Neutral Citation Number: [2020] EWHC 1571 (QB)

Case No: QB-2012-006883/HQ2X05579

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/06/2020

Before:

THE HONOURABLE MR JUSTICE GOOSE

- -

Between:

SIAMAK FERIDONI BALENGANI	**Claimant**
- and -	
MOSTAFA SHARIFPOOR	**Defendant**

- -
- -

Mr Thomas Grant QC & Mr Ryan James Turner (instructed by **Berkeley Rowe LLP**) for the **Claimant**

Mr Tiran Nersessian (instructed by **Cooke Young & Keidan LLP)** for the **Defendant**

Hearing date: 5 June 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: this judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be at 10.00am on 19 June 2020.

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MR JUSTICE GOOSE

Mr Justice Goose:

Introduction

1. The claimant is an Iranian national who makes this application to set aside a judgment entered against him on his claim and defence to counterclaim, together with an assessment of damages, interest and costs. The defendant is a Canadian national. The subject of their dispute is a property in London, which was owned by a company registered in the British Virgin Islands. The claimant and the defendant equally hold the shares in the company. This application by the claimant is made almost six years after the court orders were granted to the defendant.

2. After commencing proceedings in 2012, the claimant's solicitors ceased to act for him in 2013, prior to him suffering an accident on the 15th November 2013 which caused him significant injuries. He gives evidence in this application that he had no knowledge of what happened in the proceedings after his accident, and that he believed that they had come to an end. It was only when the claimant applied to the court for a Third Party Debt Order (TPDO) to enforce the judgment in 2020, that he says he learned of the previous orders for the first time. His application to set aside the judgment and the orders for damages and costs is made under CPR r 23.11 and r 39.3.

Background

3. The claimant, Mr Siamak Feridoni Balengani, is an Iranian national who resides outside the jurisdiction of this court. In his first witness statement he described his business interests. He is the owner and Chief Executive Officer of Almeena Trading Co. L.L.C., a company created in 1995 and located in the UAE, with a branch office in Iran. He is also the President of two other businesses, established in 2011 and 2012, which were major subcontractors of the National Iranian Oil Company in directional drilling projects.

4. The claimant describes his second business activity as property investment, both in Iran and other countries in which he invests to ensure that his wealth is protected better than if it was located entirely in one state. It was this that led him to purchase property in the UK including 13, The Avenue, Willesden, London, bought through a company incorporated in the British Virgin Islands, Framjee Properties Limited (FPL).

5. The defendant, Mostafa Sharifpoor, was formally a business associate of the claimant. He was formerly an Iranian national. In 2002 the claimant and defendant entered into a contract, the terms of which are of substantial dispute between them. At the heart of the agreement was the intention to develop 13, The Avenue, Willesden (the property) to earn a profit. Half of the shares in FPL were transferred to the defendant, the claimant retaining the other half. There is a clear dispute between the parties as to the source of the purchase money of £1.175m, paid for the purchase of the shares in FPL, as there is upon the terms of the agreement for the cost of property development.

6. By late 2012 the parties were in sufficient disagreement that the claimant commenced proceedings on the 21 December 2012, serving his Particulars of Claim on 15 March 2013. The claimant sought damages for breach of contract and an order for the return

of the defendant's shareholding in FPL. The defendant served a defence and counterclaim denying any liability to the claimant and maintaining his own claim for damages for breach of contract.

7. The parties' respective statements of case were completed by July 2013, but by the end of that year the solicitors instructed by the claimant were no longer acting, and were permitted to come off the court record by an order made on 28 November 2013 and sealed on 3 December 2013. Thereafter, the claimant represented himself but indicated that he would look for new solicitors. This was communicated to the defendant by the claimant's former solicitors. The next event in the proceedings was when the defendant applied to strike out the claimant's claim and defence to counterclaim, with judgment to be entered on his counterclaim. The application was brought under CPR r 3.4, based on the failure by the claimant to comply with Court orders and an abuse of the Court's process. On the 7 April 2014 Master Cook made the order and granted judgment for the defendant on the counterclaim ("the first order"). The claimant was not present at that hearing, nor was he represented, although it was a hearing held on the date fixed early in the proceedings for case management, when the claimant was still represented by solicitors.

8. Directions were given by the court for the assessment of damages on the counterclaim. The date for the original trial was retained and the hearing came before His Honour Judge Simpkiss QC, sitting as a Judge of the High Court on the 30 June 2014. Again, the claimant did not attend, nor was he represented, when the defendant obtained judgment for assessed damages, interest and costs ("the second hearing"). Damages awarded were £146,742.06, together with interest of £26,020.34 with judgment being entered in the total sum of £172,762.40. The defendant's costs were summarily assessed in the sum of £71,801.26 which the claimant was ordered to pay.

9. No further steps in the action were taken by the claimant after his solicitors had come off the record. Notwithstanding that the proceedings had been initiated by him, and he faced a counterclaim, the claimant made no inquiry of the court or the defendant about the proceedings for almost six years when, at the end of March 2020 he instructed new solicitors to resist the defendant's application for a TPDO. The defendant was seeking to enforce his judgment against the claimant's entitlement to a distribution of the winding-up of FPL, which had since been sold and the net proceeds were being held by the liquidator of FPL, the BVI company. In May 2020 the court granted the defendant's application for the TPDO.

