Neutral Citation Number: [2014] EWHC 1556 (QB)

Appeal No: QB/2014/0088
(Case No: HQ13X00707)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 May 2014

Before:

MR SIMON PICKEN QC
(sitting as a Deputy Judge of the High Court)

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Between:

PAMELA JUNE DALTON
(executrix of the estate of FREDERICK JOHN DALTON deceased) — **Respondent/ Claimant**

- and -

GOUGH COOPER & COMPANY LIMITED — **Appellant/ Defendant**

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Jayne M. Adams (instructed by **Weightmans LLP**) for the Appellant/Defendant.
Stephen Glynn (instructed by **Boyes Turner LLP**) for the Respondent/Claimant.

Hearing date: 2 May 2014

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APPROVED JUDGMENT

MR SIMON PICKEN QC:

Introduction

1. These are proceedings in which the Claimant, Mrs Dalton, suing as executrix of the estate of her late husband, alleges negligence and/or breach of statutory duty on the part of the Defendant, Gough Cooper & Company Limited ("Gough Cooper"), arising out of Mr Dalton's (alleged) employment by Gough Cooper in *"approximately 1951-1952"* and his exposure to asbestos dust and fibres during the course of such employment, specifically during the refurbishment and reconstruction of a chimney in an industrial building, specifically in a boiler house, at Buckland Hill in Maidstone.

2. Gough Cooper appeals against the decision of Master McCloud on 10 January 2014 (order sealed on 13 February 2014) dismissing Gough Cooper's application to set aside a judgment obtained on 3 December 2013 (order sealed on 5 December 2013) in default of service of a Defence by Gough Cooper – or, more accurately, since a Defence was actually served on 25 November 2013 (albeit after 5pm), in default of timely service of a Defence.

3. Permission to appeal was initially refused on paper by Patterson J. However, permission was subsequently granted by Burnett J after an oral hearing on 25 March 2014.

Procedural history

4. Before coming on to consider the parties' respective submissions, it is convenient, first, to set out the procedural history of these proceedings.

5. The first point to note is that Gough Cooper was not originally named as the Defendant. Gough Cooper, in fact, only became a party to the proceedings, by amendment to the Claim Form on 15 October 2013, pursuant to an order made on 3 October 2013 (order sealed on 8 October 2013) by Master Whitaker. Before this, the Defendant was not Gough Cooper but a different company, Clarke & Epps Limited ("Clarke & Epps").

6. The reason for the change, which was made with the consent of Clarke & Epps and its solicitors, Plexus Law (unsurprisingly given that a Notice of Discontinuance was filed by the Claimant on 16 October 2013), is that at a Case Management Conference on 17 June 2013, a so-called 'show cause' hearing, Clarke & Epps satisfied Master Whitaker that Mr Dalton could not, on the balance of probabilities, have been exposed by Clarke & Epps to asbestos because the kind of work described by the Claimant in the Particulars of Claim was not carried out during the time when Mr Dalton was employed by Clarke & Epps.

7. Gough Cooper only learned that it had been substituted as the Defendant in these proceedings after the event when the Amended Claim Form came to be served. I understand that this was on 16 October 2013 and that, Gough Cooper having filed its Acknowledgment of Service on 31 October 2013, the Defence

was due to be filed by not later than 14 November 2013 (there is a suggestion in the papers that the due date was 15 November 2013, but I do not think that can be right).

8. In fact, however, Gough Cooper did not file its Defence until 25 November 2013, either eleven or ten days later than the due date. The reason for the delay appears to have been that Gough Cooper's then solicitors, Berrymans Lace Mawer LLP ("Berrymans"), had to retrieve their file from their London office in order that it could be sent to Berrymans' Cardiff office which was handling the matter and which had previously sent a response dated 28 June 2011 to a letter before action sent by Boyes Turner LLP ("Boyes Turner"), on the Claimant's behalf, on 25 March 2011.

9. As a result, on 3 December 2013, the Claimant obtained judgment in default, on the basis that *"No defence"* had been filed. Even though actually a Defence had been filed by this date, it was filed later than required and it was not suggested before me that the Claimant was not entitled to obtain such judgment under CPR 12. Accordingly, Berrymans' initial attempts to deal with the matter by having the default judgment set aside under the 'slip rule' were never going to succeed.

10. What Berrymans should have done was to apply to set aside the default judgment under CPR 13.3. This was not done until 7 January 2014, three days before a Case Management Conference which was due to take place on 10 January 2014. No point having been taken by the Claimant concerning the short service of Gough Cooper's application, the setting aside application was, in fact, heard by Master McCloud at that hearing.

The hearing before Master McCloud

11. Before Master McCloud, Gough Cooper was represented not by Miss Jayne Adams, Gough Cooper's present counsel, but by other (leading) counsel instructed by Berrymans. It was only after the hearing on 10 January 2014 that Miss Adams came to be instructed by Weightmans LLP ("Weightmans") in place of Berrymans.

12. Miss Adams explained that, whereas Aviva was the insurer in respect of the period when the Claimant had previously alleged her husband was employed by Gough Cooper's predecessor as the Defendant, Clarke & Epps, (1950 to 1951), in respect of the period with which the claim is now concerned (1951 to 1952), the relevant insurer of Gough Cooper is not Aviva but BAI, which has instructed Weightmans rather than Berrymans. Although I am not entirely sure why the change in representation was only made after the hearing on 10 January 2014, nonetheless that is the explanation which I was given.

13. At the hearing, Gough Cooper's then counsel relied on CPR 13.3(1)(a) and (b), which state as follows:

> *"(1) In any other case, 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; or

(ii) the defendant should be allowed to defend the claim."

