

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2025/0003

BETWEEN:

[1] LAU MAN SANG, JAMES
[2] LUNG HUNG CHEUK
[3] CHEUNG WING SUM, ALBERT
[4] NGAI HIN KWAN, ALBERT
[5] YEUNG YIU CHONG
[6] ZHANG GUO WEI

Appellants

and

[1] KING BUN LIMITED
[2] KENCY LTD
[3] KAR KWONG DEVELOPMENT LIMITED (TRADING
AS KAI KWONG TRADING COMPANY)
[4] KHI CAPITAL LIMITED
[5] KENTRUE COMPANY LIMITED
[6] HUI PAK KONG
(Suing in the name and on behalf of themselves
and all other shareholders in Vanway International
Group Limited, except the First and Second
Appellants)

Respondents

[7] CHAU CHEUK WAH, ANGUS
[8] VANWAY INTERNATIONAL GROUP LIMITED

Respondents

Before:

The Hon. Mr. Gerard St. C. Farara	Justice of Appeal [Ag.]
The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal [Ag.]
The Hon. Mr. Dexter Theodore	Justice of Appeal [Ag.]

Appearances:

Mr. David Quest, KC for the appellants
Mr. Jern-Fei, Ng, KC and with him Mr. Jerry Samuel and Mr. James Bailey for the respondents

2025: June 17;
2026: January 30.

Interlocutory appeal – Set Aside Application – Quantum Trial – Notice of hearing to parties – Nonattendance at trial – The test of ‘good reason’ in CPR 39.5(5)(a) - Whether the learned judge, in his assessment of the evidence adopted, contrary to the principles and guidance in English case law, an ‘overly rigorous’ and too technical approach to determining under CPR 39.5(5)(a) whether the appellants had a ‘good reason’ for not attending the Quantum Trial - Whether in adopting that approach, the learned judge committed blatant errors of principle and made erroneous findings of fact such that this Court ought to set aside these findings and his dismissal of the Set Aside Application

This is an interlocutory appeal, with the leave of the Court, from an *ex tempore* judgment (“the judgment”) and order of a learned judge of the Commercial Division of the High Court of Justice in the Virgin Islands (“BVI”) made on 30th April 2024. By the judgment and order, the learned judge dismissed the appellants’ notice of application filed on 11th December 2023 (“the Set Aside Application”) to set aside an order made by the judge in their absence on 14th November 2023 (“the Order for Relief”) for the payment of equitable compensation and pre-judgment interest to the respondents in the aggregate sum of approximately US\$97 million which order was made at the conclusion of the quantum phase of the trial in Claim No. BVIHC (Com) 2017/0086 (“the Claim”), a split trial having been ordered and directed on 19th November 2018.

The Claim, commenced in 2017, is a derivative action brought, with the permission of the High Court granted on 6th July 2017, by the first to sixth respondents as minority shareholders in Vanway International Group Limited (“Vanway” or “the Company”), a company incorporated under the laws of the BVI, against the eight named defendants in the Claim. The Claim was brought on behalf of the first to sixth respondents themselves and on behalf of all other shareholders in Vanway against Lau Man Sang, James; Lung Hung Cheuk; Cheung Wing Sum, Albert; Ngai Hin Kwan, Albert; Yeung Yiu Chong and Zhang Gwo Wei being respectively the first to fifth and seventh defendants to the Claim, and Chau Cheuk Wah, Angus - the sixth named defendant to the Claim. The order made on 6th July 2017 to commence derivative proceedings also included an order that the respondents (the claimants below) be indemnified out of the assets of Vanway in respect of the costs of the said derivative action.

In brief, the respondents alleged that the appellants had breached their common law fiduciary duties and their statutory duties under sections 120 and 122 of the **BVI Business Companies Act, 2004** (“BCA”) owed to Vanway to exercise the care, diligence, and skill of a reasonable director in the particular circumstances of this case when, in August and September 2015, the Board of Directors of Vanway approved the sale of the Company’s operating subsidiaries (referred to collectively as “the Target Group”), to the first defendant/appellant, Mr. Lau; and convened an Extraordinary General Meeting (“EGM”) of

members on 15th September 2015 at which the majority of members approved the said sale of the Target Group at a gross undervalue.

By case management order dated 19th November 2018 the learned judge, *inter alia*, ordered that the issue of liability be determined at a trial (“the Liability Trial”) and the question of relief be stood over for directions of the trial judge (collectively “the CMC Split Trial Order”). The Liability Trial spanned 22 trial days in November and December 2019, July 2020 and February 2021. The written judgment on liability was delivered by the court on 11th August 2021 (“the Liability Judgment”). By the Liability Judgment the learned judge found that the allegations against the first to seventh defendants pleaded at paragraphs 9,31,46 (as against the first defendant only), paragraph 49 (as against the second to seventh defendants only), and paragraph 52 of the Amended Statement of Claim, had been substantially made out. Accordingly, the court held that the claim against the first to seventh defendants succeeded, and that he would hear the parties further in relation to any consequential matters.

The formal order of the court on the finding of liability is dated 5th October 2021 (“the Liability Order”). By the Liability Order, it was ordered that the claims against the first to seventh defendants succeed. It was also ordered and directed, *inter alia*, that the claimants were to file and serve a notice of application with evidence in support in relation to the consequential orders sought in relation to: (a) relief (b) costs; and (c) further directions for determination of quantum by 4:00 pm on the 22nd day after the entry of the said Order; the defendants were ordered to file and serve any evidence in response by 4:00 pm on the 22nd day after service of the claimants’ evidence; the claimants were given until 4:00 pm on the 15th day after service of the defendants’ evidence to file any evidence in response; and it was also ordered that a hearing, estimated at one day, be listed by the Registrar of the High Court for the first available date after 27th October 2021 ‘to determine matters consequential upon judgment and/or such further directions (including, if appropriate, as regards quantum) as may be necessary’, and a date shall be fixed by the Registrar to determine matters consequential upon the Liability Judgment and/or such further directions (including, if appropriate, as regards quantum) as may be necessary.

By order dated 10th December 2021, the learned judge gave directions for determining the issues of quantum and relief against the first to seventh defendants consequent upon the Liability Judgment (“the Quantum Trial Directions Order”). By the Quantum Trial Directions Order, directions were given by the judge on a raft of case management matters, including disclosure, a case management conference for the filing and service of witness statements of fact, and permission for the filing by the parties of their respective expert witness reports on the valuation of the Target Group, as at certain specified dates. The Quantum Trial Directions Order also included at paragraph 14:

“Trial Date and Pre-Trial Review

14. The parties shall be at liberty to apply for pre-trial review and for further directions (including as to the timing and the time estimate of the trial on the issue of Quantum and Relief) on 7 days’ notice.”

Thereafter, a case management conference (“CMC”) was held before the learned judge on 31st October 2023 principally for the giving of directions for the Quantum Trial (“the Quantum

Trial CMC Order”). By the Quantum Trial CMC Order, the learned judge gave further directions regarding several important matters. These included a prohibition against the first to fifth and seventh defendants (appellants) producing and relying at the Quantum Trial on any documents disclosed after 31st May 2023 without first obtaining the permission of the court following an urgent application on notice to the claimants (respondents); the filing by the parties of witness statements of fact by the dates specified; permission for each party to adduce expert evidence by way of an expert report exchanged by 4:00 pm on 5th September 2023 on the issue of the valuation of the Target Group as at 15th September 2015 and matters ancillary thereto.

By notice dated 7th June 2023 (“the Quantum Trial Hearing Notice”) addressed and sent to the legal practitioners for the parties, the Registry of the Supreme Court in the Virgin Islands notified the parties of the trial dates of 14th, 15th, 16th and 22nd November 2023 fixed for the Quantum Trial. Receipt of the Trial Hearing Notice was acknowledged by Mr. Carrington KC of Kendall Law, legal practitioners for the first to fifth and seventh defendants, by email sent on 8th June 2023; and by Mr. Samuel of Conyers, legal practitioners for the claimants, on the said date. By email sent 20th June 2023 at 4:34 pm, Mr. Samuel of Conyers inquired of Mr. Carrington KC with regard to the said notice and whether the defendants’ counsel will be attending the quantum trial in person or virtually. By email sent that same day at 4:52 pm, Mr. Carrington KC informed Mr. Samuel: ‘We are still awaiting instructions, but I believe the intention is to appear virtually. What is the position on your side?’ Despite follow-up inquiries by Conyers to Kendall, nothing further of note was communicated by Kendall regarding the matters of the attendance of lead counsel for the said defendants via video link, whether the first to fifth and seventh defendants intended to file expert evidence as to the valuation of the Target Group, and/or the protocols for the giving of evidence of fact and expert evidence via video link.

On 30th October 2023, Kendall Law filed a notice of application for permission of the court to be removed from the record as legal practitioners for the first to fifth and seventh defendants in the Claim. The stated grounds were that the relationship between Kendall and the said defendants had broken down irretrievably; no purpose is therefore served by Kendall remaining on the record for the said defendants; and ‘The Application herein will be duly served personally on the defendants once filed’ (“the Kendall’s Removal Application”) The Kendall’s Removal Application was served on Conyers via email from Kendall on 31st October 2023 at 4:53 pm. By email sent 3rd November 2023, Conyers asked Mr. Carrington KC of Kendall to confirm whether, in light of the Kendall Removal Application, he would not be in a position to exchange skeleton arguments in advance of the dates listed for the Quantum Trial. This position was confirmed as correct by Mr. Carrington KC by reply email on 3rd November 2023.

The Kendall Removal Application was heard by the judge and granted. A copy of the order granting permission to Kendall to be removed from the record was not included in the record of appeal nor was a copy produced during the hearing in the court below giving rise to this appeal. There was no documentary or other evidence produced before the judge at

the hearing of the Set Aside Application establishing that Kendall had served the Kendall Removal Application personally on the first to fifth or seventh defendants to the Claim. However, there was evidence from Mr. Lock in his second affirmation ('Lock 2') that Kendall had in fact emailed the Kendall Removal Application to Mr. Lock (the appointed representative for the said defendants in the proceedings in the court below), but the said email was stored in his junk mail folder and was, like some other emails from Kendall, caught up in the alleged junk mail incident which he, Mr. Lock, had experienced from 19th August 2023. This junk mail incident was the main reason relied on by the appellants for their non-attendance and non-representation at the Quantum Trial, and the primary basis on which they sought to convince the learned judge that they had made out in their Set Aside Application a 'good reason' for their non-attendance.

Prior to the filing of the Kendall Removal Application, and having not received any definitive response from Kendall to their lines of inquiry, Conyers wrote to the Registrar of the High Court on 6th October 2023 inviting the judge to make a further order for directions on papers with regard to the protocols for video link evidence of fact and expert evidence, and a revision of the trial listing from 4 days to 3 days 'given the defendants are now precluded from adducing expert evidence'. This resulted in a formal order being made by the judge on the papers dated 7th November 2023 : (i) vacating the 4th day (22nd November 2023) of the trial listing; (ii) setting out the arrangements for video-link evidence for the Quantum Trial in the Schedule to the said order; and (iii) prescribing the court's sitting times for each day of the Quantum Trial.

The Quantum Trial took place on 14th November 2023 as conveyed to the parties by the Notice of Trial Dates, as modified by the Further Directions Order. The transcript of the trial record shows that appearances were entered for the claimants and no appearance was made or entered for or on behalf of the first to fifth and seventh defendants. Learned counsel for the claimants (respondents) is recorded as informing the judge that – 'The defendants have chosen not to participate and are not being represented in this phase of the proceedings.' At the Quantum Trial, the claimants' expert witness Mr. Ben Johnson, gave evidence regarding the methodologies, analysis, opinions and conclusions in his filed expert report on the value or range of value of the Vanway subsidiaries, the Target Group. Mr. Johnson estimated the market value of the Target Group to be 'between HK\$133.8 million and HK\$441.1 million.' At the hearing, learned counsel for the claimants invited the judge to determine the value of the Target Group at the top end of the Johnson range, that is HK\$441.1 million. This position was accepted and adopted by the learned judge for the reasons stated when delivering his *ex tempore* decision on quantum and relief.

By the Set Aside Application filed on 11th December 2023, the appellants sought an order, inter alia, setting aside the Order on Relief and for a stay of the said Order. The grounds relied on in the Set Aside Application were (1) that the appellants (first to fifth and seventh defendants) had not received notice of the dates fixed for the Quantum Trial; and (2) the appellants had a good reason for not attending the Quantum Trial and had they attended and been represented and responded to the respondents' evidence at the said trial, it is likely that some other judgment or order might have been given or made. In support of the Set Aside Application, the appellants relied on three affidavits – two in support and one in response to the evidence filed by the respondents in opposition to the said application.

In his *ex tempore* judgment made 14th November 2023, the learned judge dismissed the Set Aside Application with costs to the claimants. The court's order provides: (1) the [Set Aside Application] be dismissed;(2) costs of the [Set Aside Application] are to be paid by the first to fifth and seventh defendants jointly and severally to the claimants, to be assessed if not agreed within 21 days of the date of this Order; (3) an interim payment on account of costs to be paid by the first to fifth and seventh defendants jointly and severally to the claimants in the amount of US\$173,500.00 within 14 days of the date of this Order.

The appellants, (being the first to fifth and seventh defendants) appealed the judge's dismissal of the Set Aside Application and the other orders made consequent upon its dismissal. In their Amended Notice of Appeal filed 25th February 2025, the appellants rely on seven grounds of appeal. The appellants sought orders of this Court allowing the appeal and setting aside the Dismissal Order with costs and/or setting aside the Order on Relief and ordering a re-trial of the Quantum Trial before a different judge. Some of the grounds of appeal overlap to some extent with or concern certain common or similar issues such that they were conveniently considered and dealt with together.

Before the learned judge, the central issue or main question for determination was whether the appellants (first to fifth and seventh defendants) have on the evidence adduced in support of the Set Aside Application, satisfied the requirement of a 'good reason' for setting aside the Quantum Judgment and Order on Relief made in their absence. In the appeal the central question is whether the learned judge, in his assessment of the evidence, adopted, contrary to the principles and guidance in English case law, an 'overly rigorous' and too technical approach to determining under **CPR 39.5(5)(a)** whether the appellants had a 'good reason' for not attending the Quantum Trial; and whether in adopting that approach, committed blatant errors of principle and made erroneous findings of fact such that this Court ought to set aside these findings and his dismissal of the Set Aside Application.

Held: dismissing the appeal, ordering that the appellants pay the respondents' costs of the appeal to be assessed by a judge of the Commercial Court or a Master, if not agreed by the parties within 21 days of the date of this judgment, that:

1. The starting point when considering an application to set aside a judgment or order made in the absence of the applicant/party is rule 39.5 of the **CPR**. Properly construed, rule 39.5 provides for three distinct categories of set aside applications, each governed by a specified test. The first category of set aside applications are those where the evidence establishes that there has been no notification of the trial date to the applicant/party or their legal practitioner (the 'no trial date notification' category) and is governed by rule 39.5(4). The second category (all other cases) consists of two distinct limbs and are governed, respectively by sub-paragraphs (a) and (b) of rule 39.5(5). Under the first limb (sub-para. (a)) the test is two-fold and cumulative. The first is, the 'good reason' test and the second is had the applicant or their legal practitioner attended the trial or hearing whether it is likely that some other judgment or order would have been given or made. The third category (sub-para. (b)) is whether the applicant/party has on the evidence

established that there are exceptional reasons why the judgment or order ought to be set aside (the “exceptional reasons” test).

Rule 39.5 of the **Eastern Caribbean Supreme Court Civil Procedure Rules (Revised Edition) 2023** applied.

2. In the first category of set aside applications under rule 39.5(4) (the no trial date notification category) where the evidence adduced shows, to the court’s satisfaction, that neither the party against whom the judgment was made or their legal practitioner was ‘notified’ of the date fixed for the trial at which the judgment or order sought to be set aside was given or made, the judge has no discretion, and the judgment or order must, without more, be set aside. This first category, and the mandatory dictates of its operation, is in keeping with the overriding objective under the **CPR** for the court to deal with cases justly. More fundamentally, it is in keeping and expressive of a litigant’s fundamental constitutional right to equality before the law and equal protection and benefit under the law, and the right to a fair hearing or trial before an independent and impartial court. These fundamental rights include the right not to have a matter or claim tried by a court in the absence of a party, without that party’s having had prior notification by the court of the date, time, and place of the trial or hearing. The right to a fair trial, which underpins most modern democracies, is enshrined in and protected under Article 6 of the **European Convention on Human Rights** (right to a fair hearing), which Convention has been extended by the United Kingdom and made applicable to the Territory of the Virgin Islands (“BVI”).
3. The second category of set aside applications under rule 39.5(5) is ‘all other cases’. These are cases where the evidence establishes that the applicant for such relief or their legal practitioner had been notified of the trial date but failed to attend the hearing. It is only where an application is made under sub-paragraph (a) of rule 39.5(5) that the evidence adduced in support of the application must show that (i) the applicant/party had a ‘good reason’ for failing to attend the hearing or trial; and (ii) had they attended, some other judgment or order might have been given or made by the court. These two requirements are cumulative. Where a set aside application is made under subparagraph (b) of rule 39.5(5) (the third category), the test is a higher one and the applicant must, on the evidence, show that there were ‘exceptional reasons’ why the judgment or order should be set aside.. This third category is where an applicant is or may be unable to satisfy either or both of the cumulative requirements of the second category under rule 39.5(5)(a).
4. The test of what is or constitutes a ‘good reason’ under rule 39.5(5)(a)(i) is fact sensitive, and a good reason in one case may not necessarily be a good reason for non-attendance in another. Accordingly, a judge must consider all the evidence relevant to the applicant’s non-attendance, determine what was the real reason for their non-attendance, and come to a conclusion as to whether that reason or reasons, taken singularly or cumulatively, amounts to a ‘good reason’ for their

non-attendance in the circumstances of that matter, warranting setting aside of the judgment or order given or made in their absence.

5. In deciding whether the evidence amounts to a good explanation or good reason for the applicant's non-attendance, the judge ought not to adopt 'too rigorous' or an 'overly rigorous' or too technical an approach to his assessment of what amounts or is capable of amounting to a 'good reason'. This not too rigorous approach is of particular significance, where the claim is for a large sum of money or for the ownership of assets or rights thereto or recovery of assets or rights which are of considerable value, and where the defendant has either a defence with a reasonable prospect of success to the claim or part of the claim, or where the defendant has a reasonable prospect of challenge to the amount claimed or awarded to the claimant or where the refusal to set aside the judgment or order will have very serious financial or other consequences for the defendant.
6. In adopting a not too rigorous approach to his assessment of the applicant's evidence, the judge must bear in mind that the underlying policy of the court under the **CPR** is to discourage unwarranted waste of the court's resources and not to encourage or to facilitate in any way a party seeking to use the set aside process as a means of stymieing the claim or prolonging or delaying unjustifiably the outcome of a legitimate claim and avoid finality of the proceedings. Also, in coming to a decision on whether the applicant's evidence is capable of supporting a 'good reason' for non-attendance, the judge must consider this question taking into account all the evidence adduced. In this regard, the judge is entitled to make reasonable findings of fact, bearing in mind that where questions have been raised as to whether the applicant's evidence on affidavit(s) or important elements of it ought to be believed, the court invariably will not have the benefit of such evidence having been tested by cross-examination.

Section 16(1) of the **Virgin Islands Constitution Order 2007** applied; Article 6 of the **European Convention on Human Rights** applied; Rule 39 of the **Eastern Caribbean Supreme Court Civil Procedure Rules (Revised Edition) 2023** applied.

7. When dealing with an application under rule 39.5(5)(a)(i) ('good reason') to set aside a judgment or order given or made in their absence, the judge must assess the evidence adduced by the applicant in support of his/her set aside application to establish that he has a 'good reason' for non-attendance. The decision whether to set aside the judgment or order on the basis of a 'good reason' for non-attendance, is a matter of judicial discretion exercised on the basis of the evidence adduced as to whether a 'good reason' in fact existed, which either prevented or resulted in the non-attendance of the applicant at the trial or hearing, notwithstanding that the applicant and/or their legal practitioner had prior notice of the trial or hearing. In deciding whether the applicant has shown on the evidence a 'good reason' for their non-attendance, the judge must consider whether the evidence or explanation offered is of the type and quality such that it is capable of

belief. If it is not, that is the end of the matter, and the application ought to be dismissed. If it is intrinsically capable of belief, the judge must evaluate whether the evidence, even with some shortcomings, amounts to a 'good reason' for non-attendance.

8. A party to litigation must take a proactive interest in the litigation and in protecting and advancing their interest in its outcome. It is therefore not good enough for a party not to have in place a 'proper system' or, if they have put a system in place, not to see to its continued effectiveness. Where that system has in some respects broken down, it may be necessary to take the steps to either remedy the issues with it or to put in place some other system which is better or more reliable and effective. The necessity for a proper and effective litigation system becomes even more crucial when, to the party's knowledge, as in the instant matter, the litigation is ripe for a trial of the dispute, and the setting by the court of a trial date or dates is imminent, or where a trial window has already been set by the judge, subject to its confirmation.

Brazil v Brazil [2002] EWCA Civ 1135 applied; Rule 39 of the Eastern Caribbean Supreme Court Civil Procedure Rules (Revised Edition) 2023 applied.

9. Where the applicant's evidence in support of the set aside application, reasonably considered, shows an absence of any proper litigation system for receiving communications from the court or the other party, or there has been a failure of the system put in place by the party, the evidence must be examined carefully to ascertain whether the failure or failures are attributable to the applicant and whether any such failures are or can constitute a 'good reason' for the applicant's non-attendance. A factor of obvious significance to the court's exercise of its discretion is the second limb of the cumulative requirements of rule 39.5(5)(i), that is, whether had the applicant attended the trial or hearing, it is likely that some other decision, judgment or award may have been made by the court, as the judge found in this matter. However, both limbs of this rule must be satisfied, and the failure of an applicant to satisfy either of them will result in the application being dismissed, unless the applicant can demonstrate on the evidence, where reliance has been placed on the third category of set aside applications, an 'exceptional reason' why the judgment or order should be set aside under rule 39.5(5)(b).

Rule 39 of the Eastern Caribbean Supreme Court Civil Procedure Rules (Revised Edition) 2023 applied.

10. It is clear that the learned judge considered the various explanations and reasons given in the evidence advanced and relied on by the appellants and in their submissions, in seeking to satisfy the 'good reason' limb of the test under rule 39.5(5)(a) for not attending the Quantum Trial. In doing so, the learned judge dealt with most if not all of the important points and evidential issues and factors relied on by the appellants in reaching his decision to dismiss the Set Aside Application. The learned judge examined in some detail the evidence adduced by the appellants, especially the evidence of Mr. Lock as to the alleged junk mail incident

and when it commenced. He considered and analysed each of the factors or reasons relied on by the appellants and by Mr. Lock in both of his affirmations. He found or held in relation to each of them that they did not, in his assessment and judgment, constitute a 'good reason' as a matter of fact and law; that the appellants had not discharged the burden on them to demonstrate that they had a 'good reason' for their non-attendance at the Quantum Trial; and dismissed the Set Aside Application having found none of the reasons to constitute a 'good reason'. By this approach and findings, the learned judge concluded that he was obliged under rule 30.9(5) to dismiss the Set Aside Application. In doing so, the learned judge did not apply too rigorous or technical an approach to his evaluation of the appellants' evidence in support of the Set Aside Application and did not take irrelevant matters into consideration nor did he fail to take relevant matters into account. Accordingly, there is no basis upon which this Court can or ought to disturb the judge's findings and exercise of discretion.

JUDGMENT

- [1] **FARARA JA [AG.]:** This is an interlocutory appeal filed by the appellants on 25th February 2025 with the permission of the court below, from an *ex tempore* judgment ("the judgment") and order of a learned judge of the Commercial Division of the High Court of Justice in the Virgin Islands ("BVI") made on 30th April 2024. By the judgment and order the learned judge dismissed the appellants' notice of application filed on 11th December 2023 ("the Set Aside Application") to set aside an order made by the judge on 14th November 2023 ("the Order for Relief") at the conclusion of the quantum phase of the trial in Claim No. BVIHC (Com) 2017/0086 ("the Claim"), a split trial having been ordered and directed on 19th November 2018 at a case management hearing in the Claim, for the payment of equitable compensation and pre-judgment interest to the respondents in the aggregate sum of approximately US\$97 million.

Procedural Background

Claim and order for split trial

- [2] The Claim was commenced in 2017 as a derivative action brought by the first to sixth respondents as minority shareholders in Vanway International Group Limited ("Vanway" or "the Company"), a company incorporated under the laws of the BVI

and the eight named respondent/defendant in the Claim, with the permission of the High Court granted by order dated 6th July 2017. The Claim was brought on behalf of the first to sixth respondents themselves and on behalf of all other shareholders in Vanway against the first to fifth and seventh named defendants/appellants, and Chau Cheuk Wah, Angus - the sixth named defendant to the Claim. The order made on 6th July 2017 to commence derivative proceedings also included an order that the claimants (the respondents in this appeal) be indemnified out of the assets of Vanway in respect of the costs of the said derivative action.

[3] In brief, the respondents alleged that the appellants had breached their common law fiduciary duties owed to Vanway and their statutory duties under sections 120 and 122 of the **BVI Business Companies Act, 2004**¹ (“BCA”) to exercise the care, diligence, and skill of a reasonable director in the particular circumstances of this case, when, in August and September 2015, the Board of Directors of Vanway approved the sale of the Company’s operating subsidiaries (referred to collectively as “the Target Group”), to the first defendant/appellant, Mr. Lau; and convened an Extraordinary General Meeting (“EGM”) of members on 15th September 2015 at which the majority of members approved the said sale of the Target Group at a gross undervalue.

