Neutral Citation Number: [2024] EWHC 3336 (KB)

Case No: KA-2024-000122

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ON APPEAL FROM
DEPUTY MASTER SABIC KC

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 December 2024

Before :

THE HONOURABLE MR JUSTICE MORRIS

- -

Between :

MAJID SAADATI	**Claimant/ Appellant**
- and -	
(1) SEYED EHSAN DASTGHAIB **(2) ANDREAS RUDOLF BIHRER**	**Defendants/ Respondents**

- -
- -

Andrew Butler KC and Ceri Edmonds (instructed by **Mansouri & Sons**) for the **Claimant**
Zoë Barton KC (instructed by **Cooke, Young & Keidan LLP**) for the **First Defendant**
Edward Francis (instructed by **Edwin Coe LLP**) for the **Second Defendant**

Hearing dates: 21 and 22 November 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 20 December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

THE HONOURABLE MR JUSTICE MORRIS

Mr Justice Morris:

1. This is an application by Majid Saadati ("the Claimant") for permission to appeal against the order of Deputy Master Sabic KC ("the Deputy Master") dated 20 June 2024 ("the Order") made in favour of Seyed Ehsan Dastghaib ("the First Defendant") and Andreas Rudolf Bihrer ("the Second Defendant"). By the Order, the Deputy Master set aside the order of Master Thornett dated 30 September 2020 ("the Thornett Order") pursuant to which he had granted judgment in default in the action in favour of the Claimant ("the Default Judgment"). By the action, the Claimant claims from the Defendants repayment of a loan of $15 million, together with interest. On 23 September 2024 Mr Justice Saini directed that, if permission to appeal is granted, the hearing of the appeal should follow immediately thereafter. I have heard full argument on all grounds.

The parties

2. The Claimant is an Iranian national. He was previously employed as a branch manager at a state-owned Iranian bank with which the family of the First Defendant (headed by his father, Seyed Abdollah Dastghaib) conducted business. The Claimant claims to be a property developer and has experience in the use of corporate structures, both offshore and onshore. In the period from September 2018 up to, at least, the Default Judgment, the Claimant was represented by a sole practitioner direct access counsel, John McLanachan. The Claimant is now represented by a firm of solicitors, Mansouri & Son ("Mansouri") and by Mr Andrew Butler KC and Ceri Edmonds.

3. The First Defendant is a UK national from an Iranian family. The Second Defendant is a Swiss attorney who has acted, among others, for members of the Dastghaib family and the Claimant. The Defendants were represented by Imran Ahmad at Bloomsbury Law in 2020. Mr Ahmad states that he did not inform the Defendants about the Thornett Order and hence the Default Judgment. Upon learning of the Claimant's intention to enforce the Default Judgment three years later in late 2023, the Defendants sought different legal representation. The First Defendant is now represented by Cooke, Young & Keidan LLP ("CYK") and by Ms Zoë Barton KC and the Second Defendant by Edwin Coe LLP and Mr Edward Francis of counsel.

Factual Chronology

4. The claim concerns a loan of US $15 million alleged by the Claimant to have been made in November and December 2013 by the Claimant to, or for the benefit of, the First Defendant and the Second Defendant. The purpose of the loan was by way of investment in a property development, in which the First Defendant was involved, relating to certain property in London. It appears that the sums were transferred by a company called Minion Holding Limited to one or both of two companies associated with the First Defendant's family: Embasslan SA (a Belize company) and Elham Limited (a BVI company). The Defendants both contend that the Claimant cannot establish any basis upon which either of them was party to any agreement and/or is personally liable for the sums loaned.

5. On 16 December 2019 the claim form was issued through the services of Mr McLanachan. The original claim form set out the brief details of claim completed in manuscript, as follows:

> "On 16th December 2013 the Claimant paid US$15 million to the 2nd Defendant at the request and direction of the 1st Defendant so that the Claimant and both Defendants might buy and manage properties in London. The money was to be returned strictly within 12 months from the date of payment. No monies have been returned to date."

It was stated that particulars of claim were to follow. An address for service in London was given in respect of the First Defendant and at the professional address in Zürich for the Second Defendant. The original claim form was marked not for service out of the jurisdiction.