10. By the claimant's application dated 7 May 2020, he seeks orders to set aside the second order, made by His Honour Judge Simpkiss QC on 30 June 2014, and also setting aside any previous orders which may have struck out his claim, or given summary judgment disposing of the claim, and granting judgment on liability for the counter claim. The claimant has also applied for reverse summary judgment on the counterclaim or to strike out the counterclaim if the orders are set aside. The claimant's application has become more focused since it was issued and now concentrates upon the court orders made in the first and second hearings. The claimant's application is brought six years after the orders were made.

11. The defendant, by his cross-application, seeks an adjournment of the claimant's application with permission to adduce expert evidence, but also for orders that the claimant pay into court the judgment sum, together with interest and costs ordered by

the court in 2014. The defendant's cross-application, being effectively for an adjournment in order to serve further evidence but only on terms of payment into court by the claimant, is resisted by the claimant. At the beginning of the hearing I sought clarification from Mr Nersessian, counsel for the defendant, upon the defendant's cross application which he had initially wished to be heard before the claimant's application. On reflection, Mr Nersessian agreed that the claimant's application should be heard first, since its result would dictate the future conduct of the proceedings.

The Claimant's application

12. The claimant seeks the setting aside of the court orders made in both the first and second hearings because he was not present at either of them, nor was he represented. He says that he was unaware of the dates of the hearings or of the applications being made. He suffered a serious accident on the 15 November 2013, which caused him to receive hospital in patient treatment in Tehran during his recovery, not being discharged from hospital until 14 April 2014. He had memory deficits caused by the accident but when he remembered the proceedings, he believed that they had ceased with no further action taken because he had done nothing further.

13. In his first witness statement the claimant explains that he ceased to instruct his previous solicitors, Signature Litigation LLP ("Signature"), by the end of 2013 because their costs were too much for him. He intended to seek alternative solicitors, but in the meantime would represent himself with the assistance of others, including work associates and his family. The claimant described his accident on the 15 November 2013, caused when a passenger lift in which he was in failed, and what happened to him afterwards as follows:-

> "I was hospitalized for five months and I am informed by my daughter that the doctors had given me a 30% chance of recovery. For some of that time I was not conscious and then I was only semi-conscious and in no way capable of using email or a phone – for this reason, I do not recall much of my time in hospital. The head trauma and brain injury resulted in loss of memory and smell which lasted multiple years after the accident. I was discharged from hospital on 14 April 2014. Upon my discharge from hospital, I found that I had lost the ability to make certain movements, lost some of my memories, and was largely bed-bound for the following six months…
>
> For two years after I was discharged from the hospital, I was not able to travel. I was informed by my doctors that the air pressure and difference in altitude on the plane could have further medical implications. After I regained sufficient consciousness to appreciate my injuries and my inability to travel, I gave a full power of attorney to a very close friend of mine, Mr Rouzbeh Behi (also a resident in Dubai), to take over all my responsibilities in the UAE during my unforeseen absence. The power of attorney given to him on 28 April 2014 included all legal and financial due diligence with regards to my company, Almeena.

> Due to my condition and my being in hospital, it was not possible for the employees of Almeena who received any documents or correspondence from the Court or Mr Sharifpoor to draw those documents to my attention or to properly consult with me…
>
> Prior to my accident, I believed that I would need to instruct alternative solicitors to Signature after they ceased acting or that the proceedings would simply come to an end once Signature ceased acting. Mr Joseph and I had spoken about this prior to my accident and I had informed him that I wished to continue to prosecute my claim with alternative solicitors. I only became aware that the proceedings had continued in my absence and without my knowledge when there was mail delivered to my office in Dubai [**the TPDO application in 2020].**
>
> After I came out of hospital, I was not aware or informed that I needed to take any further steps in the proceedings or to participate in the proceedings. So far as I am aware, I had not received any documents and, although I remembered later that I had been pursuing a case in England, I believed that it had simply come to an end. I thought that if the proceedings were continuing, I would have been served with official court documents….I have never seen or been served with the order of His Honour Judge Simpkiss that Mr Sharifpoor is now seeking to recover….I have recently been informed…that my belief that the proceedings had ended was not correct and, as I have tried to explain, was based on my mistaken understanding of the processes of the English legal system…"
>
> **[s.feridoni@almeena.net]** "This is an email address associated with Almeena that I previously used, but it is not an email address at which I am now able to be contacted. I stopped using the Almeena email address in or around mid-late 2014. The email account was not closed, but I stopped using it as I could not access this email from my office in Iran due to sanctions imposed on Iran."

14. In the claimant's second witness statement he added the following evidence:-

> "My daughter has confirmed to me that the last email that was sent to this email address… was sent on 19 March 2014 at 15:55. At that time I remained incapacitated in hospital in Tehran and was not able to use even a phone, let alone a computer. I was not aware that this email had been sent to the s.feridoni@almeena.net email address and had no knowledge of its contents. After I was discharged from the hospital, I continued to be incapacitated for a considerable amount of time – as I explain in my earlier statement - and this email and its

> attachment was not seen by me and was not drawn to my attention."

15. The claimant had this to say about an email letter sent from his email address on the 9 December 2013:-

> "The letter….was not written by me or on my instructions. I understand that it was written by Mr Joseph…although Edwin Coe [**Defendant's former solicitors**] is not likely to have known that it was not written by me or on my instructions. The accident had taken place only three weeks previously and I could not give instructions of any kind at that time. As I set out in paragraphs 24 and 25 of my first witness statement, the employees of Almeena were not authorised to disclose the accident and my incapacitated state to third parties."