[4] By order dated 19th November 2018 at a case management conference the learned judge, *inter alia*, ordered that the issue of liability be determined at a trial and the question of relief be stood over for direction of the trial judge (“the CMC Split Trial Order”).

Liability Trial

[5] The Liability Trial spanned 22 trial days in November and December 2019, July 2020 and February 2021. The written judgment on liability was delivered by the court on 11th August 2021 (“the Liability Judgment”). By the Liability Judgment

¹ Act No. 16 of 2004, Laws of the Virgin Islands.

(comprising 376 paragraphs), the learned judge found that the allegations against the first to seventh defendants pleaded at paragraphs 9,31,46 (as against the first defendant only), paragraph 49 (as against the second to seventh defendants only) and paragraph 52 of the Amended Statement of Claim, had been substantially made out. Accordingly, the court held that the claim against the first to seventh defendants succeeded, and he would hear the parties further in relation to any consequential matters.

- [6] The formal order of the court on the finding of liability is dated 5th October 2021 (“the Liability Order”). By the Liability Order, it was ordered that the claims against the first to seventh defendants succeed. It was also ordered and directed, *inter alia*, that the claimants were to file and serve a notice of application with evidence in support in relation to the consequential orders sought in relation to: (a) relief (b) costs; and (c) further directions for determination of quantum by 4:00 pm on the 22nd day after the entry of this Order; the defendants were ordered to file and serve any evidence in response by 4:00 pm on the 22nd day after service of the claimants’ evidence; the claimants were given until 4:00 pm on the 15th day after service of the defendants’ evidence to file any evidence in response; and it was also ordered that a hearing, estimated at one day, be listed by the Registrar of the High Court for the first available date after 27th October 2021 ‘to determine matters consequential upon judgment and/or such further directions (including, if appropriate, as regards quantum) as may be necessary’, and a date shall be fixed by the Registrar to determine matters consequential upon the Liability Judgment and/or such further directions (including, if appropriate, as regards quantum) as may be necessary.

First Quantum Trial Directions Order 10th December 2021

- [7] By order dated 10th December 2021 the learned judge gave directions for determining the issues of quantum and relief against the first to seventh defendants consequent upon the Liability Judgment (“the Quantum Trial Directions Order”). By the said Directions Order, directions were given by the judge on a raft

of case management matters, including disclosure, a case management conference, for the filing and service of witness statements of fact, and permission for the filing by the parties of their respective expert witness reports on the valuation of the Target Group as at certain specified dates. The Quantum Trial Directions Order also included at paragraph 14:

“Trial Date and Pre-Trial Review

14. The parties shall be at liberty to apply for pre-trial review and for further directions (including as to the timing and the time estimate of the trial on the issue of Quantum and Relief) on 7 days’ notice.”

- [8] As matters continued to unfold, an appeal by the first to fifth and seventh defendants against the Liability Judgment was filed. This appeal on the issue of liability was dismissed by this Court in a written judgment delivered on 7th July 2023. There has been no further appeal by the appellants against this dismissal.

Quantum Trial CMC Order 31st October 2023

- [9] Thereafter, a case management conference (“CMC”) was held before the learned judge on 31st October 2023 principally for the giving of directions for the Quantum Trial (“the Quantum Trial CMC Order”). By the Quantum Trial CMC Order, the learned judge gave further directions regarding several important matters. These included a prohibition against the first to fifth and seventh defendants (appellants) producing and relying at the Quantum Trial on any documents disclosed after 31st May 2023 without first obtaining the permission of the court following an urgent application on notice to the claimants (respondents); the filing by the parties of witness statements of fact by the dates specified; permission for each party to adduce expert evidence by way of an expert report exchanged by 4:00 pm on 5th September 2023 on the issue of the valuation of the Target Group as at 15th September 2015 and matters ancillary thereto. With respect to the trial dates and pre-trial review, the Quantum Trial CMC Order provided at paragraphs 11 to 15:

“Trial Date and Pre-Trial Review

11. The issue of equitable compensation and/or damages on account of the loss suffered by the Company and payable by the first to seventh

defendants as a result of their breaches of duty and/or breach of trust for, *inter alia*, unlawful sale of the Target Group by a gross undervalue be determined at trial (the “Trial”).

12. The Trial [i.e. the trial on quantum] shall be set down for hearing during the period 14 - 22 November 2023, subject to court availability and the availability of counsel and witnesses with a provisional time estimate of 4 court days. (emphasis added)

13. Permission is granted for ‘video-link evidence from witnesses of fact and expert witnesses. The Registrar is to approve sitting times of the court for the Trial. The parties are to agree a protocol for video-link evidence and arrangements for use of interpreters at Trial (if any) by 4 p.m. on Friday 7 July 2023, failing which a short hearing would be listed to determine any remaining areas of disagreement.

14. The parties shall indicate by letter to the court, whether counsel will be attending the Trial virtually or in person by 4 p.m. on Wednesday 21 June 2023.

15. The parties shall have liberty to apply for a pre-trial review and for further directions (including as to the timing and time estimate of the trial on the issue of Quantum and Relief) on 7 days notice.”

[10] At the CMC on 31st October 2023, the learned judge is recorded as making the following statements regarding setting the dates for the Quantum Trial:

“THE COURT: Then I can order that **in principle** the matter should be set down for the quantum trial or however it is defined in this Order, to be set down for the 14th, in the window of the 14th to the 22nd of November. (Vol.2 p. 981 L 15-19) (emphasis added)

THE COURT: So the wording on that is that the trial of the issue of quantum relief, the issue of quantum, the trial on the issue of quantum relief will, **in principle, or shall in principle** be set down over four days between the 14th to the 22nd of November inclusive. (Vol.2 p.982 L1-6) (emphasis added)

THE COURT: Okay that should be included in the Order. (Vol.2 p, 982 L13-14)”

Notice of Quantum Trial Dates

[11] By notice dated 7th June 2023 (“the Quantum Trial Hearing Notice”) addressed to the legal practitioners for the parties (then, Conyers for the claimants and Kendall

Law for the first to fifth and seventh defendants), the Registry of the Supreme Court in the Virgin Islands notified the parties of the trial dates of 14th, 15th, 16th and 22nd November 2023 fixed for the Quantum Trial² in these terms:

“Please be advised that the four days Trial **has been scheduled** for hearing on 14th, 15th, 16th and 22nd November 2023 before His Lordship, the Honourable Justice Wallbank for four (4) days at the Commercial Court Road Town Tortola British Virgin Islands.

Dated the 7th June 2023” (emphasis added)

- [12] Receipt of the Trial Hearing Notice was acknowledged by Mr. John Carrington, KC of Kendall Law by email sent at 3:54 am on 8th June 2023; and by Mr. Jerry Samuel of Conyers on the said date at 12:36 pm. By email sent 20th June 2023 at 4:34 pm, Mr. Samuel of Conyers inquired of Mr. Carrington KC with regard to the said notice and whether the defendants’ counsel will be attending the quantum trial in person or virtually. By email sent that same day at 4:52 pm, Mr. Carrington KC informed Mr. Samuel: “We are still awaiting instructions but I believe the intention is to appear virtually. What is the position on your side?” Despite follow-up inquiries by Conyers to Kendall, nothing further of note was communicated by Kendall regarding the matters of the attendance of counsel via video link, whether the first to fifth and seventh defendants intended to file expert evidence as to the valuation of the Target Group, and/or the protocols for the giving of evidence of fact and expert evidence via video link.

Kendall Law’s Removal Application

- [13] However, what followed was that Kendall Law, on 30th October 2023, filed a notice of application for permission of the court to be removed from the record as legal practitioners for the first to fifth and seventh defendants in the Claim.³ The stated grounds were that the relationship between Kendall and the said defendants had broken down irretrievably; no purpose is therefore served by Kendall remaining on the record for the said defendants; and ‘The Application herein will be duly served

² Exhibit HB Vol.2 Tab 8 p.728-729.

³ Vol 2 p.772.

personally on the defendants once filed.’ (“the Kendall Removal Application”) The Kendall Removal Application was served on Conyers via email from Kendall on 31st October 2023 at 4:53 pm.⁴ By email sent 3rd November 2023, Conyers asked Mr. Carrington KC of Kendall to confirm whether, in light of Kendall’s Removal Application, he would not be in a position to exchange skeleton arguments in advance of the dates listed for the Quantum Trial. This position was confirmed as correct by Mr. Carrington KC by reply email on 3rd November 2023.⁵

[14] The Kendall Removal Application was heard by the judge and, apparently, granted. I say ‘apparently’ because a copy of the order granting permission to Kendall was not part of the record in the subsequent hearing in the court below giving rise to this appeal. It was not included in exhibit ‘WKY-1’ to Wong 1, nor was it included in the exhibit bundles to Lock 1 and Lock 2 (see below). Likewise, a copy of the said order was not included in the record of appeal and not produced to this Court during the hearing.

[15] Importantly, there was no documentary or other evidence produced before the judge at the hearing of the Set Aside Application establishing that Kendall had served Removal Application personally on the first to fifth or seventh defendants to the Claim. However, there was evidence from Mr. Lock in his second affirmation ‘Lock 2’ (see below) that Kendall had in fact emailed the Kendall Removal Application to Mr. Lock (the appointed or engaged representative for the said defendants in the proceedings in the court below), but the said email was stored in his junk mail folder and was, like some other emails from Kendall, caught up in the alleged junk mail incident which he, Mr. Lock, had experienced from 19th August 2023. This junk mail incident was the main reason relied on by the appellants for their non-attendance and non-representation at the Quantum Trial, and the

⁴ Ibid p. 777.

⁵ Vol 2 p. 776-777.

primary basis on which they sought to convince the learned judge that they had made out a 'good reason' for their non-attendance in their Set Aside Application.

Further Directions Order - 7th November 2023

- [16] Prior to the filing of the Kendall Removal Application and having not received any definitive response from Kendall to their lines of inquiry, Conyers had written to the Registrar of the High Court on 6th October 2023 inviting the judge to make a further order for directions on papers with regard to the protocol for video link evidence of fact and expert evidence, and a revision of the trial listing from 4 days to 3 days 'given the defendants are now precluded from adducing expert evidence'. This resulted in a formal order being made by the judge on the papers dated 7th November 2023⁶ : (i) vacating the 4th day (22nd November 2023) of the trial listing; (ii) setting out the arrangements for video-link evidence for the Quantum Trial in the Schedule to the said order; and (iii) prescribing the court's sitting times for each day of the Quantum Trial.

Quantum Trial

- [17] The Quantum Trial took place on 14th November 2023 as conveyed by the Notice of Trial Dates as modified by the Further Directions Order. The transcript of the trial records that appearances were entered for the claimants and no appearance was made or entered for or on behalf of the first to fifth and seventh defendants. Learned counsel for the claimants Mr. Jern-Fei Ng ("Mr. Ng") is recorded as informing the judge that – 'The defendants have chosen not to participate and are not being represented in this phase of the proceedings.'⁷
- [18] At the Quantum Trial, the claimants/respondents' expert witness Mr. Ben Johnson gave evidence regarding the methodologies, analysis, opinions and conclusions in

⁶ Vol. 2 pages 759-761.

⁷ Transcript Vol.4 p.1718 L 12-14.

his filed expert report on the value or range of value of the Vanway subsidiaries, the Target Group. At paragraph 5.42⁸ of his expert valuation report, Mr. Johnson estimated the market value of the Target Group to be 'between HK\$133.8 million and HK\$441.1 million.' At the hearing, learned counsel for the claimants invited the judge to determine the value of the Target Group at the top end of the Johnson range, that is HK\$441.1 million⁹. This position was accepted and adopted by the learned judge for the reasons stated when delivering his *ex tempore* decision on quantum and relief.¹⁰

Quantum Trial Order on Relief

[19] The order on relief and quantum¹¹ made by the judge at the conclusion of the Quantum Trial on 14th November 2023 ("the Order on Relief") stipulates as follows:

"1. The first to seventh defendants are jointly and severally liable to pay equitable compensation in the sum of USD\$55,730,000 (the "Equitable Compensation").

2. The first to seventh defendants are jointly and severally liable to pay prejudgment interest on the Equitable Compensation from the valuation date of 15th September 2015 to the date of this Order at a rate of 7% per annum (compounded annually) in the total sum of USD\$41,144,556.37 (the "**Pre-Judgment Interest**").

3. The first to seventh defendants shall pay the Equitable Compensation and prejudgment interest apportioned as follows within 28 days of the date of this Order, that is, by 4 p.m. on Friday December 15, 2023:

- a. the sum of USD \$7,430,000 in Equitable Compensation and the sum of USD \$5,484,569.36 in prejudgment interest to be paid directly to the claimants;
- b. the sum of USD \$48,300,000 in Equitable Compensation and USD \$35,659,987.01 in prejudgment interest to be paid directly to the Eighth Defendant.

4. Post-judgment interest at the rate of 5 percent per annum shall run on the Equitable Compensation set out at paragraphs 2(b)(i) and 2(b)(ii) from the date of this Order until the date of payment.

⁸ Page 59.

⁹ Transcript pages 1832 L 9-11.

¹⁰ Transcript pages 119 onwards - Vol. 4 Tab 16.

¹¹ Vol. 2 pages 245 – 247.

5. The first to seventh defendants are jointly and severally liable to pay the claimants' costs of the trial [the Quantum Trial], to be assessed if not agreed within 21 days.

6. The first to seventh defendants shall make an interim payment on account of the said costs liability in the sum of USD \$495,000, to be paid on or before 4:00 p.m. on Friday 15 December 2023."

Set Aside Application and evidence

[20] By the Set Aside Application (filed on 11th December 2023) the appellants sought an order, inter alia, setting aside the Order on Relief and for a stay of the said Order, on the grounds stated in the application. The grounds relied on in the Set Aside Application were (1) that the appellants (first to fifth and seventh defendants) had not received notice of the dates fixed for the Quantum Trial; and (2) the appellants had a good reason for not attending the Quantum Trial and had they attended and been represented and responded to the respondents evidence at the said trial, it is likely that some other judgment or order might have been given or made. In support of the Set Aside Application, the appellants relied on three affidavits -two in support and one in response to the evidence filed by the respondents in opposition to the said application.

Lau 1

[21] The appellants filed in support of the Set Aside Application the First Affidavit of Lau Sang, James (the first appellant/defendant) together with exhibit "LMS-1" ("Lau 1"). At paragraphs 5 and 6 of Lau 1, Mr. Lau deposed:

"5. I confirm that I have spoken with the second to fifth defendants and confirm that none of us were notified of the date fixed for the hearing of the trial on issues of quantum and relief (the "Trial") at any point in advance of the Trial.

6. On 30th November 2023, Yeung Yiu Chong (the fifth defendant) received a letter from Conyers dated 24 November 2023 serving the Order [Order for Relief dated 14th November 2023] exhibited at pages 1 to 5, I was first notified of the existence of the Order on the same day by

Kenneth Lock, my general advisor. Before 30th November 2023, none of the applicants knew that (i) the Trial had been fixed to take place on 14th-16th and 22nd November 2023; nor that (ii) the Trial had taken place and an Order had been granted requiring that the Applicants pay equitable compensation and interest to the Claimants directly and to the Eight Defendant.”

Lock 1

- [22] The appellants also filed on 11th December 2023 in support of the Set Aside Application the First Affidavit of Lock Wai Kit Kenneth (“Mr. Lock”) together with exhibit “LWK-1” (“Lock 1”). At paragraph 4 of Lock 1, Mr. Lock described himself as being ‘the applicants’ sole point of contact with their legal representatives in these proceedings.’ He stated at paragraph 4:

“...it appears that, from 19 August 2023, emails from the Applicants’ legal practitioners in these proceedings, Kendall Law (“**Kendall**”), were automatically filed to my junk mail folder. I do not know why; I have asked the Company’s external IT service-provider and, despite performing checks on my laptop on 6 December 2023, they are unable to state the cause.”

- [23] Mr. Lock addressed at paragraphs 9, 10 and 11 his role in the proceedings. He states:

“9. I currently serve as general advisor to the First Defendant, James Lau, in relation to a number of his different business interests and projects. I(sic) am responsible for strategy determination and implementation, operational flow enhancements, cash-flow management and investment in respect of most if not all of those business interests and projects. As such, my role advising Mr. Lau is not just limited to the Company’s business nor these proceedings. I am also a shareholder and co-founder of a biotechnology start-up company, **which takes up a significant portion of my time**. My partner in that venture leads the scientific aspects of that company, whilst I focus on the commercial side of the business, including strategy formulation, team set up, product pipeline development and monitoring of that company’s finances.” (emphasis added)

10. I have been assisting Mr. Lau in relation to the Eight Defendant (the “Company”) and its business since March 2021 and continue to do so. Prior to working with Mr. Lau, I was employed for almost 10 years within the strategy team of one of Hong Kong’s leading financial institutions. My previous responsibilities include the determination and implementation of

key strategic initiatives, coordination with business teams to identify areas of business efficiency improvement/enhancement, and identification and execution of M&A opportunities.”

- [24] At paragraph 11 of Lock 1, Mr. Lock specifically categorizes his role as one of ‘coordinating’ the proceedings on behalf of the appellants. In that role and function, all communications with Kendall Law are made through him:

“11. Since my involvement with the Company, I have been responsible for **coordinating** the proceedings on behalf of the Applicants. **All communications with the Applicants’ legal representatives are made through me.**” (emphasis added)

- [25] Mr. Lock continues at paragraphs 14,16 and 17 of Lock 1 to describe in some detail the mechanics of how his role as coordinator worked in practice with Kendall; and to also characterize his role as ‘managing’ the appellants involvement in the proceedings:

“14. In the event that Kendall required instructions, I would typically receive an email chasing me for a response marked urgent or with high importance. **Unless I received an email from Kendall, I would assume that there was nothing significant or material that needed to be addressed.** I do not have any legal qualifications or a legal background and **managing** the Applicants’ participation in the proceedings is not my primary focus; as mentioned, **I have many other responsibilities day to day and I relied exclusively on the Applicants’ legal practitioners to notify me of any impending deadlines.** (emphasis added)

16. The date of my last communication with Kendal, prior to 30 November 2023 was 18 August 2023. I can confirm that, as at that date:

(a) **I had been notified about the orders made at the Case Management Conference on 31 May 2023 (the “CMC”) (the “CMC Order”) and received a copy of a draft order which was intended to reflect those orders made (the “Draft CMC Order”) (a copy of the Draft CMC Order is at pages 5 to 9);** (emphasis added)

(b) It was my understanding that no dates had been fixed for trial;

(c) (omitted)

(d) I can see from the Draft CMC Order that (i) each party had been given permission to adduce an expert report from one expert on the valuation of the Target Group as at 15 September 2015; (ii) those reports were to be exchanged and those experts were to meet, before producing a joint report, in September 2023.

However, it was unclear to me that the parties would be producing and exchanging new reports, and in fact I **assumed** that the parties would be limited to relying on the reports that were filed and exchanged during the Liability Phase of the proceedings (on the basis that those reports had already dealt with the issue of valuation)

17. In the intervening period, I was extremely busy with my other roles and responsibilities and was not particularly focused on the proceedings. I did not keep a record of the deadlines in the proceedings and was not generally cognizant of those deadlines. I was completely reliant on Kendall to keep me apprised of anything which required urgent attention. The CMC Order had provided for a window in which the Trial would be listed, however, as I had not received any emails from Kendall (so I thought), I assumed that there was nothing for me to action and that the Trial had not yet been listed. I understood from previous discussions with the Applicants that it could take some time before the dates for the Trial were actually confirmed.”
(emphasis added)

[26] At paragraph 18 of Lock 1, he avers that it was on 30th November 2023 via a ‘WhatsApp’ message from Mr. Terence Yeung attaching a copy of a letter dated 24th November 2023 from the respondents’ legal practitioners, Conyers, enclosing a copy of the Order on Relief that he learnt that the Quantum Trial had already taken place and of the terms of the Order made by the court against the appellants. He immediately contacted Mr. Carrington KC of Kendall but does not disclose what was said during that conversation.¹² This ‘prompted’ him to check his junk mail box, ‘where I discovered numerous emails sent from Kendall and that all emails from Kendall since 19th August 2023 had been sent to my junk mail box.’ In proof of this averment, Mr. Lock exhibited at pages 11 to 12 of exhibit “LWK-1” a screenshot showing the emails from Kendall in his junk mail folder.

[27] Also, at paragraph 21 of Lock 1, Mr. Lock states that he had initiated a ‘forensic investigation’ from an IT expert into how the emails ended up in his junk mail. The report of Mr. Michael Chau, Professor of Innovation and Information Management at HKU Business School at the University of Hong Kong, is at pages 13 to 55 of

¹² See para 19.

exhibit “LWK-1”. After setting out his qualifications, identifying the computer and software systems used by Mr. Lock, summarizing the security measures including incorporating spam filters or anti-spam mechanisms (in Mr. Lock’s case “Enhanced Junk Filter”, and how these systems work, Professor Chau concludes in his report as follows:

“In the current case, it is highly possible that the email messages that went to the junk mail folder was not attended to by Mr. Lock as no notifications were sent and just like many other email users, he did not deliberately check the contents of the junk mail folder very frequently.”
“... The situation discussed in the current case is a very common and legitimate situation that may happen for any email user.”

Wong 1

[28] In response to Lau 1 and Lock 1, the respondents filed on 27th December 2023 the Affirmation of Wong Kar Yan, Catherine together with exhibit “WKY-1” thereto (“Wong 1”). Ms. Wong is a legal practitioner and associated lawyer of Conyers in the BVI. She referred to the assertion in Lau 1 that since 19th August 2023 Kendall’s emails to Mr. Lock were automatically filed in his junk folder as “the Alleged Junk Mail Incident”. It is asserted, however, that this, even if true, could not be the reason why the appellants failed to attend the Quantum Trial, as asserted.

[29] In seeking to make this assertion good, Ms. Wong relies on a detailed chronology of matters set out in the succeeding paragraphs of Wong 1 as illustrative of ‘a sustained pattern of non-engagement and an egregious lack of compliance with court orders in these proceedings which long preceded the Alleged Junk Mail Incident in August 2023.’¹³ It is also averred that the appellants’ month’s long lack of engagement in the proceedings in the court below (long before August 2023) contradicts the assertion at paragraph 8 of Lock 1 that “[i]t was always the Applicants’ intention to participate in the quantum phase of the Trial and to contest

¹³ Para 6.

the valuation of the assets”.¹⁴ The relevant background matters and chronology of events relied on by Ms. Wong in support of the respondents’ general assertions and categorization of the appellants’ reasons for their non-attendance at the Quantum Trial as not being a ‘good reason’ and not being believable, are set out in detail at:

- “(i) paragraphs 10 to 17 dealing with non-compliance with disclosure orders;
- (ii) paragraphs 18 to 23 dealing with “Failing to Engage on Listing of CMC”;
- (iii) paragraphs 24 to 29 on the subject of “CMC Hearing on 31 May 2023”;
- (iv) paragraphs 30 to 34 dealing with the “Listing of Trial”;
- (v) paragraphs 35 to 40 dealing with “Failure to Engage in Correspondence regarding counsel attendance at the Trial”;
- (vi) paragraphs 41 to 44 dealing with “Failure to Engage in Correspondence regarding video-link protocol”; and
- (vii) paragraphs 45 to 54 dealing with “Filing of expert reports in September 2023 and Correspondence leading up to the Quantum Trial”.

[30] At paragraphs 32 and 33 of Wong 1, it is noted that on 7th June 2023 the Registry of the High Court circulated a Trial Hearing Notice of the same date ‘which confirmed that the Quantum Trial was listed on 14th – 16th and 22nd November 2023’, receipt of which notice was acknowledged on the same day by Mr. Carrington KC of Kendall on behalf of the appellants. At paragraph 34, Ms. Wong makes the following point (which was accepted by the learned judge):

“34. As outlined below, it is inconceivable that the Trial Hearing Notice (dated and received by the parties on 7 June 2023) would not have been sent to the Applicants by Kendall prior to 19 August 2023 when the Alleged Junk Mail Incident began or would not have been otherwise communicated to the Applicants. The suggestion by Mr. Lock that it was his and by extension the Applicants’ understanding, as at 18 August 2023 ‘that no dates had been fixed for trial’ is implausible.”

[31] At paragraphs 49 to 51 of Wong 1, it is recorded that on 17th October 2023 Conyers sent a copy of their draft List of Principal Issue (for the Quantum Trial) to

¹⁴ Para. 7.

Kendall, but received no comments thereon from them; the trial bundles prepared by Conyers were filed between 18th and 20th October 2023 and served on Kendall, which firm acknowledged receipt of them on 23rd October 2023. It was also recorded at paragraph 52 that on 30th October 2023, Kendall applied to be removed from the record in the proceedings as representing the appellants.

- [32] At paragraph 55 of Wong 1, it is asserted that the Set Aside Application is founded solely on the Alleged Junk Mail Incident and even assuming this to be true, 'it is inconceivable that the applicants were unaware of the Trial date for the reasons advanced at sub-paragraphs a. to d.' As to the allegation of the appellants' failure to meet deadlines in the proceedings from February 2023 - some seven months before the Alleged Junk Mail Incident, these are chronicled at sub-paragraphs a. to e. of paragraph 56 of Wong 1; which pattern of disengagement is said to have continued all the way up to the Quantum Trial. Furthermore, it is alleged in Wong 1 that the Set Aside Application was made for an improper purpose intended to frustrate the proceedings.