6. Subsequently on an unknown date, a second version of the claim form came into being ("the amended claim form"). This appears to be exactly the same document as the original claim form but with added wording. The amended claim form now stated "Particulars of Claim (attached)" and then referred to, and attached, three emails, a letter and a bank transfer confirmation, and asserted that the Defendants were jointly and severally liable to the Claimant in the sum of US$ 15 million plus interest and costs. This document does not appear to have been formally filed or issued.

7. As regards service of the claim form and/or the amended claim form, Mr McLanachan sent a letter dated 16 April 2020 addressed to the Second Defendant at two addresses, enclosing the amended claim form. The letter was received by the Second Defendant at his professional address in Switzerland on 21 April 2020. Mr McLanachan also sent a further letter dated 17 April 2020 to the Second Defendant enclosing the standard response pack to accompany the claim form. This was received by the Second Defendant on 4 May 2020. At no point was any documentation relating to service out of jurisdiction provided. It appears that service by post on the Second Defendant was defective for two reasons: first there was no compliance with CPR 6.34, given that the Second Defendant was domiciled in a Lugano Convention country, and, secondly, and in any event, service in Switzerland required compliance with the Hague Service Convention, which did not happen. The Claimant has produced no evidence that the claim form (in original or amended form) was ever directly served on the First Defendant. Rather, it appears that it was the Second Defendant who forwarded what had been sent to him on to the First Defendant.

8. On 4 May 2020 Mr Ahmad acting for each Defendant filed acknowledgments of service, ticking the box that each intended to contest jurisdiction. On 20 May 2020 Mr Ahmad on behalf of the Defendants made a formal application challenging service and jurisdiction ("the May 2020 Application"). By that application the Defendants sought an order setting aside the claim form and particulars of claim for non-service of the claim form. Alternatively, they sought orders striking out under CPR 3.4 and/or for summary judgment under CPR 24 on the grounds, essentially, that the claim has no merit. There was ambiguity in the application notice: it stated that the Defendants sought a determination without a hearing, but then gave a time estimate of 30 minutes for a hearing. The applications were supported by a witness statement from Mr Ahmad.

9. It appears that on 3 June 2020 the Court sent an email to the Mr Ahmad pointing out inconsistencies in the Defendants' application about the need for a hearing. This email is referred to in the recitals to the Thornett Order, but has not been produced in evidence.

10. Despite the existence of the Defendants' May 2020 Application, on 15 June 2020, Mr McLanachan applied, on behalf of the Claimant, for judgment in default of defence. He filed a standard form "N227 Request for judgment by default (amount to be decided by the court)", which stated:

> "The defendants have not filed ~~(an acknowledgment of service)~~ a defence to my claim and the time for doing so has expired, nor have they filed an application to contest the jurisdiction and the time for doing so has expired. I request judgment to be entered against the defendant for an amount to be decided by the court and costs" (emphasis added).

At the same time, Mr McLanachan filed form N225 "request for judgment and reply to admission (specified amount)". On that form, it was stated that "the defendant has not filed an admission or defence to my claim or application to contest jurisdiction" and "I confirm that particulars of claim have been served on the defendant in accordance with the rules". The form stated "the amount payable by defendant" to be £25,327,465.82.

11. It further appears that on 1 September 2020 the Court sent a chasing communication to the parties, requesting the Defendants to confirm their position in respect of the May 2020 application or that it was withdrawn; and that by letter dated 8 September 2020 to the Court, the Claimant confirmed that the Defendants had not communicated to the Claimant their position in relation to the May 2020 Application. These communications have not been produced in evidence but again are referred to in the recitals to the Thornett Order. Thus, whilst there is no evidence that at the time he made the application for default judgment, Mr McLanachan was aware of the May 2020 Application, it does appear that he and/or the Claimant was aware of it by 8 September 2020 at the very latest.

12. Mr Ahmad in his evidence claims that correspondence from the Court between 3 June and 30 September must have gone into his email junk box and that he did not see it.

The Thornett Order

13. On 30 September 2020 Master Thornett made the Thornett Order. In the recitals, the Master referred to the two applications and the fact that the Defendant had not responded to emails from the Court on 3 June and 1 September 2020 nor responded to the Claimant. The Thornett Order then provided as follows:

> "AND UPON the court making the following order of its own motion, it being satisfied that the Defendants have evidenced no real intention of pursuing their 20 May 2020 Application despite reasonable invitation and notice from the court to clarify and progress with the same, such that the Application stands and constituted an abuse of process.
>
> IT IS ORDERED that:
>
> 1. The Defendants' Application dated 20 May 2020 stands as dismissed.
>
> 2. Judgment for the Claimant.

