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Neutral Citation Number: [2020] EWHC 2400 (Ch)

Case No: BL-2019-001536

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

7 Rolls Building
Fetter Lane
London, EC4A 1NL

Date: 14/09/2020

Before :

MASTER KAYE

- -

Between :

Penta Ultimate Holdings Limited	**Claimants**
Penta Consulting Limited	
- and -	
Ian Storrier	**Defendant**

- -
- -

Neil Hext QC and Mark Cullen (instructed by **DaySparkes Limited**) for the **Claimants**
Nikki Singla QC (instructed by **Reynolds Porter Chamberlain LLP**) for the **Defendant**

Hearing dates: 8 April 2020

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Approved Judgment

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

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MASTER KAYE

Master Kaye :

1. This was the remote hearing of the Defendant's application issued on 11 October 2019 to set aside Judgment in Default and for Specific Disclosure.

2. The Claimants' claim was issued on 21 August 2019. It was accompanied by particulars of claim and initial disclosure. The Defendant served an acknowledgment of service indicating an intention to defend part of the claim. He did not file or serve a defence. Default Judgment was entered for an amount to be decided on 24 September 2019.

3. The application to set aside the Default Judgment was issued on 11 October 2019 and was supported by a twenty-five-page witness statement from the Defendant but did not include a draft defence. A second witness statement dated 2 April 2020 engaged more fully with the proposed defence and exhibited a draft defence. This was nearly 6-months after the application issued in October 2019 and less than a week before the hearing.

4. The evidence in opposition consists of a witness statement from Paul Clark the CEO and Director of the Second Defendant dated 9 March 2020. His statement runs to forty-four pages and is accompanied by his exhibit of in excess of 380 pages. It was served five months after the application was issued and only a month before the hearing.

5. In addition to the witness evidence and statements of case both counsel provided me with detailed written skeleton arguments which were supplemented by their oral submissions. I have considered those with care and taken into account all their submissions even if each and every submission is not referred to in this judgment.

Legal Principles

6. The starting point on an application to set aside a judgment is CPR Part 13. Unless the judgment was wrongly entered such that the court must set it aside CPR13.3 provides a discretion to the court to set aside or vary a judgment in default:

> **"13.3** (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.
>
> (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.

> (Rule 3.1(3) provides that the court may attach conditions when it makes an order)"

7. The Defendant therefore first needs to overcome the threshold test set out in CPR 13.3(1)(a) and (b), that there is a real prospect of successfully defending the claim or there is some other good reason why a judgment, validly obtained, should be set aside. Further pursuant to CPR 13.3.2 the Court must have regard to whether the application was made promptly.

8. The test to be applied in respect of CPR13.3(1)(a) is broadly the same as the test for summary judgment save that the burden of proof reverses. Thus, I remind myself that in considering the application for summary judgement the court must consider whether the Defendant has a real prospect as opposed to a fanciful prospect of defending the claim. A realistic defence is one which carries some degree of conviction that is it is more than merely arguable. To reach that conclusion I must not conduct a mini trial. However, that does not mean the court must take at face value without analysis everything the Defendant says. I should take into account not only the evidence actually before me but also evidence that can reasonably be expected to be available at trial.

9. CPR13.3(1)(b) is a free-standing alternative ground for setting aside default judgment. It has been held to be a broad test, *Berezhovsky v Russian Television and Radio Broadcasting Co* [2009] EWHC 1733 (QB).

10. An application to set aside default judgment is recognised to be an application for relief from sanctions (*Regione Piemonte v Dexia Crediop SpA* [2014] EWCA 1298) and so also engages the three-stage test in *Denton v TH White Ltd* [2014] 1 WLR 3926 ("*Denton*").

11. In *Gentry v Miller* [2016] EWCA Civ 141 ("*Gentry*"), Vos LJ explained how the test in *Denton* should be applied to an application to set aside or vary a default judgment as follows:

> "*24. The first questions that arise… in dealing with an application to set aside a judgment under CPR r 13.3 are the express requirements of that rule, namely whether the defendant has a real prospect of successfully defending the claim or whether there is some other reason why the judgment should be set aside, taking into account whether the person seeking to set aside the judgment made an application to do so promptly. Since the application is one for relief from sanctions, the tests in Denton's case then come into play. The first test as to whether there was a serious or significant breach applies, not to the delay after the judgment was entered, but to the default in serving an acknowledgment that gave rise to the sanction of a default judgment in the first place. The second and third tests then follow, but the question of promptness in making the application arises both in considering the requirements of CPR r 13.3(2) and in considering all the circumstances under the third stage in Denton's case."*

12. Therefore, after considering whether the threshold test of CPR 13.3 is met, the Court should consider and apply the three-stage test in *Denton* in respect of which the factors in CPR 3.9 (1) should be given particular weight.

13. CPR 3.9 provides:

> "(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –
>
> (a) for litigation to be conducted efficiently and at proportionate cost; and
>
> (b) to enforce compliance with rules, practice directions and orders.
>
> (2) An application for relief must be supported by evidence."

14. It is at that stage that the court engages in the consideration of the exercise of its discretion. In doing so the court must have regard to the overriding objective and all the circumstances including the need to deal with cases justly and at proportionate cost. This includes considering the prejudice to both the Defendant if judgment is not set aside and the prejudice to the Claimant, who has a validly obtained default judgment if judgment is set aside.

15. Mr Hext referred me to the recent decision of HHJ Pelling QC (sitting as a Judge of the High Court) in *Core Export SpA v Yang Ming Marine Transportation Corp* [2020] EWHC 425 (Comm) ("*Core Export*") in which he applied the approach in *Gentry*. HHJ Pelling QC refused an application to set aside default judgment notwithstanding the fact that the defendant had a real prospect of successfully defending the claim. He found on the facts of that case, that the failure to file an acknowledgment of service was serious and significant, there was no good reason for it and in all the circumstances the existence of a realistically arguable defence was outweighed by the history of delay, inaction and non-engagement.

16. *Gentry* sets out the approach to be adopted by the court on an application to set aside Judgment in Default. *Core Export* is an example of the application of that approach to the facts of a specific case. Each case will turn on its own specific facts. The exercise of the courts' discretion is not confined or limited by fact specific authorities.

17. The Court may attach conditions if it makes an order setting aside default judgment (CPR 13.3(1)(3)). The court's discretion on the imposition of conditions derives from its general case management powers. It is broad and would include consideration of factors such as any delay in making the application, the Defendant's conduct, affordability, and the overriding objective.

18. Mr Hext suggests that in this context the approach of the court in the making of a conditional order under CPR 24 may be influential. Such an order may be made where it appears to the court that, in respect of some defence or issue, it is possible that the defence may succeed but it is improbable that it will do so. A conditional order would normally require the defendant to pay a sum of money into court. (CPR PD 24 paras 4 and 5.2).

19. I consider the Defendant's application against that legal framework.

Background

20. The First Claimant ("PUHL") is a BVI company, which wholly owns the Second Claimant ("PCL"), a company incorporated in England (together "the Claimants").

21. The Claimants are an international technical staffing and solutions business, primarily providing recruitment and outsourcing services to the telecoms and information technology ("IT") marketplaces. Paul Clark is a Director and CEO of PCL. PCL has subsidiaries, branches, partnerships, and commercial agreements in various different jurisdictions.

22. The Defendant was a Director of PCL from July 2008 and CFO from September 2007. He was CFO of PUHL from November 2014. He held both those positions until June 2018. He is a qualified accountant and a fellow of the Association of Certified Chartered Accountants (ACCA).

23. The Defendant has both the benefit of Loan Notes in respect of PUHL which will become repayable in 2027 and has a minority shareholding. Mr Clark also has the benefit of Loan Notes in PUHL.

