Neutral Citation Number: [2023] EWHC 1040 (KB)

Case No: QA-2022-000056

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3 May 2023

Before :

MRS JUSTICE FOSTER DBE

- -

Between :

TOWARZYSTWO UBEZPIECZEN INTERPOLSKA SA
(an insurance company registered in Poland)

Appellant

- and -

ROGER MANN
(as Executor of the Estate of DENISE MANN)

Respondent

- -
- -

Mr Feliks J. Kwiatkowski (instructed by **Ardens Solicitors Ltd**) for the **Appellant**
Ms Aliyah Akram (instructed by **Irwin Mitchell LLP**) for the **Respondent**

Hearing date: 20 February 2023

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Approved Judgment

This judgment was handed down remotely at 3.00pm on 03 May 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE FOSTER DBE

MRS JUSTICE FOSTER DBE:

INTRODUCTION

1. This is an appeal for which permission was granted on one ground by Sir Stephen Stewart against the decision of Master Thornett refusing to set aside a judgment in default obtained by the Claimants against the First Defendant Towarzystwo Ubezpieczen Inter Polska SA ("TU") on 31 August 2017. That ground was whether the Master's refusal to set aside judgment in default was appealably wrong, by reason of his errors concerning prospects of success of TU's defence, and in his approach to their delay.

BACKGROUND

2. By its Particulars of Claim (amended on 24 March 2022 pursuant to the Order of Master Thornett), the Claimant claims as widower and executor of the estate of Denise Mann. It is a claim for damages for personal injury suffered by Denise Mann as a result of negligent cosmetic surgery in Poland on around 24 September 2013. The surgery was for the removal of excess skin following previous English surgery carried out in respect of an ongoing weight loss programme involving a gastric bypass procedure.

3. The pleadings allege negligence and/or breach of contract and/or breach of statutory duty by the First and/or by the Second and/or the Third Defendant/s. The First Defendant insured the Second Defendant, the clinic at which the surgery took place. The Third Defendant is the surgeon who carried out the surgery.

4. The Claimant asserts under Polish law a direct right of action against the First Defendant as insurer of the Second Defendant pursuant to Article 18 of Rome II, alternatively a claim for damages. He sues on a contract made in England for the provision of cosmetic surgery by the Third Defendant at the premises of the Second Defendant in Poland. The Claimant's case is that the governing law of the contract was that of England and Wales and further, in respect of the Second and Third Defendants, pursuant to Article 8(1) of the recast Brussels (1) Regulation (Regulation (EU) 1215/2012 of the European Parliament and of the Council).

5. The Claimants' case is that following Mrs Mann's second tranche of surgery on 24 September 2013, her wounds became infected and she was admitted to hospital in the UK where over 10 days her condition remained critical. She had abscesses, a washout was required, vac drains were applied and a pump used to remove the remainder of the abscesses. She was briefly discharged then readmitted through A&E and was visited by a nurse to change the dressings on her legs and left breast until June 2014. She contracted bronchopneumonia dying on 8 February 2016. The Claimant's claim was that her injuries, and, originally, her death, were caused or contributed to by the Third Defendant for which the First Defendant and Second Defendant are liable. On receipt of further medical evidence the Claimant amended the claim to withdraw the claim for causation of death (which had been vigorously disputed in any event).

6. The First Defendant's application to set aside judgment under CPR 13 was made on 15 April 2019. The hearing on 11 November 2019 was part-heard into 21 July 2021 and 5 October 2021.

CHRONOLOGY

7. On 24 September 2013 Mrs Mann underwent the surgical procedures. There was a series of communications at an early stage including correspondence in November 2014 from the Claimant's solicitors to the Defendants urging them to nominate solicitors, preferably within the English jurisdiction. Eventually, on 22 August 2016, following correspondence from the Claimant's representatives, the First Defendant insurers sent a "*full denial*" of liability to the Claimants' representatives in correspondence.

8. In September of 2016 the Claimants sent a letter to the First Defendant referring to their intention to have court documents (copies of which were annexed) translated into Polish in order formally to effect service in accordance with the Rules. They noted that the significant costs associated with translations could be avoided if solicitors were appointed within the English jurisdiction. There was no response.

9. A further letter was sent by Claimants in December 2016 and again on 20 February 2017, noting that in the absence of a response concerning the nomination of solicitors in England and Wales; the Claimants were preparing to serve proceedings directly on the First Defendant in Poland. The Defendants had been sent by email the letter of claim, a copy of the claim form and its supporting documentation all in both English and Polish.

10. On 15 March 2017 the Claimant's solicitor made a statement supporting an application to extend time for service of the Claim Form, referring to the November 2014 correspondence and the absence of any indication of an appointment of solicitors within the jurisdiction. The statement rehearsed the chronology above.

11. By Order dated 24 April 2017 an extension of time was granted and the Claimants began the process of formal service in Poland. The Foreign Process Section of the Queen's Bench Division ["QBFP"], as it then was, requested service by the Polish Court and service according to the correct procedures was duly certified as effected upon all three Defendants.

12. Initiation of formal service on 17 May 2017 was accompanied by both airmail and email transmission by the Claimants to the First Defendant of a copy of the Order of 24 April 2017. It requested, as previous correspondence had similarly requested, that the First Defendant acknowledge receipt. No acknowledgement was forthcoming. This was, of course, following the issue of a full denial the previous year in August 2016.