> 3. Defendants to pay the Claimant's costs, to be subject to detailed assessment in default of agreement.
>
> 4. A party affected by this Order may apply to suspend, vary or revoke the same providing that their Application is issued and served within 7 days of service of this Order."

14. On 1 October 2020 the Thornett Order was served by the Court by email to Mr Ahmad. On 8 October 2020 Mr Ahmad responded on behalf of the Defendants, asking for the Default Judgment to be revoked. He pointed out that the Defendants had not been able to file a defence, since the May 2020 Application had not yet been listed after nearly three months of waiting. By email dated 12 October 2020 to Mr Ahmad, the Court passed on Master Thornett's response as follows:

> "Paragraph 4 of the 1 October 2020 Order is quite clear as to what is required and when. Merely e-mailing the court with generalised observations and comment, as amounts in effect to a bare request to revert to an earlier procedural position, does not constitute compliance with the Order. The judgment stands. I further note and comment that the Defendant's e-mail correspondence dated 8 October 2020 should have been copied in to the Claimant, pursuant to CPR 39.8."

The email concluded by stating "Please take note and act accordingly". Nothing further happened until November 2023.

November 2023 onwards

15. On 24 November 2023, the Claimant's new solicitors, Mansouri, wrote to the Second Defendant informing him of the Default Judgment and indicated the Claimant's intention to enforce the Judgment without further notice. A similar letter bearing the same date was received by the First Defendant on 6 December 2023.

The Applications before the Deputy Master

16. The Defendants applied to set aside the Default Judgment. In fact, there were 11 applications listed to be heard by the Deputy Master. Each application has been given a number, which I also adopt.

The Defendants' applications to set aside the Default Judgment

17. On 20 and 22 December 2023 respectively, the First and Second Defendants each filed an application to set aside the Default Judgment (referred to as "Applications 1 and 2") pursuant to CPR 13.2 and, in the alternative, pursuant to CPR 13.3. The grounds for the application were essentially that the claim form had never been validly served. In the alternative, setting aside was sought pursuant to CPR 13.3 on the merits. Each application was supported by a witness statement from the Defendant personally.

The Claimant's application in relation to validity of service

18. On 9 February 2024 the Claimant made an application in relation to service of the claim form (referred to as "Application 4"). First he sought an order that the claim form had in fact been validly served and/or that the Defendants were estopped by their conduct

from challenging the validity of service of the proceedings; and secondly, he sought an order seeking to regularise service (retrospectively) i.e. for an order pursuant to CPR 6.15 for alternative service or pursuant to CPR 6.16 dispensing with service or directing that any defects in service do not invalidate service, pursuant to CPR 3.10. The orders were sought on the basis that the Defendants had "left the matter in abeyance", (rather than having "abandoned" or "withdrawn" the May 2020 Application).

The other applications

19. In addition, each Defendant made applications for a stay of execution of the Default Judgment (Applications 3 and 6); for security for costs (Applications 7 and 11); and to admit evidence of Swiss Law in relation to service (Applications 9 and 10). The First Defendant also applied for an order requiring the Claimant to respond to a part 18 request for information relating to service of the claim form (Application 8). The Claimant applied for the Defendants to attend for cross-examination (Application 5).

20. There were a number of witness statements before the Deputy Master: from Mr Ahmad, from each of the Defendants, from the Claimant, from Mr Felce of CYK and from Mr Rahman of Edwin Coe.

21. By letter dated 8 March 2024 to the parties' solicitors, the Court informed them of the listing of the applications, including a direction from Master Thornett that "the Master conducting the hearing shall hear such Application(s) in such order as they thinks fit and may or may not conclude such Application(s) as they thinks fit".

The hearing before the Deputy Master

22. The various applications came before the Deputy Master on 21 May 2024. At the outset, and in particular in the context of the limited time available, there was an issue as to which applications the Deputy Master should consider. Mr Butler for the Claimant contended that the Court should deal with the smaller, peripheral applications first, because the Claimant considered it important "to establish precisely what had happened" before the Court could be in a position to decide what he considered to be "the main applications" – namely Applications 1 and 2 and Application 4. However, the Deputy Master acceded to the Defendants' contention that she should determine the Defendants' applications to set aside judgment pursuant to CPR 13.2 and, insofar as it was necessary, the Claimant's application in relation to service i.e. the first part of Application 4. The Deputy Master then heard submissions on those points for the rest of that day. The Claimant now seeks permission to appeal against that initial decision of the Deputy Master: see Ground 1 below.