Lock 2

- [33] In response to Wong 1, the appellants filed the Second Affirmation of Lock Wai Kit Kenneth on 9th January 2024 together with exhibit "LWK-2" ("Lock 2"). At paragraph 6, Mr. Lock deals with the question of whether the appellants had received the notice of the dates filed for the Quantum Trial:

"6. I note that much of Wong 1 relates to matters which are not relevant to the Set Aside Application. **Ultimately the Applicants did not receive notice of the dated fixed for the Trial, nor did they receive notice of Kendall's application to come off the record dated 30 October 2023—which I can see was purportedly served on me by email, and not personally on the Applicants.** As a result, the applicants did not attend, were not represented at and were not heard at the Trial. The Judge therefore valued the group companies transferred to Mr. Lau (the "Target Group") as at the date of sale by simply accepting the top of the valuation range put forward by the expert appointed by the Claimants, from which he derived the significant amounts payable under the Order for Relief."

[34] At paragraphs 9 to 14 of Lock 2, Mr. Lock addresses the matters addressed in Wong 1 concerning the procedural background and allegations of lack of credibility of the applicants/appellants' evidence in Lau 1 and Lock 1; Kendall's application to come off the record at paragraphs 17 to 19; and what actions the applicants would have taken had they appeared at the trial at paragraphs 20 (a) to (g). At paragraph 12, Mr. Lock addresses the Trial Hearing Notice dated 7th June 2023. He states:

"I can confirm that reading Wong 1 was the first time that I became aware of the Trial Hearing Notice. I have never previously seen a copy of the Trial Hearing Notice. I also note that none of the emails from Kendall **in my junk mailbox** attached or refer to the Trial Hearing Notice. (emphasis added)

[35] Regarding Kendall's application to be removed from the record, Mr. Lock averred at paragraph 17 of Lock 2 that having reviewed the emails from Kendall in his junk mail folder "I can see that Kendall filed the Kendall [notice of application] on 30 October 2023". He continues at paragraph 18:

"On 6 November 2023, Mr. Carrington purported to serve the Kendall NoA on the Applicants by email addressed to me (a copy of which can be found at page 480)... . At no point did the applicants accept service by email addressed to me and I understand that the applicants were not personally served with the Kendall [notice of application]. Had the applicants received the Kendall NoA, they would have at least attended trial and sought separate legal representation. However, the applicants were not in fact served with the Kendall NoA and, as a result, were not represented at the [Quantum] Trial."

[36] The statement at paragraph 18 of Lock 2 is clearly intended to be self-serving and seems to miss the point somewhat. The fact is (as Mr. Lock confirms) the Kendall Removal Application had been sent to Mr. Lock as, admittedly, the coordinator and manager of the litigation for the appellants. Had he, Mr. Lock, been aware of it one would have expected him to bring the said notice of application to the immediate attention of Mr. Lau and the other appellants. However, his explanation is that because of the junk mail incident which commenced on 18th August 2023 the email attaching the Kendall Removal Notice went automatically to his junk mail folder

and, consequently, neither he nor the appellants were aware of the said removal application filed by the appellants' then lawyers.

[37] I shall return later to these and other passages from the evidence filed both in support and in opposition to the Set Aside Application, when addressing the various grounds of appeal against the dismissal of the said application.

Order dismissing Set Aside Application

[38] In his *ex tempore* judgment made 14th November 2023¹⁵ the learned judge dismissed the Set Aside Application with costs to the claimants. The court's order¹⁶ provides:

- (1) the [Set Aside Application] be dismissed.
- (2) costs of the [Set Aside Application] are to be paid by the First to Fifth and Seventh Defendants jointly and severally to the Claimants, to be assessed if not agreed within 21 days of the date of this Order.
- (3) An interim payment on account of costs to be paid by the First to Fifth and Seventh Defendants jointly and severally to the Claimants in the amount of US\$173,500.00 within 14 days of the date of this Order.

The Appeal

[39] The appellants Lau Man Sang, James; Lung Hung Cheuk; Cheung Wing Sum, Albert; Ngai Hin Kwan, Albert; Yeung Yiu Chong and Zhang Gwo Wei (being respectively the first to fifth and seventh defendants to the Claim) appealed the judge's dismissal of the Set Aside Application and the other orders made consequent upon its dismissal. In their Amended Notice of Appeal filed 25th February 2025, the appellants rely on seven grounds of appeal which are set out in some detail therein. I do not consider it necessary to set out in full each and

¹⁵ Vol.1 Tab 1 pages 182 – 215.

¹⁶ Vol.1 Tab 2 pages 235-236.

every one of the seven grounds of appeal. Instead, I have attempted to compress below some of the unnecessarily long grounds of appeal capturing the salient issues or points canvased by each ground, which fall for this Court's consideration and determination. In doing so, I consider that grounds 1, 2 and 3 are the major grounds and, if decided in favour of the appellants, will be decisive of the appeal.

[40] The seven grounds of appeal are, with some edits, as follows:

Ground 1

The judge erred in adopting an **overly rigorous assessment** of whether the appellants had a good reason not to attend the Quantum Trial, leading to a contortion of the plain language of Mr. Lock's evidence. Instead, the judge in the absence of BVI case law ought to have been guided by the approach and principles given in the English Court of Appeal cases that when construing what amounts to a good reason, the court should not adopt an **unduly rigorous approach**, should give effect to the overriding objective of deciding cases justly and in compliance with Article 6 of the European Convention on Human Rights providing for the right to a fair hearing, which guidance the learned judge either misunderstood and/or failed to follow. In doing so, the judge unduly focused on the precise words used by Mr. Lock in his evidence leading to a number of errors of findings of fact.

Ground 2

The judge wrongly concluded that there was no evidence before him that Mr. Lock had not received a copy of the Listing Notice, when the natural meaning of his evidence was that he did not receive the Listing Notice from Kendall Law, leading the judge to prefer the interpretation of Mr. Lock's evidence that he had deliberately omitted to state that 'he did not receive the Listing Notice', meaning that he likely did receive it but did not read it, which conclusion was wrong.

Ground 3

The judge misunderstood the reasons being advanced by the appellants as collectively their 'good reason' for not attending the Quantum Trial and wrongly took the view that their 'good reason' included the fact that Mr. Lock was busy and had not focused on the proceedings. This led the judge to incorrectly conclude in his judgment that 'the fatal flaw in the Applicants' application is that they have not provided a good reason for not attending the trial, particularly with the period from the CMC up to the 18th of August ...' This conclusion was based on, the judge says, there being no evidence that Mr. Lock did not receive the Listing Notice from Kendall Law. Instead the appellants' 'good reason' was simply that they did not attend the Quantum Trial because they were not aware of it; they had not received the Listing Notice from Kendall Law; there was no evidence that the Listing Notice had been sent to or received by them; and the only evidence before the judge on the matter was that the appellants were not aware of the dates on which the Quantum Trial had been listed to be heard. Furthermore, the judge took no account of the fact that Kendall Law had failed to serve the appellants' personally with the notice to come off the record in breach of **Eastern Caribbean Supreme Court Civil Procedure Rules (Revised Edition) 2023 ("CPR")** 63.6 when reaching his unfounded conclusion that it was 'improbable' that Kendall Law had failed to send the appellants the Listing Notice (via Mr. Lock or otherwise).

Ground 4

The judge was wrong in concluding that Mr. Lock had been appointed as a litigation manager and therefore could not rely on Kendall Law to keep him apprised of deadlines. The appellants had retained the services of legal practitioners and, notwithstanding Mr. Lock's role, were entitled to rely on their legal representatives to ensure that they were aware of the date of the trial when (on the unchallenged evidence before the court) those representatives apparently ceased to receive communications from Mr. Lock.

Ground 5

The judge erred in finding that the appellants were irresponsible in entrusting the management of their litigation to an individual who was busy, not particularly focused on the proceedings and did not keep a record of any deadlines. In doing so, the judge failed to consider that the appellants themselves may not have known that Mr. Lock was extremely busy during the relevant period, not particularly focused on the proceedings and did not keep a record of any deadlines.

Ground 6

The judge failed to consider the appellants' arguments in respect of Kendall Law's failure to serve notice of their application to come off the record and/or the High Court's order permitting then to do so, in breach of **CPR** 63.6, which left the appellants unknowingly without representation in the period running up to and during the Quantum Trial, and had they been personally served by Kendall Law, they would have been alerted to Mr. Lock's non-communication, and either restored communications with Kendall Law or instructed new legal representatives. Either way the appellants would have been represented at and would have therefore attended the Quantum Trial. This is in and of itself a good reason that the appellants failed to attend the Quantum Trial, either through their lawyers, or themselves.

Ground 7

The judge was wrong and/or erred in concluding that, whilst the result was momentous, 'far reaching andcould be described as harsh for [the appellants] he was constrained by law' to find that the appellants had not demonstrated that they had a good reason for not attending the Quantum Trial, which he was not constrained by the law and it was entirely within his discretion to determine whether the reasons advanced by the appellants for not attending the Quantum

Trial amounted to a good reason for the purposes of CPR 62.5, which judicial discretion includes a requirement to give effect to the overriding objective of deciding cases justly and to comply with Article 6 of the European Convention on Human Rights (the right to a fair hearing). Further, given the enormity of the quantum of the Order for Relief (totaling US\$96 million) and in circumstances where the judge (i) determined that it was likely that had the appellants attended the Quantum Trial the court might have reached a different conclusion; (ii) accepted that ‘even at 1 percent, we are still at a million dollars ...’, so even a fairly small change in the amount that the court might order is going to be possibly significant...’; and (iii) accepted that ‘without the other side present, the court might be more inclined to accept more extreme positions than if both sides are there...and on those occasions to take a somewhat more middle line between the parties’, he failed to adequately consider the overriding objective and the extreme prejudice suffered by the appellants given the substantial and unprecedented payment order which has the effect of unjustly benefiting the Claimants.

[41] The appellants seek orders of this Court allowing the appeal and setting aside the Dismissal Order with costs and/or setting aside the Order on Relief and ordering a re-trial of the Quantum Trial before a different judge.

[42] In my considered view, some of the grounds of appeal overlap to some extent with or concern certain common or similar issues such that they may conveniently be considered and dealt with together. Indeed, learned King’s Counsel for the appellants, Mr. Quest, in his written submissions filed in the appeal on 25th February 2025, adopted, to some extent, a similar approach. Having dealt first with the ‘Background’ to the appeal, he then addressed grounds 1, 2 and 3 in the same section (albeit separately) of the skeleton as dealing, broadly, with the issue or question of **‘Misconstruction of Evidence on Account of Incorrect Legal Approach’**, dealing first with what the appellants considered to be the learned judge’s ‘primary reason’ for dismissing the Set Aside Application before going on

to deal with grounds 1, 2 and 3 of the appeal, and thereafter, grounds 4,5,6 and 7 separately.

- [43] By contrast, learned King's Counsel, Mr. Ng, for the first to sixth respondents, in his written submissions filed in opposition to the appeal on 18th March 2025, adopted a not entirely dissimilar approach to that of counsel for the appellants. By his approach, the respondents dealt first with the 'Background and the Judge's ex Tempore Judgment' under three headings, namely: 'Timeline before the Quantum Trial'; 'The Appellants provided no "good reason" for not attending'; and 'The Judge's Reasoning'. Next the respondents deal with the 'Relevant Legal Principles'. This they followed, finally, with section headed the 'Appellants' Grounds of Appeal are Without Merit'. It is under this latter section that they deal with grounds 1, 2 and 3 together, followed by grounds 4,5,6 and 7 separately.

Court's Approach to the Grounds of Appeal

- [44] Before the learned judge, the central issue or main question for determination was whether the appellants (first to fifth and seventh defendants) have, on the evidence adduced in support of the Set Aside Application, satisfied the requirement of a 'good reason' for setting aside the Quantum Judgment and Order on Relief made in their absence. In the appeal the central question is somewhat different. It is whether the learned judge, in his assessment of that evidence adopted, contrary to the principles and guidance in English case law, an 'overly rigorous' and too technical approach to determining under **CPR 39.5(5)(a)** whether the applicants/appellants had a 'good reason' for not attending the Quantum Trial; and whether in adopting that approach, committed blatant errors of principle and made erroneous findings of fact such that this Court ought to set aside these findings and his dismissal of the Set Aside Application.
- [45] I have framed the central question to be addressed in the appeal with a focus on the test of 'good reason' in **CPR 39.5(5)(a)** because the learned judge found that the second limb of the test (sub-paragraph (b) of rule 39.5(5)), that is, whether it is

likely that, had the appellants or their legal practitioners attended the Quantum Trial, the court might have given some other judgment or made some other order, had been satisfied. There has been no cross-appeal by the respondents from this finding and conclusion.

[46] With this approach in mind, I will examine and analyze first the provisions of rule 39.5 and the bases therein upon which an applicant for relief can invite the court to set aside a judgment or order made in the absence of that applicant/party. In this regard, the appellants state clearly that the appeal 'solely relates to the jurisdiction under CPR 39.5.'¹⁷ Next, I will consider the various issues and questions raised by grounds 1,2 and 3 challenging the learned judge's dismissal of the Set Aside Application. In doing so, I will pose five specific questions or issues for consideration following closely the order of treatment of these issues adopted by the parties.

[47] In my judgment it is prudent and convenient to address first (as did the parties) the overarching question of 'what was the primary reason for the judge's dismissal of the Set Aside Application', an issue on which the parties are not in agreement. The answer to this question will inform my consideration of the other questions or issues under grounds 1,2 and 3 and, ultimately, my approach to and consideration of the remaining grounds of appeal.

CPR 39.5

[48] The starting point when considering an application to set aside a judgment or order made in the absence of the applicant/party is rule 39.5 of the **CPR** which states:

"39.5 (1) A party who was not present at a trial at which judgment was given or an order made may apply to set aside that judgment or order.

¹⁷ See para. 7 of the appellants' skeleton.

(2) The application must be made within 14 days after the date on which the judgment or order was served on the applicant.

(3) The application to set aside the judgment or order must be supported by evidence on affidavit.

(4) If the evidence shows that the **party or legal practitioner was not notified of the date fixed for the trial** at which the judgment was given or the order made, the judgment or order **must be set aside**. (emphasis added)

(5) In all other cases, the evidence must show –

(a) that –

(i) there was a good reason for failing to attend the hearing; and

(ii) it is likely that, had the party or legal practitioner attended, some other judgment or order, might have been given or made; or

(b) exceptional reasons why the judgment or order should be set aside.”

[49] Properly construed, rule 39.5 provides for two (possibly three) distinct categories of set aside applications, each governed by a specified test. I say possibly three because the second category is comprised of two limbs each with its own stated test for determining the success of the application. The first category of set aside applications are those where the evidence establishes that there has been no notification of the trial date to the applicant/party or their legal practitioner (the ‘no trial date notification’ category) and is governed by rule 39.5(4). The second category (all other cases) consists of two distinct limbs and are governed, respectively by sub-paragraphs (a) and (b) of rule 39.5(5). Under the first limb (sub-para. (a)) the test is two-fold and cumulative, that is, the ‘good reason’ test and had the applicant or their legal practitioner attended it is likely that some other judgment or order would have been given or made. The second limb (sub-para. (b)) is whether the applicant/party has on the evidence established that there are exceptional reasons why the judgment or order ought to be set aside (the ‘exceptional reasons’ test).

- [50] The first category of set aside applications (r. 39.5(4)) is where the evidence adduced shows, to the court's satisfaction, that neither the party against whom the judgment or their legal practitioner was "notified" of the date fixed for the trial at which the judgment or order sought to be set aside was given or made. In these circumstances, the judge has no discretion, and the judgment or order must, without more, be set aside.
- [51] This first category, and the mandatory dictates of its operation, is in keeping with the overriding objective under the **CPR** for the court to deal with cases justly. More fundamentally, it is in keeping and expressive of a litigant's fundamental constitutional right to equality before the law and equal protection and benefit under the law, and the right to a fair hearing or trial before an independent and impartial court.¹⁸ These fundamental rights include the right not to have a matter or claim tried by a court in the absence of a party, without that party's having had prior notification by the court of the date, time, and place of the trial or hearing. The right to a fair trial, which underpin most modern democracies, is enshrined and protected under Article 6 of the **European Convention on Human Rights** (right to a fair hearing), which convention has been extended by the United Kingdom and made applicable to the BVI.
- [52] In the instant matter, were the court below to have been satisfied from the evidence adduced that the appellants, the first to fifth and seventh defendants to the Claim, or their legal practitioner had not been notified of the trial dates for the Quantum Trial, the judge would have been obligated, without more, under **CPR** 39.5(4) to set aside the order made 14th November 2023, the Order on Relief, and to proceed to set a date or dates for a new trial or retrial of the issue of quantum and relief, and to give such further directions as are appropriate or necessary for the trial.

¹⁸ See sections 12 and 16 Virgin Islands Constitutional Order 2007.

[53] The second category of set aside applications under rule 39.5(5) is 'all other cases'. These are cases where the evidence establishes that the applicant for such relief or their legal practitioner had been notified of the trial dates but failed to attend the hearing. It is only where an application is made under sub-paragraph (a) of rule 39.5(5) that the evidence adduced in support of the application must show that (i) the applicant/party had a 'good reason' for failing to attend the hearing or trial; and (ii) had they attended, some other judgment or order might have been given or made by the court. These two requirements are cumulative, as the learned judge observed.¹⁹ Where a set aside application is made under subparagraph (b) of rule 39.5(5), the test is a higher one and the applicant must, on the evidence, show not just that there were 'good reasons' for their non-attendance at the trial and had they attended some other judgment or order might have been given or made by the court, but even where they are unable to do so, that there are, on the evidence adduced, 'exceptional reasons' why the court ought to set aside the judgment or order obtained in their absence.

[54] While rule 39.5 deals, broadly, with two categories of set aside applications, with the second category ('all other cases') consisting of two distinct limbs, an applicant for relief is entirely free to rely in their set aside application on any one or both categories as a basis for setting aside a judgment or order given or made in their absence in civil proceedings. Depending on which ground or how many of these grounds an applicant relies on in their set aside application, this will inform the approach to be adopted by the judge and the applicable test in rule 39.5 to each category or limb of the application. This will also inform the issues to be considered and the evidence which the judge will need to assess, in arriving at a determination as to whether the application ought to succeed or not.

[55] It follows that where an application is made by a party under rule 39.5(1) to set aside a judgment or order made in their absence, the judge ought first to address his or her mind to the grounds upon which the application is made. That is, which

¹⁹ See Transcript Vol. 1 pages 185 L 16-21.

category or categories of set aside application the extant application falls or purports to fall within; and to embark upon an evaluation of the evidence relied on to satisfy the applicable test. If the applicant relies on the first category of set aside applications and on the evidence adduced in support, the judge is satisfied that notice of the trial had not been given to the applicant/party or their legal practitioner, the judge must set aside the judgment or order made in their absence, without more. In such circumstances, the court has no discretion to exercise under rule 39.5(4).

[56] Alternatively, if the court is satisfied on the evidence adduced that notice of the trial date(s) had been given either to the applicant/party or their legal practitioner, the judge must, where the applicant relies on the second category to ground his/her application, go on to consider the application under (depending on the grounds) either the cumulative test of 'good reason' and likelihood of some other judgment or order under subparagraph (a), or the test of 'exceptional reasons' under subparagraph (b) of rule 39.5(5); or both.

[57] However, in circumstances where the applicant, for example, has not relied on the 'exceptional reasons' ground in their set aside application, the judge need not go on to consider whether, on the evidence adduced, there are 'exceptional reasons' advanced by the applicant why the judgment or order should be set aside, unless, in his opinion, the evidence adduced strongly points to some exceptional reason why the judgment obtained in the absence of the applicant/party ought nevertheless to be set aside and the trial allowed to proceed with both sides present.

[58] With regard to the 'exceptional reasons' limb of the second or 'all other cases' category of set aside applications under rule 39.5, the important question is what constitutes 'exceptional reasons' for a court to set aside the judgment or order, absent any issue or proof that the applicant or their legal practitioner had not received notice of the trial, or a 'good reason' being shown for the applicant or his

legal practitioner's non-attendance at the trial and/or it being shown that had they attended the court is likely to have made some other judgment or order. In considering this question, one does not derive much guidance from case law, most of which concerns the issue of what is meant by a 'good reason' under **CPR** 39.5(5)(a)(i).

[59] In my opinion, with respect to the 'exceptional reasons' basis, the hurdle faced by an applicant is higher than merely arguable, and the evidence led in satisfaction of this ground must be clear and conclusive. Each case or application must be considered on its particular facts and, ultimately, the answer to the question is a matter for the judge's assessment of the supporting evidence in determining the outcome of an application based on this ground. It is therefore not possible or indeed desirable for a court to lay down any strict or binding rules or requirements of universal or general application.

[60] In my opinion, the evidence adduced by an applicant in support of a set aside application on the 'exceptional reasons' ground, must go fundamentally to the fairness, correctness or legality of the proceedings, or to the procedure adopted, or to the soundness, as a matter of law or principle, of the judgment or order sought to be set aside. The evidence adduced in support of this ground must establish some factor or factors which, singularly or in combination, cast great or serious doubt about the correctness of the judgment or order, or which demonstrates conclusively that a travesty of justice has occurred in the proceedings leading to the judgment or order which it is sought to have set aside.

[61] Such factors point conclusively to the unfairness of the proceedings to the applicant for the set aside order, or which are demonstrative of their illegality, unconstitutionality or to the lack of jurisdiction of the court, or that the court had been deliberately misled in the conduct of the proceedings by the other party to the litigation or the unjust beneficiary of the judgment or order, to which the applicant was not complicit. Examples of such factors would be where (i) the court

lacked jurisdiction to make the judgment or order; (ii) the other party lacked the necessary standing to seek the relief which they have obtained by virtue of the judgment or order sought to be set aside; or (iii) the claim, judgment or order was founded on some fraudulent or deliberately misleading documentary or other evidence, such as, forged document(s), the effect of which was to completely mislead the judge or to lead him or her to proceed on a false evidential basis in giving the judgment or in making the order sought to be set aside. However, it must be emphasized that these examples are not intended to be exhaustive.

[62] In the instant matter, the learned judge did not approach his consideration of the Set Aside Application in the manner outlined above. In delivering his *ex tempore* judgment, he did not closely analyze the provisions and requirements of rule 39.5. He did not observe that there are (at least) two, possibly three, categories of set aside applications under rule 39.5. He did not first consider whether the evidence adduced by the appellants disclosed that the first ground relied on by the appellants in the Set Aside Application (no notice of the Quantum Trial dates), had been established or made out to his satisfaction. Instead, the learned judge sought to conflate his consideration of the issue of notice or lack of notice of the trial dates (the first category issue), with his consideration and analysis of the cogency of the appellants' evidence as to a 'good reason' in satisfaction of the first limb of the cumulative test under rule 39.5(5), applicable to 'all other cases'.

[63] Respectfully, the approach adopted by the learned judge as outlined above was not a correct one. However, in my judgment, the errors of approach to rule 39.5 are not, in the circumstances of this matter, fatal leading to a reversal by this Court of the learned judge's decision to dismiss the Set Aside Application. I have reached this conclusion without hesitation because, in any event, it is uncontroverted that the appellants' legal practitioners had received the Notice of Quantum Trial Dates from the Court Office and, accordingly, the predicate requirement under rule 39.5(4) for making the mandatory order setting aside the judgment and order had not been met. This meant, in practical terms, that the

judge had to, inevitably, consider the Set Aside Application on the second ground and hence as falling within the category of set aside applications relating to ‘all other cases’ under rule 39.5(5)(a), and to consider the evidence adduced in applying the cumulative test of a ‘good reason’ and ‘likelihood the some other judgment or order might have been given or made’.

- [64] In applying the cumulative test under rule 39.5(5)(a), the learned judge first considered the second limb or second question, that is, had the applicants or their legal practitioners attended the Quantum Trial whether some other judgment or order, other than what was made in the Order on Relief, would have been made or given by the court. His conclusion on this, which has not been challenged on appeal, was, yes, it was likely²⁰ :

“So is it likely that the Court might come to a different conclusion? I find in favour of Mr. Quest [counsel below for the appellants] on that point. Now I think it is likely that the Court might come to a different conclusion.”

- [65] Having found for the appellants on the second limb of the test under rule 39.5(5)(a), the judge embarked upon a consideration of the first limb, the ‘good reason’ test. Unsurprisingly, much of the judge’s analysis of the evidence and reasoning relates to this limb of the test. His conclusions on this issue were:

“And for those reasons, the Applicants haven’t produced any satisfactory reason, and good reason or any real reason at all why they didn’t attend the trial.”²¹

“Where I think this take[s] us is that the big problem, the fatal flaw in the Applicants’ application is that they have not provided a good reason for not attending the trial, particularly with the period from the CMC up to the 18th of August when, on any view, in the Lock, and by necessary extension, the Applicants’ can, in South East Asia, they must have known that this trial was going to happen and they haven’t explained why it was that they did not come to the trial. So this Court does not accept, for those reasons, the attempted explanation given by Mr. Lock on behalf of the Applicants.”²²

²⁰ See Transcript Vol.1 pages 190 L20-24; pages 191 L12-15.

²¹ Transcript Vol. 1 page 213 L-4.

²² Transcript Vol 1 page 214 L 11-22.