14. It is, however, fair to say that the submissions directed at CPR 13.3(1)(a) (real prospect of successful defence) were limited. They certainly do not appear to have been advanced in anything like the detail with which Miss Adams addressed CPR 13.3(1)(a) at the hearing before me. Master McCloud did not, therefore, have the benefit of the rather fuller submissions which I did. Indeed, it seems from counsel's skeleton argument that at least as much prominence was given to CPR Part 13.3(1)(b) (*"some other good reason"*) as was given to CPR 13.3(1)(a). That submission consisted of the point, alluded to above, that it was likely that other insurers were on risk and other solicitors would come to be instructed. On this basis, it was suggested, in my view somewhat ambitiously, that there was *"some other good reason"* for setting aside the judgment in default which had been obtained.

15. In her judgment, at [4], Master McCloud referred to CPR Part 13.3 and the need for the Court to be satisfied that a defendant has a real prospect of successfully defending the claim or that there is some other good reason for setting aside the default judgment. She also, rightly, referred to the need for the Court to consider whether the application to set aside had been made promptly – a reference to CPR 13.3(2), which is in the following terms:

"(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."

16. Master McCloud observed that there was no dispute in the present case that the period of delay which needed to be considered is the period starting on 31 October 2013 (when the Acknowledgment of Service was filed) and 7 January 2014 (when the application to set aside was issued) - although I myself am not entirely convinced that 31 October 2013, as opposed to 14 or 15 November 2013 (when the Defence should have been served) or, as I think more likely, 3 December 2013 (when the default judgment was obtained) is the relevant starting date. She referred in this context, at [5], to Gough Cooper's efforts to invoke the 'slip rule'.

17. Master McCloud then went on, at [6] and [7], to consider CPR 13.3(1)(a) and Gough Cooper's prospects of successfully defending the claim. In doing so, she noted that Gough Cooper had given what she described as a *"detailed response"* to the Claimant's letter before action (as to which, see further below), before explaining, however, that *"it seems to me that where a defence has actually been filed, as it has here now, it is the content of that defence to which I have to have regard rather than to other matters in the response to the letter of claim which were not pursued in the defence, because I have to take it*

that that is what the defendant elected would be its defence at that point, irrespective of what it may have initially said in response to the claim".

18. Master McCloud went on in the judgment, at [7], to say this:

"It is clear that on the face of that Defence that it is a Defence consisting of non-admissions, including as to common law duty. In those circumstances, I am not satisfied that, on a defence on the footing of non-admission, that there would be a reasonable prospect of success, given the material that has been filed by the claimant to establish the claim".

19. She then went on to address CPR 13.3(1)(b), doing so at the same time as considering whether the application to set aside had been made promptly under CPR 13.3(2). Her conclusion, at [9], was that there had been no adequate explanation for the delay which had taken place, and that following a *"wrong procedure"* (a reference to Gough Cooper's attempts to invoke the 'slip rule') did not amount to a good excuse for the delay which had occurred.

20. Master McCloud, accordingly, concluded as follows (at [10]):

"Looking at matters in toto, I am afraid I cannot see any other good reason why the judgment, which is a regular judgment, should be set aside, given that I have to attach quite a lot of weight to the fact that I would be depriving the claimant of a judgment regularly entertained. In those circumstances, I am going to refuse the application."

Submissions in support of the appeal

21. In her skeleton argument, Miss Adams, on behalf of Gough Cooper, characterising Master McCloud's decision as entailing the exercise of a discretion, submitted that nonetheless this was a case in which the appeal should be allowed because, as she put it, *"the Master did not exercise her discretion on a reasonable or reasoned basis and relied purely on the fact that the Defence was late"*. Miss Adams' position was that, accordingly, *"the decision was unreasonable and one which no reasonable master should or could have come to"*.

22. At the core of Miss Adams' submissions was the proposition that Master McCloud had not had adequately drawn to her attention the fact that, in the two witness statements made by Mr Dalton shortly before he died, Mr Dalton had set out details of his employment history which provided no support at all for the present claim. Miss Adams highlighted a number of matters in this connection.

23. Miss Adams pointed out that, as I have already mentioned, Mr Dalton made h
two witness statements shortly before his death. These were each dated 6 November 2010: one under a heading which named Gough Cooper as the Defendant; the other under a heading which named both Gough Cooper as the Defendant and another company, identified as *"Tilling-Stevens Limited"*, as an additional Defendant.

24. In the first of these witness statements, Mr Dalton set out his *"Employment Background"*, going back to 1942 when he left school at the age of 14 and continuing for the next 40 years. In particular, Mr Dalton stated in the witness statement that, in the period from 8 April 1946 to 8 July 1949, he *"undertook an apprenticeship as a bricklayer, working for Gough Cooper & Company Limited of Wilmington House, Wilmington, Dartford, Kent"*. He explained as follows at paragraph 12:

"During my apprenticeship I worked 52 hours per week, from 7.30 am to 5.30 pm. At the beginning of my apprenticeship I spent four months demolishing a number of prefab bungalows in Fant Lane, Barming, Maidstone. We were demolishing the prefabs in order to allow a maternity hospital to be built at the site. The maternity hospital has since been demolished. We demolished the prefabs with sledge hammers and we then used shovels, brooms and wheelbarrows to clear up the debris and to transfer the debris into lorries. When we demolished the prefabs and cleared up the debris, a great deal of dry grey dust was created and my overalls were covered in the dust. My colleagues and I were provided with no protective clothing. I was told by my work colleagues that asbestos was used in the construction of the prefabs."

