal of the Remote Application should be dismissed because the hearing was fair. Both counsel accepted that it was likely that the result on the Sanctions Application would follow the result on the Remote Application. Permission to appeal was granted in respect of the Sanctions Application because of the possibility that any unfairness in the decision on the Remote Application had infected the Sanctions Application.

69. As it is, that decision now falls to be considered as an appeal against a discretionary case management decision of the Deputy Master, which was decided on *Denton* principles. My conclusion is that the decision of the Deputy Master was well within the range of discretionary decisions open to him, and he did not take into account any irrelevant factors, or ignore any relevant ones. In particular, even if one assumes that Mr Sobowale believed incorrectly that the extension of time granted to Lendinvest also applied to him, his witness statement was not served until the day before the trial, whereas Lendinvest's had been served about 9 days before the trial. It was well within the Deputy Master's range of discretion to conclude that that was simply too late, and it was clearly correct for that assessment to be made separately from any decision on Lendinvest's application for relief from sanctions.

70. Accordingly, I dismiss the appeal on all grounds.

71. Having invited submissions on costs from both counsel prior to the handing down of this judgment, I further order that Mr Sobowale pay Lendinvest's costs of the appeal, in the agreed sum of £9,000 including any VAT, by 1 August 2024.