24. It is clear from the witness evidence of Mr Clark and the Defendant that having previously worked together over an extended period of time the relationship between them has broken down irretrievably. To that extent although the claim is by PCL and PUHL it has many of the hallmarks of a personal dispute.

25. To put that in more context it is necessary to start with the proposed sale of PCL in 2017 which appears to have been the catalyst for the significant personal falling out between Mr Clark and the Defendant and also forms part of the claim.

26. In 2016/2017 the Defendant says that Mr Clark decided he wished to sell PCL to realise the remainder of the sums due to him under the Loan Notes. The Defendant, as CFO, was actively involved in liaising with the professional team retained to assist with the sale and in providing information that would be sought by a potential purchaser. The Defendant says that he was asked to provide evidence for potential purchasers that the business was growing at a rate of 10% per annum. The Defendant says that it was not possible to show that level of growth only the possibility of that level of growth with further investment. He says that Mr Clark was unhappy with the Defendant's conclusion. Without that evidence of potential growth in the business potential purchasers and investors were not interested and the sales process failed. Mr Clark says that, in fact, the process failed because tax and financial control issues and concerns, consequent upon the Defendant's activities, were uncovered in the course of the due diligence process. PCL seeks to claim from the Defendant costs of £134K that it says it incurred in the abortive sale process.

27. The Defendant says that Mr Clark's behaviour towards him changed after the failed sale process in early 2017. He says that he was harassed and humiliated by Mr Clark and that this conduct (which is denied by Mr Clark) affected his health. He was signed off with work related stress in January 2018. He says he sought to

reach a resolution with the Claimants to allow for an agreed exit. There was instead a grievance process (which was unsuccessful) and a disciplinary process. The Defendant says this had a further negative impact on his mental health and he therefore resigned on 20 June 2018.

28. In the meantime, in the later part of 2017 the Defendant, as FD and CFO, was involved with the preparation and sign off of PCL's financial statements for the year ended 31 March 2017 ("the 2017 Accounts"). The 2017 Accounts were prepared and audited by Clarkson Hyde who continue to be retained by the Claimants for that purpose. Mr Jamie Brookes, the PCL Financial Controller, was also actively involved in the preparation of the 2017 Accounts. He continues to be employed by the Claimants and it appears he has been promoted.

29. The Defendant having been signed off in January 2018 and having resigned from the Claimants in June 2018 says that he was not fit to work again until around September 2018 due to his mental health issues. He attributes the cause of his poor mental health to the way he was treated by the Claimants and Mr Clark's behaviour. He says that he was receiving counselling.

30. In the meantime, the Claimants say they began to uncover various issues in relation to the 2017 Accounts and in respect of other financial matters with which the Defendant had been involved. It was against that background that they say the disciplinary process was instigated. They spent 10 months working through the 2017 Accounts with the assistance of various external professionals and at a cost of some £173K. The outcome of this exercise was a rewrite of the 2017 Accounts in 2018. The rewrite of the 2017 Accounts recorded a reduction in profit of £2m. The cost of this exercise forms part of the losses claimed against the Defendant.

31. Having completed the rewrite and having identified, what the Claimants say, are the extensive errors in the 2017 Accounts and other unauthorised activity by the Defendant, on 30 April 2019, the Claimants sent the Defendant a letter of claim, which made many of the allegations which now appear in this claim.

32. The Defendant says that until he received the letter of claim he had not been told about any of the alleged issues with the 2017 Accounts nor was he asked any questions about the 2017 Accounts. He did not know that there had been a rewrite of the 2017 Accounts.

33. Although the letter of claim encouraged the Defendant to notify his insurers, the Claimants having identified that he might have cover under the Claimants' D&O policy, he did not do so.

34. The Defendant says that the receipt of the letter of claim had an adverse impact on his stress levels and mental health and he found it difficult to deal with the letter of claim. On 6 June he told the Claimants' solicitors he was preparing a response.

35. On 10 June, the Claimants' solicitors contacted the D&O insurers directly. The Defendant says that as a consequence he did not believe he needed to do anything and could wait to be contacted. He did not seek advice or respond to the letter of claim. He appears to have buried his head in the sand.

36. The Defendant says he was surprised when he received the claim form in August 2019. He says he panicked, and his mental health deteriorated very rapidly. He did acknowledge service but did not file a defence in time and only sent a draft response to his insurers on 23 September the day the Default Judgment was applied for.

Promptness

37. The Defendant has been dilatory in engaging with this dispute. He has put his head in the sand and failed to grasp the seriousness of it. His conduct in failing to engage with the letter of claim, the notification of his insurers and then the proceedings when issued means he is seeking the indulgence of the court on an application to set aside a properly obtained Default Judgment.

38. Although the Defendant relies on a medical history of stress, said to be caused by the behaviour of Mr Clark, other than his witness evidence the only evidence in support of his mental health issues are some Doctors notes. As Mr Hext identified those Doctors Notes are notes which sign the Defendant off work in 2018 before he resigned from the Claimants. They do not fully support or explain his conduct in ignoring the proceedings when issued in August 2019 over a year later. In my view, the evidence said to explain the Defendant's conduct and failure to engage pre-issue and up to the date of the judgment in default, by reference to his mental health issues is very limited.

39. However, the question of promptness for the purposes of the issuing of the application to set aside the default judgment is considered not by reference to pre-issue conduct. Such pre-issue conduct comes back into consideration as part of the overall consideration of all the circumstances when considering relief from sanctions.

40. At this stage of the exercise the issue of promptness pursuant to CPR13.3(2) is considered by reference to the Default Judgment itself. The proceedings were issued on 21 August 2019. The Acknowledgment of Service was filed in time. Default Judgment was obtained on 24 September. The Defendant notified the court of his intention to apply to set aside the judgment on 26 September 2019. The Defendant's legal representatives went on the court record on 2 October 2019 and the application together with a relatively detailed witness statement was issued on 11 October 2019, albeit without a draft defence. The application to set aside the Default Judgment was therefore issued 17 days after the Default Judgment was issued and 15 days after it was served on the Defendant.

41. In considering the question of promptness a period of just over 2-weeks to issue a substantive application is in my view prompt in the context of the complex claim being raised against the Defendant and sufficiently prompt to meet the requirements of CPR 13.3(2).

Real Prospect of Success

42. If the application was made promptly the court needs to consider whether the Defendant has a real prospect of defending the claim for the purposes of the threshold test.

43. At the threshold stage the court should be careful to avoid conducting a mini-trial and should consider the merits of the case only to the extent necessary to determine that the proposed defence has sufficient merit for it to be said that the Defendant has a real prospect of defending the claim.

44. There are two broad themes to the claims made by the Claimants. First, they allege that the Defendant was negligent and acted in breach of his duty of care to them in the context of his involvement with the preparation and sign off of the 2017 Accounts. This element of the claim encompasses not only the 2017 Accounts but also other allegations of mismanagement including in relation to the abortive sale referred to above and the costs of the 2017 Accounts rewrite.

45. It is said by the Claimants that as a result of the negligence of the Defendant it was necessary to have the 2017 Accounts rewritten in 2018. This is said to have resulted in a reduction in reported profit of approximately £2m. The errors identified are wide ranging and span a number of the subsidiary companies, partnerships, and commercial agreements.

46. Mr Clark says that the rewrite of the 2017 Accounts wiped out the value of the Loan Notes held by both Mr Clark, the Defendant, and others in relation to PUHL. The Defendant does not accept this and believes that the claims against him are part of a process by which the Claimants are seeking to eliminate his rights under the Loan Notes and his minority shareholding.