13. A pro-forma Certificate of Service in EU form bears the seal of the Polish Court and the signed receipt stamp by an employee of the First Defendant confirming receipt of the certified service of the First Defendant on 17 May 2017. The Second and Third Defendants were served and took no issue with it, but sought to dispute jurisdiction by an application to Master Brown which was dismissed in a hearing on 14 July 2017. The Master was satisfied the First Defendant had had notice of that hearing but declined to appear and was not represented. Master Thornett stated a strong inference was that the Second Defendant (insured by the First Defendant) would have informed its insurer of what was going on lest failure to do so could jeopardise their insurance cover. This inference applied also to the Second Defendant informing its insurer of the stages of the litigation and steps taken within it, for the same reason.

14. After the dismissal by Master Brown of the challenge to the jurisdiction in July 2017, there was no further response to service. Accordingly the Claimants applied for judgment in default of

Acknowledgement of Service on 21 August 2017. As noted by the Master, an Acknowledgement of Service is a pre-condition to raising a jurisdiction issue under CPR 11.

15. The Application for judgment in default before the Master exhibited the correspondence of 15 March 2017 indicating transmission of the documents by way of informal service and also notification that they had been sent to the Polish Court for formal service. The Claimant relied upon these matters as showing that the First Defendant had been notified that proceedings had commenced and given all the documentation informally that would later be formally served. Judgment in default was obtained on 31 August 2017 but a striking feature is that there is no precise date on which the First Defendant admits knowledge of the default judgment and acceptance that it was required to act – either here or below. Mr Kwiatkowski's instructions were, he told this Court "*somewhere around October or November 2018*". The Master interpolated in his findings that the delay between even an October/November 2018 date and the eventual application to set aside on 15 April 2019 was a compelling ground to refuse to set aside judgment. It was some five months at least even on the First Defendant's case (which in the event, was rejected by the Master on consideration of other evidence).

16. A CCMC had been fixed for 26 March 2019 in respect of the defended claim by the Second and Third Defendants following on from the default judgment against the First Defendant. A notice of that CCMC hearing was sent to all Defendants but no response received from the First Defendant until 25 March 2019, the day before, when the First Defendant indicated it would be represented at the hearing. Mr Kwiatkowski, of counsel sought to make an unheralded, *oral* application to set aside judgment. The Court declined to hear that application but provided a timeframe for a properly constituted formal application to be made. That application was made and the hearing took place over three separate hearings, 11 November 2019, 29 July 2021 and 5 October 2021. The Master recorded that at the end of the first hearing slot the submissions of the First Defendant remained incomplete.

THE APPLICABLE PRINCIPLES on this APPEAL

17. The task of this Court is to ascertain whether the Master in refusing to set aside judgment made an appealable error. The scope of the jurisdiction is not in contention and I therefore set it out briefly, save for one aspect.

The applicable law

18. CPR 13.3 provides that:

> "(*1*) *The court may set aside or vary a judgment entered under Part 12 if:*
>
> *(a) the Defendant has a real prospect of successfully defending the claim; or*
>
> *(b) it appears to the court that there is some other good reason why–*
>
> *(i) the judgment should be set aside or varied;*
> *(ii) the defendant should be allowed to defend the claim.*

> *(2) In considering whether to set aside or vary a judgment entered under Part 12 the matters to which the court must have regard include whether the person seeking to set aside the judgment made an application to do so promptly.*"

19. Authority makes clear that the discretionary power to set aside a judgment is unconditional and its purpose is to avoid injustice. It has been said the major consideration is whether the Defendant has shown a real prospect of successfully defending the claim or some other good reason why judgment should be set aside or they be allowed to defend. Here the Defendant seeks to deprive a Claimant of a regular judgment validly obtained under the Rules and in such a case the court will not do so lightly see *El Diwany v Hansen* [2011] EWHC 2077.

20. Authority supports the proposition, as advanced by the Claimant, that promptness will always be a factor of considerable significance and if there has been a marked failure to make the application promptly a court may well be justified in refusing relief even though the Defendant may well succeed at trial (see *Standard Bank Plc v Agrinvest International Inc* [2010] EWCA Civ 1400). However, as the First Defendant argues, the discretionary power is not to be exercised in order to punish a party for incompetence but must be to further the overriding objective (*Hussain v Birmingham City Council* [2005] EWCA Civ 1570).

21. The question of whether an act has been completed "*promptly*" will take into account activities taking place before the act in question. In *Regency Roles Ltd v Carnall* (Security for Costs) [2000] 6 WLUK 576 per Simon Brown LJ, in holding 30 days was too long in making an application "*having regard to the long and generally unsatisfactory history of the proceedings to that point, the application plainly could and in my judgement reasonably should have been issued well before it was*". Accordingly a litigant must act with "*all reasonable celerity in the circumstances*" (*Khan v Edgbaston Holdings Ltd* [2007] EWHC 2444).

22. Promptness has also been described as, whilst not perhaps the controlling factor under CPR 13.3, plainly a very important factor, as is evident from the fact that it is singled out in the Rule as a matter to which the court must have regard. It is a very important factor because there is strong public interest in the finality of litigation, see *passim* the cases and *Standard Bank Plc v Agrinvest* [2010] EWCA Civ 1400.