25. Mr Dalton went on in this witness statement to deal with the period which he described as being *"Approximately 1950-1951"*. He said this at paragraph 17:

"I worked for Clarke & Epps of Cornwallis Road, Maidstone. The job involved refurbishing an old boiler house at an industrial building in Buckland Hill, Maidstone. I believe that the building was owned by Tilley & Stevens until 1950-1951 when Rootes took over the building. The job involved refurbishing the old boiler house and concerting it to gas burners. At that time all boiler houses were lagged with asbestos. In the boiler house there were ducts in the floor which were about 2' wide and 18" deep, with pipes in them. Whilst I was working in the boiler house, labourers from a firm in Canterbury were taking out the old pipes and putting in new pipes. I cannot remember whether or not the old or new pipes were lagged, but as I stated above, at that time, boiler houses were usually lagged with asbestos. My job at the boiler house was to build a new chimney 5' x 5' square and 50' high. The chimney is still standing. I was asked to lay the inner lining of the chimney with special kimolamola bricks which were pink and very light and had exceptional insulating qualities. I had to lay the kimolamola bricks with a special cement which I had to mix into a thick paste or liquid form. I believe that the kimolamola bricks and the special cement may have contained asbestos. I initially built the base of the chimney, then a labourer cut a hole in the roof of the building to put the chimney through. The hole in the roof was wide enough to accommodate the chimney and scaffolding. I believe that the roof of the building was made from corrugated asbestos. When the hole had been cut in the roof of the building, I carried on building the chimney up through the hole in the roof."

26. Mr Dalton then addressed the 1951-1952 period in these terms at paragraph 21:

"I returned to work as a bricklayer for Gough Cooper's at Hotfield. My work involved building houses for HM Forces married quarters. I do not recall coming into contact with asbestos."

27. As I say, this was what Mr Dalton stated in the witness statement which identified Gough Cooper, and only Gough Cooper, as the Defendant. In the other witness statement, made the same day and including *"Tilling-Stevens Limited"* as an additional Defendant, Mr Dalton said this in a section entitled *"Gough Cooper"*:

> *"2. I was employed by Gough Cooper on two different occasions. From 1946 to 1949 I was employed as an apprentice bricklayer, and then again in 1952 to 1953 or thereabouts, as a bricklayer.*
>
> *10. I believe I was also exposed to asbestos when Gough Cooper were engaged to carry out modernisation of two blocks in Chatham Dockyard. These blocks were very old and required a great deal of renovation. I mainly carried out work on the brickwork, although I certainly recall hammering and chiselling holes through walls that were 2 feet thick, and that were said to have been constructed by French prisoners many years ago.*
>
> *11. I do not recall anybody working with asbestos around me when in these blocks. I do not recall any lagged pipes being stripped down, or any fresh lagging being mixed up in those blocks. I believe however, that I was inevitably exposed to asbestos during this particular job because I have become aware that Chatham Dockyard was riddled with asbestos."*

28. I should mention that the version of this witness statement which was put before me jumped from paragraph 2 to paragraph 10 since there appears, judging from the internal numbering, to have been a missing page. I infer, however, from the use of the word *"also"* at the start of paragraph 10, that the missing paragraphs 3 to 9 on the missing second page entailed Mr Dalton describing previous exposure to asbestos whilst working for Gough Cooper. This was not a point which was highlighted before me by either side. Rather, Miss Adams focused on the fact that, although the claim as pleaded (by amendment) in the Amended Particulars of Claim has as its focus the 1951-1952 period (rather than the 1950-1951 period as previously pleaded), in this witness statement Mr Dalton referred to his second period of employment with Gough Cooper as being in the period from 1952 to 1953, albeit qualified by *"or thereabouts"*. Miss Adams submitted that, in view of this, nothing stated in this witness statement supports the claim as it is now framed, a claim described in the Amended Particulars of Claim as concerned with the refurbishment of *"an old boiler house at an industrial building in Buckland Hill in Maidstone"*: see the Amended Particulars of Claim, paragraph 2.

29. Miss Adams also submitted that, as regards the first of the witness statements to which I have referred, the work which Mr Dalton described himself as having done whilst employed by Gough Cooper in the relevant period (1951-1952) was not the work which it is now alleged, in the Amended Particulars of Claim, that he did: *"work as a bricklayer for Gough Cooper's at Hotfield"*

involving *"building houses for HM Forces married quarters"*, as opposed to work at a boiler house at an industrial building at Buckland Hill. Therefore, that witness statement likewise does not support the claim which is now advanced, a claim which actually relates to the work described in paragraph 17 of the first witness statement as having been carried out when Mr Dalton was employed by Clarke & Epps, albeit in the period from 1950 to 1951 rather than in the period from 1951 to 1952.

30. Miss Adams went on to draw attention to what Mr Dalton then had to say in the second witness statement under the heading *"Tillings-Stevens Limited"*. In paragraphs 12 to 15 he said this, addressing the claim as it is now put in these proceedings, since I was told that the industrial building at Buckland Hill is the same place as the St Peter's Street address referred to below:

> *"12.I was certainly exposed to asbestos when working for Tillings-Stevens Ltd at their largescale factory premises in St Peters Street, Maidstone, close to the River Medway and the main railway line serving Maidstone and London. The factory had previously been used in the construction of Vulcan lorries. Refurbishment works were being carried out and I was engaged to build a chimney in the boilerhouse. I do not know if that particular building had been a boilerhouse previously, but the building in which I was based was a large open building with many metres of lagged pipes running horizontally and vertically across all the walls. There was no ceiling, but there was a metal framed pitched roof with asbestos sheets attached to the top.*
>
> *13. My job was to build a 50 ft high squire chimney and measured 5 ft by 5 ft. The chimney required the use of two different bricks. I recall bricks called 'kimono mola' which were used on the inside, and I speculate these may have contained asbestos. Regular bricks were used on the exterior. The chimney I constructed is still there to this day.*
>
> *14. While I was working at the foot of the chimney, a number of men had to rip out all the pipes that had been in place previously and which were lagged with a white asbestos material. This work was not carried out with any care or precision, and was very physical. People used various methods to remove the pipes around and above me, sometimes within 10 ft of where I was working.*
>
> *15. The removal of the pipes generated a lot of dust and mess throughout the day, making it a very dusty place to work. The dust was worse at the ends of the day when people were sweeping up. I certainly breathed in asbestos fibres all the while this work was being carried out. We did not have any doors or windows open because it was cold, and there were no ventilation facilities. Neither was there any provision for safety equipment, such as masks."*

31. This witness statement was not before Master McCloud at the hearing on 10 January 2014. Nor was its existence known about by Gough Cooper at the time of that hearing. In the circumstances, it made obvious sense for it to be admitted as fresh evidence on the hearing of the appeal; indeed, the Claimant

consented to this happening. Whilst it does not follow simply from the fact that the witness statement was not before Master McCloud that her conclusion as to the prospects of Gough Cooper successfully defending the claim was wrong, it does underline the fact that Master McCloud's focus was really on the Defence as pleaded, rather than the underlying support for the case advanced in the Amended Particulars of Claim.

32. As to that issue, the underlying support for the Claimant's case, Miss Adams drew attention to the fact that Mr Dalton's description of his employment history in the first of the witness statements to which I have referred was consistent with how Boyes Turner put things in the letter before action sent to Berrymans and dated 25 March 2011. In that letter, Boyes Turner stated as follows:

"Mr Dalton was employed by your client [Gough Cooper] as an apprentice bricklayer from 8 April 1946 to 8 July 1949 and as a bricklayer from approximately 1951 to 1952. At the time, your client was based in Wilmington House, Wilmington, Dartford, Kent.

At the beginning of Mr Dalton's apprenticeship, he spent four months demolishing a number of prefabricated buildings in Fant Lane, Barming, Maidstone. The prefabricated buildings were being demolished in order to allow for the construction of a maternity hospital on the site. He was informed by his work colleagues at the time that the prefabricated buildings were made of asbestos.

Mr Dalton demolished the prefabricated buildings using a sledgehammer. He then used a shovel, broom and wheelbarrow to clear up the debris and transfer it to a lorry on the site so that it could be taken away and dumped.

Whilst Mr Dalton was demolishing the prefabricated buildings and clearing away the debris, a vast amount of dry, grey dust was created. The dust would disperse into the atmosphere around where Mr Dalton was working and cover his work overalls."

33. However, as Miss Adams pointed out, this is not the claim which has ultimately come to be advanced by the Claimant in these proceedings. That claim, directed in the first instance against Clarke & Epps rather than Gough Cooper but now advanced against Gough Cooper rather than Clarke & Epps, is a claim which relates to Mr Dalton's employment (originally by Clarke & Epps in the period *"between 1950 to 1951"* but now by Gough Cooper in the period *"between 1951 to 1952"*) *"refurbishing an old boiler house at an industrial building in Buckland Hill in Maidstone"*: see, again, the Amended Particulars of Claim, paragraph 2. It does not concern Mr Dalton's employment as an apprentice bricklayer by Gough Cooper in the period from 8 April 1946 to 8 July 1949; nor does it concern Mr Dalton, in that period (1946 to 1949), spending *"four months demolishing a number of prefabricated buildings in Fant Lane, Barming, Maidstone"*.

34. In short, as Mr Glynn acknowledged, the claim described in the letter before action is not the same claim as is now advanced against Gough Cooper in this

action. The present claim is the one foreshadowed in paragraph 17 of the first witness statement (dealing with Clarke & Epps) and in paragraphs 12 to 15 of the second witness statement (under the heading *"Tillings-Stevens Limited"*) to which I have referred: the claim relating to the boiler house in St Peters Street, Maidstone (alternatively known as Buckland Hill). This is the claim which, in the event, when the Claim Form was issued, came to be advanced against Clarke & Epps, rather than Tilley & Stevens Limited, the company identified in the Particulars of Claim as the owner of the industrial building with the boiler house and, it seems, the proper name of *"Tillings-Stevens Limited"*.

35. This claim (against Clarke & Epps) was dropped as a result of the 'show cause' hearing which took place in June 2013, it having been pointed out by Plexus Law, Clarke & Epps' solicitors, that the work carried out at the boiler house could not have been carried out in 1950-1951, during the period when, according to Mr Dalton, he was employed by Clarke & Epps, and as then alleged by the Claimant in the Particulars of Claim, because the relevant planning permission was not obtained until July 1952.

36. It is this same claim which is now pursued against Gough Cooper, despite, as Miss Adams submitted, it not being the claim put forward in the letter before action and despite the claim against Gough Cooper finding no positive support in either of Mr Dalton's witness statements made on 6 November 2010. Nowhere in either of those witness statements did Mr Dalton say that he was employed by Gough Cooper whilst working at the boiler house. On the contrary, according to Mr Dalton, he was employed not by Gough Cooper but by Clarke & Epps (as stated in the first witness statement to which I have referred) or by *"Tillings-Stevens Limited"* (as stated in the second witness statement) whilst engaged in that work. Furthermore, in paragraph 21 of the first witness statement to which I have referred, Mr Dalton stated that, during 1951-1952, the period in relation to which the claim now relates, he worked as a bricklayer for Gough Cooper *"building houses for HM Forces married quarters"* when he did not recall *"coming into contact with asbestos"*.