47. Those are serious allegations which are denied in their entirety by Mr Clark. The rewrite of the 2017 Accounts has been undertaken by professional accountants at considerable cost. He says it is absurd to suggest that the Claimants and he would deliberately reduce the value of the Loan Notes by £millions simply to undermine the Defendant's Loan Notes and minority shareholding.

48. Although the Claimants are corporate entities this dispute has, as I say, the hallmarks of a personal dispute between individuals. The relationship between Mr Clark and the Defendant who had worked together since 2014 has plainly broken down irretrievably.

49. The 2017 Accounts and mismanagement allegations are wide ranging. Many include detailed allegations about specific sums of money and the treatment of those sums of money in the 2017 Accounts over a wide range of the international subsidiaries, partnerships, or commercial agreements. These are set out in the particulars of claim and then expanded on by Mr Clark in his evidence.

50. The Claimants say that the errors identified have caused significant loss. They say that some of the errors are as a direct result of the Defendant's own action or inaction whilst others are a result of his failure to identify errors made by others.

51. The Claimants' case is that the Defendant, as FD and CFO and as a qualified accountant, was responsible for the production of the 2017 Accounts. He signed off the 2017 Accounts so he must have been satisfied that they provided a true and fair view of the financial position of both PCL and PUHL. The Claimants say that given his role, the Defendant cannot seek to abdicate responsibility for the errors and mistakes that have been identified in the 2017 Accounts.

52. The Defendant says that this mischaracterises his role in PCL and PUHL. He says that his role was a senior leadership role with high-level oversight of the finance functions. He says that he was not involved in the granular detail of the preparation of the management accounts, audit processes or other granular level functions in relation to the finances of PCL and PUHL. He was entitled to and did rely on the systems put in place by PCL and PUHL for the accounting and auditing processes.

53. He sets out how he says the audit process was conducted and says that if there were any misstatements or anything wrong with the 2017 Accounts, which he does not accept, that any such error was either not caused by him at all or not by him alone. He does not accept the errors, however caused, resulted in loss.

54. The Defendant says that Mr Brookes and his team were involved day to day in the minutiae of the accounts and liaised with Clarkson Hyde who prepared and audited the 2017 Accounts. Mr Brookes or Clarkson Hyde could and did seek the Defendant's input as they thought necessary but otherwise just got on with it. Although the Defendant was copied in on some emails between Mr Brookes and Clarkson Hyde he does not accept that he should have been expected to be intimately involved with each email nor does he accept that by being copied into emails he was underwriting the contents without more. He draws a distinction between emails that were sent to him and ones into which he was copied.

55. He says that if he was only copied in to an email but not specifically asked to comment he would assume, and was entitled to assume, that those who were copying him in were able to deal with the issues raised.

56. He identifies that despite Mr Clark's evidence stating that he was copied in to emails relevant to the alleged errors that in fact only a very small number of the 380 pages of selective documents exhibited to Mr Clark's witness statement were in fact copied to him. He says that most of the ones relied on to support the alleged breaches were not copied to him.

57. He also notes both the retention and promotion of Mr Brookes despite his role in respect of some of the alleged errors in the 2017 Accounts and the alleged unauthorised payments. Further, he notes that no complaint is made about Clarkson Hyde who audited the 2017 Accounts. He wants the opportunity to consider whether to bring contribution proceedings against Mr Brookes and Clarkson Hyde.

58. Mr Hext describes the overarching theme of the defence as being an argument that the Defendant had no responsibility and no involvement in the 2017 Accounts but, he says, the documents suggest that he had a far greater involvement than he admits.

59. The Claimants do not accept the Defendant's explanation as being either a defence or representative of the Defendant's conduct or role in relation to the 2017 Accounts. They say that the suggestion that the Defendant did not and or had no obligation to read emails he was copied into in relation to particular accounting matters is incredible and is no defence to the accounting errors identified in the 2017 Accounts.

60. In any event, Mr Hext points to examples of the Defendant stepping in and engaging with emails he was only copied in to even where he was not positively asked to comment. This the Claimants say is inconsistent with the Defendant's suggestion that he only engaged with emails that he was copied in to when asked to by Mr Brookes or Clarkson Hyde.

61. The Claimants set out detailed allegations in the evidence and the particulars of claim identifying in respect of particular items why they say they were incorrectly treated in the 2017 Accounts.

62. Mr Hext points to some examples where he says that the Defendant had knowledge about the matters that were subsequently wrongly or incorrectly included in the 2017 Accounts.

63. For example, in respect of the TCom Iqamas the Claimants say that the Defendant misrepresented the position. He failed to write off the value of expired pre-paid residency visas (the Iqamas) in the 2017 Accounts despite having written them off in management accounting documents he had prepared in about March 2017 as part of the due diligence process for the abortive sale. The Defendant was copied into emails between Mr Brookes and Clarkson Hyde in November 2017 in which a different treatment of the Iqamas was proposed. The Claimants say that this failure to identify and correct the error caused a misstatement in the 2017 Accounts and caused loss. I note that the value of the Iqamas was some £60,000.

64. The Defendant argues that he did not misrepresent the position. His role was not one that required him to have or retain such a granular knowledge of every item in the 2017 Accounts. Mr Brookes and Clarkson Hyde were dealing with the preparation of the 2017 Accounts on a day to day basis. He says it is unrealistic to suggest that he had to duplicate Mr Brookes' work. Mr Brookes appeared to have dealt with the issue without the need to ask him for any input.

65. He says that the Claimants have not produced the management accounts in which the Iqamas are said to have been written off or any evidence that the Iqamas had expired. He says not only was it not part of his role in 2017 to have identified this issue through being copied in to emails but nor could he be expected to recall figures he had used 6 months earlier to identify the potential error. He argues that without further disclosure he cannot say what the position is or was in relation to the Iqamas.

66. Another example pleaded against the Defendant relates to Penta Arabia. It is said by the Claimants that the Defendant had the requisite information to enable him to identify the correct treatment of the Penta Arabia office and operational costs but negligently failed to include £401,451 of office and operating costs in the 2017 Accounts. This caused the profit to be overstated. The Defendant says that the Penta Arabia account was managed by Mr Brookes not him on a day to day basis. Further that in the absence of disclosure he simply does not know whether the £401,451 of office and operating costs was included in the 2017 Accounts and if not why Mr Brookes or Clarkson Hyde did not identify the issue.

67. For each of the pleaded failings in relation to the 2017 Accounts the position is broadly similar. I remind myself that notwithstanding both counsel's detailed

submissions on the various pleaded failings it is no part of my role on this application to conduct a mini trial. I need to determine only whether the Defendant has persuaded me that his defence on liability meets the threshold test.

68. The Claimants have identified a number of particular accounting treatments which they say were incorrect and are directly attributable to the Defendant. The Defendant says that it is clear on the limited evidence available that the Defendant was not involved in the detailed figures. Further, he argues that it is clear even on the limited documents produced to date that many of the representations complained about were made by Mr Brookes or involve exchanges between Mr Brookes and Clarkson Hyde, to which, at best, the Defendant was only copied in.

69. Mr Singla argues that it is for the Claimants to prove the Defendant's role and responsibility in relation to each alleged error in the 2017 Accounts. He argues that the Claimants have not done that and there is a significant dispute of fact about the Defendant's role and what he was responsible for and/or who else might have been responsible for the work undertaken in respect of which errors are alleged. He argues that there is a real issue with a real prospect of success in relation to the 2017 Accounts about whether the Defendant had responsibility for and was therefore liable for the errors, if any, in the 2017 Accounts.

70. Mr Singla therefore argues that there is a defence on liability which overcomes the test of real prospect of success in relation to the 2017 Accounts.