23. Mr Kwiatkowski advanced the view, supported by the Claimant, that the better approach to a 13.3 application is to apply also the well-known "*Mitchell*/*Denton* principles" by reference to CPR 3.9 (see *Mitchell* and *Denton v TH White Ltd* [2014] EWCA Civ 906, [2014] 1 W.L.R. 3926, [2014] 7 WLUK 202). He made reference to the case of *Gentry v Miller* [2016] EWCA Civ 141 where the approach had been accepted (albeit arguably *obiter*). He recognises there have been differing views at first instance (including *Ince Gordon Dadds LLP v Mellitah Oil and Gas BV* [2022] EWHC 997 (Ch) to like effect, but taking the contrary view, *Cunico Resources NV v Daskalakis* [2018] EWHC 3382 (Comm); [2019] 1 W.L.R. 2881. See also *C v D* [2022] 5 WLUK 99*)*. The *Denton/Mitchell* analysis in its third stage deals with "*all the circumstances*" which Mr Kwiatkowski submitted is different from the approach of 13.3 which requires regard to be had more particularly to promptness. One of Mr Kwiatkowski's essential submissions to me was that the Master had failed to have regard to matters other than promptness. His skeleton argument phrased it that "*he relegated all other factors to de facto exclusion*".

24. *Gentry v Miller* followed an earlier, *obiter,* consideration in *Regione Piemonte v Dexia Crediop SPA* [2014] EWCA Civ 1298 where the effect of the *Mitchell/Denton* principles was considered

by Sir Christopher Clarke in the context of CPR r.13.3, upholding the Judge below in refusing to set aside a default judgment. It is noteworthy that there, as the Claimant points out, the extent and character of the delay alone was said to afford good grounds to refuse to set the judgment aside, even if the defence had a prospect of success. The Court of Appeal reflected that CPR r.13.3 required an applicant to show that he had real prospects of a successful defence or some other good reason to set the judgement aside. If he did, the court's discretion was to be exercised in the light of all the circumstances and the overriding objective.

25. Promptness of the application was a mandatory and important consideration, hence a court could refuse to set a judgment aside even if the defendant showed a real prospect of success but the merits of any defence were never irrelevant. The nature and extent of the delay, the reason and any justification for it, the strength of the defence and the justice of the case were all relevant considerations (see *Piemonte* paras 34-36, 40). Since the overriding objective was to enable the court to deal with cases justly and at proportionate cost, including enforcing compliance with rules, the approach to r.3.9 in *Mitchell* and *Denton* would be relevant. Paragraphs 40 to 45 of *Piemonte* make good these propositions. It was expressed thus by Sir Christopher Clarke:

> "*40. ... The court must have regard to all the factors it considers relevant of which promptness is both a mandatory and an important consideration. Since the overriding objective of the Rules is to enable the court to deal with cases justly and at proportionate cost, and since under the new CPR 1.1(2)(f) the latter includes enforcing compliance with Rules, Practice Directions and Orders, the consideration set out in CPR 3.9 are to be taken into account: ....*
>
> *41. Denton makes clear that any application for relief against sanctions involves considering (1) the serious and significance of the default; (2) the reason for it; (3) all the circumstances of the case. At the third stage factors (a) and (b) in CPR 3.9 are of particular but not paramount importance.*
>
> *42. The Judge concluded that the delay in making the applications to set aside the default judgment was both significant and serious, of itself, sufficient to justify their dismissal. In any event he was not persuaded that Piemonte had any real prospect of success or that there was any other good reason for setting aside the judgment of Cook J.*"

and at paragraph 126:

> "*Whilst in limited respects I have found there was a realistic prospect of establishing non-compliance with Italian law that is not sufficient to justify setting aside the judgment. In my view the extent and character of the delay alone afforded in this case, good grounds to refuse to set the judgment aside even if the defence had a real prospect of success. In the light of the character and extent of that delay it would require a defence of some considerable cogency, based on pretty convincing evidence ... to justify setting the default judgment aside ...*"

26. There is a growing body of first instance jurisprudence on whether or not the *Denton* principles apply to an application made under CPR 13.3. Since the parties did not raise a contested point before me, I do not *decide* the issue here, but, on the invitation of both Counsel, treat the two Court of Appeal cases as authoritative on this issue for the purposes of this case, even if the *Denton* consideration in each Court of Appeal case might be said strictly to be *obiter*.

27. Mr Kwiatkowski for his part accepted that his clients had not been prompt. He accepted the chronology as set out in the fifth statement of Ms Wolfe that deposes to the fact that service in this case was effected formally on 17 May 2017; the application for default judgment was made on 23 August 2017, on 6 September 2017 the Order for default judgment was sealed and on 12 December 2017 the Order was sent to the First Defendant's representative by email. On 28 March 2019 a disposal hearing and case management conference had been set down and it was on 15 April 2019 that the First Defendant's application to set aside judgment was lodged. However promptness he said was not the *single* decisive factor, yet the Master had treated it as such and thus made an error of principle.

28. This application is, of course, in part a challenge to the factual evaluation made by Master Thornett. The general principles applicable to such a challenge apply here. They have been set out in many places, most notably perhaps in *Tanfern Ltd v Cameron Mac-Donald* [2000] 1 WLR 1311 CA. I adopt the encapsulation by Saini J recently in the context of a section 33 challenge in *Sakandar Azam v University Hospital Birmingham NHS Foundation Trust* [2020] EWHC 3384. At paragraphs [50]-[52] he said:

> "*50. An appellate court will only interfere with a discretionary evaluation where an appellant can identify one or more of the following errors:*
>
> *(i) a misdirection in law;*
> *(ii) some procedural unfairness or irregularity;*
> *(iii) that the judge took into account irrelevant matter;*
> *(iv) that the judge failed to take into account relevant matters; or*
> *(v) that the judge made a decision that was "plainly wrong".*
>
> *51. Error type (v) requires some elaboration. This means a decision which has exceeded the generous ambit within which reasonable disagreement is possible.*
>
> *52. So, even if the appeal court would have preferred a different answer, unless the judge's decision was plainly wrong, it will be left undisturbed. Using terms such as "perversity" or "irrationality" are merely likely to cause confusion. What is clear is that the hurdle for an appellant is a high one whenever a challenge is made to the outcome of a discretionary balancing exercise. The appellate court's role is to police a very wide perimeter and it will be rare that a judge who has exercised a discretion having regard to relevant considerations will have come to a conclusion outside that perimeter. I would add that an appellate court is unlikely to be assisted in such challenges by a simple re-argument of the points made to the judge below. It needs to be underlined that an appellate court in an appeal such as the present is exercising a CPR 52.21(1) "review" power. It is also well-established that the weight to be given to specific factors is a matter for the trial judge and absent some wholly unjustifiable attribution of weight, an appellate court must defer to the trial judge.*"

29. These are the principles I apply.

THE MASTER's DECISION

30. In a lengthy and meticulous judgment the Master after canvassing the multiple arguments raised and analysing the evidence, concluded his overall assessment that the serious default and failure to act promptly, described as "*a gross and damaging picture*", overbore any other arguments that had been canvassed on behalf of the First Defendant. The proposed defences did not change that estimation. The core of his reasoning was to the following effect. He rejected the contention there was a good reason for the delay, he considered the chronology, and was struck by the early full denial of liability by the First Defendant. He reflected it was clear there had been correspondence over a lengthy period well before the default judgment was entered, the eventual formal service of proceedings was not at all the start of the matter. He said at paragraph 4(i):

> "*The submission of a "full" denial pre-issue therefore implies the First Defendant had entirely understood what was going on and concluded it would be denying liability. If this is wrong or unfair, then the only logical counter-interpretation is that the First Defendant had simply not read the documentation sent by the Claimants' firm but improvised a response by itself.*
>
> *The provision of a "full denial" nine months or so before service also is central to the issue of the First Defendant's considerable delay: delay in the way it approached correctly to issue and present its Application, the form of the Application once issued (as was then sought to be amended) and after that the elaboration of its proposed defence. Put shortly, the First Defendant has had a long period of time commencing in August 2016 in which to realise that its "full-denial" was by no means closure of the proposed claim and so both to protect and to assert its position anew. The nature of service of proceedings in May 2017, as challenged by the First Defendant, is therefore but part of a larger picture.*"

31. The Master described the First Defendant's general explanation as to what happened before its April 2019 Application as "*vague and undeveloped*" (paragraph 4(m)). He said further at [36] that:

> "*I find that the start of the First Defendant's knowledge of the default judgment commences a few days after 12 December 2017 and certainly not "somewhere around October or November 2018". The April 2019 Application is therefore even later than it first seems, notwithstanding the point made by Mr Kwiatkowski that provision of the default judgment by this method did not constitute formal service of the default judgment by way of CPR 23.9.*"

32. The Master placed reliance upon the fact that there had also been considerable steps by way of notification to the First Defendant and invitations to respond before the formal completion of service was effected in May 2017. The Master noted some six months between even the *admitted* knowledge, and the date of the application in April 2019 that impressed itself upon the Master. In fact the Master rejected the suggestion that the judgment came to the attention of the First Defendant only at the end of 2018 (see above at [31]). He took a very detailed approach to the evidence, for example with regard to the materials proffered to support the case that there had not been culpable delay.

33. The evidence before the Master was deposed to by Mr Pawel Grochowalski, Senior Officer of the

First Defendant. He, however, had not been involved at all during the relevant time. He based his evidence purely on his interpretation of the claims file, which interpretation had not been assisted in any way by employees directly employed at the relevant stage. Rather, it was his commentary on a file which he asserted had been treated as closed by the First Defendant in 2016. He emphasised that the matters to which he deposed were only interpretation, and not a personal account of events that *may* have taken place. He sought to say the case had been closed after early correspondence and that there would be nothing to do until the Polish court told them. They were accordingly entitled to ignore correspondence.

34. Rejecting these explanations, the Master noted the scant information of internal process of how the First Defendant reacted to service in May 2017. The Master's consideration of the lapse of time involved the reflection that any reasonable and responsible organisation ought to have raised more specific enquiries. The suggestion was also made that eight months after judgment was signed, the departure of the relevant officer on maternity leave was somehow of relevance. The First Defendant's deponent stated they were unaware of the seriousness, because no formal court document had arrived, learning of the judgment only in the October/November of 2018. This was, as the Master's analysis showed, demonstrably false.

35. The evidence of the Claimant was quite to the contrary. The Claimant's solicitor was contacted on 12 December 2017 by a solicitor calling on behalf of the First Defendant. That person, a Mr Mark Stiebel of Charles Mia, Solicitors, was updated by Ms Wolfe on behalf of the Claimants including as to the fact that the Claimants had obtained an Order for default judgment and the matter would shortly be listed for hearing. She updated him, but refused his request to agree to it being set aside. She indicated the First Defendant would need to make an application to court and repeated the information in an email – which she exhibited before the Master. The email enclosed a copy of the Order.

36. The Master expressed some very significant reservations about the evidence proffered by the First Defendant. Noting the various explanations given for the very tardy response including that because practice in Poland was different, they would have ignored materials sent because they did not come from the Polish Court - even though it was in respect of a claim in another EU state. It was also suggested that in June 2018 a relocation to new offices might have prompted a review.