“... I believe I am constrained by the law to find that the Applicants do not satisfy the first condition of the test, and that because the conditions are cumulative means that the application must stand dismissed....and that, ... will be the order of the Court.”²³

[66] As to notice of the Quantum Trial being given to the appellants themselves, the learned judge, having considered the issue in the context of the assertion of a ‘good reason’ for the appellants’ non-attendance, did not make a definitive finding that the first to fifth and seventh defendants had notice or did not have notice of the Quantum Trial Dates. Again this is not fatal as it is readily apparent from the evidence of Mr. Lock (considered and assessed by the judge) and from the way in which the judge reached his conclusion with regard to the issue of a ‘good reason’, that implicit in his reasoning and findings is that he was not satisfied that the appellants had established that they and Mr. Lock did not have notice of the Quantum Trial Dates. What the learned judge did find is that Mr. Lock, and by extension the appellants, had received the draft CMC Quantum Trial Order fixing a November 2023 trial window for the Quantum Trial. He also found it improbable that Mr. Carrington, KC of Kendall would not have sent the Trial Listing Notice to Mr. Lock by email; and he was not satisfied on the evidence of Mr. Lock that the appellants had established that Kendall had not sent the Listing Notice to Mr. Lock during the period 7th June to 18th August 2023. All these findings or reasons are challenged by the appellants in the appeal.

[67] At this juncture, it is opportune to go on to consider grounds 1, 2 and 3 of the appeal. These grounds put in issue what was the primary or central reason for the learned judge’s dismissal of the Set Aside Application, an issue on which both sides disagree; and the question of whether the learned judge adopted too rigorous an assessment of the evidence in support of the Set Aside Application and, in doing so, make errors of fact which ought properly to be set aside by this Court leading either to a rehearing by another judge of the Set Aside Application

²³ Transcript Vol 1 page 215 L 8-12.

or, alternatively, to this Court conducting its own assessment and coming to its own conclusion.

Grounds 1, 2 and 3

[68] Grounds 1, 2 and 3 can be distilled into the following five questions or issues:

- (1) Was the judge's primary reason for dismissing the Set Aside Application that there was no evidence, that Mr. Lock and by extension, the appellants, had not received from their legal practitioners, Kendall, a copy of the Trial Hearing Notice for the Quantum Trial? (**G. 2 - Primary Reason for Dismissal - Issue 1**)
- (2) Was a correct natural reading of Mr. Lock's evidence that he had not "received" the Trial Listing Notice from Kendall? (**G. 2 - Natural Reading of Lock's Evidence – Issue 2**)
- (3) Did the judge adopt an overly rigorous approach to his assessment of the appellants' evidence in considering whether they had a good reason for not attending the Quantum Trial, leading to a contortion of the plain language of Mr. Lock's evidence? (**G. 1 - Overly Rigorous Approach – Issue 3**)
- (4) Did the judge misunderstand or misinterpret the reasons advanced by the appellants as 'collectively' their good reason for not attending the Quantum Trial, and had he considered the appellants' reasons 'collectively' ought he to have decided that they provided a 'good reason' for their non-attendance? (**G. 3-Misunderstanding of 'collective' Good Reason – Issue 4**)
- (5) Did the judge take no or no sufficient account of the fact that Kendall had failed to serve the appellants personally with the Kendall Removal Application in breach of **CPR 63.6**, when reaching, unfoundedly, the conclusion that it was 'improbable' that Kendall had failed to send the Trial Listing Notice to the appellants via Mr. Lock or otherwise? (**G. 3-Finding it was improbable Kendal has failed to send Trial Listing to Lock - non-service of the Kendall Removal Application - Issue 5**)

[69] All five of these issues concern the broad question: Whether the learned judge adopted an overly rigorous and too technical an approach to his assessment of the appellants' evidence in support of the Set Aside Application leading to errors in findings of fact and to the judge wrongly dismissing the Set Aside Application.

[70] Before delving into consideration of grounds 1, 2 and 3, I make one further observation with regard to the grounds of appeal. Issue 5 above (ground 3 para.13) by which the appellants complain that ‘the judge took no or no sufficient account of that fact that Kendall had failed to serve the appellants personally with their notice of application to come off the record in breach of CPR 63.6 when reaching his unfounded conclusion that it was “improbable” that Kendall had failed to send to the appellants the Listing Notice (via Mr. Lock or otherwise)’ while similarly premised is not the same as the issue or challenge to the judgment posited by ground 6, by which the appellants contend that Kendall’s failure to serve the appellants personally with the Kendall Removal Application and the Order of Removal “was in and of itself a good reason” for the appellants’ failure to attend the Quantum Trial, and a matter which the learned judge failed to properly consider when reasoning his decision to dismiss the Set Aside Application. I will, therefore, first deal with the non-service of the Kendall Removal Application when dealing with Issue 5 above and later with the non-service of the said application and subsequent Removal Order on the appellants when dealing with ground 6. I will adopt the same approach as the parties and deal with Issue 5 (ground 3 para.13) when dealing with ground 6.

Grounds 1, 2 and 3

Appellants’ Submissions

[71] The appellants’ case on appeal as put by Mr. Quest KC, is that the evidence adduced by them in support of the Set Aside Application demonstrated, to the standard required in such applications, that the appellants had not been told and were not aware of (1) the Quantum Trial taking place on the dates that it did; and that (2) their legal practitioners, Kendall, had applied to the court to come off the record and had been by order of the judge, permitted to come off the record in the proceedings below shortly before the Quantum Trial was set to commence. It is also, the appellants’ overarching contention at paragraph 7 of their skeleton

argument filed in the appeal on 11th June 2025, that this appeal ‘solely relates to the jurisdiction [of the court] under CPR 39.5.’ More specifically, in the appeal the Court is only concerned with whether the learned judge was wrong to find that the appellants had not on the evidence adduced provided a ‘good reason’ for their non-attendance as that phrase is used and understood to mean in **CPR 39.5(5)(a)(i)**, the judge having found that the appellants had satisfied the second condition at sub-paragraph (ii) of what is accepted is a two-part cumulative test under rule 39.5(5)(a). The appellants rely on their skeleton argument filed 25th February 2025 (refiled 11th June 2025) and their skeleton argument in reply filed 11th June 2025 to the respondents’ skeleton argument filed 18th March 2025. To a considerable extent, the appellants’ skeleton in reply rehashes much of the points and submissions made in the original skeleton.

Issue 1- Primary Reason for Dismissal

[72] In addressing the first Issue posited above, it is the submission of the appellants that the ‘primary reason’ for the learned judge’s dismissal of the Set Aside Application ‘appears to be’ his conclusion that there is an absence of evidence that Mr. Lock did not ‘receive’ from Kendall the Trial Hearing Notice dated 7th June 2023, in the period between the CMC Quantum Trial on 31st May 2023 and the start of Mr. Lock’s alleged junk mail incident on 18th August 2023.²⁴ In support of this submission, the appellants rely on certain extracts from the judge’s *ex tempore* judgment²⁵ which extracts are helpfully set out (almost in full) at paragraph 18 of their skeleton argument. I shall return to consider those extracts, and others, later when analyzing the respective submissions of the parties on this issue.

Issue 2- Natural Reading of Lock’s evidence

²⁴ See appellants’ skeleton at para. 17.

²⁵ Transcript Vol 1 pages 212, 213 and 214.

[73] With regard to the second question posited, the appellants argue that by adopting too rigorous an approach to his assessment of Mr. Lock's evidence in Lock 1 concerning whether he and hence the appellants had notice of the Quantum Trial dates, the learned judge came to the incorrect and erroneous conclusion that the appellants had not proven on Mr. Lock's evidence that he had not received the Listing Notice from the appellants' legal practitioners, Kendall, and/or Mr. Carrington KC. They submit that had the learned judge properly considered Mr. Lock's evidence, and not applied an overly technical or linguistic approach to this assessment of his evidence befitting the interpretation of a contract or statute, he would have concluded that the natural reading of his evidence is that:

- i. Mr. Lock simply did not receive the Trial Listing Notice from Kendall; and (ii) when he checked his junk mail folder sometime after being sent a copy of the 24th November 2023 Order on Relief to see if a copy of the Trial Listing Notice had been attached to an email from Kendall or Mr. Carrington KC in that folder, he did so with the knowledge that he had not received a copy of the said Notice prior to 18th August 2023, otherwise there would have been no logical reason for him to have checked that folder.

[74] Reliance is also placed by the appellants on Mr. Lock's evidence in Lock 2 pertaining to the Trial Listing Notice, in which it is stated in summary that:

- (a) the first time he became aware of the existence of the Trial Hearing Notice was when reading the evidence filed on behalf of the respondents, Wong 1, in opposition to the Set Aside Application;
- (b) he had never previously seen a copy of the Trial Hearing Notice; and
- (c) none of the emails from Kendall in his junk mail folder attached or referred to the Trial Listing Notice.²⁶

[75] The appellants submit that in reasoning to his finding on this issue, the learned judge placed too technical and linguistic a meaning to certain of the individual words used by Mr. Lock in Lock 1. This approach led him into error and making

²⁶ Lock 2 para. 12.

adverse inferences not open to him based, incorrectly, on both the absence or non-use by Mr. Lock of certain specific words, and the appellants' decision (as stated in Lock 1) not to waive privilege over their communications with Kendall during the relevant intervening period.

[76] This approach, says the appellants, led the judge wrongly to conclude or to deduce or assume without evidence that Mr. Lock must have received the Trial Listing Notice from Kendall during the intervening period of 7th June 2023 to 18th August 2023, but he had not seen it because he was too busy with other matters and demands. This is a reference to the judge's conclusion that because Mr. Lock stated in Lock 1 that he had never 'seen' or 'been aware' of the Trial Hearing Notice, rather than stating that he had not 'received' it, meant that there was no evidence of him not receiving it and, therefore, it was not part of the appellants' case on 'good reason' that Mr. Lock had in fact not received a copy of the Trial Listing Notice.²⁷

[77] The appellants also argue that the judge having wrongly placed too much emphasis on the use by Mr. Lock of certain specific words and the absence of use of other specific words, led to his erroneous finding that the appellants had failed to establish that Mr. Lock had not received the Listing notice from Kendall. This interpretation of Mr. Lock's evidence, say the appellants, is apparent from the exchanges between the judge and Mr. Ng, Lead Counsel for the respondents, during his concluding submissions.²⁸ . Extracts of this exchange are set out in full at paragraph 20 of the appellants' skeleton and need not be repeated here. It is the appellants' argument that although this exchange did not form part of the judge's reasons for dismissal of the Set Aside Application, it demonstrates his thinking and reasoning, notwithstanding that he was later informed by the appellants' Lead Counsel that he was not entitled to draw adverse inferences as a result of a party's refusal to waive privilege over their communications.²⁹

²⁷ Ibid para. 20.

²⁸ At pages 82 L10-22 and 24; page 83 L 20; pages 84 L 5-17, 19 – 22.

²⁹ Para. 21.

[78] The appellants also submit that there was no application to cross-examine Mr. Lock on his affirmation evidence, and had he been cross-examined on this aspect of his evidence (above mentioned) where he stated that upon checking his junk mail folder he did not see the Listing Notice attached to any emails there, he would have been able to confirm on oath that he did not receive the Trial Listing Notice from Kendall during the intervening period 7th June 2023 to 18th August 2023. I would merely comment at this juncture, as the respondents have argued in their submissions, that this is a plainly impermissible attempt by the appellants to posit matters not evidence before the learned judge and to indulge in a dose of speculation as to what Mr. Lock's response would have been had he been subjected to cross examination on this aspect of his affidavit evidence.

[79] This notwithstanding, the appellants' substantive argument on this issue is that the correct interpretation which the judge failed to adopt on this issue is the natural meaning of Mr. Lock's words and evidence concerning his not 'seeing' the Trial Listing Notice when, at a later stage, he had checked his junk mail folder. The appellants also contend that their interpretation is borne out by the interpretation previously placed on Mr. Lock's evidence by Lead Counsel for the respondents, when he stated in submissions: "Mr. Lock claims that, by that date [18 August 2023], Kendall had not provided a copy of the Trial Hearing Notice or advised that the trial had been listed to take place between 14 -16 and 22 November 2023."³⁰ Here, I would comment that the crucial question is not what opposing counsel said or might have said in their submissions, but what is indeed the natural meaning of the words used by and the evidence provided by Mr. Lock when read fully and in its proper context.

Issue 3- Overly Rigorous Approach

³⁰ Para. 21 respondent's hearing skeleton dated 26th April 2024.

[80] This third question concerns the issue of whether the learned judge adopted ‘an overly rigorous approach’ to his assessment of the issue whether the appellants had a ‘good reason’ for not attending the Quantum Trial, and whether in doing so, it led him ‘to a contortion of the plain language of Mr. Lock’s evidence’. Integral to this question is what is meant by the phrase ‘good reason’; and what is the applicable test in assessing the evidence adduced and the reason or explanation advanced by an applicant for their non-attendance. The appellants contend that the applicable test is not whether the evidence adduced is necessarily ‘correct’ but it was ‘capable of belief’. Further, it is argued that in none of the English cases relied on is it suggested that the test of a ‘good reason’ is similar to any standard of care as, for example, in negligence or whether the applicant for relief acted without fault. Put simply, the question is one of fairness. However, Mr. Quest KC in his oral submissions also accepted that the test under **CPR 39.5(5)** is a higher one than under the equivalent English provision **CPR 39.3(5)(b)**.

[81] The appellants’ first point is that the judge ought, absent any BVI case law on the point, to have sought guidance given repeatedly by the English Court of Appeal as to the proper approach when construing what amounts to a ‘good reason’. This guidance, say the appellants, is to the effect that the judge must not adopt an ‘unduly rigorous’ an approach, should seek to give effect to the overriding objective of deciding cases justly, and to comply with Article 6 of the European Convention of Human Rights enshrining the right to a fair hearing. They posit that this issue is aligned closely with ground 7 of the notice of appeal which challenges the judge’s recognition or acceptance that his dismissal order was ‘far reaching ... and could be described as harsh for the [appellants]’, he was ‘constrained by the law’ to find that the appellants had not demonstrated a ‘good reason’ for their non-attendance. I shall return to ground 7 in due course.

[82] In support of this first point, the appellants submit that the learned judge’s approach to Mr. Lock’s evidence was contrary to the guidance given in a number of decisions of the English Court of Appeal. They rely on certain passages from

the judgment of Lord Dyson in **Estate Acquisition and Development Ltd v Wiltshire**³¹ at paragraphs 20, 21 and 22. At paragraph 20, Lord Dyson quoted with approval from the judgment of Mummery LJ in **Brazil v Brazil**³² at para.12. There Mummery LJ opined that the phrase ‘good reason’ was incapable of precise definition and there was no set criteria differentiating a good reason from a bad one. However, the Lord Justice accepted as correct the dicta of Har J that ‘although the court must be satisfied that the reason is **an honest or genuine one**, that by itself is **insufficient to make a reason for non-attendance a “good reason”**’; and the court must examine all the evidence ‘relevant to the defendant’s non-attendance’. For my part I wholly agree with and accept as correct these guiding principles.

- [83] At paragraph 21 in **Estate Acquisition** relied on by the appellants, Lord Dyson opined that once the reason for a party’s non-attendance is that he did not know or was not aware that the hearing was taking place on a particular day that it did, ‘it will usually be necessary to ask why the party was not aware that the hearing was taking place on that day: see para 21 of Brazil’s case.’ This is so because ‘the mere assertion that the party was unaware of the hearing date is unlikely to be sufficient to constitute a good reason’ for their non-attendance. Again, I accept as correct and wholeheartedly endorse these principles. Lord Dyson’s dicta at paragraph 21 continues:

“Once a party is aware that proceedings have been served, he knows that it is likely that steps will be taken in the proceedings and that there will be a hearing or hearings. **Unless he has nominated a solicitor to act on his behalf**, he must be taken to expect to receive communications personally from the opposing party and/or the court. These will include notifications of hearing dates. If he does not have a system in place for ensuring that such communications are received by him, he is unlikely to be able to rely on the absence of such a system to say that he had a good reason for not attending the hearing.” (emphasis added)

³¹ [2006] EWCA Civ 533.

³² [2002] EWCA Civ 1135.

[84] The appellants also rely on the guidance given by Lord Justice Lloyd in **Attorney General of Zambia (for and on behalf of the Republic of Zambia) v Meer Care & Desai (a firm) and others**³³, at paras 50 and 55. In the passages relied on the learned Lord Justice deals with the approach to evidence of a 'good reason' absent the benefit of cross examination of an affiant regarding his evidence on the specific factual issue in question. In approaching that situation, the Lord Justice references first whether the evidence adduced was 'capable of belief', and, if it was, whether it would amount to a good reason. At paragraphs 50 and 55, the Lord Justice states (in relevant part):

50. "It is not for me in the absence of cross-examination, to decide whether Mr. Basile is to be believed in his account of his response to the litigation documents, but it seems to me that it is capable of belief. For similar reasons, I find his explanation that he did not realise that he was being sued capable of belief... According to Mr. Sullivan's submission, Mr. Basile took a conscious tactical decision not to take part in the proceedings, and the additional invoices now produced are late fabrications. It may be that Mr. Sullivan will be able to demonstrate that this is the case when he has the opportunity to cross-examine Mr. Basile, but without cross-examination the **theory** does not seem to me to demonstrate that Mr. Basile's account is not capable of belief..." (emphasis added)

55. "It seems to me that Mr. Basile's account of why he did not realise that he was a Defendant to these proceedings, and therefore did not take any part in the proceedings, is one which is capable of belief and **which, if believed**, would amount to a good reason for the purposes of rule 39.3(5)(b)."

[85] In the instant matter, the appellants' point is that, absent cross examination of Mr. Lock, the proper approach of the learned judge to the assessment of his evidence generally, and more specifically, with regard to the issue of whether he had 'received' the Trial Listing Notice from Kendall during the intervening period, ought to have been first what was the meaning of his evidence on a 'natural reading' on it; second the context in which the words were used; thirdly whether Mr. Lock's evidence in that regard was 'capable of belief' not applying too rigorous or an overly technical approach to the assessment of it. Had the learned judge

³³ [2008] EWCA Civ 754.

approach his duty in that way, he could not but conclude that Mr. Lock's evidence was that neither he nor the appellants had 'received' or were aware of the Trial Listing Notice and this was the real reason for their non-attendance at the Quantum Trial.

[86] The appellants also rely on the decision of the English Court of Appeal in **Mohun-Smith and another v TBO Investments Ltd**³⁴ at paragraphs 24, 25, 26 and 27 of the judgment of the court given by Lord Dyson (as he then was), endorsing the guidance given in **Estate Acquisition and Development Ltd v Wiltshire**; and **Bank of Scotland plc (formerly Governor and Co of the Bank of Scotland) v Pereira and others**³⁵, and the need, when applying the 'good reason' condition of the test in rule 39.5(5)(a)(i), to give effect to the overriding objective to decide cases justly and to comply with Article 6 of the European Convention on Human Rights.

[87] At paragraph 24, Lord Dyson having recognized that an appellate court must be slow to interfere with a decision of a lower court 'on the question of whether a litigant had a good reason for not attending the trial, opined that such a decision by a judge 'is a fact-sensitive evaluation made in the light of all the circumstances', and is the kind of decision that an appellate court would only strike down 'for reasons analogous to those which justify interfering with the exercise of discretion.' In particular, the appellants rely on this statement of principle at paragraph 24:

"This is particularly important where, as in the present case, the court should usually not adopt a very rigorous approach to the question whether the litigant has shown a good reason for not attending"

[88] The appellants underscore that not only did the learned judge not refer to these authorities on the proper approach by a court to the question of whether an applicant had shown a 'good reason' for not attending a trial or hearing, which cases had been cited by Lead Counsel for the appellants, but he did not follow the

³⁴ [2016] EWCA Civ 403.

³⁵ [2011] 1 WLR 2391.

guidance in them when assessing Mr. Lock's evidence generally and in relation to specific parts of his evidence pointing to or demonstrating a 'good reason' why the appellants had not attended the Quantum Trial. The appellants also submit that the judge's incorrect approach led him into an improper consideration of certain other issues not material to what was the appellants' 'good reasons for non-attendance', such as (i) Mr. Lock's statement in Lock 1 that during the intervening period he was busy with other responsibilities; and (ii) that he was responsible for 'coordinating' the proceedings on behalf of the appellants, which the judge, incorrectly, took to mean that he was 'actively managing' the proceedings on their behalf.

[89] It is also the submission of the appellants that the learned judge did not make any finding as to whether Mr. Lock's evidence and explanations were 'capable of belief' and certainly he did not find that they were not. As to whether Mr. Lock's evidence amounted to a 'good reason' for the appellants' non-attendance, the appellants argue that it clearly did. It is Mr. Quest KC's submission that it is a fact that the appellants and Mr. Lock were not aware of the Trial Listing Notice or that the Quantum Trial was to take place on the date on which it did, because the communication was diverted (automatically) into 'spam' – the junk mail folder. Further, had they known the Quantum Trial hearing was taking place on those dates they would have attended; and had they known that Kendall had applied to come off the record in the proceedings (as they should have been informed), they would have taken steps to appoint new legal representatives and to attend the hearing.

[90] In relation to the judge's finding of no good reason, the appellants argue that the essential point on which his finding is based is that before the junk mail incident, Mr. Lock received from Kendall and had seen the CMC Order referring to a trial window. However, in relation to the question of whether Mr. Lock had received from Kendall, prior to the commencement of his junk mail incident of 18th August 2023, the Trial Listing Notice, the judge adopted a too narrow and too technical an

approach to his evidence. It was submitted that it is implicit in Mr. Lock's evidence that what he is saying is that he did not receive the Listing Notice, and it would be rather disingenuous to find otherwise.

Issue 4- Misunderstanding of collective good reason

[91] The main complaint by the appellant is that the judge incorrectly addressed the evidence advanced by the appellants as the reasons why they were not aware of the Quantum Trial 'in a disaggregated manner'. They seek support or justification for so arguing, in this statement by the learned judge 'none of these are good reasons for the Applicants not attending the trial'.³⁶ The appellants submit that by doing so the judge failed to understand that the appellants 'good reason' for not attending was 'cumulative', and the judge erred in assessing the reasons advanced by Mr. Lock in his evidence of a piecemeal basis.³⁷

[92] This fourth question is a short one and can be disposed of immediately. The above extract from the judgment is incomplete. The full sentence reads: 'As Mr. Ng. has said in his skeleton, **none of these** are good reasons for the Applicants not to attend the trial.' (emphasis added) This was a reference by the judge to various evidential matters analyzed by the judge immediately prior to this statement, with respect to which he agreed they did not amount to a 'good reason'. However, at page 207 (internal) of the transcript³⁸ the judge having concluded his assessment of Mr. Lock's evidence and the contending positions and interpretations of the parties with respect thereto, states: 'But what we have here today is quite extraordinary **two-part** explanation.' (emphasis added). The judge goes on from there in his judgment to consider the two principal reasons or explanations offered by the appellants and Mr. Lock for the appellants' non-attendance, including the 'junk mail incident' in relation to the question of whether Mr. Lock had shown that he had not 'received' the Trial Listing Notice, and the allegation that Mr. Lock's

³⁶ Transcript Vol 1 page 207 L6-8.

³⁷ See para. 31 and 32 of the appellants' skeleton.

³⁸ Vol1 page 211 L 20-21.

evidence showed that he had not 'received' the Trial Listing Notice from Kendall during the intervening period of 6th June 2023 to 18th August 2023. These were not accepted by the judge as good reasons or as a good reason why the appellants did not attend the Quantum Trial:

“And in **those** reasons, the Applicants haven't produced any satisfactory reason, any good reason or any real reason at all what they didn't attend the trial” (emphasis added)³⁹

[93] There is no merit in this aspect of ground 3 of the appeal. First, the judge's approach was to consider each 'reason' relied on evidentially by Mr. Lock and to assess his evidence as to whether that 'reason' or that piece of his evidence could constitute a 'good reason' in law for setting aside the Order on Relief; and to also consider the two principal reasons or 'two-part' explanation advanced on behalf of the appellants for their non-attendance and whether they together or separately could amount to a 'good reason'. He found that they did not. Second, in my judgment this was a proper approach for the judge to adopt in assessing the evidence and reasoning to a conclusion on the Set Aside Application. This leaves open for consideration whether the judge in doing so erred in his assessment of the evidence by adopting too rigorous an approach. I shall contend with this important legal issue later in the judgment.

Issue 5 – Failure to take into account non-service of Kendall Removal Application

[94] This issue arising from paragraph 13 of ground 3, has not been addressed by the appellants in their skeleton argument. There are therefore no submissions elucidatory of this limb of ground 3. Instead, the appellants have focused their sting on ground 6 by which, as explained above, they assert that the failure to serve the Kendall Removal Application filed 30th October 2023 personally on the appellants and, likewise to serve them personally with the Removal Order was in

³⁹ Vol 1 page213 L 1-4.

and of itself a 'good reason' for the appellants' non-attendance at the Quantum Trial.

Respondents' Submissions

- [95] The respondents argue that the appeal is without merit and the learned judge adopted the correct approach to his assessment of the appellants and Mr. Lock's evidence in particular, came to correct primary findings of fact, and his conclusion that the appellants had presented no good reason for their failure to attend the Quantum Trial leading to this being a fatal flaw in their Set Aside Application and its dismissal are unassailable. Additionally, the respondents reject the contention that the proper test of what constitutes a 'good reason' for the purposes of **CPR 39.5(5)(a)(i)** is not whether the evidence or explanation offered by the applicant is 'capable of belief', as argued by the appellants. In this regard, they submit that the learned judge did not adopt too rigorous or too technical an approach to his assessment of Mr. Lock's evidence. He was entitled to analyze his evidence to determine what was the real' reason for the appellants' non-attendance and whether it supported or was evidence capable of supporting of a 'good reason' for the appellants' non-attendance.