37. Miss Adams submitted that, in the circumstances, there is every reason to suppose that Gough Cooper would be successful in resisting the Claimant's claim. She pointed out, in particular, that, in order for the claim to succeed, the Court would have to reject the Claimant's own evidence, in the form of Mr Dalton's two witness statements dated 6 November 2010, indeed as matters stand the Claimant's only employment history evidence. Admittedly, there is a witness statement dated 25 August 2013 from the Claimant herself, in which she explains that her husband *"had difficulty providing [his solicitor] with his employment history"* and makes the point, entirely reasonably, that that difficulty is *"understandable bearing in mind that on that date Fred was clearly in very poor health and bearing in mind Fred's age and the time that had passed since the relevant events"*. Whilst this might explain Mr Dalton's confusion, what it does not, however, do is provide positive support for the Claimant's case that Mr Dalton was employed by Gough Cooper when working at the boiler house. It seems to me, therefore, that the point which Miss Adams urged upon me, namely that the claim as presently framed against

Gough Cooper is not supported by the Claimant's own evidence, is a point which has considerable validity.

38. I remind myself, however, that the question at the setting aside of default judgment stage is not whether a defence will necessarily succeed, but whether *"the defendant has a real prospect of successfully defending the claim"* (see CPR 13.3(1)(a). Miss Adams' submission was that, had Master McCloud been addressed on the merits of Gough Cooper's defence in the detail with which I was addressed, then, Master McCloud could have reached only one conclusion: that Gough Cooper has, at a minimum, a real prospect of successfully defending the claim. Indeed, Miss Adams was inclined to suggest that, ultimately, based on the evidence as it currently stands, Gough Cooper would be bound to succeed and the claim would be bound to fail.

39. Miss Adams submitted that Master McCloud's focus on the Defence, and seemingly nothing else, despite her non-specific reference in her judgment to *"the material that has been filed by the claimant to establish the claim",* makes the present case one in which it would be appropriate to interfere with Master McCloud's exercise of discretion. In this regard, I was reminded of the guidance given in the White Book at paragraph 52.11.4 (*"Grounds for allowing appeal"*), as follows:

"As to what constitutes a sufficient error in the exercise of discretion to warrant interference by the appeal court, see Tanfern Ltd v Cameron MacDonald [2000] 1 W.L.R. 1311, para. 32. Brooke L.J. suggested that guidance might be gained from the speech of Lord Fraser in G. v G. (Minors: Custody Appeal) [1985] 1 W.L.R. 647 at 652. In the latter part of the passage cited by Brooke L.J., Lord Fraser stated:

> *'... the appellate court should only interfere when they consider that the judge of first instance has not merely preferred an imperfect solution which is different from an alternative imperfect solution which the Court of Appeal might or would have adopted, but has exceeded the generous ambit within which a reasonable disagreement is possible.'*

An alternative formulation of the threshold test for interference with the exercise of discretion by the appeal court is that stated by Lord Woolf M.R. in Phonographic Performance Ltd v AEI Rediffusion Music Ltd [1999] 1 W.L.R. 1507 at 1523:

> *'Before the court can interfere it must be shown that the judge has either erred in principle in his approach or has left out of account or has taken into account some feature that he should, or should not, have considered, or that his decision was wholly wrong because the court is forced to the conclusion that he has not balanced the various factors fairly in the scale.'"*

In fact, this passage comes from Stuart-Smith LJ's judgment in ***Roache v News Group*** [1998] EMLR 161 at 172. In ***Phonographic Performance Ltd v AEI Rediffusion Music Ltd***, Lord Woolf MR was citing the passage with approval.

40. Miss Adams submitted that Master MacCloud's conclusion that Gough Cooper had not established that it *"has a real prospect of successfully defending the claim"* was mistaken, indeed that it was a conclusion which (together with the ultimate exercise of the discretion by Master McCloud) no reasonable tribunal could have reached. Miss Adams submitted, in particular, that Master McCloud ought not to have confined herself to a consideration of the Defence, specifically the fact that the Defence is a document *"consisting of non-admissions"* (see [7] of the judgment). Miss Adams acknowledged that the Defence is, indeed, a document which consists of non-admissions. She submitted, however, that there was nothing wrong with this in circumstances where it is for the Claimant to make good the allegations contained in the Amended Particulars of Claim, including, importantly, the allegation that Mr Dalton was employed by Gough Cooper when he carried out the work which he did in relation to the boiler house.

41. In any event, when the claim is viewed against the backdrop of the two witness statements made by Mr Dalton on 6 November 2010 and once it is appreciated that the claim against Gough Cooper faces the difficulties which she identified before me, Miss Adams' position was that, really, only one conclusion was appropriate: that, contrary to the view reached by Master McCloud, Gough Cooper *"has a real prospect of successfully defending the claim"*.

42. As to the delay which occurred in the making of the application to set aside the judgment in default which the Claimant had obtained, Miss Adams recognised that Master McCloud was entitled to form the view which she did, namely that the application to set aside had not been made promptly and that following a *"wrong procedure"* did not amount to a good excuse for the delay which had occurred. She submitted, however, as clearly was the case, that Master McCloud had only considered the question of delay (and CPR 13.3(2)) in the context of her consideration of whether there was *"some other good reason"* to set aside judgment (under CPR 13.3(1)(b)). On this basis, Miss Adams submitted, if the view were to be taken that Master McCloud's decision in relation to CPR 13.3(1)(a) cannot stand, it is appropriate to consider the question of delay if not entirely afresh, then in a different context. Miss Adams submitted that, in such circumstances, the lack of promptness in making the application, even allowing for Master McCloud's view about the adequacy of the reason given for the delay, ought not to result in a conclusion that the default judgment should be maintained.