37. The Master held that the company should have taken reliable advice from the date of service in May 2017, if not earlier when they were notified by the Claimants' solicitors and at the latest from about mid-December 2017.

Realistic Prospects of Success

38. It is asserted the Master ignored guidance on the proper application to ascertaining whether there was a realistic prospect of success and failed to accord sufficient respect to the arguments Mr Kwiatkowski raised. The Master heard long argument and set out the First Defendant's arguments succinctly. He concluded as follows at paragraph 12:

> "*e. The First Defendant seeks to disconnect any association between the Third Defendant and its insured. Mr Grochowalski suggests that the Deceased must personally have contracted with the Third Defendant because her bank statements show a money transfer directly to him. So, he contends, the Third Defendant must only in person be directly liable to her. The First*

Defendant's seeks to amplify this point by way of its own internet investigation to illustrate that the Third Defendant professionally practises in his own right.

f. *This is a surprising argument given both Second and Third Defendant are represented in this claim by the same firm of well-known and experienced clinical negligence solicitors who do not seem to have identified any conflict of interest in this long running matter. Their Defence affirms that, by way of a single contract, they were contracted to provide service to the late Mrs Mann.*

g. *I note that the Deceased's consultation sheet signed by the Third Defendant was on the headed paper of the Second and bears its stamp. Plainly, therefore, they offered their services in conjunction with each other and without distinction. The Third Defendant concedes that both he and the Second Defendant provided the services. Conversely, nothing has been produced by the First Defendant in explicitly contractual terms to show any independent contact solely with the Third Defendant.*

h. *The First Defendant seeks to argue that its policy of insurance "does not cover Adam Kelecinski in his own person". I am not sure that this is a separate or independent point once, as I am satisfied would be the overwhelmingly probable finding at trial, one accepts that the Third Defendant worked for the Second Defendant at least for the purposes of the services to Mrs Mann.*

i. *A further point is that the Second Defendant was only insured by the First for limited events such as outpatient procedures. This too is unconvincing. The Second Defendant clearly advertised its services in cosmetic surgery and the claim includes care provided to the Deceased following her surgery. As distinct from the financial extent of the First Defendant's indemnity to the Second, the proposition that the scope of the First Defendant's liability to the claim is at least limited seems a very fine one at this late stage, having regard to the sequence of events discussed above.*

j. *I am similarly unpersuaded that the maximum liability to indemnify [100,000 EUR for one incident and 500,000 EUR for all incidents] because the policy affords only the statutory minimum of cover, constitutes an actual defence. I remind myself that Miss Crowther QC at the first hearing offered an approximate valuation of the claim in the region of £50-100,000 and Mr Kwiatkowski, in closing the Application at the second hearing, sought to emphasise the low value of the claim as a factor to the exercise of the discretion.*"

CONSIDERATION OF THE ARGUMENTS

39. Mr Kwiatkowski made a number of points on appeal suggesting that each revealed an error of approach in the Master that constituted an error of law; in broad terms:

    a. A departure from the appropriate standards for assessing the prospects of success so

serious as to amount to an error of law, tainted also by errors of fact as to the date of submission of the Defence also misapprehending that the Defence had in his submission *already* been successful – in that the claim in respect of death had been withdrawn making the claim smaller

b. The Master in finding the First Defendant's delay egregious, he disregarded other instances where the Claimant had made errors, particularly that the default judgment of 31 August 2017 sealed 6 September 2017 had not been served on the First Defendant; further the delay had not caused any prejudice to the Claimant.

Arguable Defence Errors of Fact

40. Mr Kwiatkowski argued first that the Master was wrong to reject the submission that there was a real prospect of success in the Defendant's Defence. He pointed to errors he says were made by the Master as to the factual context for example, as accepted by the Applicant, the draft Defence was in fact attached to the First Defendant's application in *April 2019* to set aside the judgment in default. (The Master gave a date of October 2019.) The Claimant agreed this was so but suggested it made no material difference at all since the delay from judgment to application was (even if this is correct) 16 months, rather than 22 months.

41. A further error of the Master's was said to concern a change in the Claimant's case. The skeleton argument produced for the hearing on 28 March 2019, (listed as a disposal hearing, but at which the First Defendant appeared and sought to make the oral set-aside application), had set out damages in excess of £200,000. This was for the negligent infliction of death. Thereafter the allegation that the negligent treatment caused the Claimant's wife's death was withdrawn and the claim amended to £77,752. That was a material point in his favour submitted Mr Kwiatkowski: it formed the basis of his submission to me that the Defence had already proven to be successful as to a large part of the claim. He did not accept that what was in issue was the remaining contention as to negligence and the sum thereafter claimed in respect of that. He said it was a heavy point in favour of allowing the case to go forward and represented the fact that the Defence had already succeeded in part so should not be struck out. The concession had first been made orally in November 2019 at the adjourned (for the second time) hearing of the set aside application. The Master he said misunderstood the weight of this step. This must show that the claim had a real prospect of success at least as to that part which had been dropped.

Error regarding *Easyair* test and real prospect of success

42. He further submitted that the Master had misunderstood the standard to be applied when considering the notion of a real prospect of success under 13.3(1). The *Easyair Limited* description of "*real*" meaning "*not fanciful*" was accepted as read across from CPR 24 and summary judgment into 13.3(1). He said that the Judge misunderstood and disregarded what was clearly a real prospect of defending the case. It does not mean that it is probable that the Applicant will succeed. He took me to the statements of Mr Grochowalski who is described as one of the senior management in place at the First Defendant and whose evidence the Master ought to have accepted.