In support of his evidence the claimant also relies on the witness statement of his adult daughter Setarah Feridoni Balengani. She stated in relation to the claimant's email address: -

> "When I carried out that search, it showed that the last email from Edwin Coe is the email …19 March 2014…. I am not able to explain why those emails **[all those after this date]** are not showing in the email account if they were sent to my father; however I can confirm that they were not contained in the inbox of the email address….
>
> When my father suffered his accident, I was in the middle of my studies in Canada and was 24 years of age….When I arrived in Iran, my father was in the intensive care unit at Tehranpars Hospital….
>
> Fortunately, my father was discharged from hospital on 14 April 2014 and he was able to return to the family home in a wheelchair. However, he was not able to walk on his own and needed constant help. The trauma to his brain had resulted in partial memory loss… He was certainly not able to conduct his business for many months after his return home, and spent most of his time in bed during that period. He was also instructed not to fly for the next few years…. The trauma to his head caused temporary memory loss which was followed by forgetfulness, which continues to this day.
>
> … **[the defendant]** refers to an apparent proof of delivery, which is exhibited, showing Edwin Coe's letter of 19 March 2014 being delivered to my father's business address in Iran… on 31 March 2014 **[with reference]** by a "ghoddosi". The delivery confirmation is not actually signed and neither I nor my father have any idea who "ghoddosi" is or what it might

> refer to. Nor do we know why such a word was printed on the alleged proof of delivery."

16. On behalf of the claimant Mr Grant QC, who appeared with his junior Mr Turner, submitted that the test to be satisfied in respect of both the first and second hearings is that contained within CPR r 39.3(5). Whilst the first hearing was not a trial so as to require the same test as the second hearing, it is stricter than the wider discretion given to the court under CPR r 23.11 which favours the defendant. Further, it was submitted that the claimant's evidence establishes that he acted promptly when he found out that the court had made its orders in the two hearings, since it was only in March 2020 that he made the discovery; he had a good reason for not attending the hearings and he has a reasonable prospect of success in his claim and defence to counterclaim. Mr Grant QC also submitted that there was no requirement to satisfy the *Denton* principles in seeking relief from court sanction under CPR r 3.9 for either hearing.

17. Further, although the claimant had applied for summary judgment on the counterclaim, Mr Grant QC accepted that this should await the outcome of his application to set aside the two court orders.

The Defendant's response to the application

18. On behalf of the defendant Mr Nersessian submits that the claimant cannot satisfy each of the three questions to be answered in CPR 39.3(5). Although he may have had a reasonable prospect of success at any trial, he did not act promptly and did not have a good reason for being absent or represented at the two hearings which took place almost six years ago. Nothing has been done by the claimant during that substantial period of time, until he was stung into action this year, when he realised that his indirect share in the proceeds of the London property were to be used to discharge the judgment debt.

19. Mr Nersessian submits that, in any event, neither of the hearings were trials, such that CPR r 39.3 has no application. The test to be applied in respect of the first hearing is the broad discretion within CPR r 23.11, and in respect of both hearings the *Denton* principles within CPR r 3.9. It was argued that the claimant is in the position of a litigant who is seeking relief from sanctions. The claimant was guilty of serious and significant breaches of the court's orders, having started proceedings but then deciding to abandon them. Even accepting that he had suffered serious injuries, he was able to communicate with the defendant's solicitors on the 9 December 2013; he was aware of the two important fixed hearing dates because they had been set by the court early in the proceedings and had chosen not to contact the court, the defendant or to instruct new solicitors. Further, a delay of six years with actual knowledge of the proceedings and the court orders, means that the claimant's applications must fail. Alternatively, he had constructive knowledge, based on what he knew but failed to inquire further about the proceedings for over six years, which renders unconscionable the granting of relief.

20. In the third witness statement of Mr Young, the defendant's solicitor, the full history of the litigation between the claimant and defendant is revealed. The detail of the

proceedings is set out within paragraphs 6, 9 and 47 of Mr Young's statement and the exhibited pleadings and correspondence there referred to. It demonstrates active involvement in the litigation by the claimant until shortly after his previous solicitors came off the court record.

The Chronology of the litigation

21. The claim form was dated the 21 December 2012 and the particulars of claim, upon which the statement of truth was signed by the claimant, was served on the 15 March 2013 being stamped as received by court on the 26 March 2013. The case was allocated to the Multi-Track and orders were made which were agreed between the parties on 4 July 2013. On the 14 August 2013, after service of the defence and counterclaim, the claimant served a reply and defence to counterclaim dated the 16 July 2013, the statement of truth again being signed by the claimant. On the 14 August 2013 further orders were made in case management, dealing with disclosure and inspection of documents, witness evidence, expert evidence, the trial bundle and ordering a trial window between the 19 May 2013 and the 31 July 2014 with a time estimate of 5 days. A further case management conference was ordered for the 7 April 2014 before Master Cook.

22. The case management orders were amended by agreement between the claimant's solicitors and the defendant's solicitors on 11 October 2013 with a signed Consent Order. On the 24 October 2013 the trial date was fixed with a trial window of 5 days from the 30 June 2014.

23. On the 8 November 2013 the claimant's solicitors, Signature, wrote to the defendant's solicitors, Edwin Coe LLP stating that they were to make an application to the court for alternative method of service upon the claimant, because they were seeking to come off the record as his solicitor. Within that letter suggestions were made for an amendment to the previously agreed case management orders but maintaining the further hearing dates fixed. Within the letter it was stated by Signature "*we are requesting that service (upon the claimant) shall take effect by way of service on our client's email address*". By a court order dated 28 November 2013 Signature were permitted to withdraw as solicitors for the claimant and to come off the record with immediate effect. In paragraph 2 of that order it was provided "*A copy of this order shall be served on the claimant and on the defendant forthwith. Service on the claimant shall be effected by sending a copy of this order by email to s.feridoni@almeena.net a copy shall also be sent by post to the claimant at 478 Assadai Avenue, Unit 20, Tehran, Iran*". Both the email and postal addresses were provided by the claimant.