The Claimant's position

43. Mr Glynn submitted that, in circumstances where Gough Cooper's then counsel had elected not to address Master McCloud on the matters now focused on by Miss Adams before me, the Court should be slow to allow the appeal. He observed that Gough Cooper really had only itself to blame that Master McCloud reached the decision which she did. Certainly Master McCloud cannot be blamed, Mr Glynn suggested, for not picking up on the matters now advanced before me.

44. Mr Glynn submitted that it was all the more remarkable, as he put it, that Master McCloud was not addressed on these matters because, when serving the Amended Claim Form and Amended Particulars of Claim on Berrymans, in their letter dated 16 October 2013, Boyes Turner had themselves highlighted the fact that Mr Dalton's evidence, in the form of the first of the witness statements dated 6 November 2010 to which I have referred, was to the effect that he was employed at the relevant time not by Gough Cooper but by Clarke & Epps. Specifically, the letter stated as follows:

"… In his statement dated 6 November 2010, the Deceased stated that he worked for Clarke & Epps Limited between approximately 1950 and 1951 and he was exposed top asbestos when he had to build a brick chimney in an industrial building owned by Tilling and Stevens Limited in Buckland Hill in Maidstone. The Deceased stated that he worked for Gough Cooper and Company Limited from 8 April 1946 to 8 July 1949 and subsequently in 1951 to 1952.

We have issued Court proceedings against Clarke & Epps Limited. Clarke & Epps Limited have disclosed archived planning applications lodged by Tilling and Stevens Limited in relation to their premises at Buckland Hill. These include an application for planning permission which was granted in July 1952 for the construction of a chimney stack and the adaption of the existing premises to a boiler house at the junction of Buckland Hill and St Peter's Street. This is clearly corroborative of the Deceased's account of exposure at the Buckland Hill property building the chimney stack. However the building work is unlikely to have started until after planning permission was granted and this would post date the Deceased's employment with Clarke & Epps Limited. We believe that the Deceased must have been confused about who his employer was when the Buckland Hill chimney was being built, and we believe that the Deceased's correct employer was Gough Cooper & Company Limited on the basis that this company employed the Deceased between 1951 to 1952 and we know from the planning documents that the construction of the chimney probably took place in the second half of 1952. We have therefore substituted Gough Cooper & Company Limited as Defendant, in place of Clarke & Epps Limited. …".

45. Mr Glynn suggested, it seems to me with considerable force, that this should have been brought to Master McCloud's attention. He submitted that it was for Gough Cooper to establish that it *"has a real prospect of successfully defending the claim"*, and that Gough Cooper ought not now to be permitted to impugn Master McCloud's decision on the basis of material to which Master McCloud was not taken and submissions which were not advanced before her.

46. Mr Glynn further submitted that, even if the material had been highlighted before Master McCloud and even if the submissions which Miss Adams advanced before me had been advanced before Master McCloud, still the decision reached by Master McCloud was within the range of decisions which it was open to Master McCloud to make. On that basis, Mr Glynn submitted, Master McCloud's decision, and her order, ought not to be disturbed.

47. As to Gough Cooper's delay in making the application to set aside, Mr Glynn submitted that this of itself justified Master McCloud's decision not to set aside the judgment in default which the Claimant had obtained. As he put it, the worst that can be said is that Master McCloud's decision was harsh. That did not mean, however, that the decision should not be allowed to stand.

48. In this context, Mr Glynn suggested that, whilst the approach described in ***Mitchell v News Group Newspapers Limited*** [2013] EWCA Civ 1537 might not be of direct relevance on an application to set aside a default judgment, nevertheless it is clear from this authority, and the other cases which have followed it, that there ought to be adherence to the CPR. Accordingly, Mr Glynn submitted, this approach should influence the approach to the question of delay under CPR 13.3(2).

Decision

49. I have considered the parties' respective submissions with care. I have done so, in particular, conscious that I must avoid the temptation to consider matters afresh. This is, after all, an appeal. As such, it entails *"a review of the decision of the lower court"* (see CPR 52.11(1). This is not a case in which *"a practice direction makes different provision for a particular category of appeal"* (CPR 52.11(1)(a)), nor is it a case in which I consider it appropriate *"in the interests of justice to hold a re-hearing"* (CPR 52.11(1)(b)). As to the latter, although I take account of the fact that the second of the two witness statements made by Mr Dalton on 6 November 2010 to which I have referred did not come into Gough Cooper's possession until after the hearing before Master McCloud, Gough Cooper nevertheless had the first of the witness statements and, indeed, Boyes Turner's letter dated 16 October 2013 attaching the Amended Particulars of Claim. Gough Cooper, therefore, had material available to it which would have enabled it to advance the submissions which Miss Adams has advanced before me on this appeal.

50. In these circumstances, it does not seem to me that the interests of justice demand that I should, exceptionally, treat the appeal as a rehearing as opposed to a review of Master McCloud's decision, and I decline to do so. Accordingly, in line with the approach helpfully explained by May LJ in ***E.I. Du Pont Nemours & Co v S.T. Du Pont*** [2003] EWCA Civ 1368, [2006] 1 W.L.R. 2793 at [94] (as set out in the notes in the White Book at paragraph 52.11.1) I remind myself that I should *"accord appropriate respect to the decision of the lower court"*. I bear in mind also that I should be all the more wary about disturbing the decision of Master McCloud if and insofar as her decision entailed the exercise of a discretion, since a discretionary decision should only be interfered with in the limited circumstances which I have previously described.