71. Mr Hext argues that the Claimants' position is simply that the Defendant as FD and CFO had ultimate responsibility for the 2017 Accounts. His defence that he either had no responsibility or no involvement cannot have any real prospect of success in relation to the 2017 Accounts allegations on liability.

72. Mr Singla argues that in respect of the 2017 Accounts allegations, causation will be a significant and central issue between the parties. He argues that it is not realistic to divorce a determination of causation from issues of liability. In order to determine causation given the nature of the dispute a Judge will need to grapple with the scope of the Defendant's duty of care and whether it was breached.

73. He argues that causation and ascertaining the duty of care and its scope are, in this case, intrinsically linked. The Judge will need to consider the factual evidence about the Defendant's actual role, the nature and extent of any audit system in place and the respective roles and responsibilities of Mr Brookes and his team, Clarkson Hyde, and the overseas partners and subsidiaries in providing the information that was included in the 2017 Accounts.

74. He argues therefore that the Judge will need to consider that evidence irrespective of any Default Judgment on liability.

75. On this issue the Claimants and Defendant did not significantly disagree about the court's approach to determining causation but did disagree about whether that had any significant bearing on the question of whether the Default Judgment on liability should be set aside. Mr Singla argued that whilst the Default Judgment remained, even if the Judge were to determine that the Defendant was not the

predominant cause of any particular loss, they would not be in a position to find that the Defendant was not negligent or in breach of duty.

76. Mr Singla argues that since the Claimants will have to prove they have suffered loss the Judge will have to consider what loss has been caused by each alleged error in the 2017 Accounts and whether in this case on the facts the Defendant was the sole cause of each error.

77. Thus even if the default judgment remained there would still be a substantial trial to determine causation and loss which would have to consider the same factual issues as would need to be considered for liability, and for which there would need to be disclosure and witness evidence in due course.

78. Mr Singla therefore argued that both in relation to the substance of the defence and as a matter of discretion the court should take into account that the Judgment in Default on liability would, at least to some degree, either prevent the Defendant from deploying all aspects of his defence on causation and loss or fetter the Judge.

79. Mr Hext does not agree with this assessment of the limitations on the trial on causation and loss. He argues that the Judge does not need to revisit liability in order to determine the issues of causation and the Claimants are entitled to the benefit of not having to prove liability. He argues it would reduce the scope of the trial and the likely costs as breach of duty would not be in issue. The Claimants do not accept that causation is intrinsically linked to liability. Mr Hext notes that the defence does not plead a positive case in relation to breach of duty.

80. There is a clear divergence of views between the Claimants, Mr Clark, and the Defendant about the Defendant's day to day role in the Claimants' business and in relation to the accounting functions. It is said by the Claimants and Mr Clark that the Defendant's role included and should have included involvement in the granular detail of the accounting and financial processes within the Claimants. The Defendant says he had little direct involvement in the process at that level.

81. The second broad theme in the claim relates to claims for repayment of monies said to be owed by the Defendant to either PCL or PUHL in relation to unorthodox or unauthorised payments and loans arranged by the Defendant for his own benefit and the benefit of others.

82. This category includes the Defendant's Directors' Loan which, unlike the rest of the claims he admits is repayable, but not until 2027 when the Loan Notes mature. It is this that caused him to acknowledge service saying he admitted part of the claim.

83. This category of claims includes claims for repayment by the Defendant of overpaid bonuses and salary payments made to himself and others. Some of these claims arise out of the bonuses said to have been overpaid as a result of the 2017 Accounts overstatement of profits. There are also claims relating to tax payments/treatments and consequent additional tax payments, costs and penalties said to have been incurred as a result of some of the systems set up by the Defendant.

84. Mr Hext addressed the different aspects of this category of claims in his submissions and his skeleton in some detail and argued that there is simply no credible defence to these claims. He noted that in the draft defence for some of these allegations the Defendant had simply put the Claimants to proof. He did, however, acknowledge that the Defendant's witness evidence engaged more fully with those aspects of the claim.

85. Indeed, it seems to me that the further engagement in the Defendant's witness statements, signed with a statement of truth, presents a difficulty for the Claimants. The Defendant's evidence asserts that the 2015 bonus payments and the overpayments for 2016 – 2018 were orally agreed with Mr Clark. I accept, as highlighted by Mr Hext, that there are concerns about a letter said to record the agreement in relation to the Defendant's salary arrangements at a later date, notwithstanding the Defendant's explanation. However, that letter does not detract from the Defendant's primary evidence that is repeated in the draft Defence that there was an oral agreement with Mr Clark in respect of the salary arrangements. Whether, if and how it was documented is, at this stage, secondary.

86. In respect of the allegations concerning payments routed through Dubai/UAE it is said by the Claimants that the payments to the Defendant and Mr Sobrany routed through Dubai using Mr Brookes' bank account and overpayments made to Mr Brookes were not authorised and have caused the Claimants tax difficulties. Various sums are claimed in relation to tax penalties and other tax related costs.

87. The Defendant says the payments were approved by Mr Clark and Mr Foley the Chairman of PCL. Mr Hext argues that whilst it is not accepted that Mr Clark and Mr Foley knew about it (it is denied in Mr Clark's witness evidence) – it was something which the Defendant as an accountant, FD and CFO, should not have permitted to happen in any event as it would and did adversely affect the Claimants from a tax perspective.

88. The Defendant's evidence is that he confronted Mr Brookes about the payments, but that Mr Clark knew about them and allowed them to continue. The Claimants say that Mr Clark first identified the issue in April 2016 and raised it at Board Level. The Claimants say that the Defendant was told to put a stop to it. Yet it appears to have continued until December 2017. Mr Brookes appears central to this allegation and counter-allegation but there is, understandably, no evidence from him at this stage.

89. Mr Hext argues that if there were only one such irregularity it might be that the court could take a different approach but where there is, what Mr Hext describes as, a pattern of irregular behaviour and irregular payments the court should not indulge the Defendant. The Defendant does not dispute receipt of the monies. He admits he has a Directors Loan. He does not deny he received what the Claimants say are overpayments of salary or that he received monies routed through Dubai. It is the Defendant's position that these irregular arrangements which in some instances have caused the Claimants tax difficulties, were all authorised by Mr Clark and/or Mr Foley.

90. This is particularly so in relation to the Directors Loan Account. The Defendant admits that he will at some point have to repay his Director's Loan of

approximately £51,000. However, he says that Mr Clark had agreed that the loan could be offset against the value of the Loan Notes in 2027. Mr Clark sets out in his evidence what he says were the limited situations in which Directors or staff could take out loans and provides evidence of how they were documented. He denies the arrangement pleaded by the Defendant existed. He explains why he says this was highly unlikely to be true.

91. As Mr Hext identifies, the Defendant does not provide any evidence about when precisely the Directors Loan agreement was made or how it was supposed to work. Mr Hext submits that the alleged agreement is inherently improbable. The value of the Loan Notes depends on the financial position of the company in 2027. The Defendant's case is that he had agreed with Mr Clark that he could borrow against the Loan Notes, the value of which was uncertain, for 10 years. It is Mr Clark's evidence that the value is currently "wiped out". It would certainly have been an unusual arrangement.

92. Mr Hext identifies a number of points, which tend to suggest that the arrangement if it existed was not as the Defendant suggests. He points to the fact that the Directors' Loan was recorded in the accounting records under "sundry debtors" not Directors' Loans. The Defendant has not provided any explanation for this treatment save to accept that the Directors' Loan has been accounted for incorrectly. Mr Hext points to the Defendant making some repayments towards the loan which he argues is inconsistent with not having to repay until 2027. He notes that the Defendant admitted the loan was due for repayment but now says not yet.