43. The elements of Mr Grochowalski's evidence that he said were improperly dismissed or ignored by the Master included that the policy insured only the clinic, it is not responsible for the actions

of a surgeon. He also referred to those parts which suggested the policy did not cover the type of surgery carried out.

44. He submitted, as he had to the Master, that although the Second and the Third Defendants are agreed that both of them offered services to the Claimant's late wife, there is no significance in this. This should be the subject of detailed evidence: it may be that the doctor alone is negligent and not the premises but these are matters that fall to be decided in a full case. Similarly, the second statement of Mr Grochowalski which was accepted by the Master although delivered late, deposed to a number of important points that he said the Master failed to accord sufficient weight to the contract he said was with the Third Defendant personally – demonstrated by a payment from Mrs Mann's account to his. The website also showed the doctor was acting as an individual at the time of the surgery, that was one of two ways in which he operated. He either conducted his business himself alternatively through the clinic, and on this occasion it was himself. The logical conclusion of the evidence is that it must be Doctor Kalecinski personally because the clinic is not mentioned. Further, he said, the insurance contract (for which the court had an English translation) referred to outpatients only. At trial this material would be fleshed out by expert evidence – there was none to date - but for the purposes of showing a real prospect of success this was said to be sufficient.

45. On this basis he submitted that the Master did not take the materials seriously, it was wrong of him to conclude as he did. He submitted the Master's treatment of Mr Grochowalski's evidence was "*wholly unreasonably dismissive*". It was in contravention of *Easyair* and constituted in fact a mini-trial. He was making a conclusive determination without evidence of foreign law and without the benefit of cross examination as to foreign law or of Mr Grochowalski or of the Third Defendant doctor and this was going too far.

46. It is clear in my view, however, that the Master dealt with those matters – but adversely to the First Defendant (see extract above) it is not irrelevant that the hearing to set aside the properly obtained default judgment took place over three separate occasions. There were three lengthy skeletons and the issues were exhaustively considered by reference to thousands of documents. The Defendant had every opportunity to provide *ex parte* evidence or other material. The Master considered the case as put, rejecting it for cogent reasons (see paragraph [38] above). I can discern no error of law in the Master's conclusions nor other error of approach to the materials, and in truth these points were a re-argument of the case below. With regard to the factual contentions this was not "*conducting a mini-trial*". To prefer the direct evidence of the Claimant's solicitor with intimate involvement in the case to that of Mr Grochowalski who could give no direct evidence is not "*conducting a mini-trial*". No more is the drawing of reasonable, indeed obvious inferences from the facts and circumstances. The Master was fully entitled to his view and applied the appropriate legal tests when forming that view. The Master's brief conclusions on the legal points raised evince no error in my judgement.

47. In any event, in so far as it was submitted that there was a reasonable prospect of success in respect of the First Defendant's defence, whilst Ms Akram denied it was the case, she also referred to the notes to the White Book under 13.3 indicating that even where there is a reasonable prospect of success of a defence the court will in an appropriate case nonetheless not overturn a regularly obtained judgment in default. I agree, and also with the proposition that this was a case that fell into that category.

48. Mr Kwiatkowski also said the Judge did not understand his submission properly concerning the effect of a concession that the death had not been caused by the alleged negligence. Further, he

had sought to rely upon a new medical report which he said bolstered the First Defendant's chances in another way. He criticised the report obtained by the Claimant from Dr Frati saying that it did not say anything about negligence, accordingly a report was obtained from Professor Myers and the court ought to look at that.

49. I indicated that if I came to the conclusion that the Master had gone wrong in the exercise of his discretion or otherwise, I would be considering the matter afresh myself and would therefore look at the new evidence. I looked at it *de bene esse* in the course of the hearing and put to Mr Kwiatkowski, what the Respondent argued, namely that there were no documents whatsoever forming a basis for this report: it was an expert report based necessarily on assumptions. He submitted that the court should in any event consider it as a further plank in his argument that there was here a real prospect of success. A further plank was to the effect that there was no clear evidence of negligence since the medical report submitted by the Claimant did not state as much.

50. Ms Akram submits, and I accept, it was a misunderstanding on the part of the First Defendant to say that there was an absence of evidence of negligence: that was entirely because the report of Dr Frati was in respect of condition and prognosis. It was <u>not</u> a report purporting to deal with causation and the completed tort of negligence. Issues of causation would always be at large in the damages hearing. By reference to the case of *Lunnun v Singh (Hajjar)* [1999] WL 477360 a decision of the Court of Appeal of 1 July 1999, she supported the proposition that on an assessment of damages all issues are open to a Defendant save to the extent that they are inconsistent with the earlier determination of the issue of liability - that is so whether the determination is the form of a judgment following a full hearing or a default judgment. The default judgment, she submitted, had settled the issue that <u>some</u> damage had been caused to the Claimant by the insured actions, but not <u>how much</u> damage had been caused, therefore issues of causation were at large. It is not open to the First Defendant therefore to contend that the acts which he insured were not causative of any loss at all to the Claimant but he is still able to argue that they were not causative of particular items of the claimed loss. (See the citation from *Maes Finance Ltd and Anr v A Phillips and Co* (transcript 12 March 1997 per Sir Richard Scott V-C.) I accept these submissions. It is a misunderstanding to criticise the scope of the Claimant's evidence. I accept this analysis as plainly correct.