51. I have nevertheless reached the clear conclusion that this is a case in which the appeal should be allowed. I set out my reasons, relatively briefly, in what follows.

52. First and most fundamentally, it does seem to me that Master McCloud's decision that Gough Cooper has no *"real prospect of successfully defending*

the claim" simply cannot be right. Without in any way wishing to suggest that Gough Cooper's defence is bound to succeed, it is, however, quite clear to me that Gough Cooper has at least a real prospect of successfully defending the claim. In truth, I struggle to see how any other view could be reached on this issue.

53. As I see it, the lack of positive support for the claim in either of Mr Dalton's two witness statements dated 6 November 2010 makes this conclusion inevitable, bearing in mind that it will be for the Claimant to establish at trial that her husband was, indeed, employed by Gough Cooper when he was carrying out the work at the boiler house which, according to Mr Dalton, caused him to be exposed to asbestos. The sad circumstances in which Mr Dalton made his two witness statements on 6 November 2010 may well explain the confusion which the Claimant appears to acknowledge exists in those witness statements. The fact remains, however, that, at least on the basis of the evidence which so far exists, in the form of those witness statements, there is no evidence positively supporting the case which the Claimant now advances. On that basis, Gough Cooper must, it seems to me, have a real prospect of successfully resisting liability to the Claimant.

54. Secondly and importantly, if and insofar as Master McCloud's decision involved the exercise of a discretion, which, as I come on to explain, on analysis, it seems to me it may not actually have done, then, adopting the cautious approach which I have described above, I ask myself whether, having regard to my conclusion that Gough Cooper has at least a real prospect of successfully defending the claim, this is a case in which it would be appropriate for me to disturb Master McCloud's decision. I am clear that the answer to that question is that it is, indeed, appropriate to do this. In my judgment, this is a case in which, I stress through no fault of Master McCloud herself, Master McCloud *"has left out of account ... some feature that [s]he should ... have considered"* (see ***Roache v News Group*** [1998] EMLR 161 at 172, as referred to earlier).

55. I refer here, of course, to the various matters which Miss Adams urged upon me, based on Mr Dalton's witness statements as well as the letter before action dated 25 March 2011 and, indeed, the letter from Boyes Turner dated 16 October 2013 attaching the Amended Particulars of Claim. It is unfortunate that these were not matters which were raised before Master McCloud. Even allowing for the fact that one of the 6 November 2010 witness statements was not available to Gough Cooper, nor even known about, at the time of the hearing on 10 January 2014, Gough Cooper was nevertheless in a position to make appropriate reference to the other material, which, as I understand it, was available at the hearing before Master McCloud, and so to make submissions directed towards the merits of its defence by reference to that material, which I am quite clear would have led Master McCloud to arrive at a different decision to the one which she reached. The fact is that, because this was not done, Master McCloud left out of account matters which should have been considered.

56. I should explain, in this context, that I have taken into account the fact that Master McCloud expressed the view, in her judgment at [6], that *"it is the*

content of [the] defence to which I have to have regard rather than to other matters in the response to the letter of claim which were not pursued in the defence, because I have to take it that that is what the defendant elected would be its defence at that point, irrespective of what it may have initially said in response to the claim". It is notable that Master McCloud was referring here only to the response to the letter before action from Boyes Turner dated 25 March 2011, namely Berrymans' letter dated 28 June 2011. No reference was made, for example, to Boyes Turner's letter dated 16 October 2013, in which the confusion on the part of Mr Dalton was expressly mentioned. This is the letter which Gough Cooper failed to draw to Master McCloud's attention, but which was before Master McCloud. Nor is there any mention of the first of Mr Dalton's witness statements dated 6 November 2010 to which I have referred, and to which it is clear that no reference was also made, despite it again being before Master McCloud. In short, Master McCloud's sole focus was on a single piece of correspondence which was a response to a different claim to the claim advanced, by amendment, in the present proceedings.

57. I am in little doubt that, had this other material been raised with Master McCloud and the associated submissions made, she would not have confined herself to the observation that it was appropriate to focus on the Defence. It seems to me inevitable that, had Master McCloud appreciated that the non-admissions to be found in the Defence were accompanied by the substantive points which were addressed to me by Miss Adams, she would not have dismissed the Defence in the way that she did. I consider, therefore, that Master McCloud was probably not meaning to place an artificial limitation on what she was prepared to take into account when considering CPR 13.3(1)(a), but that she was merely reflecting the limited scope of the submissions which she heard and the material which she was shown.

58. On that basis, as I say, it seems to me that Master McCloud left out of account features which should have been considered and which, had they been considered, would have led her to reach a different decision. If I am wrong about this, and Master McCloud was intending to say that, notwithstanding, for example, what Mr Dalton had stated in a witness statement dated 6 November 2010 and Boyes Turner's letter dated 16 October 2013, she was only prepared to have regard to the terms of the Defence and nothing more, all of which seems not to have been the case, then I consider that this would not only have entailed a failure (on this basis, no longer inadvertent) to take account of features which should have been considered, but that it would also have involved Master McCloud having *"erred in principle in [her] approach"* and having reached a decision which was *"wholly wrong because … [she] has not balanced the various factors fairly in the scale"* (see, again, ***Roache v News Group*** [1998] EMLR 161 at 172, as referred to earlier).

59. I would only add that, although it is unfortunate that Gough Cooper did not put its case in the same way before Master McCloud as it did before me on this appeal, it does not seem to me that it would be right, even taking account of the fact that this appeal entails a review rather than a rehearing, to dismiss the appeal on that basis. In my view, to adopt such an approach would be to result in injustice: shutting Gough Cooper out from being able to advance a

case which appears to have real merit; and allowing the Claimant to continue to benefit from what might very well prove to be in the nature of a windfall in the sense that she would have the benefit of a judgment which, on the merits, she does not deserve to have.