93. Mr Hext says that the court should treat this evidence and these defences with circumspection and as being inherently improbable. He argues that for these elements of the claims it cannot be said that the Defendant has a real prospect of success.

94. In respect of these alleged unauthorised or irregular payments Mr Singla argues simply that where there is a dispute of oral evidence there is a real issue to be tried and it cannot be said there is no real prospect of success.

95. In keeping with the personal nature of the dispute the Defendant's evidence is that Mr Clark was in fact the main decision maker within the Claimants who personally authorised many of the acts now complained of in relation to the alleged unorthodox and unauthorised payments. The authorisations or agreements are said to have been oral. Mr Clark denies that the conversations took place or that he authorised or agreed to the Defendant's actions in relation to the overpayments or loans whether they were to the Defendant himself or others. Mr Clark not only denies that he agreed to the Defendant's actions but says that the alleged agreements and authorisations simply make no sense.

96. Two preliminary points emerge. It is clear that despite the length of Mr Clark's witness evidence and the size of the exhibit at over 380 pages, that the Claimants have cherry-picked a piecemeal selection of documents in relation to some of the very serious allegations made. It is clear that the documents relied on are by no means comprehensive or complete. Although disclosure has not yet been undertaken, and one would not expect the documents to be complete, the

imbalance between the Claimants and Defendant in terms of access to the documents relevant to the claims, on the facts of this case, is a factor to take into account in the context of an application to set aside a default judgment. I address the application for disclosure below.

97. Although the Defendant's second witness statement and draft defence were provided very late in the day in combination, they do now engage with the allegations set out in the particulars of claim. Where the Defendant has been able to recall or identify from the limited documents available to him what the issues are in relation to the items identified in respect of the 2017 Accounts he has sought to set out the nature of his defence to the allegations. In addition, he has raised issues about the roles of Mr Brookes and Clarkson Hyde and the interaction between those roles and the Defendant's role in relation to the preparation of the 2017 Accounts. This goes to the heart of the issue of whether the Defendant has sole, primary or any liability for the alleged errors in the 2017 Accounts. In respect of the other claims he has identified in his evidence and draft defence what he says were oral agreements or authorisations for the majority of the contested matters.

98. The claim against the Defendant is a substantial claim involving serious allegations. At present there is a Default Judgment on liability with causation and loss still to be determined.

99. Albeit belatedly the Defendant has now provided a draft defence. In that defence and in his witness evidence he raises a number of defences to the claims against him. In respect of the 2017 Accounts he raises a number of different strands to his defence.

100. Overall in relation to the 2017 Accounts and the rewrite he says simply that it was not, in most cases, his responsibility to ensure that the 2017 Accounts were accurate and that if there were errors that he was not the sole or primary cause of those errors. Whilst the Claimants are frustrated by this and by the delay to the proceedings caused by the Defendant and submit that it is the CFO/FD's role to ensure that the 2017 Accounts were complete and accurate and to sign off on them that is not a complete answer to the claim. In relation to the unauthorised or unorthodox payments the Defendant relies on what he says were oral agreements reached between him and Mr Clark. Whilst Mr Clark denies those conversations or agreements it is difficult to see how that can be said to not be more than merely fanciful as a defence.

101. As set out above the test I have to apply to determine whether the Defendant has a real prospect of successfully defending the claim requires me to consider whether there is a more than a merely arguable defence.

102. The Claimants' frustration caused by the delay in progressing the claim because of the Defendant's failure to properly engage until recently is evident. However, I have to consider the application on the basis of the evidence before the court, which includes the Defendant's second witness statement and draft defence.

103. The Defendant has satisfied me that in relation to the 2017 Accounts he has a more than merely arguable defence. It is not fanciful for him to argue that he is not or is not wholly responsible for any errors in the 2017 Accounts.

104. There are a large number of individual interlocking parts to the rewrite of the 2017 Accounts. The Claimants' claim identifies in relation to each of the elements they rely on why they say that the Defendant is responsible for the error. However, many of those allegations are derived from an allegation that the Defendant had an overall responsibility for the accounts as a consequence of his role within the Claimants. It is the Defendant's defence that his role was overarching, and he did not have the role or responsibility at a granular level attributed to him by the Claimants and Mr Clark in relation to the 2017 Accounts. Further that in relation to some aspects of the claims the fault if any lies with Mr Brookes or Clarkson Hyde. Although I accept that this is not currently positively pleaded it is clear from the witness evidence.

105. In saying that I take into account that the Defence lacks some particularity. However, the issues raised by the Defendant go to the heart of the claim in respect of liability, if as argued by the Defendant, he was not responsible for some or all of the errors identified.

106. The Defendant has not had access to the documents, or the detailed work carried out by the Claimants with the assistance of expert accountants over a 10-month period. Thus, it seems to me to be likely that there will be further evidence and documents that will become available to the parties following disclosure and witness evidence that will have a significant impact on questions of liability. I have addressed the application for disclosure below.

107. The Defence as supplemented by the witness evidence identifies a defence that is more than merely fanciful. It cannot be said that the Defence as set out in the witness evidence and draft defence is entirely without substance.

108. The draft defence and witness evidence in combination raise serious issues in relation to the issue of liability in respect of the 2017 Accounts that are more than merely fanciful.

109. This is a case in which there is a real possibility of evidence emerging from disclosure and witness evidence and cross-examination which will have a significant impact on the questions of liability in respect of the 2017 Accounts and associated claims.

110. The Claimants may in due course turn out to be right - this may all be very simple and straightforward. It may be smoke and mirrors but on the face of what is available to the court I am satisfied the defence on liability is one that the Defendant should be allowed to pursue in respect of the 2017 Accounts.

111. In relation to the unauthorised payments and overpayments the position is that the Defendant does not deny receipt of the sums of money but in witness evidence signed with a statement of truth says that such payments were authorised by Mr Clark and/or Mr Foley. Mr Clark denies that any agreements were reached and points to the unlikelihood of such agreements particularly in relation to the

Directors Loan Account. The Claimants also point to other evidence said to be inconsistent with the Defendant's account in relation to alleged agreement in respect of the Directors Loan Account.

112. The draft Defence on these issues despite Mr Hext's best efforts to persuade me, cannot be said to be entirely fanciful and without substance. Those parts of the Defence rely on what will be contested oral evidence in relation to alleged agreements between the Defendant and Mr Clark. Whilst those agreements are denied by Mr Clark, I cannot say that a Defence based on a clash of oral evidence is unarguable and without substance.

113. Where there is evidence and counter evidence in relation to an alleged oral agreement it would be rare for a court to be able to determine that there was not a defence that was more than merely arguable and met the threshold test. Without clear evidence to support one version or the other which tipped the balance, such an agreement has to be tested at trial before the trial judge. I cannot determine disputed questions of fact in relation to oral agreements on the basis of untested and clearly incomplete witness and documentary evidence.

114. Whilst I have considerable sympathy with the Claimants in relation to the position in respect of, in particular, the Directors Loan the additional evidence relied on by Mr Clark does nothing to directly challenge the allegation of an oral agreement but is used to support an argument that the alleged oral agreement is inherently unlikely. It seems to me that in relation to the Directors Loan, at least, though more than merely arguable given the nature of the defence raised it is improbable.

115. Despite Mr Hext's very able submissions it seems to me that the Defendant has a defence that overcomes the threshold test for setting aside default judgment under CPR13.3(1)(a) in relation to both parts of the claim. It is clear that there are serious issues to be determined on liability.