51. As to the First Defendant's proposed defence, the First Defendant insurer of the clinic had sought to suggest that the Claimant's deceased wife contracted personally with the surgeon, Adam Kalecinski, and the Second Defendant clinic was unconnected to that relationship. The Master rejected that contention. He concluded that by reason of the evidence including the consultation sheets signed by the surgeon on the clinic's headed paper and with the clinic's stamp, that the Second and Third Defendant offered their services in conjunction with each other and without distinction. Indeed, the *Third Defendant* conceded that both he and the clinic provided the services. There was no evidence of an independent contract solely between the patient and the surgeon. The Master observed that the Second and Third Defendants were contacted by a single contact to provide services to Mr Mann.

52. It was also sought to be said that the surgeon's actions were not covered by the current policy, the Master rejected this. It was also said that the clinic was insured by the First Defendant only in respect of out-patient procedures. This contention was also rejected: the lie to this suggestion was given by the advertising of the clinic of its services and cosmetic surgery including post-operative care was given to the deceased, wife of the Claimant.

53. The Master rejected as a defence the statement that the maximum liability under the insurance

contract could only amount to €100,000 per incident. This was, in the Master's estimation not a "*defence*": the claim itself was said to amount to between £50-£100,000 in any event.

54. I can see no error of law or principle in the Master here.

55. Mr Kwiatkowski pointed to paragraph 13 in which the Master said, "*None of the Defendant's ancillary arguments and nothing by way of proposed defence sufficiently changes the gross and damaging picture of serious defaults and failure to act promptly by the First Defendant in bringing its Application.*" This was the driver of his conclusions he said, this was (see paragraph 5d) "*sufficient alone to dismiss*" the Applicant's case. That was a wrong approach, however awful the delay. However, this submission ignores the careful analysis which had gone before over 17 or so pages of the Master's decision and also the law: see *Piemonte* above and the notes to 3.13.

56. In so far as there was an assertion that a Polish law expert was required, the contract pleaded by the Claimant with the Second Defendant, who is insured by the First Defendant, is plainly governed by English law. It was concluded here, in English. No expert in Polish law had been proffered for any matter. The suggestion that there were arguments to be made as to the scope of the policy itself had not been supported other than by an assertion from an executive on behalf of the First Defendant in Poland. The Master was in my judgement correct in his conclusions on this aspect of the proposed Defence and how he reached them.

57. The objection that the clinic was insured only for outpatient care and only in respect of day cases, takes the First Defendant no further. The Claimant was indeed a one day surgery, as the Claimant submitted, and I accept there was nothing in the submission that the policy was inadequate to insure the acts of the surgeon because he operated at times possibly on his own. Ms Akram was correct to point to the defence of the Second and Third Defendants which admitted that the Second Defendant carried on business as a private hospital providing facilities including cosmetic surgery in Poland and that the Third Defendant carried on business as a cosmetic surgeon undertaking surgical procedures at the premises of the Second Defendant. Both Defendants admitted that the First Defendant (insurer) was liable to the Claimant to compensate her directly in relation to any breach of the contract on the part of the Second or the Third Defendant (paragraph 5 of Defence of the Second and Third Defendants).

Failure to take account of all circumstances

58. The Master was required to take account of <u>all</u> the circumstances it was submitted, certainly, he should pay particular attention to promptness but also look at whether there was a defence with a reasonable prospect of success. The *Denton* approach required the court to look at all the circumstances but in this case Mr Kwiatkowski said the Master started with delay and believed he was entitled to throw out other considerations. He "*tossed the baby out with the bath water*". I disagree. The Master was careful to canvas the myriad matters drawn to his attention by Mr Kwiatkowski – again this attack on approach is in truth a re-argument of the particular points put below.

59. Mr Kwiatkowski reminded me that the Court of Appeal in *Hussain v Birmingham City Council* [2005] EWCA Civ 1570, Lord Justice Chadwick said, that the rules should not be exercised so as to punish parties for incompetence but rather exercised in order to further the overriding objective. He submitted that given the *Denton* approach the Master's conclusions "*did not add*

up", he referred to paragraph 6 of the judgment at page 44 where the Master having expressed adverse views as to delay, "*nonetheless*" went on to consider his other submissions. This takes the matter no further. Read in its entirety the Master considered "*all the circumstances*" exhaustively.

60. He made a further point which he had also argued below, concerning service of the default judgment, whether informally or formally upon the First Defendant as they should have done. Ms Akram for the Claimant accepted that the judgment was not served in August; but this was immaterial she submitted. I am constrained to agree: it is inconceivable that this fact could affect the overall picture as it emerged of the Defendant's behaviour. I reject this criticism.

61. Mr Kwiatkowski submitted these apparently small points were an indication that the Master was unsympathetic and had "*taken against*" the First Defendant which was detectable from the Master's tone (on his page 43w) he quoted particularly the "*notwithstanding…*" used in rejecting the First Defendant's arguments. He argued that the Master did not understand the point that he had made. Again I do not accept, even if it is the case an error was made as to an element of part of the delay, that it would have made a material difference in his assessment of where the balance lay between the parties nor that Mr Kwiatkowski's arguments were misunderstood.

62. His further submission was that although asked to depose to elements of prejudice, Ms Wolfe on behalf of the Claimant was unable to point in her statement to the Court to any substantial prejudice. Given that the matter was a concern in particular of the Master between the first and the second adjournment of the application, he said it is highly significant that there was none. He took no account of the absence of prejudice in his decision: yet another example of failing to put materials into the balance in favour of the First Defendant, it was said. Again, I do not accept this submission, in my judgement there was inevitable prejudice.