The Deputy Master's decision

23. The Deputy Master gave oral judgment on 20 June 2024. She set aside the Default Judgment on the mandatory ground under CPR 13.2 as an irregular judgment in light of the requirements of CPR 12.3 not being met, having found that (1) there had been no service of the claim on either Defendant in accordance with the CPR and (2) there had been no opportunity provided upon dismissal of the May 2020 Application for the Defendants to serve a second acknowledgment of service, as provided for in CPR 11. At the same time, she dismissed the first part of the Claimant's Application 4. Thus, by the Order, the Deputy Master declared that the claim form was not served on the First

Defendant or the Second Defendant in accordance with the CPR and that the period for service of the claim form and particulars of claim under CPR 7.5 had expired. The Order ordered that Application 4 as to part was dismissed, that Applications 1 and 2 were allowed pursuant to CPR 13.2 and that the judgment and order for costs in the Thornett Order were set aside.

24. The Deputy Master then proceeded to give directions for the determination of the remaining applications. (Applications 3, 5 to 11 are now listed to be heard on 17 January 2025 and the balance of Application 4 is listed to be heard in February 2025.) The Deputy Master ordered the Claimant to pay the Defendants' costs of the applications and of the hearing to be assessed, if not agreed. She further made orders for interim payment on account of those costs in favour of the First and Second Defendants in the sums of £134,474.75 and £57,573.50 respectively, to be paid by 18 July 2024. The Order reflected these further decisions.

This appeal: subsequent events

25. On 11 July 2024 the Claimant filed and served its notice of appeal against the Order and at the same time applied for a stay of execution of the order for payment on account of costs. On 16 July 2024 Sheldon J made an order, on the papers, staying payment of the costs order until determination of the Claimant's application for permission to appeal, with liberty to apply. On 23 July 2024 the Defendants applied to set aside the order of Sheldon J. The matter came before Saini J on 23 September 2024, who made an order covering a number of matters. Sheldon J's order for a stay was set aside, but the Defendants' solicitors each gave an undertaking that they would retain the interim costs moneys in client accounts until judgment in relation to the Claimant's appeal.

The Deputy Master's Judgment

26. In her judgment ("the Judgment"), the Deputy Master started by summarising the eleven applications that had been listed before her. At paragraph 3, she referred to the fact that there had been insufficient time for her to deal with all the applications. She continued:

> "At the beginning of the hearing, I decided firstly to deal with the set aside application on the mandatory ground. I was mindful of the fact that the determination of that part of the application would have a significant bearing on the necessity to hear the other applications. This is my judgment on that application alone, and anything I say here by way of factual matrix should be approached with an appropriate degree of caution and mindful of the fact that I am not determining, as a matter of fact, anything which may impact on the other applications that remain outstanding…"

At paragraphs 4 to 6 of the Judgment, she set out a summary of the facts. She described the period between the Thornett Order and November 2023 as "a curious and inexplicable period of inaction or ineffectiveness of the most serious kind by the defendants' legal representative". She added that such inaction or ineffectiveness was a common feature which "plagues all parties in this claim".

27. At paragraphs 7 and 8 she summarised the parties' positions. The Defendants' application for mandatory setting aside under CPR 13.2 was based on two reasons. First, the procedural requirements as to service were not met at the time of the default judgment. Secondly, CPR 11(7) affords a defendant the right to file and serve a further acknowledgment of service. She went on (at paragraph 7):

> "The code for default judgment is a complete code, and here the court is concerned with considering mandatory grounds which focus on the procedural requirements imposed on the claimant. CPR 13.2 imposes a duty on the court to set aside if those have not been complied with".

The Claimant's case was that it was not open to a defendant who has acted unconscionably to invoke the court's duty in the self-contained code for default judgments. That applied in the present case.