Some Other Good Reason:

116. Mr Singla argued that in any event there was some other good reason to allow the Defendant to defend on liability. He relied by analogy on authorities relating to summary judgment where there was said to be a need to investigate and/or all the factual cards were weighted in the hands of one party (*Dellal v Dellal and ors* [2015] EWHC 907 (Fam) and *Harrison v Bottenheim* (1878) 26 WR 362). He submitted that this could amount to a good reason. Mr Hext argued that to expand good reason on an application to set aside default judgment to a case where the defaulting party had not seen all the documents would emasculate the test the court is required to apply. He argues it should be approached in a similar way to the test for some other compelling reason pursuant to CPR24.

117. I agree with Mr Hext. Merely because a Defendant has not had access to all the documents that he thinks he might want to see is not of itself sufficient to amount to a good reason why a judgment in default should be set aside. The cases relied on by Mr Singla are fact specific and of limited assistance in this case. Whilst the good reason test is broad as identified in *Berezhovsky v Russian Television* it should be sparingly applied. Each case will turn on its own facts and the court

must consider all the circumstances when considering the free-standing ground under CPR 13.3(1)(b).

118. Consideration of whether there is some other good reason why the judgment should be set aside and the defendant should be allowed to defend on liability therefore overlaps with and falls to come back into consideration at the discretion stage of the exercise. I therefore consider it further below

Denton and Discretion

119. The threshold test pursuant to CPR 13.3(1)(a) having been overcome I need to consider the three-stage test in Denton and then all the circumstances at which stage the free-standing good reason ground re-emerges.

Serious and Significant:

120. Plainly a failure to serve a defence, particularly where it results in default judgment, is serious and significant. It is a failure to comply with a rule, it delays the progress of the claim, it takes up the time and resources of the parties and the court.

Reason:

121. The Defendant relies on his poor mental health and the lack of documents. Neither of these is a good reason for failing to file a defence on the facts of this case. The Defendant has simply buried his head in the sand. His evidence of his poor mental health is unsupported by any up to date evidence but even accepting it at face value it does not explain the failure to engage with his own insurers at an earlier stage that might have avoided the judgment in default. The absence of the provision of documents is no explanation at all for the failure to either file a defence or seek an extension of time in which to do so. At this stage, the court should be considering the reason for the breach for which relief from sanction is being sought. The breach is the failure to file the defence having filed an acknowledgment of service indicating an intention to defend. There is no good reason.

All the Circumstances:

122. It is at this stage of the exercise that all the other factors are taken into account. This includes consideration of the overriding objective and the need to manage cases efficiently, fairly and at proportionate cost having regard to the complexity, importance, and value of the case. There are a number of competing factors to consider at this stage of the exercise.

123. Many of the factors considered as part of the threshold stage come back into consideration at stage three of the Denton test which overlaps with the exercise of the court's discretion pursuant to CPR13.3(1)(a) and (b).

124. As part of the overall consideration the court needs to reconsider promptness in its broader context and not limited to the issuing of the application.

125. Whilst for the reasons set out above, I am satisfied that the application to set aside judgment was itself prompt there is a broader consideration at this stage. I note

that the draft defence was only provided shortly before the hearing which is further evidence of delay in progressing the defence.

126. It is suggested by the Defendant that Covid-19 played a part in the delay because Mr Clarke's witness statement was only served on 9 March 2020. I acknowledge that there was a national lockdown on 24 March 2020 which may at the margins provide some explanation for the draft defence and second witness statement only being served on 2 April. However, that appears to provide limited assistance to the Defendant overall since his solicitors had been instructed since October 2019.

127. I need to factor into the balancing exercise the Defendant's failure to engage after receipt of the letter of claim and the delays overall caused by his failure to engage with the dispute when he now seeks the indulgence of the court to let him back into the proceedings.

128. Against that I balance the fact that the Claimants on their own case appear to have spent some 10-months on the rewrite of the 2017 Accounts with full access to all the documents before preparing a detailed letter of claim. However, the letter of claim did not provide any significant documents to support it when the Claimants knew that the Defendant did not have access to any documents.

129. The Claimants were aware of the Defendant's work-related stress issues in 2018 prior to his resignation so were, so far as they could be, on notice of a potential issue in relation to the Defendant's mental health. I accept that they sought to encourage the Defendant to notify his insurers and that whilst they sought a quick response to the letter of claim did not in fact issue the claim until 3 months later. Mr Singla criticises the Claimants for not using the Professional Negligence pre-action protocol nor providing a copy of it to the Defendant but did not identify what difference it would have made to the Defendant's pre-action conduct on the facts of this case.

130. Despite having 6-months to do so the Defendant has not produced any substantive or current evidence to support his evidence that poor mental health was a factor in his non-engagement. Many litigants find litigation both stressful and distressing. It is not without more an explanation or excuse for non-engagement over an extended period of time.

131. As I have identified above to my mind the Defendant is, to some extent, the author of his own misfortune. This is a case in which he received the letter of claim and the proceedings but simply did not respond in time. Although his mental health issues are prayed in aid the evidence supporting that is sparse and does not excuse his failure to engage over an extended period of time. He has been dilatory in engaging in this dispute and has caused the proceedings to become delayed and protracted and that is not consistent with the overriding objective.

132. However, I do take into account that this is a negligence claim against a professional man and the issues of causation and loss will not be simple or straightforward. The fact that the court will have to engage with the evidence necessary for the Claimants to meet the challenge of proving causation and loss is an important factor in this application and in the consideration of the exercise of discretion. Further, it seems to me that the absence of access to documents has in

my view impacted adversely on the Defendant's ability to fully plead to the allegations against him.

Disclosure Application

133. This neatly segues into the application for disclosure. Although couched as an application for specific disclosure it is in fact an application pursuant to paragraphs 5.11 and 5.12 of PD51U as Mr Singla accepted. It is therefore an application on the basis that the Initial Disclosure given by the Claimants was not sufficient to enable the Defendant to understand the claim and to formulate his defence.

134. In each case the Defendant seeks disclosure of the documents that would enable him to properly investigate the allegations of overstatement or misreporting in the 2017 Accounts. This is set out in the Defendant's evidence and the draft defence and also in the application for disclosure. The documents sought by way of disclosure include:

i) All documents held by Clarkson Hyde in relation to the audited accounts of PCL for the year ended 31 March 2017.

ii) All documents held by the Claimants in relation to the audited accounts of PCL for the year ended 31 March 2017

iii) All communications between the Claimants and Clarkson Hyde in relation to the audited accounts of PCL for the year ended 31 March 2017.

135. PD51U introduced a significant culture change in the approach to disclosure in the Business and Property Courts of England and Wales by limiting disclosure to documents that are reasonably necessary for a fair disposal of the claim, with the extent of disclosure being tailored to particular issues in the claim. However, key documents that are relied on or are necessary to understand a party's case are to be provided at an earlier stage with the relevant statement of case.

136. The Claimants' initial disclosure should therefore be the key documents on which the Claimants rely in support of their claim and are necessary to enable the Defendant to understand the claim he has to meet. However, by paragraph 5.3(3) PD51U seeks to manage the extent of initial disclosure by placing a page or document limit on initial disclosure to avoid an unnecessary increase in costs at an early stage in the proceedings.

137. The limit of 1000 pages or 200 documents (unless the parties agree otherwise) was intended to ensure the obligation to give initial disclosure was reasonable and proportionate having regard to the overriding objective. It was not intended to be an overly burdensome exercise.

138. When providing initial disclosure, the disclosing party should identify the extent of any searches actually undertaken for the purposes of commencing the proceedings but is under no obligation to undertake a more wide-ranging search-based exercise.

139. However, in this case the Claimants had already undertaken an extensive search covering a period from November 2014 to April 2018 including carrying out a forensic review of the Defendant's laptop.