Issue 1 – Primary reason for Dismissal

- [96] The respondents stoutly dispute the central premise (first question) of the appellants ground 2. They disagree that the primary reason given by the learned judge for dismissing the Set Aside Application was his conclusion that there was an absence of evidence that Mr. Lock did not 'receive' the Trial Hearing Notice. In countering this ground, the respondents contend for what they say was really the primary or central basis upon which the Set Aside Application was dismissed.
- [97] However, it is also the respondents' case (in response to the second issue) that, in any event, the judge was correct in analyzing the evidence of Mr. Lock in the way which he did and to conclude that Mr. Lock, and hence the appellants, had not

shown that he (Mr. Lock) had not received the Listing Notice from Kendall. They argue that to say this was the primary reason on which the judge reached his conclusion on the test of a 'good reason', is a mischaracterization of the judge's reasoning, and fails to take account of his stated primary or central reason for dismissing the Set Aside Application.⁴⁰

[98] The respondents argue that the extracts from the transcript of the judgment relied on by the appellants at paragraph 18 in support of their contention and argument on the 'primary reason' for dismissal issue, are misplaced as these extracts focus on a short portion of the judge's reasoning, and not the fuller consideration of the judge's judgment and reasoning which clearly identify what is the primary or main reasons for the judge's dismissal of the application. Likewise, the appellants' reliance on part of an exchange between the judge and lead counsel for the respondents, which they acknowledge does not form part of the judge's reasoning for the dismissal, is entirely misplaced.

[99] It is the respondents' case on this issue, that the correct representation of the judge's reasoning and conclusion leading to his dismissal of the Set Aside Application, would be his repeated reliance on and findings in the judgment on the evidence showing that: (i) the appellants knew that the court was intending to list the Quantum Trial in November 2023; (ii) Mr. Lock and hence the appellants had a copy of the draft CMC Quantum Trial Order which had so provided; and (iii) they knew a procedural timetable had been set leading up to the said trial.

[100] The appellants submit that this knowledge notwithstanding, the appellants and Mr. Lock did nothing to check with Kendall or the court as to whether the hearing was going ahead on the dates provided for in the trial window. This the respondents contend was the judge's primary reason for concluding that the appellants, as applicants, had no 'good reason' for their non-attendance.⁴¹ Accordingly, they submit, since the appeal on ground 2 has proceeded on an incorrect reading of or

⁴⁰ Para 25 of the respondents' skeleton arguments.

⁴¹ Ibid.

conclusion as to the judge's reasoning and the bases upon which he dismissed the application, grounds 1 and 3 premised, as they are, on that incorrect reason or basis, can take the appellants case nowhere.

Issue 2 – Natural Reading of Lock's evidence

[101] Further, in relation to issue 2 (above), the respondents underscore in their submissions that the appellants (personally or via Mr. Lock) had a responsibility as litigants/parties in ongoing proceedings who had been informed that the Quantum Trial would be listed in November 2023, to check with Kendall or the court, on whether the trial was in fact taking place within the stipulated trial window in the CMC Quantum Trial Order. This, on their own evidence, the appellants and Mr. Lock had failed to do. This failure was, the respondents argue, fatal to any notion that they had a 'good reason' for not attending.⁴²

[102] The respondents also argue that the judge correctly assessed Mr. Lock's evidence regarding the Trial Hearing Notice. He correctly observed that nowhere in his evidence did Mr. Lock say that Kendall had not sent him the Trial Hearing Notice,⁴³ which is a 'striking omission, particularly so given that Mr. Lock did choose to detail correspondence that he had with Kendall. His explanation of his purported lack of awareness of the hearing was coy and related only to his purported "understanding" of whether the hearing had been formally listed.'⁴⁴

[103] Accordingly, the respondents submit that the learned judge was entitled to assess the credibility of the evidence presented by the appellants in the way in which he did with respect to Mr. Lock's evidence. Moreover, there was a proper evidential basis for the judge to draw the conclusion that Mr. Lock must have "received" the Trial Hearing Listing from Kendall, Mr. Lock having not said that he had not received it from them during the intervening period between the issuance of the

⁴² Para. 36 of the respondents' submissions.

⁴³ See Transcript page 199 L 1-13.

⁴⁴ Para. 37 of the respondents' submissions.

Listing Notice on 7th June 2023 and the commencement of Mr. Lock's junk mail incident on 18th August 2023. Also, as the judge commented, given the unlikelihood that a senior lawyer like Mr. Carrington KC would have omitted to pass such an important document on to his clients or at the very least tell them the hearing had been listed and for specified dates.

[104] It is also the respondents' case in response to this issue, that the judge did not misconstrue the evidence of Mr. Lock. He did not make findings or inferences unsupported by the evidence or that no reasonable judge would have made; and there is no basis on which this Court ought to disturb any findings of fact or inferences made by the judge, whether about the Trial Hearing Notice or otherwise.⁴⁵ In any event, submit the respondents, nothing turns on any such findings or inferences, because the basis of the judge's conclusion that there was no 'good reason' given evidentially by the appellants, was because Mr. Lock and hence the appellants, had been informed that the Quantum Trial hearing would be in November 2023 and, on their own evidence, they failed to check if it was going ahead during the prescribed trial window period in the CMC Quantum Trial Order. Moreover, the reasons or explanations on which the application was grounded were not made out by the evidence and did not constitute a 'good reason', principally because the alleged email incident had commenced at best on 18th August 2023, well after the issuance of the Listing Notice for the Quantum Trial.⁴⁶

[105] The implication of this submission is that Mr. Lock had not given evidence that he had checked his inbox folder for the said intervening period but had not found an email from Kendall or Mr. Carrington KC attaching the Trial Listing Notice or informing Mr. Lock of the said notice and/or the Quantum Trial dates. Accordingly, Mr. Lock's evidence did not establish that Kendall or Mr. Carrington KC had not communicated the Trial Listing Notice or trial dates to Mr. Lock in advance of the

⁴⁵ Para. 39 of the respondents' submissions.

⁴⁶ Para. 40 of the respondents' submissions.

dates fixed for the Quantum Trial, which burden of proof rested with the appellants.

Issue 3 – Overy Rigorous Approach

[106] On this issue (ground 1), the respondents dispute the correctness of the ‘capable of belief’ test when assessing evidence as to a ‘good reason’ in a set aside application, as relied on by the appellants at paragraph 26 on the basis of the dicta of the English Court of Appeal in the **Attorney General of Zambia v Meer Care & Desai** case. The respondents first argue that this case concerned an application to admit new evidence in an appeal against a judge’s dismissal of a set aside application. This type of application evokes the *Ladd v Marshall* principles, which includes an assessment as to whether the new evidence sought to be adduced on appeal is ‘presumably to be believed’, ‘apparently credible’ or ‘capable of belief’. The Court of Appeal applied this threshold test to the question of whether the new evidence ought to be admitted and then appears to have applied the same standard to assessing the evidence for the purpose of the set aside application which had been dismissed. However, contend the respondents, no court has either before the **Attorney General of Zambia** case or since used the ‘capable of belief’ language to describe how evidence ought to be assessed when dealing with a set aside application. Likewise, it is not the case that judges cannot make findings of fact in set aside applications. It is argued that the opposite is true.

[107] In support of this submission, the respondents cite the decision of the English Court of Appeal in **Brazil v Brazil** where at paragraph [12] Mummery LJ held:

“The court has to examine all the evidence relevant to the defendant’s non-attendance; ascertain from the evidence what, as a matter of fact, was the true ‘reason’ for non-attendance; and looking at the matter in the round, ask whether that reason is sufficient to entitle the applicant to invoke the discretion of the court to set aside the order.”

[108] The respondents also rely on **Bank of Scotland v Pereira** where at paragraph [27] Lord Neuberger stated:

“An appeal against a judge’s decision under CPR r 39.3 to refuse (or indeed to allow) an application to set aside a judgment does not, at least normally, involve challenging a discretion. However, an appellate court should be slow to overturn a decision of this nature, unless satisfied that the judge went wrong in principle. The decision will often involve making findings of fact, and, while the findings will normally be based on written evidence only, an appellate court should never lose sight of the principle that the first instance tribunal is the primary finder of fact. In so far as the decision involves a balancing exercise, an appellate court should pay proper respect to the judge’s views. Another way of making essentially the same point is that the appellate court normally has a reviewing, as opposed to a rehearing, function in such a case, and it can therefore only interfere if satisfied that the judge was wrong.”

[109] I observe here that the *dicta* in the passage above, Lord Neuberger MR is providing helpful and sound guidance as to an appellate court’s approach to findings of fact, ‘normally based on written evidence’, made by the lower court judge in assessing the evidence in support of a set aside application under the English CPR r.39.3 (the equivalent to ECSC 39.5). While this clearly involved assessing the findings of fact made by the judge as to whether same amounts to a ‘good reason’ to set aside the order made in proceedings not attended by the applicant for a set aside order, it does not address the question of what is the proper approach of the judge to such assessment – whether he ought to adopt a not too rigorous approach. However, the respondents also rely on dicta of Lord Neuberger MR at paragraph [55], where he states: ‘in the great majority of cases, a judge hearing such an application should not allow oral evidence’, and his observation that the judge is entitled to ‘reject some (even all) of the applicant’s evidence on the basis that it is inconsistent or inherently improbable’.

[110] It is the respondents’ submission that the judge was correct in not adopting or applying the ‘capable of belief’ test. Instead, he was entitled to make findings of

fact on the paper evidence and, in doing so, to assess the evidence adduced for any inconsistencies or inherent improbabilities. As to the statement by Lord Neuberger in *Pereira*, relied on by the appellants in their submissions, that ‘the court should, at least in many cases, not be very rigorous when considering the applicant’s conduct’, the respondents argue that the learned Master of the Rolls recognized the standard of scrutiny to be applied to an applicant’s evidence in support of a ‘good reason’ for his non-attendance will vary from case to case. The degree of rigour to be applied to the respondents’ submission, would be less where the applicant has ‘a good or unblemished record’ in the proceedings, but more where he/she does not and has been obstructive or unscrupulous litigants, or had disobeyed a court order. In the latter circumstances, a more rigorous approach might be justified. In support of this proposition, the respondents cite the decision in **Shocked v Goldschmidt**⁴⁷ and **Zhang and another v Deng and another**⁴⁸

[111] Accordingly, the respondents submitted that in these proceedings the appellants have shown themselves ‘time and time’ again to be obstructive litigants -suppressing documents during the liability phase, flouting disclosure orders relating to quantum, failing to comply with each and every one of the court’s directions after the CMC Order in May 2023; and without offering any explanation as to “why they allegedly did not know that the Quantum Trial was going ahead or why, if they intended to attend, they breached the court’s directions’; all with which the judge as the presiding judge over these proceedings was all too familiar. Accordingly, taking these factors into account, ‘if the learned judge applied more scrutiny to the appellants’ reasons for non-attendance at the Quantum Trial than he might of a cooperating litigant, he was entirely justified in doing so.’⁴⁹

[112] On this basis, argued the respondents, the judge applied an appropriate level of scrutiny to the appellants’ and Mr. Lock’s evidence when he found, on Mr. Lock’s

⁴⁷ [1998] 1 All ER 372.

⁴⁸ [2024] EWHC 2392 at para.[65].

⁴⁹ See para. 34 of the respondents’ submissions

own evidence, that he was too busy with his other roles and responsibilities in the months leading up to the Quantum Trial and so did not check whether the hearing had been listed for during the trial window in the CMC Order, which Mr. Lock, the appellants' litigation coordinator and manager, had received and was fully aware. Secondly, the judge was entitled to scrutinize Mr. Lock's role and to describe him as 'actively managing' the proceedings, as Mr. Lock had stated in Lock 1 that he was 'responsible for coordinating the proceedings', and there was no evidence from Mr. Lau in Lau 1 indicating that he or any other of the appellants played any active role in managing the proceedings. Thirdly, and in the same vein, it is submitted by the respondents that the judge applied the appropriate level of scrutiny, and it was open to him, on Mr. Lock's own evidence, to make certain observations concerning Mr. Lock's role as coordinator and the kind of functions which he performed in that capacity:

"...he didn't just pass messages on from Kendall to Mr. Lau or the other Respondents, but he read and interiorize, i.e. read them and understood them and what the individual provisions of various documents were, in fact, saying. So it went beyond a mere role of postman, but there was a greater strategic coordination or management role that he assumed."⁵⁰

- [113] In support of Mr. Lock and the appellants' knowledge of the trial window dates and the proposed directions for the filing by both parties of expert evidence as to the valuation of the Target group, Mr. Ng KC, learned counsel for the respondents, in his oral submissions referred to certain extracts from the transcript of the CMC at which the CMC Order was made by the learned judge at pages 937,939,940 and 981 of Vol 4 of the Appeal Bundle. At page 937 (Lines 4-12):

"MR CARRINGTON:I do not understand the difficulty of my learned friend with our proposed dates, because what has happened is that with our proposed days, the parties would submit reports, meet and any final report is produced by the 18th of September which would be roughly two weeks before the start date for the trial window. So, in other words, our proposal does not affect the proposed trial window at all."

⁵⁰ Transcript page 194 (internal) L 7-13.

[114] Reference was also made to an email sent 5th June 2023 from Kendall to Conyers⁵¹ in which Ms. Reisa Singh inquired: 'Will you be preparing a listing request to lock in the November 2023 dates?' Also, an email sent 2nd June 2023 from Mr. Carrington KC of Kendall to Conyers attaching the draft CMC Order with their comments and suggesting: 'I would suggest that we do a listing request to secure the dates as soon as possible once lead counsel have indicated their availability.' Finally, the respondents also referred to an exchange of emails between Mr. Samuels of Conyers and Mr. Carrington KC of Kendall on 20th June 2023⁵² whereby Mr. Samuel had inquired of Mr. Carrington KC as to whether the appellants' lead counsel would be appearing at the Quantum Trial in person or virtually, to which Mr. Carrington responded '... we are still awaiting instructions, but I believe the intention is to appear virtually.' It is submitted by the respondents that considering all these documents and exchanges of correspondence, there must have been communications between Kendall and Mr. Lock during the intervening period (7th June to 18th August 2023), and any notion that there could have been any doubt on the part of the appellants that the Quantum Trial would take place on the dates listed in the CMC Order is misconceived.

[115] It is also submitted by the respondents that in Lock 1 the explanation for the appellants' non-attendance was Mr. Lock's junk mail incident, which stretches incredulity as a possible good reason for the appellants' non-attendance.⁵³ Further, nowhere in Mr. Lock's evidence did he say the Listing Notice was not sent by Kendall to him or that he had been told that the Quantum Trial would not be taking place on the dates listed in the CMC Order. In this regard, it is notable that the appellants did not obtain any evidence on affidavit from either Mr. Carrington KC or from some appropriate person at Kendall in the BVI concerning any of these factual matters regarding the emails sent by Kendall to Mr. Lock during the intervening period or whether the Listing Notice had been sent to Mr. Lock during that period.

⁵¹ Vol 4 page 726.

⁵² Vol. 2 pages 734 & 735.

⁵³ Para. 17 of Lock 1.

- [116] In relation to the applicable principles, the respondents cited passages from the judgment of Mummery LJ in **Brazil v Brazil**; Dyson LJ in **Estate Acquisition** at paras. 21 and 22; **Zhang v Deng** at paras. 63 to 66; and **Bank of Scotland** per Lord Neuberger at page 52, paras.25 and 26.

Issue 4 – Misunderstanding collective good reason

- [117] The respondents' short submissions on this issue (ground 3) are quite cryptic and dismissive of it. They muse that the appellants rely on one sentence from the judgment to support their submission that the judge approached the 'good reason' question in a disaggregate manner and failed to understand that their 'good reason' for not attending was cumulative, but actually omit the context of the sentence, where the judge was quoting from the submissions of counsel for the respondents. This is a reference to the omission from the quoted sentence of the words: 'As Mr. Ng has said in his skeleton', a reference to Mr. Lock's 'feeble' excuse that he was too busy, had failed to keep a record of deadlines and was not particularly focused on the proceedings.
- [118] Further, the respondents argue, when dealing with a set aside application with several separate (or inter-related) reasons advanced, it is appropriate for the judge to first assess each reason individually, and then to assess in the round whether a good reason exists. This, submits the respondents, is consistent with the *dicta* in **Brazil v Brazil**, which has been applied consistently thereafter. Accordingly, the respondents argue that the judge's approach by first considering each 'reason' being relied on individually by the appellants, assessing whether it could amount to or constitute a 'good reason', making clear what he considered to be the 'true' or primary reason for their non-attendance (the appellants inaction in circumstances where they knew that the hearing would be listed for November 2023), and then assessing whether this amounted to a 'good reason' was correct as a matter of law. Accordingly, there is no merit in ground 3.

Issue 5 – Failure to take account of non-service of the Kendall Removal Application

- [119] Having regard to what is said at paragraph [88] above, I need only say that the respondents' position is that there is no merit in the challenge to the judge's statement of 'improbability' on this basis, and nothing in the appeal turns of this point.

Analysis and Conclusions on Issues 1 to 4 (Gs. 1,2 &3)

Issue 1 – Primary Reason for Dismissal

- [120] As summarized above, the appellants and the respondents are at odds as to their understanding or conclusion of what is the 'primary' or 'central' reason upon which the learned judge found that the appellants had not, on their evidence in support of the Set Aside Application, shown that they had a 'good reason' for their non-attendance at the Quantum Trial and that the said application ought to be dismissed.
- [121] Both sides rely on certain passages in the judgment to justify the respective positions or interpretation to which they contend. I must therefore set out in full and analyze the relevant parts of the judge's reasoning leading to his finding of no good reason and the dismissal of the Set Aside Application. These passages are at internal pages 207 to 211 of the hearing transcript⁵⁴, which I now set out below:

“... But what we have here today is a quite **extraordinary two-part explanation**.

One, is that they didn't attend the trial because the material communications concerning the trial had gone into the junk file. Even looking at that superficially, that only happened from the 18th of August 2023. And very material communications had undoubtedly got through to them, at least in the shape of the Draft CMC Order well before that particular breakdown in communications, if indeed there was such a breakdown in communications.

Moreover, the application that Kendall, John Carrington, KC, and his office did not send the hearing notice on to Mr. Lock is an improbable one, **but I**

⁵⁴ Vol.1 Tab 1 pages 212-213 & 214-215.

don't need to rule on the probability of that happening. It suffices merely to point out that Mr. Lock must show the Applicants' good reason in his evidence. **Mr. Lock must show, in the case, therefore, that Kendall did not send that hearing notice to Mr. Lock.** Mr. Lock doesn't show that. What he does show is that he was busy, focused on other things and not cognizance of deadlines.

In other words, what his evidence is, is that he was quite possibly distracted. He doesn't even say whether or not upon further investigation he received the notice. **So the evidence from Mr. Lock on that point does not satisfy a good reason.** And, in fact, what we are left with is that the trial date of the 14th to the 22nd of November must have been in the minds of the Applicants already before the junk file breakdown in communications, such as it might have been. **And in those reasons, the Applicants haven't produced any satisfactory reason, any good reason or any real reason at all why they didn't attend the trial.**

Now it has been said by Mr. Quest that the fact that they applied immediately after they got the judgment shows, or it is congruent with their narrative that they didn't know about it trial date, well, not necessarily..... There is quite often another motive behind a step. So the fact that he applies after the event, he had to apply soon after the event, he was already stretching it three weeks afterwards. Any longer than that, an argument might have arisen that he didn't apply promptly. **He applied promptly. They applied promptly.** But at the same time, it doesn't mean that their motive was purely a disinterested, bona fide one because they had a good reason for not attending the trial. It could very well have been the case that they knew of the trial or they should have known about the trial in all the circumstances and they took the view that they weren't going to engage with it and after the event, try and spin things out even longer. That's possible. So I am not going to take that particular submission from Mr. Quest very far.

Where I think this takes us is that the big problem, the fatal flaw in the Applicants' application, is that they have not provided a good reason for not attending the trial, particularly with the period from the CMC up to the 18th of August when, on any view, in the Lock, and by necessary extension, the Applicants' can, in South East Asia, **they must have known that this trial was going to happen and they haven't explained why it was that they did not come to the trial. So this Court does not accept, for those reasons, the attempted explanation given by Mr. Lock on behalf of the Applicants.** In those circumstances, then, I believe, I am constrained to find in favour of Mr. Ng and the Claimants and I have, on this occasion, although the result, I think is far reaching and it could be described as harsh for these Respondents, nonetheless, I think upon the law and applying what I understand to be the law, to the facts and those facts include the factual matrix between the 31st of May 2023

and the 18th of August 2023, not just after the 18th of August 2023, applying the law, applying the law to the facts, I believe I am constrained by the law to find that the Applicants do not satisfy the first condition of the test, and that because the conditions are cumulative means that the application must stand dismissed. And that, learned Counsel, will be the order of the Court.” (emphasis added)

[122] It is clear from the extracts above, that the learned judge identified from the appellants’ evidence at least two primary reasons or two parts of an explanation pointing to a ‘good reason’ for their non-attendance, in purported satisfaction of the first limb of the cumulative test at rule 39.5(5)(a). This is what he referred to as the ‘two-part explanation’.

[123] The first part or first primary reason identified by the judge was the junk mail incidence, which Mr. Lock is alleged to have experienced from 18th August 2023 where emails from Kendall and Mr. Carrington KC automatically went into his junk mail folder, a phenomenon which he was unaware of until after the Quantum Trial and the Order on Relief of the court had been sent to him by Mr. Terence Yueng.⁵⁵ The learned judge considered that this basis or reason was lacking in soundness as a credible or legitimate reason for the appellants’ non-attendance. In brief, this was because matters concerning the issuance by the Court Office of the Listing Notice to counsel for the parties occurred in June 2023, well before Mr. Lock’s alleged junk mail incident commenced on 18th August 2023 and, importantly, as the judge saw it, before the junk mail incident, material communications by the established means of email from Kendall and Mr. Carrington KC , had gotten through to Mr. Lock on his computer and, by extension, to the appellants. Accordingly, the learned judge found that this first primary reason or part of the two-part explanation did not amount to a ‘good reason’ in satisfaction of the first limb of the cumulative test at rule 39.5(5)(a).

[124] From the above extracts of the proceedings, the learned judge’s short treatment of this first part of the appellants’ ‘explanation’, was obviously because this

⁵⁵ Para. 18 of Lock 1.

conclusion rests, to a large extent, on his analysis and findings earlier in the judgment as to the primary and pivotal role and functions of Mr. Lock, on behalf of the appellants, in the litigation as the 'middle man' so to speak between them and their legal practitioners, Kendall and Mr. Carrington KC as their lead counsel; the veracity of Mr. Lock's evidence regarding the alleged 'junk mail incident' as it relates to important matters or steps in the litigation prior to 18th August 2023. The judge concluded that even if this junk mail computer incident had befallen Mr. Lock in the way he described in his evidence and from the date he said it did, nevertheless, it did not provide a good basis upon which to conclude that he had shown that he had not been sent the Listing Notice by Kendall and/or Mr. Carrington KC and him being unaware of it. This the learned judge saw as improbable absent proof from Mr. Lock that he had searched the inbox on his computer for the intervening period between the receipt of the listing notice by Mr. Carrington KC at Kendall and the commencement of Mr. Lock's junk mail incident over 2 months later.

[125] In the extracts quoted above, the judge also addressed briefly the submission by Lead Counsel for the applicants/appellants, that because the appellants had promptly filed the Set Aside Application once they had become aware of the Order on Relief, this was consistent with and lends credence to the appellants not having received or been made aware of the Listing Notice. In considering this submission, the judge found that the Set Aside Application had been made promptly. However, he did not accept and was not convinced that he could take this fact any further as lending proof to the assertion that Mr. Lock had shown on his evidence that he had not 'received' the Listing Notice from Kendall.

[126] Furthermore, while the judge was of the view that the contention that Kendall and Mr. Carrington KC had not sent the Listing Notice to Mr. Lock was 'improbable', he expressly declined to make any conclusion on this point and did not incorporate it as part of his reasoned judgment and conclusion of lack of a 'good reason'. Instead, the judge stated that the burden was on the appellants through the

evidence of Mr. Lock to show that Mr. Lock had not received the Listing Notice from Kendall; and Mr. Lock and the appellants had, on their evidence, not done so. On this point, the judge found (from Mr. Lock's evidence) that he was very busy, focused on other matters, and not cognizance of the timetable and deadlines during that relevant period under consideration from the issuance of the Listing Notice on 7th June 2023 to the Quantum Trial in November 2023.

[127] These findings of fact by the learned judge are grounded and must be read in conjunction with his earlier analysis of Mr. Lock's evidence in the judgment. At page 199 of the transcript, the learned judge characterized Mr. Lock, the appellants litigation coordinator and manager charged with conveying communications from Kendall to the appellants and from the appellants to Kendall, as 'the weakest link in this so-called system that they [the appellants] had in place.' More detailed analysis and treatment of Mr. Lock's evidence by the judge in relation to the central question of whether the appellants had shown a 'good reason' for their non-attendance, are as follows:

"At **page 200 L 2** onwards:

'Mr. Lock himself says he was extremely busy with other roles and responsibilities. Well, it is not a good reason not to attend a trial, that you mis-communicated a hearing notice because you were busy or extremely busy with other roles and responsibilities. Particularly, I might add, if you already had the draft CMC order in front of you which told you that the Court was going to be holding a trial or intending to hold a trial in a particular time period.'

'And then Mr. Lock also says he wasn't particularly focused on the proceedings. Well, that's not anybody else's problem apart from Mr. Lock and the Applicants' problem. If they go and put a system in place involving a man with no other eyes on the matter, who is not a lawyer, who is extremely busy and who happens to be not particularly focused on the proceedings anyway, then why should that be treated as a good reason or a good reason at all not to attend the trial.'