24. In an email on the 3 December 2013, Signature informed the defendant's solicitors that no further work had been done on the file by them, but went on to state "*We did, however, inform the claimant of the next step in the proceedings*". Whilst it was not identified what that step would be, it is reasonable to conclude that it would involve further preparation for the fixed hearings and trial dates.

25. From the 6 December 2013 and at all material times thereafter, the defendant's solicitors communicated with the claimant by sending emails to the email address provided by the claimant. Documents were also, on occasions, delivered personally to the postal address which the claimant had provided. Significantly, an exchange of

email correspondence between the 6 and 9 December 2013 reveals communication between the parties after Signature ceased to act. On the 6 December 2013 the defendant's solicitors emailed a letter to the claimant's email address at s.feridoni@almeena.net stating "*We understand Signature Litigation LLP have ceased to act as your solicitors. We would be grateful if you would confirm whether you intend to instruct further solicitors or to proceed as a Litigant in Person*". Thereafter, the letter concentrated on inspection and further disclosure of documents in the course of the litigation. On the 9 December 2013 an email was received by the defendant from the claimant's email address, attaching the documents that had been requested in the email of the 6 December 2013 and including a three page letter signed at its end "*Yours sincerely S.Feridoni Balengani* ". Within that letter it was stated "*Thank you very much for your letter dated the 6 December 2013. Currently I am in contact with my friends in England who could assist me in introducing a lawyer who may take over this litigation from Signature Litigation LLP, meanwhile please allow me to proceed as litigant and responding to your letter as follows*…". Thereafter the letter engaged in considerable detail about the litigation, commenting on the evidence involved as well as attaching further documents and making careful observations upon the litigation.

26. Pausing at this stage, it should be observed, as is obvious, that this letter was sent from the same email address that was provided by the claimant's solicitor when they withdrew from the case; it appeared to be signed by the claimant himself and expressed a detailed knowledge of the claim as one might expect a litigant to have. On any fair reading of that document it gave every appearance of having been sent by the claimant himself, whether he had assistance in the use of English or not. No further communication was received from the claimant after the 9 December 2013 until April 2020, when the court had made an interim TPDO.

27. The defendant continued, nevertheless, to contact the claimant and to serve applications upon him through the email address, as well as through the postal address. The defendant gave notice that the claimant was in breach of the court orders in relation to trial preparation, and that an application would be made to the court to strike out the claim and defence to counterclaim unless there was immediate compliance. On 24 February 2014 the defendant wrote by email to the same email address, giving notice to the claimant of the application and its hearing date, being the same date as had been fixed earlier for further case management. The defendant obtained a court order under CPR r 6.15 and 6.27, for deemed service of the application to strike out on the basis of it having been served on the claimant's email and postal addresses given to the court by his former solicitors, Signature, when they came off the record. Upon service by courier to the postal address, receipt was acknowledged on 31 March 2014 by a person identifying themselves as "Ghoddosi", whom the claimant does not recognise. The court order obtained by the defendant pursuant to CPR r 6.15 and 6.27 also gave permission of service on the claimant of all subsequent documents in the proceedings by sending them only to the email address mentioned above.

28. On the 7 April 2014 the court (Master Cook) granted the applications sought. The claimant was not present, nor was he represented. Directions were also given for an assessment of damages hearing on the counterclaim, the trial for which was listed on the same day as the originally fixed trial date, being the 30 June 2014. Copies of the

court orders made on the 7 April 2014 were served via the email address directed by the court, which was an address that the claimant had previously provided. Notice of the hearing to assess damages, together with the evidence to be relied upon and a supporting skeleton argument were also served on the email address directed by the court. After damages were assessed by His Honour Judge Simpkiss QC on the 30 June 2014, together with interest and costs, copies of the court order made were again served on the same email address on 18 July 2013.

Relevant provisions of the CPR

29. The starting point when considering which of the provisions of the rules applies to the hearings in this application, is to determine the nature of the respective hearings. The first hearing, on the 7 April 2014 before Master Cook, was an application by the defendant to strike out the claimant's claim and defence to counterclaim, due to his failure to comply with orders made by the court in case management and preparation for trial. Judgment was entered in the absence of the applicant, in favour of the defendant on both the claim and the counterclaim. The second hearing, on the 30 June 2014 before His Honour Judge Simpkiss QC, was a hearing for the assessment of damages consequent upon judgment being entered on the counterclaim in the first hearing.

30. Although Mr Nersessian submitted that neither of these hearings was a trial, such that CPR r 39.3 could not apply to them, Mr Grant QC submitted that the second hearing was a trial of the issue of damages. Whilst I am persuaded that the first hearing was not a trial (as was common ground), I am not persuaded in relation to the second hearing. The hearing before Master Cook, the first hearing, could not have been a trial: it was an interlocutory hearing imposing a sanction upon the claimant. No evidence was to be called or cross examined by either party. However, the second hearing, before His Honour Judge Simpkiss QC, plainly was a trial. It was a hearing to determine, upon evidence to be called by the parties, the assessment of damages on the counterclaim. During that hearing evidence could be called and cross-examined by both sides. Notice of the date of that hearing, being the original trial date 30 June 2014, had been served upon the parties at a time when both were represented by solicitors.