140. Despite these very extensive searches the claimants' initial disclosure consisted of only 24 items. These included the Annual Reports and Financial Statements for PCL for 2015, 2016, 2017 and 2018 including the restatement. Those are no doubt large documents with a large number of pages and at least some of them are obviously key documents. However, the other documents disclosed by way of initial disclosure seem modest and are unlikely to represent all the key documents given the number and nature of allegations made.

141. In addition to the Annual Reports and Financial Statements, the initial list of disclosure included a Board Report from 2016, 6 pay slips for the Defendant and his terms and conditions of employment. There are only 8 documents that are either emails or email exchanges which appear to relate directly to some of the alleged errors in the 2017 Accounts. In addition, there is a spreadsheet prepared by Mr Brookes which is said to outline salaries and bonus advances to the Defendant in 2015 but no underlying documents. The initial disclosure includes an undated letter in relation to the salary claims, which I have already commented on, and there is a review document.

142. Given the wide-ranging allegations made in the claim in relation to both the 2017 Accounts and the various salary, bonus, and loan allegations, this does not seem to me to be the key documents on which the Claimants can have relied in support of the claim as set out in the particulars of claim. It does not seem likely to be the key documents that might have been reasonably necessary to enable the Defendant to understand the claim.

143. However, I need to consider that in the context of Mr Clark's 380-page exhibit which responded in some detail to matters raised by the Defendant in his first witness statement. The exhibit is not initial disclosure and was evidence prepared for a different purpose. It was not provided to the Defendant until March 2020. It does, however, have to be taken into account when considering the application for further initial disclosure. I accept that the documents supporting Mr Clark's statement are a piecemeal selection of documents no doubt cherry picked by the Claimants to support their case.

144. However, there would be no purpose in the court directing further initial disclosure of documents that have now been disclosed albeit through an exhibit to witness evidence. It would not be reasonable or proportionate or in keeping with the overriding objective nor consistent with PD51U paragraph 5.4 (3)(a).

145. The Defendant sought the wide-ranging categories of documents set out at paragraph 134 above. They are not narrow or focussed requests but amorphous broad ranging categories covering all documents in each of the three categories identified.

146. This is a claim in which the obligation to give disclosure will be heavily weighted on the Claimants. On the facts of this case it is difficult to envisage the Defendant having many documents at all relevant to the claims. Conversely, given the nature

of the claims the Claimants will have to give extensive disclosure on some basis in due course. It is a factor the court must have regard to when considering any order for disclosure under PD51U.

147. Mr Singla argued that if the Claimants' objection was only to the scope of the categories identified in the application they should have engaged in a process of seeking to narrow them to find a form of words to describe the documents that the Defendant was seeking. He says that had the Claimants been willing, in principle, to provide the documents the parties could have sought to agree search terms.

148. I do not agree. This was the Defendant's application for disclosure. It ought to have been possible, if the documents were key documents necessary to plead the defence, to be able to identify them in a more narrow and focussed way even if the Defendant did not know precisely what they were. It is for the party seeking to persuade the court that the initial disclosure was inadequate and further early disclosure was necessary to enable it to understand the claim and to formulate its defence to set out in clear terms the narrow focussed further initial disclosure it is seeking.

149. Initial disclosure is not intended to provide an opportunity for one party to seek wide-ranging early search-based disclosure before the parties and the court have had the opportunity to consider the real issues for disclosure. That would fly in the face of the purpose of PD51U, which is intended to limit disclosure to the issues for which it is considered that there needs to be some reference to contemporaneous documents for there to be a fair resolution of the proceedings. Such disclosure is to be reasonable and proportionate having regard to the overriding objective and the factors set out in paragraph 6.4.

150. Although in the draft defence the Defendant pleads in relation to many of the allegations (in relation to the 2017 Accounts) either that he can neither admit or deny the allegations against him or that he reserves the right to plead further following disclosure that does not of itself mean that further broad search based disclosure is necessary, reasonable and proportionate at the initial disclosure stage.

151. Even if it were possible to identify a narrow focussed class of key documents that could be argued to be necessary to either understand the claim or formulate the defence it does not necessarily mean that it would be reasonable or proportionate to order further initial disclosure.

152. In my view the classes of documents sought in this application, as formulated by the Defendant, do not come within the scope of initial disclosure, in any event, as being key documents necessary for the Defendant to understand the claim or formulate his defence.

153. Whilst it seems to me that the Claimants' initial disclosure was not adequate, they have since provided additional documents on which they rely in the exhibit to Mr Clark's statement. That selection of documents is by its very nature self-serving given its purposes, however, what it demonstrates is that the extent of the documents that might be available is likely to be significant and substantially more than would have fallen to be disclosed within the scope of initial disclosure on any basis.

154. However, given the obvious limitations of the Claimants' initial disclosure (taking into account the apparently extensive searches already undertaken) had the Defendant taken a very narrow and focussed approach identifying a small number of key documents or narrow focussed class of documents said to be necessary to understand the pleaded case they may have fallen within the scope of an application under paragraph 5.1. However, the court would still have to be satisfied that any additional initial disclosure exercise could be carried out in a reasonable and proportionate manner having regard to the overriding objective.

155. Mr Singla argues that the classes of documents sought are plainly relevant documents. It is however important to differentiate between documents that relate to the claim or defence that may well fall within the scope of extended disclosure and a list of issues for disclosure and the narrower class of key documents that a party should provide as part of the initial disclosure exercise.

156. It may well be that in this case when it comes to the DRD and case management that the apparent limits on the initial disclosure will form part of the court's consideration when determining which model for extended disclosure is reasonable and proportionate. However, that is for another day.

157. For the reasons set out above, I am not persuaded that the Claimants should give further initial disclosure at this stage.

158. Finally, however, it ill behoves Mr Hext to both resist any disclosure at all at this stage given the imbalance of documents and information whilst at the same time criticising the Defendant for his failure to fully particularise his defence. He cannot have his cake and eat it.

159. It seems to me on the facts of this case that the Defendant is at a disadvantage in terms of equality of arms when it comes to documents and access to documents and I take that into account as part of all the circumstances and the broader consideration of discretion in relation to the application.

160. A significant factor in this case when considering all the circumstances and the value and importance of the case to the parties is that here there will be a substantial trial in any event to consider causation and loss. It seems to me that the Judge at trial will have to consider substantially the same factual matters and documents in determining causation and loss as they would have to consider if liability were added back into the mix.

161. Thus considering the exercise of discretion I take into account and consider the prejudice to the Claimants in having to pursue liability as well as causation and loss and balance that against the prejudice to the Defendant in not being able to raise a defence on liability at all.

162. For the Claimants, the court needs to take into account that they have a validly obtained judgment in default on liability with only causation and loss to resolve. They say that is a valuable judgment that should not be set aside. They say it will simplify the trial on causation and loss as the Judge will not have to engage in considering breach. They have already been prejudiced by the delay caused by this

application. The Claimants have suffered a significant loss as a result of the Defendant's actions which they are entitled to pursue.

163. For the Defendant, the inability to defend the claim on liability significantly prejudices his position. He will not be able to defend himself on issues of breach of duty which he says are key in this case. Mr Singla argues the issues on causation and loss – particularly causation - are overlapping and intrinsically linked with issues of liability.

164. Despite Mr Hext's submissions I am not persuaded that the liability issues in this case can be said to be so distinct from causation that it can be said to provide any significant advantage in terms of saving costs or time to maintain the judgment in default where I have otherwise already determined that the defence overcomes the threshold test of being more than merely arguable. In such a case it seems to me that that is both a factor in considering all the circumstances and would militate towards permitting the Defendant to set aside judgment on liability in accordance with the overriding objective.