At page 201:

Then thirdly, Mr. Lock went on to say he did not keep a record of the deadline and the proceedings and was not generally cognizance of those deadlines. Well, isn't that what a coordinator and manager is supposed to do?

Well, again the fact that Mr. Lock who is suppose[d] to be coordinating, is suppose[d] to be managing these proceedings, didn't keep a record of deadlines, presumably because he was not particularly focusing on them as he also said, this is plainly not a good reason not to attend the trial, particularly, as I might add, since the Applicants must be taken to have known from the draft case management order that the Court intended to hold a trial in that time period identified precisely with reference to exact calendar days in the Draft CMC order.

And at **pages 202-203** –

And then he says he was completely reliant on Kendall to keep him apprised of anything which required urgent attention. Well, for somebody who is suppose[d] to be manager and coordinator for the Applicants and that they chose this gentleman to take on that role, that again is not a good reason not [to] attend the trial, particularly, since you already knew from the, at least the draft case management order, of the trial window.

As Mr. Ng has said in his skeleton, none of these are good reasons for the applicants not to attend the trial.”

- [128] In my judgment, it is clear from the extracts above from the judgment, and indeed from a full reading of the judgment below, that the learned judge considered the various explanations and reasons given in the evidence, advanced and relied on by the appellants in their submissions in seeking to satisfy the ‘good reason’ limb of the test under rule 39.5(5)(a) for not attending the Quantum Trial. In doing so, the learned judge clearly dealt with most if not all of the important points and key evidential issues and factors relied on by the appellants in reaching his decision to dismiss the Set Aside Application. The learned judge examined in some detail the evidence adduced by the appellants (especially the evidence of Mr. Lock) and considered each of the factors or reasons relied on by the appellants and by Mr. Lock in both of his affirmations. He found or held in relation to each of them that they did not, in his assessment and judgment, constitute a ‘good reason’ as a matter of fact and law; that the appellants had not discharged the burden on them to demonstrate that they had a ‘good reason’ for their non-attendance at the Quantum Trial; and dismissed the Set Aside Application having found none of the reasons to constitute a ‘good reason’. By this approach and findings, the learned judge concluded that he was obliged under rule 30.9(5) to dismiss the Set Aside Application.

[129] In the concluding part of his judgment, the judge referred to what he saw or found as the ‘fatal flaw’ in the appellants’ Set Aside Application. This was their failure to provide, on the evidence, a ‘good reason’, thereby not satisfying the first limb of the cumulative test under **CPR 39.5(5)(a)**. The judge went on to state:

“**particularly** with the period from the CMC up to the 18th of August when, on any view, (sic) Mr. Lock, and by necessary extension, the Applicants must have known that this trial was going to happen, and they haven’t explained why it was they did not come to the trial. So this Court does not accept, for those reasons, the attempted explanation given by Mr. Lock on behalf of the Applicants.”

[130] By this passage, the judge identified and dealt with the second-part of Mr. Lock’s evidence of a ‘good reason’, that he and the appellants were aware by virtue of the draft CMC Order that the court intended to list the Quantum Trial during the November 2023 trial window set out in the said Order, but they made no inquiries, as they ought to have done as parties to litigation, either of their lawyers, Kendall and Mr. Carrington KC, or of the court, have not adequately explained why they did not and, therefore, not provided a ‘good reason’ for not attending the Quantum Trial.

[131] Moreover, from this extract, the learned judge did not identify or posit as the ‘primary’ or ‘in particular’ reason, the lack of evidence to support a finding that Kendall had **not** sent to Mr. Lock in June 2023 or that Mr. Lock had not ‘received’ the Listing Notice for the Quantum Trial, as contended by the appellants. I therefore reject as wholly incorrect the appellants’ premise or contention that this was his primary reason for dismissing the Set Aside Application. Such a ‘conclusion’ does not accord with the language used by the learned judge in describing what he saw as the particular reason for the ‘fatal flaw’, that is, the failure to show a ‘good reason’ for the appellants’ non-attendance. What the learned judge does identify as the ‘particular reason is, as argued by the respondents, that Mr. Lock and the appellants were aware from the draft CMC Order that the trial was intended to take place in November 2023 during the trial

window dates specified in the said order, and neither the appellants or Mr. Lock took the initiative to contact their lawyers, Kendall, or the court, to find out whether the Quantum Trial would be proceeding on those November dates; and any explanation founded on Mr. Lock's alleged junk mail incident which started on 18th August 2023, cannot and does not bear scrutiny when the Trial Listing was issued to the lawyers for the parties on 7th June 2023, well before any junk mail incident had begun.

- [132] It is therefore incorrect to conclude, as the appellants do, that the judge's primary reason for the dismissal was his finding that the evidence did not establish that Kendall and Mr. Carrington KC had not sent the Trial Listing to Mr. Lock. Accordingly, and for the reasons above, this first issue under ground 2 fails.

Issue 2 – Natural Reading of Lock's evidence

- [133] This second issue (canvassed by ground 2 of appeal) is whether the judge erred in applying, contrary to authority, undue rigour to the precise words used by Mr. Lock and, instead, ought to have concluded on a 'natural reading' of Mr. Lock's evidence, that he was saying that he did not receive the Listing Notice from Kendall or Mr. Carrington KC and not, as the judge found, that Mr. Lock had deliberately omitted to state that he 'did not receive the Listing Notice', meaning that he likely did receive it but did not read it.

- [134] In assessing Mr. Lock's evidence on this issue, the learned judge first considered the CMC Quantum Trial Order. The judge (correctly) did not find that what was stated at paragraph 12 of the CMC Order amounted to fixing the actual trial dates for the Quantum Trial, but provided for a 'trial window', which was subject to court availability and the availability of counsel and witnesses. He observed⁵⁶:

"So from that one can assume that it must have been in their minds, the Applicants' mind that the Court was intending to hold a hearing between the 14 and the 22nd of November 2023, even if it was still to be confirmed

⁵⁶ Transcript Vol.1 page 199 L14-20.

with the reference to court availability and the availability of counsel and witnesses.”

[135] As to whether Kendall had sent the Notice of Trial Dates by email to Mr. Lock (the appellants’ litigation coordinator and manager), the learned judge considered, generally, circumstances where a party to litigation does not have or has not put in place a proper system to ensure that they receive communications from the opposing party and/or the court in the proceedings relating to the case and the proceedings. In support of this proposition, the judge referenced dicta from Lord Dyson in **Estate Acquisition and Development Limited v Wilshire** at paragraphs 21-22.⁵⁷ At internal pages 188 and 189 of the transcript of the judgment⁵⁸ the learned judge set out in full the following extracts from the judgment of Lord Dyson, which provide important guidance:

“The mere assertion that the party was unaware of the hearing date is unlikely to be sufficient to constitute a good reason. It will usually be relevant to inquire whether the party was aware that proceedings had been issued and served. Once the party is aware that proceedings have been served, he knows it is likely that steps will be taken in the proceedings and that there will be a hearing or hearings.”

Unless he had nominated a solicitor to act on his behalf, he must be taken to expect to receive communications personally from the opposing party and/or court and this will include notifications of hearing dates. **If he does not have a system in place for ensuring that such communications are received by him, he is unlikely to be able to rely on the absence of such a system to say that he had a good reason for not attending the hearing.**

Similarly, if a party is aware that proceedings are imminent and he[has] not established a system for ensuring, **so far as practicable**, that communications relating to the impending litigation are received by him, then that also would not be a good reason.” (emphasis added)

[136] The *dicta* above addresses situations where a party has not put in place a proper system which, so far as practicable, would ensure that he/she, as a party to impending litigation, would receive, in a timely manner, communications

⁵⁷ Transcript Vol 1 page 192 L7-18.

⁵⁸ Vol1 page192-193.

concerning the proceedings whether from the opposing party and their lawyers or from the court itself. If no proper system has been put in place, the party is unlikely to be able to rely on its absence to establish that he had a 'good reason' for not attending the trial. This is so because the mere assertion that the party was not aware of the trial date is itself unlikely to constitute a 'good reason' for their non-attendance. This is because they are already well aware of the proceedings either from having commenced them or having been served with them as a defendant. In those circumstances, there arises, as a matter of principle and common sense, an expectation or likelihood that steps will be taken in the proceedings, procedurally or substantive, as the litigation progresses, whether by the opposing party and by other parties with the same interest as that party, which may or will require some appropriate response from the party or their legal representative on their behalf, and within certain stipulated timelines set either by the court or by rules of court; and that, from time-to-time, hearings will become necessary for which the court will set dates, including dates for the trial of the matter.

[137] This imposes on parties to litigation the requirement to put in place or to ensure that there is in place consistently throughout the period of the litigation, a 'proper system' for monitoring the progress of the proceedings through its various stages and to receive and respond timely to steps taken in the proceedings by the other party or their legal practitioner. Accordingly, it is not for a party to litigation to simply sit back and await communications from their lawyers, and to not make regular inquiries of them, especially absent any communications from their lawyers of record for some time.

[138] Therefore, a party to litigation must take a proactive interest in the litigation and in protecting and advancing their interest in its outcome. It is therefore not good enough for a party not to have in place any 'proper system' or, if they have put a system in place, not to see to its continued effectiveness. Where that system has in some respects broken down, it may be necessary to take the steps to either

remedy the issues with it or to put in place some other system which is better or reliable and effective. The necessity for a proper and effective litigation system becomes even more crucial when, to the party's knowledge, the litigation is ripe for a trial of the dispute, and the setting by the court of a trial date or dates is imminent, or where a trial window has already been set by the judge, subject to its confirmation.

[139] Usually, once a party has engaged a legal practitioner who is on record in the proceedings, they would have satisfied the requirement of ensuring that a proper system is in place. This can be seen from the above *dicta*. The importance of this can also be seen from rule 39.5(4) which speaks to the party 'or their legal practitioner' not being notified of the date fixed for the trial. This is because a party's legal practitioner of record in the proceedings is an integral part of the smooth operation of the legal system and the front person for the parties, to whom other parties and their lawyers as well as the court will communicate to their client with regard to the litigation and proceedings. For example, a judge or at times the Court Office will consult with the parties' respective legal practitioners of record before setting trial or hearing dates. Notification of the dates fixed for trial or a hearing to the legal practitioner of record is notification to that party. Similarly, the service of documents filed in the ongoing proceedings on the other party's legal practitioner, whether in person or via the litigation portal, is effective service of that document on that party, unless the applicable rule proscribes personal service on the party themselves.

[140] In the instant matter, the appellants did engage the services of Kendall as legal practitioners of record in the proceedings, and Mr. Carrington KC as their lead counsel after the Liability Trial and judgment. In that way, the appellants must be taken to have put in place a proper system for ensuring communication from either the court or the respondents to them. However, this was not the typical situation of direct communication between the legal practitioner and the client(s). The appellants in-place system involved pivotally Mr. Lock as their litigation

'coordinator' and 'manager', as Mr. Lock self-described himself in Lock 1. Under this litigation system tailored by and put in place by the appellants themselves, Mr. Lock was juxtapositioned between their legal practitioners of record and counsel, Kendall and Mr. Carrington KC, and the appellants as the clients. Accordingly, practical efficacy of this system to a large extent rested with Mr. Lock and how he discharged his functions as their litigation coordinator and manager. In putting this kind of litigation system in place, the appellants must, on Mr. Lock's evidence in Lock 1, been aware of how diverse his interests were and how busy he was or would be.

[141] Mr. Lock described his functions as receiving and passing on to the appellants (Mr. Lau) communications and documents in the proceedings from Kendall/Mr. Carrington KC to the appellants and receiving communications from the appellants (through Mr. Lau) and communicating those instructions to Kendall/Mr. Carrington KC. In this respect, from his evidence, he was not just a conduit of communications back and forth between the lawyers of record and the appellants, as the learned judge correctly observed.⁵⁹ Part of his role was acting as an 'advisor' to Mr. Lau in these proceedings but not limited only to these proceedings.⁶⁰ At paragraph 11 he states that since his involvement with the Company (from March 2021): 'I have been responsible for coordinating the proceedings on behalf of the Applicants. All communications with the Applicants' legal representatives are made through me.' Also, at paragraph 12 he states that 'it was agreed that Kendall would take all instructions in this matter, written or oral, from me or any person nominated by me.' In this regard, it is Mr. Lock's evidence that the 'primary method' of communication between Kendall and himself would be by email.)

[142] At paragraph 14 of Lock 1, he, most tellingly, avers:

⁵⁹ Transcript Vol.1 page 190 L 19-22.

⁶⁰ Para. 9 of Lock 1.

“In the event that Kendall required instructions, I would typically receive an email chasing me for a response marked urgent or with high importance. Unless I received an email from Kendall, I would **assume** that there was nothing significant or material that needed to be addressed. I do not have any legal qualifications or a legal background and **managing** the Applicants’ participation in the proceedings is **not my primary focus**; as mentioned I have many other responsibilities day to day and I **relied exclusively** on the Applicants’ legal practitioners to notify me of any impending deadlines.”

[143] Regarding the issue of whether the appellants had put in place a ‘proper system’ to manage their participation in the proceedings, there are several obvious difficulties with his evidence above, pointing, as it does, to the appellants not having put in place a proper system, but one centered and dependent upon Mr. Lock who was admittedly a very busy man, who did not make notes of litigation deadlines, and whose interests were very diverse, and who did not check with Kendall or Mr. Carrington as to further developments as the November 2023 trial window dates got closer. There is also absent any evidence from the appellants or Mr. Lock of either checking with each other or making periodic enquiries directly of Kendall and/or Mr. Carrington KC, as there is no suggestion that the arrangement with Mr. Lock did may have precluded either of them from doing so.

[144] Many of these concerns pointing to the inadequacy of the appellants’ litigation system and the inaction of Mr. Lock who had knowledge, as did the appellants, of the trial window set for November 2023 for the Quantum Trial, were considered and assessed by the learned judge in his judgment from internal pages 188 to 191⁶¹. The judge’s conclusions reached on this aspect of Mr. Lock’s evidence and on the main issue of a ‘good reason’ are set out in the passages from his judgment at paragraph 112 above, and do not bear repeating at this juncture. The judge’s expressed views regarding the appellants’ litigation system, Mr. Lock’s integral role as coordinator and manager, and his own evidence of being too busy with other interests and matters, especially during the critical intervening period, were considered. Suffice it to be said that the judge was sufficiently unimpressed with

⁶¹ Transcript Vol.1 pages 194-195.

the appellants' litigation system, resting as it did on Mr. Lock, and what he clearly saw as a failure on the part of both Mr. Lock and the appellants to ensure that they were properly monitoring and responding to communications coming from Kendall and Mr. Carrington KC. Aptly in my view, the learned judge described Mr. Lock as the 'weakest link in the so-called system'⁶²; and he described the appellants actions in relation to the monitoring of their participation in the litigation as of an 'irregular and irresponsible manner'.⁶³ This latter statement is the subject of ground 5.

[145] The judge's analysis at paragraph 112 above casts much doubt on Mr. Lock's evidence in Lock 2 where he stated that from checking his 'junk mail folder' he did not find any email there to which the Trial Hearing Notice had been attached. This conclusion was mainly on the basis that the said Trial Notice, had been sent by the court office and received by Kendall and Mr. Carrington KC on 7th June 2023 well before the commencement of Mr. Lock's alleged 'junk mail incident' on 18th August 2023. The judge also thought it 'improbable' that Mr. Carrington KC and his Kendall office did not send the Notice of Trial Dates to Mr. Lock,⁶⁴ but expressly did not base his decision as to a lack of a 'good reason' on this observation. Instead, the learned judge held that it was for the appellants (through Mr. Lock) to show that 'Kendall did not send that hearing notice to Mr. Lock.' He found as a fact that 'Mr. Lock does not show that. What he does show is that he was busy, focused on other things and not cognizance of deadlines.'

[146] The judge also observed that while Quantum Trial Hearing Notice had clearly been received by Kendall Law –

"[T]here is no evidence that he [Mr. Lock] didn't receive it and what he says, if I am not mistaken, that he didn't find it in his junk mail. **Well, he wasn't looking at his junk mail at that point. That was only later.** The problem with junk mail only arose from the 18th of August earliest **and so if it had been sent in June, then it wouldn't be in his junk mail, it**

⁶² Page 199 L 20-21.

⁶³ Page 203 L 11.

⁶⁴ Transcript Vol. 1 page 212 L 6-8.

hadn't, and there's no reason to think that it would've been sent after the 18th of August, so it is entirely understandable that he might not have seen it in his junk mail because it wasn't there."⁶⁵ (emphasis added)

- [147] Based on the judge's evaluation of the evidence of Mr. Lock, it would be fair to conclude that the learned judge, albeit not making a firm or definitive finding, may or more likely had been sent by Kendall to Mr. Lock sometime after 7th June 2023 and before 18th August 2023, Mr. Lock had not by his evidence showed that he had not 'received' the Trial Notice during that period since, as was his evidence, he was very busy with other matters, interests, investments and responsibilities. Accordingly, the appellants had not discharged the burden of proving that Mr. Lock, and by extension, themselves, had not received the Trial Hearing Notice, and this was the 'fatal flaw' in their application.
- [148] Had the appellants established by evidence that the Trial Notice had not been received by them or their legal practitioners, this would have invoked the mandatory requirement for the judge to set aside the Order on Relief made in their absence at the Quantum Trial. The predicate finding under rule 39.5(4) for the evidence to show that 'the party **or** legal practitioner' was not notified of the date fixed for the trial. Here, the evidence adduced clearly shows that the appellants' legal practitioners had received notice of the dates fixed for the Quantum Trial. There was no evidence from Kendall adduced by the appellants on this or any other issue of fact in this matter. Furthermore, no explanation was given by the appellants or Mr. Lock as to whether they had approached Mr. Carrington KC or some other lawyer at Kendall requesting them to provide evidence on affidavit addressing this or any other issue of relevance or importance to their Set Aside Application, or confirmatory of Kendall not having sent the Trial Notice to Mr. Lock via email, in the usual way, and if they did, to exhibit a copy of said email showing the date it was sent and the attachment of the Listing Notice or at least a reference to it with the trial dates in the body of such email.

⁶⁵ Transcript Vol.1 page 202 L24-25; 203 L1-9.

[149] In Lock 1, Mr. Lock at paragraph 16 states that his last communication with Kendall prior to 30th November 2023 (after the Quantum Trial and Order on Relief) was 18th August 2023. He goes on to 'confirm' certain matters 'as at that date'. None of what he has listed includes confirmation that he had checked his inbox and no email sent by Kendall or Mr. Carrington KC from 7th June up to 18th August 2023 referred to the trial dates having been set or attached the Listing Notice which informed the legal practitioners for the parties of the fixed dates for the Quantum Trial. It is at paragraph 17 that Mr. Lock gives evidence as to how busy he was or had been during the intervening period of June to August 2023, and that he 'did not keep a record of deadlines in the proceedings', a most telling admission of fact and one which the learned judge was correct in my judgment to take into account when considering and assessing the evidence of Mr. Lock as to a 'good reason' for the appellants' non-attendance at the Quantum Trial.

[150] Also, at paragraph 19 of Lock 1, Mr. Lock relates that having been informed by Mr. Terrence Cheung from Conyers of the Order on Relief, he 'immediately' contacted and (presumably) spoke with Mr. Carrington KC about what he had discovered. However, he does not disclose what transpired during the said conversation with Mr. Carrington KC (presumably on the basis of privilege) and the judge below was left completely in the dark as to what exactly was discussed, whether the issue concerning the Listing Notice and it being sent or not sent by Kendall or Mr. Carrington KC to Mr. Lock was addressed, and what was Mr. Carrington KC's response thereto. The only matter of relevance to this issue disclosed by Mr. Lock at paragraph 19 is that following his conversation with Mr. Carrington KC, 'this prompted me to check my junk mail box where I discovered numerous emails sent from Kendall and all the emails from Kendall since 19 August 2023 had been sent to my junk mail box', and he exhibits at pages 11 to 12 a 'screenshot showing emails from Kendall in my junk mail folder.'

[151] A few points arise from Mr. Lock's evidence at paragraph 19. The first is that it is his conversation with Mr. Carrington KC which 'prompted' him to check his junk

mail folder. No more specificity is provided as to exactly what said by Mr. Carrington KC may have prompted this action. Secondly, and importantly as the learned judge alluded to in his reasoning, Mr. Lock does not state either at paragraph 19 or anywhere in Lock 1 that he not only checked his junk mail folder following that call to Mr. Carrington KC, but also his inbox for the period between 7th June 2023 and 18th August 2023 and, having done so discovered that none of the emails from Mr. Carrington KC or Kendall during that period referred to or attached the Listing Notice for the Quantum Trial. Thirdly, the 'screenshot' of Mr. Lock's junk mail folder from 18th August 2023 serves as proof only of a 'junk mail incident' from that date. It does not serve as evidence of what transpired prior to 18th August 2023 with emails from Kendall or Mr. Carrington KC to Mr. Lock. Fourthly, the 'screenshot' listed line by line the email that went into his junk mail folder from the said date but is not evidence of their contents. It is this sort of evidence or proof which was lacking from Mr. Lock, as the learned judge observed and found.

[152] Lock 2 was filed in reply to Wong 1. At paragraph 6 Mr. Lock states (in part): 'Ultimately, the Applicants did not receive notice of the dates fixed for the trial..', a reference to the Quantum Trial. Also, at paragraph 12 he states: 'I also note that none of the emails in my junk mailbox from Kendall attach or refer to the Trial Listing Notice.' It is this bit of evidence from Mr. Lock which the appellants argue was misinterpreted by the learned judge who, instead of giving the words used a 'natural reading' (which I interpret as their natural and ordinary meaning), approached their interpretation, contrary to authority, with 'undue rigour' in finding that they did not amount to proof that Mr. Lock had not 'received' the Listing Notice from Kendall or Mr. Carrington KC. Had the learned judge applied a 'natural reading' to the words used, he would have concluded that Mr. Lock was saying that he and hence the appellants had not 'received' the Listing Notice.

[153] I have considered carefully the judge's approach to and assessment of Mr. Lock's evidence (extracts at para. 112 above) on this issue. I do not accept that the

learned judge's approach to and assessment of this evidence was incorrect or improper or too rigorous or that he erred as a matter of principle. The findings made by the learned judge that Mr. Lock had not by this or any of his evidence showed that he had not 'received' the Listing Notice during the period 7th June 2023 to 18th August 2023 was open to him on Mr. Lock's evidence read naturally or given its natural and ordinary meaning from the words used and there is no basis on which this Court ought to set it aside or come to some other interpretation or meaning. The fact is, on Mr. Lock's own evidence, he checked the emails in his junk mail folder searching to see whether the Listing Notice had been attached or referred to in any of the emails therein from Kendall or Mr. Carrington KC, and found there were none. This was well after the intervening period of 7th June 2023 to 18th August 2023 and after the Quantum Trial and Order on Relief had been made. Critically he gave no evidence whatsoever of having checked for emails from Kendall or Mr. Carrington KC arriving in his inbox folder during the said intervening period or even after. There is no evidence of or pointing to a search by Mr. Lock of his inbox much less such search having not yielded any email with the Trial Hearing Notice attached or which mentioned the said notice or that the dates for the Quantum Trial had been fixed by the court. These are significant gaps in Mr. Lock's evidence, which even in reply to Wong 1 he did not address in Lock 2.

- [154] For all the reasons given above, I do not agree with the arguments of the appellants on this second issue, and can find no plausible or sound basis in law upon which to disturb the judge's finding that the appellants had not discharged their evidential burden of showing that Mr. Lock, and by extension the appellants, had not, during the intervening period or after, received from Kendall or Mr. Carrington KC, the Listing Notice for the Quantum trial. The effect of this is that there was no basis upon which the learned judge could have set aside the Order on Relief under rule 39.5(4).

[155] As mentioned above, proof of notice of a hearing or trial on an applicant or their legal practitioner does not of itself defeat a set aside application grounded under rule 39.5(5). Likewise, it does not establish conclusively a lack of a 'good reason' for the purposes of an application under rule 39.5(a), as is the case in the instant matter.

Issue 3 – Overly Rigorous Approach

[156] In my opinion, the test to be applied in determining whether a 'good reason' has been shown by an applicant in a set aside application pursuant to rule 39.5(5)(a)(i) for their non-attendance at a trial or hearing at which a judgment or order was given or made in their absence, is not whether the evidence adduced or explanation provided was 'capable of belief', as contended by the appellants. The question of whether evidence adduced in support of an application is 'capable of belief' is integral to the judicial function at trials and when having interlocutory applications where evidence in support is required under the **CPR** and, especially where the rules of court or burden of proof require an explanation or reason for the applicant's failure to do some act mandated by the rules. It is not a free-standing test, but is integral to the process and exercise when a court is assessing the evidence adduced and especially where it is necessary for the court to reach a finding as to whether that evidence ought to be accepted as establishing a fact relevant to its determination of the claim or application. This is so whether the court is assessing evidence given at a trial or evidence by way of affidavit on an interlocutory application.

[157] Evidence adduced in support of set aside application under rule 39.5(5) must first be capable of belief otherwise the reason or explanation advanced by the applicant for relief cannot, on such evidence, constitute a 'good reason' for the applicant's non-attendance, and the application ought to be dismissed. On the other hand, where the evidence adduced is 'capable of belief' or is accepted by the learned judge as factual, the judge must go on to consider whether that evidence or explanation can amount to a 'good reason' for the applicant's

non-attendance. This is a question or issue of mixed law and fact, as it is not every explanation or reason for nonattendance advanced evidentially which, albeit capable of belief, will amount to a ‘good reason’ under **CPR 39.5(5)(a)(i)**.