31. Having determined the nature of the first and second hearings, the relevant provisions of the CPR to this application are as follows:-

> "**Relief from sanctions**
>
> 3.9 (1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –
>
> (a) for litigation to be conducted efficiently and at proportionate cost; and

> (b) to enforce compliance with rules, practice directions and orders.
>
> (2) An application for relief must be supported by evidence.
>
> …
>
> **Power of the court to proceed in the absence of a party**
>
> 23.11 (1) Where the applicant or any respondent fails to attend the hearing of an application, the court may proceed in his absence.
>
> (2) Where –
>
> (a) the applicant or any respondent fails to attend the hearing of an application; and
>
> (b) the court makes an order at the hearing, the court may, on application or of its own initiative, re-list the application.
>
> …
>
> **Failure to attend the trial**
>
> 39.3(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.
>
> …
>
> (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".

The applicable law

32. It was agreed between the parties during the course of argument that the application to set aside the orders made in the first hearing by Master Cook, must be under CPR r 23.11. That rule provides the court with a wide discretion in deciding whether to set aside the orders made and relist for a hearing. The court's discretion to do so must be

used sparingly – see *Riverpath Properties Ltd v Brammall (2000) WL 463 31 January 2000; Yeganeh v Reese [2015] EWHC 2032*. Further, although it might be thought that the application to set aside Master Cook's orders are simply to bring about a full hearing of the strike-out application and not, at this stage, to obtain relief from sanction, that ignores the reality. The claimant is seeking relief because the court was satisfied that he was in breach of court orders and there was an abuse of process. Entering judgment against the claimant on both the claim and defence to counterclaim and striking out the same, were obviously sanctions, which the claimant now seeks to set aside. CPR r 3.9 is, therefore, engaged and the three stage process identified in *Denton v TH White Ltd [2014] EWCA Civ 906; [2014] 1 WLR 3296* must be considered by this court in the decision to be made on the application.

33. In the course of argument Mr Grant QC submitted that first instance decisions in *Tubelike Ltd v Visitjournies.com Ltd [2016] EWHC 43 (Ch)* and *Phonographic Performance Ltd v Balgan [2018] EWHC 1327 (Ch)* indicate that CPR r 39.3 should be applied as a reference point in the decision to be made in this case; further that Rule 3.9 overloads the test to be applied. However, both of those cases concerned an application to set aside summary judgment under Rule 24 in the absence of a party. Although similar, they were not applications to set aside the strike out orders under Rule 3.4. Further, the reasons for referencing the Rule 39.3(5) test were because there was little assistance in the Rules for a set aside application under Rule 24. Although of interest, these decisions do not prescribe the test in this case for setting aside the orders in the first hearing. Neither is clear authority that Rule 3.9 should not be relevant in the decision I have to make.

34. The second hearing on 30 June 2014 requires the claimant to satisfy positively each of the three questions identified in CPR r 39.3(5), namely that he acted promptly when he found out that the court had exercised its power to enter judgment or make an order against him; that he had a good reason for not attending the trial; and that he has a reasonable prospect of success at trial. How is that test to be applied?

35. In *Bank of Scotland v Pereira* [2011] EWCA Civ 241; [2011] 1 WLR 2391 Lord Neuberger MR (as he then was) stated at paragraph 24:-

> "*An application to set aside judgment given in the applicant's absence is now subject to clear rules. As was made clear by Simon Brown LJ in Regency Roles Ltd v Carnall [unreported] 16 Oct 2000:-*
>
> *"…the court no longer has a broad discretion whether to grant such an application; all three of the conditions listed in CPR Rule 39.3(5) must be satisfied before it can be invoked to enable the court to set aside an order. So, if the application is not made promptly, or if the applicant had no good reason for being absent from the original hearing, or if the applicant would have no substantive case at a retrial, the application to set aside must be refused. On the other hand, if each of those three hurdles are crossed, it seems to me that it would be a very exceptional case where the court did not set aside an order. It is a fundamental principle of any civilised legal system, enshrined in the common law and in Article 6 of the*

> *Convention for the Protection of Human Rights and Fundamental Freedoms, that all parties in a case are entitled to the opportunity to have their case dealt with at a hearing which they or their representatives are present and are heard. If the case is disposed of in the absence of a party, and the party (1) has not attended for good reasons, (2) has an arguable case on the merits, (3) has applied to set aside promptly, it would require very unusual circumstances indeed before the court would not set aside the order.*
>
> *"The strictness of this trio of hurdles is plain, but the rigour of the rules is modified by three factors. First, what constitutes promptness and what constitutes a good reason for not attending is, in each case, very fact sensitive, and the court should, at least in many cases, not be very vigorous when considering the applicants conduct; similarly, the court should not prejudge the applicant's case, particularly where there is an issue of fact, when considering the third hurdle. Secondly, like all other rules CPR Rule 39.3 is subject to the overriding objective, and must be applied in that light. Thirdly, the fact that an application under CPR Rule 39.3 to set aside an order fails does not prevent the applicant seeking permission to appeal the order …."*

36. In the case of *Mohun-Smith & Anr v TBO Investments Ltd [2016] EWCA Civ 403; [2016] 1 WLR 2919* the Court of Appeal considered further the application of CPR Rule 39.3(5), reaffirming the importance of satisfying the three steps within the rule and, secondly, the court's discretion as explained by Lord Neuberger in *Pereira*. In allowing an appeal against the refusal to set aside orders made under CPR Rule 39.3, the court concluded on the facts of that appeal that the lower court had adopted an over rigorous approach to the evidence relied upon by the absent party, leading to over-harsh criticism and analysis. Rather than setting out any new or further developed principles in the court's approach to applications under this rule, this decision was, as many cases are, fact specific. Similarly, in the case of *Solanki v Intercity Telecom Ltd [2018] EWCA Civ 101* where, again, the Court of Appeal reaffirmed the approach to be taken by the court in a set aside application under CPR r 39.3.