60. Thirdly, since it is clear that Master McCloud's consideration of CPR 13.3(2) (delay) was in the context of CPR 13.3(1)(b) (*"some other good reason"*) rather than CPR 13.3(1)(a) (real prospect of successfully defending the claim), I consider that it is both open to me, and indeed appropriate, that the question of the promptness of Gough Cooper's application to set aside the default judgment is reconsidered. However, it seems to me that in the present case, in line with the guidance given by May LJ in the ***E.I. Du Pont*** case, *"appropriate respect"* ought to be accorded to Master McCloud's assessment that the application was not made sufficiently promptly and that the explanation for the lack of promptness was not a good one.

61. It seems to me that, notwithstanding what she had to say concerning delay and taking account of her view that the delay was not acceptable, Master McCloud would almost certainly have reached a different overall conclusion on the application had she decided that Gough Cooper's defence had real prospects of success, as I consider she would (and should) have decided had matters been properly aired before her. On that basis, and because I am quite clear that the lack of promptness (which I accept there was) ought not to mean that the setting aside application should fail in circumstances where there is a real prospect of Gough Cooper succeeding with its defence, the appeal should succeed notwithstanding that lack of promptness.

62. I have reached this conclusion having taken into account the ***Mitchell*** approach to procedural requirements, but nevertheless regarding myself as being able, consistent with what CPR 13.3(2) itself expressly contemplates, to *"have regard"* to the promptness of the application to set aside, rather than being obliged to treat the lack of promptness as being necessarily fatal to the application. Similarly and obviously, it cannot be the case that Gough Cooper's failure to file its Defence on time should mean that, without more and merely by reference to the ***Mitchell*** approach, the setting aside application must fail. Were that the position, then, it is difficult to see why CPR 13.3 would be in the terms which it is in. I might add that the approach which I have described seems to me to be consistent with the approach adopted by Burton J in ***Mid-East Sales Limited v United Engineering and Trading Company (PVT) & another*** [2014] EWHC 1457 (Comm), a judgment handed down last Friday (9 May 2014), after argument in the present case, and a decision which came to my attention only after I had circulated a draft of this judgment, in fact the day before the handing down of the judgment in final form. In the ***Mid-East Sales*** case Burton J set aside a default judgment, in part, on the basis that the relevant defendant had *"arguable defences, such as more than to satisfy the first condition in CPR 13.3(1)"*, in circumstances where the delay involved was 5½ months. I do not consider that the shorter period of delay which there has been in the present case is of such a scale as to mean that the application should fail, in circumstances where there is a real prospect of Gough Cooper succeeding with its defence. I consider this to be

the case whether the delay is to be regarded as having started at *"the end of October"* (as Master McCloud considered: see her judgment at [9]) or as having started in mid-November 2013 (when the Defence was due) or as having started when the judgment in default was obtained (on 3 December 2013), whilst nevertheless considering that it is the last of these dates which is directly relevant for the purposes of CPR 13.3(2) since clearly Gough Cooper was not in a position to apply to set aside the default judgment until after that judgment had been obtained.

63. Fourthly, and really only out of completeness, I should point out that to the extent that Miss Adams relied on *"some other good reason"* for setting aside the default judgment, under CPR 13.3(1)(b), I see no basis at all for disturbing the conclusion reached by Master McCloud. Indeed, I consider that there is no *"other good reason"* to set aside the default judgment. In particular, I am not remotely persuaded that the fact that different insurers (and, indeed, solicitors) are now involved compared with when the default occurred constitutes a *"good reason"* for the purposes of CPR 13.3(1)(b).

64. Lastly, as I have mentioned, although both parties characterised Master McCloud's decision as entailing the exercise of a discretion, on analysis, it seems to me that Master McCloud may very well not have been exercising a discretion at all. I say this because having concluded that neither of the requirements set out in CPR 13.3(1)(a) and (b) was satisfied, there was effectively no room for the exercise of a discretion nevertheless to set aside the default judgment. CPR 13.3(1) provides that *"the court may set aside or vary a judgment entered under Part 12 if"* (a) or (b) apply. As I see it, if neither (a) nor (b) applies, then, the discretion arising from the use of the word *"may"* does not arise. The position would be different if Master McCloud had decided that there was a real prospect of successfully defending the claim (CPR 13.3(1)(a)) or that there was *"some other good reason"* to set aside the judgment (CPR 13.3(1)(b)). In that event, Master McCloud would then have had to decide whether, exercising her discretion, the default judgment should be set aside. That was not, however, the position in the present case because Master McCloud held (incorrectly, in my view) that there was no real prospect of Gough Cooper successfully defending the claim and (correctly, in my view) that there was not *"some other good reason"* to set aside the judgment. Accordingly, there was no scope for the exercise of a discretion, at least a discretion over and above the element of discretion which may be inherent in the ascertainment of whether there was *"some other good reason"* to set aside the judgment. As I have explained, I am clear that the appeal should be allowed even on the basis that, in making her decision, Master McCloud did exercise a discretion. I need not, therefore, base my decision on this appeal on this additional point – a point on which neither counsel addressed me. However, had it been necessary to do so, I would have been inclined to allow the appeal on this alternative, and logically anterior, basis.

Conclusion

65. For all these reasons, I allow Gough Cooper's appeal and order that the default judgment obtained on 3 December 2013 should be set aside.

66. I will hear submissions as to costs in the event that the parties are unable to reach agreement in this regard.