28. At paragraphs 9 to 19, the Deputy Master set out her decision. She did not accept the Claimant's submissions for three principal reasons. First, "as a matter of principle, to accept the propositions as to unconscionable behaviour would amount to a prohibition on the court's ability to comply with its duty, not the exercise of its discretion, under CPR 13.2 … CPR 12.3 applies irrespective of the defendant's conduct and is focused instead on compliance by the claimant with the CPR. … As a matter of principle the defendant's conduct cannot be relevant to the assessment of the test under CPR 13.2. Further, no sufficient basis was put forward to make out the proposition that the defendant was estopped from asserting facts as to compliance with CPR 12.2 and 12.3, which would invoke the court's duty under 13.2". The case of *Olafsson v Gissurarson (No 2)* [2006] EWHC 3214 (QB) supported her conclusion.

29. Secondly (at paragraph 11), the suggestion that rejecting the Claimant's proposed approach would lead to chaos and injustice is answered by the remainder of the CPR, which amply accommodates for any injustice between the parties to be resolved. In the present case, the Claimant had an outstanding application in relation to service which was yet to be determined, as was done in the *Olafsson* case.

30. Thirdly (at paragraph 12), even if she was wrong as a matter of principle and it would be permissible in appropriate circumstances for the court to estop the defendant from exercising their right and the court could decline to comply with its duties, she did not consider that the present case was one where it would be appropriate to do so. She adopted a broad, merits-based approach not constrained by strict rules, citing the case of *LA Micro Group (UK) Ltd v LA Micro Group Inc* [2021] EWCA Civ 1429 at §26. In reaching that conclusion she had taken into account the entire factual matrix including three particular factors "which again I have determined on a preliminary basis only at this stage given that they may be subject to further argument between the parties and a close examination of the evidence"**.**

31. The first factor was the duty of candour in applying for default judgment: see paragraph 13. When applying for default judgment, the Claimant failed to bring to the Court's attention the fact that by disputing jurisdiction, the Defendant had been relieved of the obligation to file the defences and thus the fact that matters on which the court had to be satisfied were at least arguably not satisfied. She considered that that was a fatal blow to the Claimant's plea for the equitable doctrine of estoppel. She continued:

> "there [is significant force] in the submission that the conduct of the claimant's litigation is the source of the [misfortune] from which he now seeks relief."[1]

Secondly, (at paragraph 14) referring to abuse of process and *Aktas v Adepta* [2010] EWCA Civ 1170 at §26, she did not consider the Defendants' conduct to be a case of wilful response but rather more as negligent or mistaken conduct. Thirdly, the abuse which Master Thornett found in dismissing the May 2020 Application focused on the manner in which the application was prosecuted and not the substance of the application.

32. At paragraph 16 the Deputy Master concluded as follows:

> "In all these circumstances the touchstone of "the administration of justice being brought into disrepute" is not met on the present facts. This is instead a case which has suffered from extraordinary apparent failings on the part of all the parties' legal representatives (which I should say are not the representatives who appear before me)."

33. At paragraph 18 she concluded that the mandatory conditions for setting aside the default judgment were plainly met. In relation to the Second Defendant, what should have been done by way of service out of the jurisdiction was not done (as the Claimant accepted). It followed "that there was no compliance with CPR 12.2."[2] In relation to the First Defendant she rejected the contention that there had been service at the address stated in the claim form. There was no direct evidence of proper service. The evidence was limited to the two letters of 16 and 17 April 2020 sent to the Second Defendant and there was no certificate of service. The positive evidence all pointed the other way. The Deputy Master concluded at paragraph 19:

> "I conclude that the default judgment entered against the first and second defendant was irregular on two bases: first, the want of service and second the lack of compliance with CPR 12.3. It follows that I am obliged to set it aside under CPR 13.2 and I do so".

She refused permission to appeal. The contention that there had been procedural impropriety was rejected on the basis that the decision as to how the applications were dealt with was a case management decision. She commented that it was sensible and appropriate to deal with the applications in the way that she had dealt with them. In relation to the second ground of appeal relating to the 7-day period of challenging the order contained in the Thornett Order, she commented that that was not a prohibition on the Court complying with its duty under CPR 13.2.

Relevant CPR provisions

34. CPR Part 13.2 provides as follows:

[1] The transcript refers to "significant flaws" and "misfortunate". However, the text above is more likely to reflect the Deputy Master's oral judgment

[2] I consider that this was intended to be a reference to CPR 12.3.