[158] In support of their argument that the test of whether evidence adduced by an applicant in support of a set aside application under rule 39.5(5)(a)(i) is whether it is ‘*capable of belief*’, the appellants rely on the *dicta* of Lloyd LJ at paragraph [50] in **Attorney General of Zambia**. They stress, in particular, that absent cross-examination, which is not appropriate in such applications, the test is whether the applicant’s explanation or ‘reason’ is capable of belief. The respondents counter by saying that this is not the correct test applicable to such applications and, in any event, any such statement of principle in **Attorney General of Zambia** has not been followed or applied in any subsequent decisions of the English courts. The respondents argue that the ‘good reason’ threshold under the **CPR** is a stricter or more exacting approach than what prevailed under the previous or old rules. Accordingly, it is now the position that an applicant under rule 39.5(5) seeking to set aside a judgment or order made in their absence, faces a more exacting approach and must provide evidence showing a well-supported reason for their non-attendance.

[159] I agree with and adopt this statement of principle. It is rooted also in the policy or overriding objective of the **CPR** of ‘discouraging unwarranted waste of the court’s procedural resources’. As stated in **Zuckerman on Civil Procedure**⁶⁶ at para. 22.154:

“The conditions placed on the court’s power to restore proceedings or to set aside Judgment represent a **stricter approach to non-attendance** than under the old rules, which did not contain comparable restrictions. The **more exacting CPR approach** reflects the policy of **discouraging unwarranted waste of procedural resources**. A party who cannot provide a **well-supported reason** for non-attendance cannot succeed in overturning a decision given in their absence”. (emphasis added)

⁶⁶ 4th Edn. 2021, Sweet & Maxwell.

- [160] On a careful reading of paragraph [50] in **Attorney General of Zambia**, Lloyd LJ was not attempting to and did not pronounce, as a general rule, that the test to be applied in applications under the English equivalent of the **CPR** 39.5(5)(a) is whether the applicant's reason is 'capable of belief.' Indeed, if that were the test to be applied it would be, in my judgment, too low a bar and not in keeping with a 'more exacting approach' now required under the **CPR** to provide a 'well-supported' reason for non-attendance and could have the effect of encouraging parties to waste the court's resources and to use set aside applications as a means of frustrating and delaying the finality to proceedings.
- [161] Moreover, a finding that evidence of an explanation or reason is intrinsically 'capable of belief' does not necessarily lead to the conclusion that it amounts to a 'good reason' for an applicant's non-attendance. It is simply one of the elements of the court's approach to an assessment of the evidence adduced in support of a 'good reason' for an applicant's non-attendance at the trial or hearing. In some cases a finding that the evidence is 'capable of belief' may essentially be decisive of it being a 'good reason', as was the case in **Attorney General of Zambia**; while in other instances it may not.
- [162] The context in which Lord Justice Lloyd referenced at paragraph [50] the evaluative exercise of 'capability of belief' is where, absent cross-examination, it was not for him, at the appellate level, to 'decide whether Mr. Basile is to be believed in his account of his response to litigation documents'. In those circumstances, the learned Lord Justice concluded that Mr. Basile's account 'is capable of belief.' This approach to Mr. Basile's evidence by the Lord Justice is further underscored where, at paragraph [50], he refers to the submission of counsel for the respondent as to why his evidence was incapable of being believed. Counsel's submission was that Mr. Basile 'took a conscious tactical decision not to take part in the proceedings', and 'the additional invoices not produced are late fabrications'. In not accepting this submission, Lloyd LJ found that 'without cross examination the **theory** does not seem to me to demonstrate

that Mr. Basile's account is not capable of belief' (emphasis added). This is not a pronouncement of a test of what is a 'good reason' under the English **CPR** rule 39.5(b). It was merely the Lord Justice's objective assessment of the evidence first to ascertain whether it was capable of belief in light of the 'theory' offered by counsel for the opposing party as to why it was not. At paragraph [55] the Lord Justice's two-step approach to the question of a 'good reason' is manifest when he found that Mr. Basile's account of why he had not realised that he was a party to these proceedings 'is one which is capable of belief and which, **if believed**, would amount to a good reason for the purposes of rule 39.3(5)(b)'. (emphasis added)

[163] Where the evidence adduced by an application to a set aside application is not capable of belief, that would be the end of the matter, and the application must be dismissed. Where the evidence is 'capable of belief' the judge must go on to consider whether it amounts to a 'good reason' for the applicant's non-attendance, especially in the face of circumstances where the applicant or their legal practitioner had notice of the trial or hearing, a category 2 application under **CPR** 39.5(5)(a). This issue remains a question of fact for the judge to decide on the whole evidence, having found the explanation offered by the applicant/party for their non-attendance was intrinsically 'capable of belief'. In this regard, I agree with and accept as correct the respondents' submission that the test of what is or constitutes a 'good reason' is 'very fact sensitive', and a good reason in one case may not necessarily be a good reason for non-attendance in another.

[164] Accordingly, a judge must consider all the evidence relevant to the applicant's non-attendance, determine what was the real reason for their non-attendance and come to a conclusion as to whether that reason or reasons taken singularly or cumulatively, amounts to a 'good reason' for their non-attendance in the circumstances of that matter or case warranting setting aside of the judgment or order given or made in their absence. In **Brazil v Brazil** Mummery LJ at paragraph [12] put it this way:

“... I agree with Hart J that, although the court must be satisfied that the reason is an **honest or genuine one**, that by itself **is not sufficient** to make a reason for non-attendance a “good reason. The court has to **examine all the evidence** relevant to the defendant’s non-attendance; ascertain from the evidence what, as a matter of fact, was the **true** “reason” for non-attendance; and looking at the matter in the round, ask whether that reason is sufficient to entitle the applicant to invoke the discretion of the court to set aside the order. An over **analytical approach** to the issue is not appropriate, bearing in mind the duty of the court, when interpreting the rules and exercising any power given to it by the rules, to give effect to the overriding objective of enabling it to deal with cases justly. The perfectly ordinary English phrase “good reason” as used in CPR 39.3(5) is a sufficiently clear expression of the standard of acceptability to be applied to enable a court to determine whether or not there is a good reason for non-attendance.” (emphasis added)

[165] The appellants also submit that whether the applicable test of a ‘good reason’ is the ‘capable of belief’ test or some other test (as suggested by the respondents), in any event, the learned judge ought not to have adopted, as he did, a ‘very rigorous’ or ‘too rigorous’ an approach to his assessment the evidence adduced by the appellants, even where the evidence of Mr. Lock may have some ‘short comings’. In support of this submission, the appellants rely on the dicta of Lord Dyson MR at paragraphs [28] and [29] in **Mohun-Smith v TBO Investments Ltd**:

“28. Having **identified shortcomings** in the defendant’s evidence, the judge should have reminded himself of the general need **not to adopt a very rigorous approach and to have regard to the overriding objective of dealing with cases justly and in accordance with article 6 of the [European Convention on Human Rights]**. This was particularly important in a case where (i) **the claim was for approximately £2 m**; (ii) the defendant had a defence which had reasonable prospects of success; and (iii) **it must have been apparent that a refusal to set aside the earlier decision would be likely to have very serious consequences for the defendant**. The judge knew that this was a small company. In my view, he adopted too rigorous an approach to his assessment of the medical evidence.

29. ... But for the reasons given in the Pereira case And the estate Acquisition case ... and which I have elaborated above, **the court should not generally adopt too rigorous an approach in its assessment of the evidence adduced in support of an application under rule 39.3(3).**” (emphasis added)

[166] I accept as correct the above statement principle and the guidance given by Lord Dyson in **Mohun-Smith**. In my opinion, these principles and approach to dealing with applications to set aside a judgment or order given or made in the absence of a party are correct, based, as they are, on certain overarching and fundamental rights and principles applicable to civil litigation. These are the overriding objective of courts under the **CPR** to deal with cases justly, and the right of every litigant to a fair hearing before an independent and impartial court established by law guaranteed by section 16(1) of the **Virgin Islands Constitution Order 2007**⁶⁷ and by Article 6 of the **European Convention on Human Rights**. The constitutional importance and reputation of our adversarial court system rests on the independence of the courts, access to the courts by litigants, and for their disputes to be settled by a fair and impartial process in accordance with applicable court rules and after hearing both parties.

[167] Accordingly, trials and hearings must be conducted by the courts on notice to the parties and their legal practitioners. This does not automatically excuse a party whom, with notice of the trial or hearing dates, elects for some reason not to attend and who has no good reason for their non-attendance. It is not axiomatic that a court will or must, in those circumstances, set aside a judgment or order of the court given or made in that party's absence. On the other hand, where no notice of the trial or hearing was given to the applicant, he or she has a right, underpinned by section 16(1) of the **Virgin Islands Constitution Order 2007** and Article 6 of the **European Convention on Human Rights** to have any judgment or order made in their absence set aside without more and for the matter to be reheard on notice to them. This is what undergirds the requirements of rule 39.5(4) and (5).

[168] Taking all these matters into account, I would summarize the applicable principles as follows:

⁶⁷ 2007 No. 1678.

“(1) When dealing with an application under rule 39.5(5)(a)(i) (‘good reason’) to set aside a judgment or order given or made in their absence, the judge must assess the evidence adduced by the applicant in support of his set aside application to establish that he had a ‘good reason’ for non-attendance bearing in mind that the evidence is usually on affidavits with supporting documentary evidence exhibited and that in such applications cross-examination to test the truthfulness and cogency of the evidence is usually not permitted.

(2) In assessing the evidence of the applicant, the judge must bear in mind the overriding objective of dealing with cases/applications justly and the fundamental right of a party to civil litigation to a fair trial or fair hearing.

(3) The decision whether to set aside the judgment or order on the basis of a ‘good reason’ for non-attendance, is a matter of judicial discretion exercised on the basis of the evidence adduced as to whether a ‘good reason’ in fact existed, which either prevented or resulted in the non-attendance of the applicant at the trial or hearing, notwithstanding that the applicant and/or their legal practitioner had prior notice of the trial or hearing.

(4) In deciding whether the applicant has shown on the evidence a ‘good reason’ for their non-attendance, the judge must consider whether the evidence or explanation offered is of the type and quality such that it is capable of belief. If it is not, that is the end of the matter, and the application ought to be dismissed. If it is intrinsically capable of belief, the judge must evaluate whether the evidence, even with some shortcomings, amounts to a ‘good reason’ for non-attendance.

(5) In deciding whether the evidence amounts to a good explanation or good reason for the applicant’s non-attendance, the judge ought not to adopt ‘too rigorous’ or an ‘overly rigorous’ or too technical an approach to his assessment of what amounts or is capable of amounting to a ‘good reason’.

(6) This not too rigorous approach is of particular significance, where the claim is for a large sum of money or for the ownership of assets or rights thereto or recovery of assets or rights which are of considerable value, and where the defendant has either a defence with a reasonable prospect of success to the claim or part of the claim, or where the defendant has a reasonable prospect of challenge to the amount claimed or awarded to the claimant or where the refusal to set aside the judgment or order will have very serious financial or other consequences for the defendant.

(7) In adopting a not too rigorous approach to his assessment of the applicant’s evidence, the judge must bear in mind that the underlying

policy of the court under the **CPR** is to discourage unwarranted waste of the court's procedural resources and not to encourage or to facilitate in any way a party seeking to use the set aside process as a means of stymieing the claim or prolonging or delaying unjustifiably the outcome of a legitimate claim and avoid finality of the proceedings.

(8) Also, in coming to a decision on whether the applicant's evidence is capable of supporting a 'good reason' for non-attendance the judge must consider this question taking into account all the evidence adduced. In this regard, the judge is entitled to make reasonable findings of fact, bearing in mind that where the questions have been raised as to whether the applicant's evidence or important elements of it ought to be believed, that the court invariably will not have the benefit of such evidence having been tested by cross-examination.

(9) Where the applicant's evidence in support of the set aside application, reasonably considered, shows an absence of any proper litigation system for receiving communications from the court or the other party or there has been a failure of the system put in place by the party, the evidence must be examine carefully to ascertain whether the failure or failures are attributable to the applicant and whether any such failures are or can constitute a 'good reason' for the applicant's non-attendance.

(10) A factor of obvious significance to the court's exercise of its discretion is the second limb of the cumulative requirements of rule 39.5(5)(i), that is, whether had the applicant/defendant attended the trial or hearing, it is likely that some other decision, judgment or award may have been made by the court. Both limbs of this rule must be satisfied, and the failure of an applicant to satisfy either of them must result in the application being dismissed, unless the application can demonstrate on the evidence an 'exceptional reason' why the judgment or order should be set aside under sub paragraph (b)."

[169] Did the learned judge adopt too rigorous an approach and, if so, did this lead him into making errors of fact warranting this Court setting aside the Order on Relief? In my judgment, the appellants have failed to make their submissions good on ground 1 of the appeal (Issue 3). I am not convinced that the learned judge adopted too rigorous or an overly rigorous approach to his assessment of Mr. Lock's evidence in support of the Set Aside Application. In my view, the judge's approach to Mr. Lock's evidence in delivering his *ex tempore* judgment was detailed, analytical, and thorough and in keeping with applicable principles when

considering a set aside application on the ground of 'a good reason' for non-attendance under **CPR 39.5(5)(a)(i)**.

[170] The judge considered in some detail the evidence in Lock 1 and 2 as it related to a number of issues of fact and to the question of whether the appellants had put forward a 'good reason' for their non-attendance at the Quantum Trial. One such issue concerned whether the evidence showed that Mr. Lock had not received from Kendall a copy of the Trial Listing Notice. While the judge did not conclude that there was evidence showing that Kendall had not sent the Notice to Mr. Lock they having received it from the court office on 7th June 2023, he was not satisfied, on the evidence of Mr. Lock, that he had not received the said Notice from Kendall during the intervening period from 7th June 2023 to 18th August 2023, which date, according to Mr. Lock's evidence, was the start of his computer junk mail incident. In this regard, the learned judge did not accept Mr. Lock's evidence in Lock 2 that having searched his junk mail folder after the Order on Relief had been brought to his attention in November 2023 and he had a conversation with Mr. Carrington KC, he did not find any email in that folder from Kendall or Mr. Carrington KC with the Trial Listing Notice attached, or which referred to the trial dates having been set by the court office in BVI for the Quantum Trial.

[171] In my judgment, the judge's analysis of Mr. Lock's evidence and his conclusion of lack of proof on this issue during the critical intervening period, does not belie too rigorous or an overly rigorous approach to his assessment of Mr. Lock's evidence. What the learned judge did was to embark upon an approach and assessment of Mr. Lock's evidence as the principal supporting evidence of the appellants which is commensurate to the standard of scrutiny required of or permitted by a judge dealing with a set aside application on the 'good reason' ground with a view to being satisfied that the said evidence 'well-supported' the appellants' good explanations or reasons for their non-attendance. The simple fact is that no evidence pertaining to what emails had been received by Mr. Lock in his inbox from Kendall or Mr. Carrington KC during the said intervening period and before

the junk mail incident began on 18th August 2023 was given or provided by Mr. Lock in his two affidavits or by Mr. Lau in Lau 1 or by any of the appellants.

[172] With regard to this latter point, the learned judge stated:⁶⁸

“... so it is entirely understandable that he might not have seen it in his junk mail because it wasn’t there. But are we to understand, to suppose that Kendall didn’t send it to him? Well, he doesn’t say that. There’s no evidence that Kendall didn’t sen[d] it to him. He just says that he didn’t see it. Now there might be a lot of reasons for that, but just not seeing something, is that good enough reason to overturn an entire judgment and send this back to a trial of a number of days at huge expense because somebody didn’t see something?”

And at page 208 lines 10 to 16

“It suffices merely to point out that Mr. Lock must show the Applicants’ good reason in his evidence. Mr. Lock must show, in this case, therefore, that Kendall did not send that hearing notice to Mr. Lock. Mr. Lock doesn’t show that. What he does show is that he was busy, focused on other things and not cognizance of deadlines.”

[173] It was of some importance, even critical, for Mr. Lock to demonstrate by his evidence that Kendall had not sent to him the Trial Listing Notice received by them on 7th June 2023, well before the junk mail incident of 18th August 2023. Moreover, much heavy weather was and is being made by Mr. Lock, and by extension the appellants, of this junk mail incident which was being advanced by Mr. Lock as a primary reason why he was not aware or could not have been made aware by Kendall of the Trial Listing Notice. However, Mr. Lock while producing evidence and documents tending to show the existence of this ‘junk mail incident’ with his personal computer which he used to receive and send communications to and from and to Kendall and to pass those on to Mr. Lau, he failed to produce any evidence pertaining to the intervening period prior to the commencement of the ‘junk mail incident’ and after the Trial Listing Notice had been received by Kendall as Mr. Carrington KC had confirmed by an email of 7th June 2023 in response to Mr. Samuel of Conyers BVI on behalf of the respondents. Indeed, at no point in his

⁶⁸ Transcript Vol. 1 at page 199 line 7 to 17.

evidence did Mr. Lock say that he also checked his inbox for emails from Kendall or Mr. Carrington KC during the intervening period of 7th June 2023 to 18th August 2023 and he did not find any email to which the Trial Listing Notice had been sent or attached or mention made of the actual trial dates. Furthermore, such a conclusion cannot, adopting a not too rigorous approach, reasonably be interpreted, surmised or deduced from any evidence or statement in Lock 1 and 2. Absent any such evidence, and bearing in mind that the 'good reason' being advanced by the appellants for their non-attendance must not just be capable of belief, but must be 'well-supported' by evidence, Mr. Lock's evidence clearly fell short in this important respect, as the learned judge rightly concluded.

[174] This lack of cogent evidence from Mr. Lock (which Mr. Lau in Lau 1 and, indeed, the other appellants could not speak to) concerning this critical intervening period, cannot be cured or explained away, as the appellants have sought to do in their arguments, on the basis of some strained interpretation of other aspects of Mr. Lock's evidence and inviting the judge (and this Court) to assume or to deduce that Mr. Lock must or could only have been saying in Lock 2 that he had already ascertained from his inbox that there was no email there from Kendall or Mr. Carrington KC attaching the Trial Listing Notice sent during the said intervening period and before his junk mail incident. Likewise, it is not explicable on the basis that the learned judge adopted too rigorous an approach to his assessment of Mr. Lock's evidence on this issue. In my opinion, the conclusion by the judge on this issue and on this aspect of Mr. Lock's evidence is well supported by the evidence of Mr. Lock himself and the judge's reasoning has not been shown to be flawed. Furthermore, the judge's assessment and analysis of Mr. Lock's evidence was in keeping with his duty to ensure that the reason or reasons being relied on as 'good reasons' for the appellants' non-attendance is/are 'well-supported' by the evidence adduced by them in support of the Set Aside Application. Moreover, the judge's reasons for finding that Mr. Lock had not provided any evidence to show that Kendall had not sent him the Trial Listing Notice during the intervening period were

sound, measured and his conclusion not blatantly wrong or such that no reasonable court could reach such a conclusion on this evidence.

[175] At pages 201 to 203 of the transcript, the learned judge addressed the significance of Mr. Lock and the appellants having knowledge from the CMC Order that the Quantum Trial was to take place between 14th and 22nd November 2023. He found, as there was no evidence to suggest otherwise, that neither Mr. Lock, the self-admitted litigation coordinator and manager of these proceedings for the appellants, or the appellants themselves, had treated these proceedings and the upcoming Quantum Trial with the kind of time, interest and attention which they ought or are obliged to do as litigants and parties to important civil litigation. The evidence adduced by them does not show that either Mr. Lock or Mr. Lau or any of the other appellants had tried to contact, by email or by phone or otherwise, Kendall or Mr. Carrington KC and to find out whether the Quantum Trial would take place on the dates listed in the CMC Order, or generally to check on the progress of the litigation including obtaining and filing expert evidence on the value of the Target Group as permitted by the CMC Order of May 2023.

[176] The judge's analysis of these matters are as follows:

“Well, again the fact that Mr. Lock who is supposed to be coordinating, is supposed to be managing these proceedings, didn't keep a record of deadlines and was not generally cognizant of these deadlines, presumably because he was not particularly focusing on them as he also said, this is plainly not a good reason not to attend the trial, particularly, as I might add, since the Applicants must be taken to have known from the draft case management order that the Court intended to hold a trial in that time period identified precisely with reference to exact calendar days in the Draft CMC order.”⁶⁹

“....There was a reference to specific dates. So this must have acted on their mind, this must have been on their mind that this could have happened. They have a responsibility. Litigants have a responsibility. Let's be clear about this. They also have a responsibility to help the Court. That's in the overriding objective, but they have a responsibility. This is the action of an irresponsible litigant.”⁷⁰

⁶⁹ Page 201 L 14 to 25

⁷⁰ Page 202 L 3 to 11.

“.... It is simply inexplicable and inexcusable that neither Mr. Lock nor any of the Applicants sought to reach out to Kendall about the various procedural milestones throughout in 2023 or ask whether the Court had listed the hearing between the 14th and 22nd of November 2023 as directed by the CMC in May.”⁷¹

[177] The learned judge at page 214 of the transcript summarized what he saw as the ‘fatal flaw’ in the appellants’ Set Aside Application and his conclusion on the issue of ‘good reason’:

“Where I think this takes us is that the big problem, the fatal flaw in the Applicants’ application is that they have not provided a good reason for not attending the trial, particularly with the period from the CMC up to the 18th of August when, on any view, (sic) [Mr.] Lock, and by necessary extension, the Applicants’ can, in south East Asia, they must have known that this trial was going to happen and they haven’t explained why it was that they did not come to the trial. So this Court does not accept, for those reasons, the attempted explanation given by Mr. Lock on behalf of the Applicants.”

[178] In my opinion, the approach of the learned judge to this evidence was correct and the conclusions which he reached were reasonable and cannot be assailed. Furthermore, his approach and analysis were not too rigorous or overly technical, as argued by the appellants. The evidence from Mr. Lock showed clearly that he had seen and was well-aware of the draft CMC Order. He was therefore cognisant of the trial window dates stated therein, and the outside date stated therein for the appellants to file their expert report on the valuation of the Target Group for the purposes of the Quantum Trial. However, his evidence is that he made no notes of these important dates but, instead, having made certain uninformed assumptions regarding the said dates without consulting with Kendall and/or Mr. Carrington KC. Neither he nor the appellants themselves inquired or contacted Kendall or Mr. Carrington KC with regard to the various matters to be addressed, such as whether the evidence of witnesses of fact and of the respective experts on value will give their evidence remotely and whether leading counsel for the parties will appear at the Quantum Trial in person or remotely.

⁷¹ Page 203 L 22 to 25 and page 204 L 1 to 2.

[179] Mr. Lock's evidence was that unless he received an email from Kendall or Mr. Carrington KC, he assumed that there was nothing that he or the appellants needed to be aware of or to do. Even as the dates in the CMC Order for the trial approached, no attempt was made by Mr. Lock or the appellants to contact Kendall or Mr. Carrington KC. Mr. Lock's 'excuse' was that he was extremely busy during this period with other interests and matters and did not have the time to dedicate to this matter, an excuse which the learned judge rightly found did not accord with the appellants having a good reason for not being aware of the trial dates and not attending the Quantum Trial.

[180] In relation to ground 1 and this Issue 3, I hold that the learned judge did not adopt too rigorous an approach to his assessment of Mr. Lock's evidence. In my view, the learned judge did just what was required of him in assessing Mr. Lock's evidence in order to ascertain whether the appellants' reason or reasons for their non-attendance at the Quantum Trial was 'well-supported'. His conclusion that it was not was also correct on any reasonable assessment of Mr. Lock's evidence. In arriving at this conclusion, the learned judge was not blatantly wrong. Accordingly, the learned judge was correct in finding that no 'good reason' had been established on Mr. Lock's evidence, and that the appellants' Set Aside Application was fatally flawed in that no good reason for their non-attendance had been made out.

Issue 5 – Finding it was “improbable” Kendall had failed to send Trial Listing to Lock - non-service of Kendall Removal Application on appellants via Mr. Lock

[181] This ground of appeal and Issue can be disposed of quickly. It was not addressed by the appellants in their written or oral submissions.

[182] At paragraph 13 of ground 3 in the notice of appeal, the appellants challenge the judge's finding that it was 'improbable' that Kendall had failed to send the

appellants the Listing Notice via Mr. Lock, on the basis that he had taken no sufficient account of the fact that Kendall had failed to serve the Kendall Removal Application on the appellants personally in breach of **CPR** 63.6. This would seem to be suggesting that the failure to serve the appellants personally with the Kendall Removal Application in breach of **CPR** 63.6, is evidence tending to show that it was not 'improbable' that Kendall had not sent the Listing Notice to Mr. Lock.

[183] As mentioned above, and as the respondents have submitted, the learned judge expressly did not make any finding that Kendall had sent the Listing Notice to Mr. Lock during the intervening period. His finding was that Mr. Lock had not shown on his evidence that he had not received the Listing Notice from Kendall during the intervening period, as he did not say so in his affidavits and produced no proof that he had checked the emails from Kendall received in his inbox during the intervening period and did not find any which had the Listing Notice attached or referred to it and the trial dates having been fixed.