63. Mr Kwiatkowski did not accept that the delay of his clients of itself prejudiced the Claimant. He described the default judgment as a "*windfall*" to the Claimant which had arrived because the Polish insurance client was incompetent in addressing the matter at an earlier stage. The case was no more difficult to prove now as it was then. In my judgement this submission is fanciful. Necessarily there has been disadvantage, and the manner of contesting judgment (eventually) did cause prejudice.

64. The Claimant's solicitor explains that following the default judgment which is enforceable under the Brussels 1 (Recast) Regulation, the Claimant did not see the commercial sense in pursuing the issue of liability further or progressing the claim against the Second and Third Defendants. Indeed, Ms Akram reminded the court of the stark facts of the case. The Claimant's deceased wife had attended the clinic for a day procedure, her convalescence took place elsewhere at accommodation arranged by the surgeon but not at the clinic. Her injuries and the subsequent deep rooted infection required three weeks in hospital and nine months of continuous dressings changed. Dr Frati, the consultant plastic surgeon's evidence was based upon a full clinical examination of Mrs Mann on 11 July 2015, discussion with her, a hand written operation note written by Dr Kalecinski the surgeon and her own medical notes since the aftercare was not dispensed by Dr Kalecinski but rather by her GP, when she flew back to the UK on 1 October 2013. A condition and prognosis report had been obtained and served at the beginning before the Claimant's wife had died in February 2016 before proceedings were issued in September 2016. A statement had been taken in respect of quantum. A quantum judgment was expected to be ordered against the First Defendant at the disposal hearing.

65. It was only on the day of the hearing that there was any suggestion the First Defendant would be applying to set aside the Order for default judgment. It was the application of 15 April 2019 that first indicated the Claimant could not immediately rely upon the judgment. Between 6 September 2017 and the 15 April 2019 application, the Claimant had reasonably relied on the default judgment being enforceable. The Claimant highlighted the necessity to revisit all the issues including liability, were the judgment to be set aside so late in the day. These are coherent aspects of prejudice. I agree.

66. Mr Kwiatkowski summarised his submission based on the correct approach as "*the Master was so consumed by the issue of delay that he threw out any other considerations*". Finally he said the Master had been tired after an earlier case that morning and Mr Kwiatkowski had not finished his submissions by 5 o'clock that first afternoon. Had the case been heard all at once he submitted that the Master would have had a better appreciation of the accumulation of points in his client's favour.

67. I reject these contentions. The First Defendant had a full opportunity to address the Court. His arguments were rejected on their merits and there is no ground to suggest the Master was unfair, prejudiced or dealt other than wholly properly with the case. The Master made no error either in rejecting as material the Claimant's failure to serve the judgment in 2017: in context this was immaterial.

68. I can discern no error of law by the Master and I can discern no error of approach in his evaluation of the evidence. In particular the following aspects of the case illustrated the strength of the Claimant's position.

69. As Ms Akram submitted, it was indeed the case that the Master was particularly struck by the appalling delay of the First Defendant. I agree with her, he was entitled to that view on the evidence she submitted, he was also entitled to the view that he took of the evidence of Mr Grochowalski. He declined to accept certain aspects of it and contrasted the purported explanation for delay with the fact that a full letter had been written on 22 August 2016 from the First Defendant, the insurers, to Irwin Mitchell, the Claimant's representatives as set out above. She emphasised that in that letter the insurer stated that the Clinic has compulsory civil liability insurance and referred to the policy. Its terms were informative, it covered civil liability of the entity performing medical activity in Poland and claims for damages resulting from the provision of health services or unlawful provision of health benefits caused by an act or omission during the period of insurance cover. It covered damages caused to third parties arising from culpable acts or omissions of the insured's medical staff, that is to say it was "*a prerequisite for such liability is the fault of the insured's medical personnel, damage and an adequate causal relationship between them*". The letter sets out that an independent medical expert was consulted to determine whether the medical treatment carried out by medical staff "*bore the signs of medical malpractice or lack of due diligence*". It took a point in the purpose of the treatment and stated she gave consent and the consequences were in any event typical and non-negligent.

70. As Ms Akram submitted, it was the gross inactivity of the First Defendant thereafter, coupled with the Master's rejection of the submission, that the insurers had no knowledge of the claim that was being made, that drove the Master's conclusions, which were, on the evidence, inevitably unfavourable to the First Defendant. He was entitled to reach these conclusions.

71. Furthermore, and importantly, I accept as she submitted that even if it were possible to spell out some defence, even one that had a real prospect of success, it was not an error of principle in the

Master to refuse to extend time in the circumstances.

72. I accept that the Master chose to deal compendiously with the 13.3 principles and the *Denton* principles arising under 3.9. In a case such as the present that meant that all the circumstances were taken into account as he considered the case. The Master was properly asking himself what the circumstances told him, he was not conducting a mini-trial, but determining whether the defence could be of sufficient strength in the light of the passage of time and the First Defendant's conduct of the case.

Summary

73. I am of the clear view that the judgment of the Master may not be overturned on appeal.

74. Applying the principles set out above I can detect no error of principle in the Master's approach. I say at this juncture that whether I were to apply an approach to CPR 13.3 that reflects the *Denton* doctrine, or not, it would have made no difference to my overall view of the merits of this appeal nor the correct approach to the evidence in this case.

75. This Appeal must be dismissed.