"***Cases where the court must set aside judgment entered under Part 12***

13.2 The court must set aside a judgment entered under Part 12 if judgment was wrongly entered because–

a) in the case of a judgment in default of an acknowledgment of service, any of the conditions in rule 12.3(1) and 12.3(3) was not satisfied;

b) in the case of a judgment in default of a defence, any of the conditions in rule 12.3(2) and 12.3(3) was not satisfied; or

c) the whole of the claim was satisfied before judgment was entered." (emphasis added)

35. By contrast, CPR 13.3 provides:

"***Cases where the court may set aside or vary judgment entered under Part 12***

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."
(emphasis added)

36. CPR Part 12.3 provides as follows:

"*12.3 (1) The claimant may obtain judgment in default of an acknowledgment of service only if at the date on which judgment is entered-*

a) the defendant has not filed an acknowledgment of service or a defence to the claim (or any part of the claim); and

b) the relevant time for doing so has expired.

(2) Judgment in default of defence (or any document intended to be a defence) may be obtained only—

(a) where an acknowledgment of service has been filed but, at the date on which judgment is entered, a defence has not been filed;

(b) in a counterclaim made under rule 20.4, where at the date on which judgment is entered a defence has not been filed,

and, in either case, the relevant time limit for doing so has expired.

(3) The claimant may not obtain a default judgment if at the time the court is considering the issue –

(a) the defendant has applied-

(i) to have the claimant's statement of case struck out under rule 3.4; or

(ii) for summary judgment under Part 24

and in either case that application has not been dealt with;

….

…

(Rule 6.17 provides that, where the claim form is served by the claimant, the claimant may not obtain default judgment unless a certificate of service has been filed.)"

37. CPR 12.12 is headed "Supplementary provisions where applications for default judgment are made" and provides, inter alia, as follows:

"…
(6) Both on a request and on an application for default judgment the court must be satisfied that—

a) the particulars of claim have been served on the defendant (a certificate of service on the court file will be sufficient evidence);

b) either the defendant has not filed an acknowledgment of service or has not filed a defence and that in either case the relevant period for doing so has expired;

c) the defendant has not satisfied the claim; and

d) the defendant has not admitted liability to pay all the money claimed and requested time to pay."

38. The "relevant time limit" referred to in CPR 12.3(1)(b) and (2) is set out in CPR 15.4, which provides as follows:

"*15.4(1) The general rule is that the period for filing a defence is—*

a) 14 days after service of the particulars of claim; or

b) if the defendant files an acknowledgment of service under Part 10, 28 days after service of the particulars of claim.

(2) The general rule is subject to rules 3.4(7), 6.12(3), 6.35, 11 and 24.4(2)." (emphasis added)

39. CPR 11 provides, inter alia, as follows:

"(1) A defendant who wishes to –

a) dispute the court's jurisdiction to try the claim; or

b) argue that the court should not exercise its jurisdiction

may apply to the court for an order declaring that it has no such jurisdiction or should not exercise any jurisdiction which it may have.

(2) A defendant who wishes to make such an application must first file an acknowledgment of service in accordance with Part 10.

(3) A defendant who files an acknowledgment of service does not, by doing so, lose any right that he may have to dispute the court's jurisdiction.

(4) An application under this rule must –

(a) be made within 14 days after filing an acknowledgment of service; and

(b) be supported by evidence.

(5) If the defendant –

(a) files an acknowledgment of service; and

(b) does not make such an application within the period specified in paragraph (4),

he is to be treated as having accepted that the court has jurisdiction to try the claim.

(6) An order containing a declaration that the court has no jurisdiction or will not exercise its jurisdiction may also make further provision including –

(a) setting aside the claim form;

(b) setting aside service of the claim form;

(c) discharging any order made before the claim was commenced or before the claim form was served; and

(d) staying the proceedings.

(7) If on an application under this rule the court does not make a declaration

(a) the acknowledgment of service shall cease to have effect;

(b) the defendant may file a further acknowledgment of service within 14 days or such other period as the court may direct; and

(c) the court shall give directions as to the filing and service of the defence in a claim under Part 7 or the filing of evidence in a claim under Part 8 in the event that a further acknowledgment of service is filed.

(8) If the defendant files a further acknowledgment of service in accordance with paragraph (7)(b) he shall be treated as having accepted that the court has jurisdiction to try the claim.

(9) If a defendant makes an application under this rule, he must file and serve his written evidence in support with the application notice, but he need not before the hearing of the application file –

(a) in a Part 7 claim, a defence; or

(b) in a Part 8 claim, any other written evidence."