37. In *Gentry v Miller* [2016] EWCA Civ 141; [2016] 1 WLR 2696 the Court of Appeal was dealing with an appeal against an order setting aside orders under CPR Rules 13.3 and 39.3(5) after judgment was entered in default of an acknowledgement of service and the absence of the defendant at a hearing to assess damages. At paragraph 23 it was said (per Vos LJ):-

> *"23. It is useful to start by enunciating the applicable principles. Both sides accepted that it was now established that the tests in Denton's case [2014] 1 WLR 3926 were to be applied to applications under CPR Part 13.3: (see paragraphs 39-40 of the judgment of Christopher Clarke LJ in Regione Piemonte v Dexia Crediop Spa [2014] EWCA Civ 1298, with whom Jackson and Lewison LJJ agreed). It seems to me*

> *equally clear that the same tests are relevant to an application to set aside a judgment or order under CPR Part 39.3.*
>
> *24. The first questions that arise, however, in dealing with an application to set aside a judgment under CPR Part 13.3, are the express requirements of that rule…*
>
> *25.I do not think that any different analysis applies under CPR Part 39.3. The court must first consider the three mandatory requirements of CPR Part 39.3(5), before considering the question of whether relief from sanctions is appropriate applying the test in Denton's case [2014] 1 WLR 3296. Again, the sanction from which relief is sought is the order granted when the applicant failed to attend the trial, not the delay in applying to set aside the resulting judgment. The promptness of the application is a pre-condition under CPR Part 39.3(5)(a) and is considered as part of all the circumstances under the third test in Denton's case."*

38. When considering the different submissions in relation to whether CPR 3.9 should be engaged in this application to set aside the orders made in the second hearing, it is important to bear in mind the terms of Rule 3.9. It is widely cast in order to apply to many, but not all, applications for relief from the court. However, it is not confined to particular types of case or sanction. It identifies the court's general discretion to give relief from any sanction imposed for failure to comply with any rule or court order. That general discretion is expressed through the application of the *Denton* principles: a three stage process assessing the seriousness and significance of breach, why the default occurred, and all the circumstances of the case. In *Gentry v Miller* the Court of Appeal plainly concluded that Rule 3.9 is engaged to set aside a judgment given where a party did not attend the trial. It must be considered after the three mandatory questions are answered in favour of the applicant under CPR r 39.3(5).

39. I do not accept the submission of Mr Grant QC, that because in *Pereira* Lord Neuberger MR did not refer to CPR r 3.9 when he described the court's approach to CPR r 39.3, it means that rule 3.9 is not relevant. In *Pereira* the appellant failed at the first hurdle: he could not satisfy each of the mandatory questions asked in CPR r 39.3(5), such that no discretion remained with the court, nor would Rule 3.9 need to be considered. Whilst this does not explain why Rule 3.9 was not referred to by Lord Neuberger MR as part of the decision process in a set aside application under Rule 39.3 (although it was in the application for permission to appeal out of time), I am not persuaded that *Gentry v Miller* is out of step or inconsistent with the decision or reasoning of *Pereira* or subsequent authority. The remaining discretion, after satisfying the three questions in Rule 39.3(5), is sufficient to incorporate the *Denton* principles when they ask the most obvious questions about any breach of rule or court order and the circumstances of the case. In my judgement Rule 3.9 falls to be considered in respect of both applications to set aside the orders made by the court by both Master Cook and His Honour Judge Simpkiss QC in the first and second hearings respectively.

40. An additional submission was made in the course of oral argument by Mr Nersessian, that even if the applicant could satisfy each of the mandatory tests in CPR Rule

39.3(5), in particular that he did not have actual knowledge of the court orders made until very recently, he certainly had constructive knowledge from about 2014. This, he argues, should be taken into account at the discretion stage and serve to deprive him of the relief he now seeks in relation to the second hearing. Mr Grant QC submitted that the applicant cannot be the subject of both a subjective and objective test upon his knowledge of the judgments entered, because it creates a double and inconsistent test. For reasons which will become clear in this judgment, I do not have to decide this question in relation to the second hearing, although my provisional view is that constructive knowledge, whilst not relevant within CPR Rule 39.3(5), may be considered in an appropriate case at the discretion stage. It would have to be rare to cause the court to decline to exercise its discretion in favour of the application. However, I am persuaded that constructive knowledge may be a relevant factor as part of the court's wider discretion under CPR Rule 23.11 concerning the interlocutory hearing before Master Cook.

41. Accordingly, the test that I shall apply in respect of these applications is not identical between the two hearings which are the subject matter to the application. The interlocutory hearing (the first hearing) on the 7 April 2014 requires the court to exercise a broad discretion under CPR r 23.11 and also to consider the *Denton* principles under CPR r 3.9. The trial hearing (the second hearing) on 30 June 2014 requires the court to consider CPR r 39.3 and, if appropriate, Rule 3.9. Both applications are inherently for relief from sanction.