165. It also seems to me that whilst an absence of access to documents of itself is not, on the facts of this case a good reason to set aside under CPR13.3(1)(b), I am persuaded that the court should factor into both consideration of all the circumstances and the consideration of a good reason under CPR 13.3(1)(b) the fact that there will be a substantial trial in this case on causation and loss involving substantial disclosure and witness evidence and potentially expert evidence. I refer to paragraphs 72- 79 and 116 – 118 above. It seems to me that the trial will need to consider substantially the same factual issues as would need to be considered to determine liability. There would be a substantial overlap in the evidence and disclosure on liability and causation. To my mind that is another factor for permitting the Defendant to defend on liability as well as causation and loss in any event.

166. I would therefore have concluded on the particular facts of this case that there was some other good reason for permitting the Defendant to defend on liability as well as causation and loss pursuant to the free-standing ground under CPR 13.3(1)(b) in any event.

167. Ultimately, I need to take into account the need to act fairly as between the parties and balance their respective positions whilst also having regard to the overriding objective more broadly and the need to conduct cases efficiently and at proportionate cost.

168. As I set out at paragraphs 15 and 16 above *Core Export* is an example of the application of the exercise of discretion where the Judge did not exercise his discretion in favour of the Defendant having found there was an arguable defence. However, each case turns on its own facts and the facts in this case differ in significant respects to those in *Core Export. Core Export* was a low value cargo claim of around £25,000 where the issue was who was the party to a contract. By contrast this is a complex claim of more significant value of £1m plus where the issues in relation to causation and loss will give rise a substantial trial involving disclosure and witness evidence in any event.

169. I am not persuaded in this case that the Defendant's overall delay, inaction, and non-engagement until after the judgment in default on liability tips the balance against permitting the Defendant to defend on liability and in favour of the Claimants. It is only one aspect of the many factors that I have taken into account. Overall, the circumstances in this case weigh in favour of allowing what is an arguable defence on liability to be pursued.

170. Whilst there has been some delay in reaching this stage which the Claimants will say causes them prejudice granting the set aside and relief from sanctions would not affect the progress of the proceedings, at least going forwards, but to refuse relief from sanctions would cause considerable injustice to the Defendant.

171. I emphasise however, that beyond the conclusion that there is sufficient merit in the proposed defence to find that the prospects of success cannot be said to be fanciful on an interlocutory application I say nothing more about the merits of the defence overall.

Conditions

172. Mr Hext raised the possibility of the court attaching conditions to the setting aside of the default judgment. He submitted that this was a case in which the court should order the Defendant to pay all or part of the current value of the damages claim and/or debt claim into court. Where a defence overcomes the threshold test but is improbable the court should consider applying conditions. He notes there is no evidence from the Defendant of his financial position and no evidence to suggest such an order would stifle the ability of the Defendant to defend.

173. Mr Singla argues that there is no application seeking conditions nor was it addressed in the Claimants' evidence. He says that the first time it was raised was in the Claimants' solicitor's letter of 25 March 2020 only two weeks before the hearing. I note that this was over a week before the Defendant filed his second witness statement and draft defence. The question of the Defendant's financial ability to meet any conditions that might be imposed on him was not addressed in that witness statement despite being on notice of the Claimants' intention to seek the imposition of conditions in the event that judgment on liability was set aside.

174. Mr Singla submits that although the court has the power to impose conditions it would be unfair in this case and inconsistent with the authorities. He argues that there is nothing that the Defendant has done or failed to do that requires the court to impose a penalty on him.

175. He relied on the notes in the White Book where the editors refer to the case of *Olatawura v Abiloye* [2003] 1 WLR 275 which was quoted and followed in *Ali v Hudson* [2003] EWCA Civ 1793 where the Court of Appeal stated that an order for security

> "should not ordinarily be made unless the party concerned can be shown to be regularly flouting proper court procedures or otherwise to be demonstrating a want of good faith; good faith being understood to consist of a will to litigate a genuine claim

> or defence … as economically and expeditiously as reasonably possible in accordance with the overriding objective…"

176. He relies on the Defendant's evidence and his prompt response to receiving notice of a default judgment. He suggests that the Claimants' attempt to have a penalty placed on the Defendant is vindictive and should be rejected. He says that the Defendant has provided an explanation for the default and shown a proper sense of contrition. In the absence of any financial evidence he submits that an order to pay £1m into court would stifle the claim.

177. However, it seems to me that the purpose of conditions in relation to an application to set aside judgment in default is not dissimilar to the purpose of conditions on a summary judgment application. It is a case management tool to enable the court to take a proportionate approach to, for example, a particularly weak aspect of a defence as well as in cases where there is evidence of failure to comply with court procedures. CPR 3.1(3) enables the court to impose conditions in accordance with the overriding objective for the purpose of conducting cases efficiently, justly, fairly and at proportionate cost. The court has regard to the overriding objective and its case management powers when considering the use of the courts' resources.

178. The Claimants made it clear on 25 March 2020 that they would seek to ask the court to impose conditions in the event that the court set aside judgment. This was, as I say a week before the Defendant filed his second witness statement and his draft defence. It cannot be said that the Defendant was not on notice of the Claimants' intention to ask the court to impose conditions. Neither in that witness statement nor in correspondence thereafter did the Defendant's legal team address the question of conditions.

179. The court should not impose a condition on the Defendant which would have the effect of stifling his defence but the burden of satisfying me in relation to the suggestion that any condition would stifle the claim is on the Defendant. There are no hard and fast rules about the circumstances in which the court can impose conditions provided it does so in a manner consistent with the overriding objective.

180. In this case, I have found that in relation to the Directors Loan Account the defence though arguable is improbable. The amount of the Directors Loan is a sum which the Defendant admits is due to the Claimants but argues is not repayable until 2027. I have found that the Defendant's conduct was dilatory in relation to both his pre-action conduct and the proceedings albeit that I have accepted that the application to set aside judgment was itself made promptly. I have noted the continued delay in engaging fully with the claim with the late provision of the draft Defence, only a week before the hearing. These are all factors that weigh in the balance against the Defendant and in favour of the court imposing some condition on the Defendant both to provide a measure of security in relation to the improbable defence and to encourage efficient case management in the future.

181. It is my intention therefore to direct that the Defendant pays into court as a condition of the Default Judgment on liability being set aside the total amount of the Directors Loan which is approximately £51,000. This is a relatively modest sum in the context of the claim as a whole and represents a sum which the Defendant accepts he will have to repay at some point. It therefore seems to me to

meet the balance between imposing a condition, which for the reasons set out above seems to me to be a matter of good case management in this case, but setting it at a level which is reasonable and proportionate in the context of the claim as a whole.

Conclusion

182. I find therefore that for the reasons set out above the Defendant has satisfied me that he has a real prospect of defending the claim on liability. (threshold test CPR 13.3.1(a))

183. I am satisfied that the application was made promptly albeit that the draft defence was not provided until shortly before the hearing of the application (CPR 13.3.2).

184. Applying the approach in *Gentry* and considering the 3-stage Denton test and the exercise of discretion whilst this was a serious breach for which I am not satisfied there was any good reason nonetheless when considering all the circumstances and the overriding objective as a matter of discretion the judgment in default should be set aside and the Defendant should be allowed to defend liability as well as causation and loss. Further that on the particular facts of this case there is in any event some other good reason to permit him to do so for the reasons set out above.

185. Finally, and for the reasons set out above as part of my broad case management powers I impose a condition on the Defendant that he must pay into court a sum equivalent to the amount outstanding on his Directors Loan Account.

186. I would invite counsel to seek to agree the terms of an order to reflect the above.