[184] Dealing briefly to the substance of paragraph 13 of ground 3, it is difficult to equate the non-service of the Kendall Removal Application on the appellants personally with evidence showing that Kendall had not sent and Mr. Lock had not received the Listing Notice during the intervening period and before the inception of his junk mail incident on 18th August 2023. Similarly, the non-service of the Removal Application on the appellants personally, is not evidence showing or tending to show that it was not 'improbable' that Kendall would have not sent the Trial Listing Notice to Mr. Lock during the said period. For these reasons, the learned judge did not err in not taking the non-service of the Kendall Removal Application on the appellants personally into account in accepting that it was 'improbable' that Kendall would not have sent and Mr. Lock had not shown that he had not 'received' the Listing Notice during the intervening period. What the evidence does establish, as conceded by the appellants⁷² is that Kendall had sent the Removal

⁷² Para.38 of the appellants' skeleton arguments.

Notice to Mr. Lock on 6th November 2023 via email. Accordingly, there is nothing of substance in this point at paragraph 13 of ground 3.

- [185] For the reasons given above grounds 1,2 and 3 of the appeal are not successful. I do not consider grounds 4 or 5 to be issues of much substance and neither of them would be dispositive of the appeal. I now go on to consider ground 6, which is to some extent tied in with paragraph 13 of ground 3 just dealt with.

Ground 6 – Failure to serve appellants personally with the Removal Application and Order

- [186] The appellants have made heavy weather of this ground of appeal. They submit that there was a clear failure on the part of Kendall to serve the Removal Application on the appellants personally as mandated by the provisions of CPR 63.6(2); and also to serve a copy of the Removal Order on them personally as mandated by sub-paragraph (4). It is submitted that had Kendall taken either of these steps, as they were obligated to do under the rules, the appellants would have been alerted to the 'breakdown in communications' between Kendall and Mr. Lock, and taken steps to either restore communications between them or instructed new legal practitioners to go on record in the proceedings below. They submit further that the consequence of this breach of the rules by Kendall is that the appellants were not legally represented at the Quantum Trial and they, the appellants, therefore failed to attend.

- [187] The appellants stress that the learned judge failed first to recognize that this was a freestanding 'good reason' for their non-attendance and, secondly, he did not address this reason or factor in his judgment, albeit engaging with the point only twice⁷³ (there was therefore no assessment by the judge or consideration of the appellants' submissions to him on this issue. Moreover, the judge was plainly wrong to have accepted the respondents' submissions on this issue because (i) he

⁷³ Page 86 L 12-14; and page 127 L 25 to page 128 line 14 of the Transcript Vol. 1.

erred in concluding that the appellants had received the Trial Hearing Notice or that there was no evidence before him that they had not received it; and (ii) even if Mr. Lock had received the Trial Hearing Notice and the appellants were thereby deemed to have knowledge of it, the appellants should still have had legal representatives on the record under a duty to attend at the Quantum Trial on their behalf.”⁷⁴

[188] The respondents consider ground 6 to be a ‘red herring’. They submit that there is no merit in it whatsoever. They emphasize that the ‘original’ reason provided by the appellants for their non-attendance at the Quantum Trial in Lock 1, was related to Mr. Lock’s junk mail incident and nothing else. It is only after the respondents filed Wong 1 in response, that the appellants, realizing the ‘insufficiency’ of that basis as amounting to a ‘good reason’, that additional justifications were given in Lock 2.

[189] Indeed, at the time of filing the Set Aside Application supported by Lau 1 and Lock 1, the appellants and Mr. Lock would have been aware that Kendall had applied for and had been removed from the record as their legal practitioners in the proceedings below, because of Kendall’s inability to contact and to receive responses to their communications sent, as customary, by email to Mr. Lock. Yet, the failure to serve the appellants with the Removal Application and/or Removal Order was not first advanced as a reason for the appellants’ non-attendance at the Quantum Trial.

[190] The respondents also submit that the reason for the requirement of service of a removal application and the order on the party, is not to provide notification of an impending trial or hearing date, but simply to notify the client that their lawyers have come off the record in the proceedings.⁷⁵ The respondents also argue that, in any event, the appellants’ point assertion about what they would have done had they been served with the Removal Application and/or the Removal Order, misses

⁷⁴ Para. 45.

⁷⁵ Para. 58.

the real ‘elephant in the room’ in relation to the judge’s ruling and dismissal of the Set Aside Application. The real reason is that Mr. Lock and the appellants had been told of the Quantum Trial reserved dates for months before the Removal Application was filed in October 2023 and they and/or Mr. Lock, their chosen litigation coordinator and manager, did nothing at all to communicate with Kendall or Mr. Carrington KC, and failed to comply with the court’s various directions in the CMC Order despite Kendall’s several attempts to get instructions from them about these deadlines and directions.

- [191] It is the respondents’ submission that the appellants and Mr. Lock knew of the trial window in the CMC Order, and yet they did nothing about it to prepare for their attendance at and to defend their case on the quantum of equitable compensation for the Target Group to be assessed by the judge and ordered to be paid to the respondents by the appellants, which sum they must have appreciated would be very considerable and certainly into the millions of US currency. This, say the respondents, was the ‘true reason’ for the appellants’ failure to attend the Quantum Trial and not any failure on the part of Kendall to serve them with the Removal Application or the Removal Order, which Kendall had also sent to Mr. Lock by email.

Analysis and conclusion on ground 6

- [192] At first blush, this ground of appeal may appear to have some merit. However, the simple answer to it is that it does not address the primary reason on which the learned judge found that there was no good reason shown and dismissed the Set Aside Application. This is that the appellants and Mr. Lock were well aware of the trial window reserved by the CMC Order from as far back as May 2023, and there is no evidence whatsoever from the appellants or Mr. Lock that they had shown any interest in giving or taken any steps to inquire or to provide instructions to Kendall or Mr. Carrington KC to advance their preparations for the Quantum Trial expected to take place in November 2023, or to comply with the directions of the court in the CMC Order necessary or important to the conduct of the Quantum

Trial. This was all necessary for the appellants to do during not just the intervening period of 7th June 2023 to 18th August 2023, but also during the period thereafter and up to the date in November 2023 for the start of the Quantum Trial. Instead, there was not just total inaction but complete silence on the part of the appellants and Mr. Lock, whom they had entrusted with the coordination and management of these proceedings on their behalf. In fact, there is no evidence adduced by the appellants or from Mr. Lock that they were in touch and communicating with each other about the CMC directions and the steps necessary to be taken by them to ensure that they comply with the directions and are in a position to attend and to be properly represented at the Quantum Trial.

[193] Against this backdrop of total silence, inertia, and abject disinterest by the appellants, and the admitted failures of Mr. Lock because he was very busy with other interests and matters during that period, Kendall and Mr. Carrington KC were sending emails to Mr. Lock and making efforts to receive instructions from the appellants via Mr. Lock, but receiving no response. This ultimately led to Kendall taking the decision to come off the record and to file the Removal Application which was sent to Mr. Lock, as was the Removal Order ultimately obtained by Kendall.

[194] That this is the factual position is not only astounding but is incontrovertible on the evidence. It is not indicative of a party showing a keen interest in monitoring their litigation, especially of one of this magnitude, which they are involved in as defendants. This wholly unacceptable and indefensible behaviour on the part of these appellants, is what led to their non-attendance at the Quantum Trial.

[195] The fact is that Kendall did send a copy of the Removal Notice to Mr. Lock on 6th November 2023, and likewise the Removal Order subsequently granted. Thus, the application was 'on notice' to the appellants in compliance with rule 63.6(2). Sub-paragraph (4) stipulates that it is the Order made by the court which must be served 'personally' on the appellants, as the former clients of Kendall and Mr.

Carrington KC. In these circumstances, a failure to serve the appellants personally with the Removal Notice cannot, on any proper view, be considered to be nor does it equate with a 'good reason' under rule 39.5(5)(a)(i). Moreover, any failure to serve the appellants personally with the Removal Order itself cannot, in my view, in the particular circumstances of this matter and the appellants' demonstrable lack of communication and keen interest in the proceedings in which they are defendants facing a very substantial compensatory award being made against them, be considered a 'good reason' for the appellants' non-attendance at the Quantum Trial. Accordingly, ground 6 fails.

- [196] This brings me to the remaining grounds of appeal which I can deal with fairly shortly. Of those grounds, I will deal with grounds 4 and 5 together before addressing ground 7, which I have to some extent already touched on.

Grounds 4 and 5: (i) Entitlement to rely on Kendall; and (ii) Appellants did not know Mr. Lock was too busy

- [197] There is no merit in either of these grounds of appeal. A client or party to litigation is entitled to rely on their appointed lawyers or legal practitioners to discharge the professional duties and obligations commensurate with the lawyers/client relationship. Accordingly, where a party to litigation appoints a lawyer or firm of lawyers to represent him, he is taken to have put in place a proper system by which to receive communications concerning the litigation whether from the opposing or other parties and their lawyers or from the court. However, the engagement of a lawyer or firm of lawyers, such as Kendall, is not a one-way, but a two-way street, with both parties having certain obligations to one another. These may in some instances be contractual where there is in place a written retainer or actual agreement which spells out the respective expectations and obligations of the lawyer and their client. For it to work properly, it requires both parties to at least be able to communicate with each other as the litigation is continuing and the client/party must expect that there will be communications from

the court including notice of hearing dates.⁷⁶ Accordingly, it is a relationship where, especially in litigation, the client or party to the litigation is expected to not only make timely payment of fees billed to their lawyer for services rendered but to ensure that they are in a position to receive from and to make regular communications/instructions to their lawyers concerning the conduct of the litigation and their interests therein.

[198] The appellants handed over most if not all of this to what was essentially a 'middle man', Mr. Lock, whose evidence is that he was the coordinator and manager of the appellants' interest in these proceedings, and the person through whom Kendall and Mr. Carrington KC would communicate with and receive instructions from the appellants. This arrangement came into being after the Liability Trial and judgment and before or at the Quantum Phase of the trial. On Mr. Lock's evidence in Lock 2, the learned judge was correct to conclude that Mr. Lock had been appointed as litigation manager. At paragraph 11 of Lock 1, he stated 'I have been responsible for coordinating the proceedings on behalf of the Applicants.' While Mr. Lock's engagement by the appellants would not absolve Kendall of their duties as legal practitioner of record for the appellants in the proceedings, the facts show that it was Kendall and Mr. Carrington KC who were sending email communications to Mr. Lock for onward sending and attention of the appellants but receiving no response and no instructions. Accordingly, there is nothing to ground 4.

[199] Likewise, there is nothing to ground 5. By this ground the appellants assert that they did not know that Mr. Lock, their litigation coordinator and manager, was too busy, as he, Mr. Lock, clearly admitted in Lock 1 and Lock 2. This assertion is being advanced by the appellants without any evidential basis and to argue that the judge was wrong to conclude that they were 'irresponsible' in engaging Mr. Lock for that role. Mr. Lock was admittedly not a lawyer. It would be passing strange that the appellants did not appreciate he was a very busy man based on what Mr. Lock himself described as his role and involvement with Mr. Lau and not

⁷⁶ Per Lord Dyson in *Estate Acquisition* at para. 21.

just in relation to these proceedings. The appellants therefore must live with their choice and with their demonstrably lack of communication with Mr. Lock, at least to the extent that no evidence of such communication concerning the proceedings in the court below was provided either in Lau 1 or in Lock 1 and 2.

[200] The simple point is that whether the appellants knew or ought to have known that Mr. Lock was a busy man and perhaps not well-suited for the role of litigation coordinator and/or manager, the fact is that he was very busy and did not pay sufficient attention to his duties as such and was, during a critical period at which he had knowledge from the CMC Order that the Quantum Trial would take place in November 2023, seeming 'absent' from the discharge of those duties. He was during the said period not doing the very basic things which one would expect of a person in that position, such as regularly checking on emails from Kendall and Mr. Carrington KC, calling them if necessary to discuss what was taking place, and being proactive in inquiring of Kendall and Mr. Carrington KC, on behalf of the appellants, as to the progress of the litigation and towards complying with directions in the CMC Order. Likewise, by finding out whether the trial window dates were being kept for the Quantum Trial, so that he would be in a position to inform the appellants about all such pertinent matters.

[201] As mentioned above, there is no evidence from Mr. Lau or the other appellants of what they did to enquire of Mr. Lock as to what was transpiring with these proceedings. Had they done so, they perhaps would have learnt from Mr. Lock how busy he was or has been, and may have put themselves in a position to decide whether to keep the arrangements with Mr. Lock in place in relation to the proceedings, or to put in place some other arrangement best suited to their purposes so as to ensure the timely communications and responses, and the giving of important instructions to Kendall and Mr. Carrington KC in order to protect their interest. For these short reasons, grounds 4 and 5 fail.

Ground 7 – Failure to exercise judicial discretion

[202] By this ground the appellants' primary complaint is with the learned judge's conclusion that he was 'constrained by the law' to find that the appellants had not demonstrated that they had a good reason for not attending the Quantum Trial. They argue that this statement by the judge, at the end of his judgment, 'suggests' a misapprehension by him of the guidance given by the English Court of Appeal in relation to applications of this type. They surmise that this guidance clearly indicate that the question of whether reasons advanced by an applicant amount to good reasons 'for the purposes of the court's jurisdiction', fall squarely within the exercise of judicial discretion and required the judge in exercising that discretion to also give effect to the overriding objective of deciding cases justly.⁷⁷

[203] In seeking to advance this line of argument based, as it is, on what is perceived to be an apparent 'misunderstanding' by the judge, the appellants pray in aid, this extract from a much earlier part of the judgment:

"And we can conveniently start, for example, by enquiring, are these cases where the English Courts, for example, which [is] our closest equivalent, have held that an Applicant had or would have had no good reason for not attending the trial."⁷⁸

[204] The appellants point next to the judge referring to the decision of the English court in **Estate Acquisition**, as an example of a case where the court held there was no good reason provided by the applicant in circumstances 'where a party knows that proceedings have been issued ... but that party does not have a system in place to ensure that they receive communications from the opposing party and/or the Court.' Reference was also made to other passages from the decision in **Estate Acquisition** cited by the judge, each concerning where the applicant is found not to have put in place or to establish a system for ensuring, as far as practicable, that communications concerning the litigation, existing or pending, are received by him, and that would not amount to a 'good reason' under the English equivalent of the ECSC CPR 39.5(5)(a)(i). The appellants stress that the judge went on to

⁷⁷ Para 46.

⁷⁸ Page 44 L 2-7 of the Transcript.

consider whether the appellants in the instant matter, had a system in place and to conclude, ultimately, that he was 'constrained by law' to find that the appellants did not have a good reason for failing to attend the Quantum Trial.⁷⁹

[205] The appellants cite, in particular, the guidance given by Lord Neuberger at paragraphs 24 and 26 in **Bank of Scotland plc (formerly Governor and Co of the Bank of Scotland) v Pereira and others** and by Lord Dyson in **Estate Acquisition and Development Ltd v Wiltshire and another**. The appellants also cite the statement at paragraph 28 of the judgment of the Court of Appeal in **Mohun-Smith and another v TBO Investments** endorsing the reasons given in **Pereira** and in **Estate Acquisition** cautioning not to adopt a very rigorous approach, and to have regard to the overriding objective to deal with cases justly and in accordance with Article 6 of the European Convention on Human Rights. They also underscore that the 'court should, at least in many cases, not be very rigorous when considering the applicant's conduct'; and also that regard must be had to its importance in cases where the claim is for a large sum of money.

[206] In relation to this last factor (large sum of money), the appellants accept that the judge clearly appreciated the 'magnitude' of the impact of the dismissal of the Set Aside Application on the appellants. He accepted that the result 'was far reaching and ... could be described as harsh for the Applicants'; and he concluded that had the appellants attended the Quantum Trial, some other order might have been made and that even a 1 percent lesser sum is still 1 million dollars, illustrating that even a small change in the amount of the valuation of the Target Group, 'is going to possibly be significant...'⁸⁰

[207] This notwithstanding, the appellants submit that 'the judge failed to consider the overriding objective and the extreme prejudice suffered by the [appellants] given

⁷⁹ Para. 48.

⁸⁰ Page 186 L 3-20 of the Transcript.

the substantial and unprecedented payment order which has the effect of unjustly benefitting the respondents.’⁸¹

[208] In response to ground 7, the respondents dismiss this ground and the appellants’ arguments as another ‘unmeritorious attempt’ to impugn the judge’s determination of there being no good reason advanced, ‘by parsing a comment that the judge made at the end of his judgment.’⁸² In relation to the judge’s statement that he was ‘constrained by the law’, the respondents argue that the appellants misunderstood the point the judge was making and the context in which it was made. This comment was coming, as it did, after the judge had conducted a ‘forensic analysis’ of the authorities relating to the ‘good reason’ threshold, and the reasons advanced by the appellants for their non-attendance. It is submitted, therefore, that in doing so, the judge weighed all the relevant factors in the balance, including the large amount of the compensation award, exercised his discretion as to whether the ‘good reason’ threshold had been met by the appellants, and explained his reasons why the appellants had not met the threshold. It was only then that he held he was ‘constrained by the law’ to find in favour of the respondents and dismiss the Set Aside Application. In essence, submit the respondents, the learned judge did not err, but did exactly what the appellants accuse him of not doing.

[209] As to the judge’s musing that a different order might have been made had the appellants’ attended the Quantum Trial, the appellants submit that this argument wrongly conflates two limbs of the cumulative test at rule 39.5(5)(a), when as a matter of law, each limb is separate and distinct and must be satisfied on evidence individually. Further, the fact that one limb is not satisfied has no impact on the other limb. In support of this proposition the respondents cite this passage from **Zukerman on Civil Procedure** at para. 22.159:

⁸¹ Para 53.

⁸² Para. 61.

“It is therefore clear that failure to attend the trial can be very risky and that a party cannot absent themselves from the proceedings and hope to have the result reversed merely by showing that they have a good case on the merits.”

- [210] The respondents also submit that even where both conditions/requirements of the test at rule 39.5(5)(a) have been met, the court still has a residual discretion not to set aside the order, albeit this would be appropriate only in very ‘unusual circumstances.’ However, the court’s discretion does not work in reverse, that is, the judge has no discretion to set aside the order where the applicant has failed to meet either of the two limbs of the test or both of them. Accordingly, looking at in this way, the respondents submit that the learned judge was correct when he stated that the failure to satisfy the ‘good reason’ condition was fatal to the appellants’ Set Aside Application.

Analysis and conclusion – ground 7

- [211] I am generally in agreement with the points and arguments advanced by the respondents in answer to ground 7, which in my view are to be preferred. The learned judge’s statement that he was ‘constrained to find in favour’ of the respondents, came immediately after the passage close to the end of his judgment wherein he referred to the failure of the appellants to provide a ‘good reason’ for them not attending the Quantum Trial and branded this as the ‘fatal flaw’ in the Set Aside Application. That a failure to establish a ‘good reason’ for non-attendance is fatal to the test and hence the application under rule 39.5(5)(a) is clear from the analysis of rule 39.5 in the section above. It follows that a finding of ‘no good reason’ by a judge on a proper assessment of the evidence of an applicant, is fatal to the exercise of the discretion to set aside an order, as the learned judge correctly stated. Accordingly, his identification of the ‘fatal flaw’ in the appellants’ Set Aside Application was not an error of law or misapprehension of principle.
- [212] The statement ‘*I believe I am constrained by the law*’, the focal point of the appellants’ ground 7, gets them nowhere. First of all, the judge’s full statement

was: 'I believe I am constrained by the law to find that the Applicants do not satisfy the first condition of the test, and that because the conditions are cumulative means that the application must stand dismissed.' This statement was made at the end of the judgment and immediately followed the judge's summary that he had applied the law as he understood it to the facts, 'including the factual matrix between the 31st of May 2023 and the 18th of August 2023, not just after the 18th of August 2023'.

- [213] Further, the statement complained of does not 'suggest' as the appellants argue, a misapprehension by the judge of the guidance from the English Court of Appeal. A full reading of the judgment shows that the learned judge analyzed the appellants' evidence, ascertained what was the 'true' or real reason for their non-attendance, and assessed whether that reason could amount to a 'good reason' in this case. This approach and exercise were in keeping with the guidance in the English cases relied on by the appellants.
- [214] The gravamen of the dicta of Lord Neuberger at paragraphs 24 and 24 of the judgment in **Bank of Scotland v Pereira**, is that once a good reason for non-attendance has been demonstrated by an applicant, and he has an arguable case on the merits, it would require very unusual circumstances for a court not to set aside the order. This *dictum* clearly demonstrates that once an applicant has on the evidence adduced, satisfied the cumulative threshold test in rule 39.5(5)(a), it is almost certain that the court will exercise its discretion in favour of setting aside the order. In the English context, Lord Neuberger also identified, apart from these two hurdles, a third hurdle which an applicant must satisfy, this being that he has applied promptly. Lord Neuberger categorized these hurdles as a 'trio of hurdles', ascribing to them a '**strictness**' which is plain.
- [215] Lord Neuberger added, however, that 'the **rigour of the rule** is modified by three factors'. The first is what constitutes 'promptness'; what constitutes a 'good reason' which is very fact sensitive; and 'the court should, at least in many cases,

not be very rigorous when considering the applicant's conduct'. In relation to this last statement, it would seem to suggest that there may be some cases where it is permissible or warranted for the judge or the court to adopt a very rigorous approach to the assessment of the evidence in support of the application. The second modifying factor which he identified, is that the English equivalent of rule 39.5(5)(a) is, like all other rules in the CPR, subject to or is to be interpreted in accordance with the overriding objective. This is indeed a common feature and requirement when interpreting and applying the various procedural rules of the CPR. Accordingly, the 'good reason' rule must be applied in that light. The third modifying factor identified is that failure of an application under rule 39.5 of the CPR does not prevent the applicant from seeking permission to appeal the order sought to be set aside. This is another option which is open to a party who has received a judgment or order given or made in their absence to appeal same to the Court of Appeal. Where the matter is interlocutory permission to appeal must first be obtained.

[216] The *dicta* of Lord Dyson in **Estate Acquisition v Wiltshire** makes the obvious point that the CPR does not define and it would be undesirable for a court to attempt to define a 'good reason' within the meaning of the rule. However, the rule must be interpreted in light of the overriding objective and Article 6 of the Convention (right to a fair hearing), and the judge must have both of these considerations in mind when interpreting and applying the phrase 'good reason'. Lord Dyson also cautioned that the phrase 'good reason' must not be applied too strictly. This latter point may also be considered as another or fourth way in which the courts are to modify or temper the 'strictness' of the rule 39.5(5)(a).

[217] Another tempering factor, can in some cases be the gravity of the impact of a dismissal of the set aside application on the applicant. I do not see this as identical with the second condition at sub-paragraph (ii) of rule 39.5(5)(a), as the respondents contend. This second condition is whether, had the applicant attended the hearing, it is likely that some other judgment or order different from

the one made in their absence would have been made by the court. This second condition, which must also be satisfied, is different from a court of judge, in the exercise of his discretion, considering and weighing the magnitude of the judgment or order on the applicant, whether as to the quantum or otherwise of the judgment or order made in the absence of the applicant. This aspect, the learned judge also alluded to. He considered the quantum of the Order on Relief (some US\$97 million) as 'far reaching' and 'harsh' for the respondents.⁸³ He also earlier in his judgment referred to his decision as 'momentous'⁸⁴, and mused that with an award of US\$97 million, even a 1 percent difference downwards would equate (roughly) to a \$1m reduction, which is a lot of money.⁸⁵ These passages elucidate that the judge's mind was live to this issue and factor as he considered the merits of the application, whether a 'good reason' had been made out on the evidence from the appellants, and which way he ought to exercise his discretion.

[218] The judge also considered the inherent advantages of a hearing at which both parties are present and represented:

"I think it is generally accepted that the value of adversarial proceedings is that it gives the Court a balanced picture. Without the other side present, the Court might be more inclined to accept more extreme positions than if both sides are there and they establish some kind of balance... it is very common for a court on those occasions to take a somewhat more middle line between the parties. So, is it likely that the Court might come to a different conclusion? Now I think it is likely that the Court might come to a different conclusion."⁸⁶

[219] For the reasons given above, it is my judgment that ground 7 proceeds from a false premise, that is, that the judge was saying at the end of his judgment that he was bound or constrained by the law to reject the reason relied on by the appellants as being a 'good reason'. Instead, the judge having conducted an analysis of the evidence adduced and having determined the 'real' reason for the appellants non-attendance at the Quantum Trial, and having found that the said

⁸³ Page 211 L 2 of the transcript.

⁸⁴ Page 179 L 22-23.

⁸⁵ Pages 182-183.

⁸⁶ Page 186 L 11-24 Transcript.

reason was in his judgment not a 'good reason' as it did not accord with his understanding of what is meant by the phrase 'good reason' in rule 39.5(5)(a)(i), concluded that the appellants as applicants had not produced the kind or quality of evidence which supported the reason or reasons upon which they relied to explain why they had failed to attend the Quantum Trial and had therefore failed to establish that first limb of the test, then reached the conclusion that he was 'constrained by the law' to dismiss the Set Aside Application. Accordingly ground 7 also fails.

Disposition

[220] The appellants having failed on all seven grounds in their notice of appeal, the appeal ought to be dismissed with costs to the respondents. I would therefore make the following orders:

(1) The appeal is dismissed.

(2) The appellants shall pay the respondents' costs of the appeal to be assessed by a judge of the Commercial Court or a Master, if not agreed by the parties within 21 days of the date of this judgment.

[221] It is only left for me to express first of all my apology for the longer than usual time which it has taken to prepare and make ready this judgment for delivery, and for the length of this judgment. Secondly, I also express the Court's appreciation to the parties' lead counsel and support teams for their helpful submissions and for their patience.

I concur.
Davidson Kelvin Baptiste
Justice of Appeal [Ag.]

I concur.
Dexter Theodore
Justice of Appeal [Ag.]

By the Court

Chief Registrar