Discussion and Conclusion

42. Whilst it would be logical to start by considering the application to set aside the first hearing because it was the first in time, the essential evidence to be considered is effectively the same for both hearings. The claimant's application is based on his evidence that he was not present at either hearing because he had suffered a serious accident. This meant he could not physically attend. Further, he believed that the proceedings had stopped because he did not instruct new solicitors, nor did he do anything further to progress the action. If the evidence establishes on the civil standard of proof that the claimant did not find out about the court orders made in the two hearings until March 2020, then that finding of fact will be centrally important to the claimant's application. It is convenient therefore to assess the available evidence upon this central, factual issue.

43. It is important to recognise that this application is not a trial in which witnesses are called and tested in cross-examination, so that the court is able to make findings of fact. Whilst there is plainly a dispute upon the central issue, I must assess critically the evidence on the face of the witness statements and documentation on both sides, and reach a conclusion upon whether the claimant was either unaware of the two hearings until 2020, or knew of them and decided consciously not to take part or be represented. The evidence rests upon the credibility of the claimant when he says that he had no knowledge of the hearings or the orders made until 2020. The court should not merely accept the claimant's evidence without question, nor should the court be over-rigorous in assessing the claimant's evidence, given the consequences of refusing his application. He did not, as an obvious fact, attend either hearing and there has not been a full trial of the claim and counterclaim. It also necessary, as always, to have in mind the Overriding Objective.

44. With the foregoing in mind, I have come to the clear conclusion that the claimant did not find out for the first time about the hearings only when he received notice of the TPDO proceedings in 2020. I am satisfied that the claimant knew what had happened in the proceedings at all material times, but for reasons of his own lost interest in his claim and decided to take no further part in the proceedings. I have reached this conclusion on the basis of the following evidence:

1) The claimant is an intelligent, literate, international businessman. He is the sole owner and CEO of Almeena Trading Co LLC located in the UAE and with a branch office in Iran. He is also President of other companies which are major subcontractors in the Iranian oil industry. He has property interests and business interests in Iran, the UAE, Canada, British Virgin Islands and the UK. Whilst he has "basic English" he has the assistance of advisors, employees and his family (including his daughter) who are fluent in English.

2) Whilst the claimant was hospitalised until the 14 April 2014 he knew prior to his accident on the 15 November 2013 of the following:-

   (a) That the trial date of both the claim and counterclaim had been fixed for the 30 June 2014.
   (b) The pre-trial hearing, in which further orders were going to be made had also been fixed for the 7 April 2014.
   (c) His evidence is that he wanted to continue to act in the proceedings on his own or with the appointment of new solicitors, something which was repeated in the email letter dated 9 December 2013.
   (d) He knew of the detail of the counterclaim against him, as well as of his own defence to that counterclaim, having signed the statement of truth on those pleadings.

3) Although the claimant was undoubtedly incapacitated for a period of time as a result of his accident, remembering only later that he was a litigant, he accepts that he did nothing to inquire about the proceedings which he had commenced. He did not contact the court, his former solicitor, the defendant's solicitors, nor did he ask his family or any business associate to find out. His explanation that he believed or assumed nothing had happened means that he knew of the litigation but decided to do nothing about it.

4) It is significant that the litigation included a counterclaim against the claimant. Firstly this means that he knew that the defendant was pursuing him in his own substantial counterclaim and, secondly, that there is even less reason to believe that the litigation had simply stopped.

5) Whilst the claimant states in his witness evidence that he did not understand the English legal system and thought it operated in the same way as the Iranian legal system, allowing a claimant to walk away from the proceedings and expect nothing further to happen, such a belief is not credible given the claimant's experience of international business and the legal systems within the different countries within which he operated. At the very least it was a simple question to ask a lawyer to discover if the English legal system operated the same way as the Iranian system. He does not say that he made

that inquiry at any time. The claimant's evidence that he believed he could walk away is highly questionable.

6) Further, the claimant knew through his solicitors that a trial date of the claim and counterclaim was fixed for the 30 June 2014 and a pre-trial court hearing was fixed for 7 April 2014. He knew, whilst he was still represented by Signature, that the court had made orders for the preparation of the trial, including directions upon witnesses, disclosure, experts and trial bundles. He had also been told of the "next step" in the proceedings by Signature when they ceased to act for him. Additionally, the email address, used throughout the proceedings being s.feridoni@almeema.net as well as the postal address 478 Assadai Avenue, Unit 20, Tehran, Iran, were provided by his solicitors to the court for further communication about the proceedings upon the withdrawal of his solicitors.

7) After his solicitors ceased to act, the defendant's solicitors sent an email on the 6 December 2013 asking the claimant if he was to seek to be represented by solicitors or to act for himself, and also raised a series of questions in relation to the documents. That communication was via the email address that he had provided to the court and to the defendant. He accepts that it was the correct email address. On the 9 December 2013 the letter emailed in reply and bearing the name of the claimant, provided a clear answer and raised detailed comments about the litigation which would only be expected to be given by the claimant. It also included private banking details in order to make forensic points in the litigation. On any reasonable and critical observation of that letter, the only conclusion to be reached is that it was written (even with assistance in English) by the claimant having received the email of the 6 December to his address.

8) The claimant's evidence that he did not write that email but that another person (*"I understand that it was written by Mr Joseph")*, may have done is not credible. No witness evidence has been provided by "Mr Joseph" or anyone else to claim authorship, notwithstanding that he was a close business associate of the claimant. Further, the detail of the letter and whether the claimant was going to instruct other solicitors in early December 2013, are details almost peculiarly in the sole knowledge of the claimant. Either the claimant wrote the email himself or, more likely, it was written upon his instruction and dictation for translation by another. I am satisfied that this letter was written by the claimant or with his knowledge and instruction. It demonstrates that the claimant, despite his accident, retained detailed knowledge of the proceedings and was answering emails from the defendant in early December 2013. His explanation that someone else wrote the email letter without his authority or knowledge is not credible.

9) Although the medical record, proving the claimant's injuries and inpatient hospital treatment before discharge on the 14 April 2014 must be accepted on its face, it conspicuously fails to describe his mental capacity and ability to understand the litigation he had commenced during his recovery from the accident. Undoubtedly, he suffered serious injuries, but did they mean that he could not have remembered the litigation he was engaged in, or that he could not have written (with assistance or otherwise) the email and letter dated the 9

December 2013? This is not answered by the evidence relied on by the claimant.

10) The claimant's evidence that he granted a power of attorney to a colleague Mr Behi, which is said to demonstrate his incapacity in 2014, presents only part of the picture. The Power granted is only in respect of the claimant's Almeena company, with business premises in Iran and the UAE. Significantly, it is not in respect of any of claimant's property investment interests which are described by him in his first witness statement as his "second business activity". The subject matter of these proceedings is, as the claimant confirms in his evidence, part of that second activity but was not made the subject of the Power.

11) After the 9 December 2013, whilst the claimant did not answer any further correspondence, all communication by the defendant's solicitors was sent to the same email and postal addresses as provided by the claimant. The documents sent to the claimant clearly recorded that the proceedings were continuing, that orders were made and the hearing dates, which had been fixed at a time when the claimant was represented by his previous solicitors, were still relevant. Although the claimant denies seeing or reading any of the correspondence sent to his email address, that is not, in my judgement, credible. Although it may be possible to understand that one or several documents might not have reached their destination and been brought to his attention, to say that he did not know of any of them is not credible.

12) On the face of the claimant's evidence he had access to his email address until "mid or late 2014", which included all of the material emails dealing with the two hearings. Even on the evidence of claimant's daughter, who searched the inbox of the email address account to find that the last received email was dated on 19 March 2014, that was the email which informed the claimant of the impending application to strike out. There is no explanation as to what happened to each of the emails before that date, or why there should not be any received afterwards if it was to the correct address. The documents and emails sent all used the same email address.

13) After the claimant's email dated the 9 December 2013 he continued to receive emailed correspondence from the defendant's solicitors to that same address. This included court orders and notice of the applications leading to the first and second hearings. He had been informed of the importance of those dates when he was represented by solicitors.

14) After taking no further steps in the proceedings the claimant did nothing for almost six years. He decided only in March 2020 that he needed to act to prevent the defendant from enforcing his judgement debt against him by the application for a TPDO on the net proceeds of sale of the London property in the liquidation of FPL.

45. Having made this finding of facts, it must follow that the claimant has allowed almost six years to pass before deciding to make this application. It has been made just as the defendant appears to be enforcing his judgment debt against the claimant. It follows that this application has not been made promptly or with celerity. This finding is of

central importance to the claimant's application in respect of both hearings which he failed to attend.

46. I turn now to consider the application to set aside the orders made by Master Cook in the first hearing on 7 April 2014. The court granted judgment against the claimant on both his claim and his defence to counterclaim because he failed to comply with court orders in an abuse of the Court's process. Although he was an inpatient in hospital until the 14 April 2014, he has left it almost six years to make this application. Of itself this is sufficient to refuse the application under CPR r 23.11.

47. In applying the three stage test in *Denton*, because the claimant is seeking relief from sanctions under CPR r 3.9, his breach of the court orders were, as Master Cook concluded, serious and significant breaches, amounting to an abuse of the court's process. Although Master Cook was unaware that the claimant had suffered serious injury, the fact remained that he ceased to do anything in the litigation up to the 7 April 2014, including instructing new solicitors or contacting the court.

48. Secondly, the default occurred partly because of the claimant's accident, but not entirely. He was able to send the 9 December 2013 email and, therefore, able to arrange for compliance with the court orders or, at the very least, contact the court and ask for an extension of time or adjournment.

49. Thirdly, the circumstances of the case require me to take into account the claimant's conduct both before the first hearing as well as afterwards. Having commenced proceedings against the defendant and being met with a substantial counterclaim, the claimant dispensed with his solicitors and indicated that he would seek new ones, which he failed to do. He took no further steps in the action although he was aware of significant dates, including the trial date. He was aware of the continuing litigation and the court orders made, but has done nothing, whilst living outside the jurisdiction, for almost six years. Only now, when the defendant is enforcing his judgment, has the claimant decided to make an application to the court.

50. In these circumstances the application to set aside the orders of Master Cook made on the 7 April 2014 is refused.

51. I turn now to consider the application to set aside the orders made by His Honour Judge Simpkiss QC in the second hearing on the 30 April 2014. Applying the three questions within CPR r 39.3(5), I have made a finding of fact that the claimant has not acted promptly when he found out that the court had made orders and entered judgment against him. On the contrary, he has delayed substantially. Accordingly, he cannot satisfy the first question in paragraph 5(a) of the rule. This deals with the application shortly and it is not necessary, therefore, for me to consider paragraphs 5(b) and (c). It follows from Rule 39.3(5) and *Pereira* that I cannot grant the application in relation to the second hearing either. For the sake of completeness and applying CPR r 3.9 and the Denton three stage test, I would refuse the application for relief from sanction for the same reasons as for the first hearing.

52. In conclusion I refuse the claimant's application in respect of both the first and second hearings. The remaining applications by the claimant therefore do not arise. It also means that the defendant's cross application falls away.

53. I invite the parties to agree any costs and other consequential orders within 14 days of the handing down of this judgment, failing which a further, short oral hearing may be listed.