(emphasis added)

40. By CPR 24.4, if a party applies for summary judgment before the defendant has filed a defence, the defence need not be served before the hearing of the application and then, pursuant to CPR 24.6, following determination of the application, the court may give directions for the filing of a defence.

41. CPR 3.3 makes provision for the Court to make an order of its own initiative, and CPR 3.3(4) indicates that it may do so without hearing the parties or giving them an opportunity to make representations. However, where the Court does this, CPR 3.3(5) provides that *"a party affected by the order may apply to have it set aside, varied or stayed, and the order must contain a statement of the right to make such an application.*" (emphasis added). An application under CPR 3.3(5) must be made within the period specified by the court or not more than 7 days after service of the order: CPR 3.3(6).

42. CPR 6.15 makes provision for service of the claim by an alternative method or at an alternative place. CPR 6.15(2) provides that the court may order that steps already taken to bring the claim form to the attention of the defendant by an alternative method or alternative place is good service. This is retrospective validation. CPR 6.15(4) provides that an order must specify the date of deemed service *and* periods for filing acknowledgment of service and a defence. Under CPR 6.16 the Court may dispense with service of a claim form in exceptional circumstances. This may be directed to have retrospective effect.

43. CPR 6.17 deals with notice and certificate of service relating to the claim form. CPR 6.17(2) provides:

"*(2) Where the claimant serves the claim form, the claimant –*

a) must file a certificate of service within 21 days of service of the particulars of claim, unless all the defendants to the proceedings have filed acknowledgments of service within that time; and

b) may not obtain judgment in default under Part 12 unless a certificate of service has been filed."

(emphasis added)

44. CPR 7.5 provides time limits for the service of a claim form; where it is to be served within the jurisdiction, it must be served within 4 months of the date of issue; and where it is to be served out of the jurisdiction, it must be served within 6 months of issue.

Relevant case law on CPR 13.2 and validating service

45. I have been referred to *Credit Agricole Indosuez v Unicof and others* [2002] EWHC 77 (Comm) per Langley J at §18; *Shiblaq v Sadikoglu* [2003] EWHC 2128 (Comm) at §§19 to 24 and [2004] EWHC 1890 at §58 [2005] 2 CLC 380; *Olafsson v Gissurarson* [2006] EWHC 3162 (QB) at §§ 14 to 15, 28 to 29 and [2006] EWHC 3214 (QB) at §19; *Dubai Financial Group LLC v National Private Air Transport Services Co Ltd* [2016] EWCA Civ 71 [2016] 1 CLC 250 at §§28-32 and 37-42 and *YA II PN Ltd v Frontera Resources Corporation* [2021] EWHC 1380 (Comm) at §§14, 53-60. From these authorities, I derive the following propositions:

(1) CPR 13.2 provides for mandatory setting aside of judgment in default. It applies not only where there has been service, but no compliance with the conditions in CPR 12.3, but also where there has been no valid service at all. Failure to file an acknowledgment of service in CPR 12.3(1) means failure to file when under a duty to file, and if there has been no valid service, there is no duty to acknowledge service. A default judgment entered in those circumstances is one which can be set aside under CPR 13.2. (In my judgment, the same must apply for judgment in default of service of defence - if there has been no valid service of claim form, then there is no time limit for filing a defence and therefore no duty to serve a defence).

(2) Even where defective service can be retrospectively validated (pursuant to CPR 6.15 and/or CPR 6.16)), that would not retrospectively impose on the defendant a duty to acknowledge service/serve a defence. It does not retrospectively start time to run. Thus retrospective validation of service cannot found a basis for obtaining, or retrospectively validating, a judgment in default of acknowledgment of service or of defence. Where service is validated retrospectively, there has to be a new time allowed for acknowledgment of service. Where there is no such time limit provided for a new acknowledgment of service, judgment in default of acknowledgment of service cannot be granted. Moreover, any prior default judgment will have been entered at a point where time for acknowledgment of service had not expired.

(3) In *Olafsson*, judgment in default was set aside under CPR 13.2 even where the defendant knew all along of the proceedings and deliberately chose not to take part in the proceedings and only applied to set aside judgment in default over a year later. In that case, delay, knowledge and silence did not displace the mandatory rule.

46. Further, common law waiver of a jurisdiction objection is doing an act inconsistent with maintaining a challenge to the jurisdiction. Such a waiver must clearly convey to the claimant and the court that the defendant is unequivocally renouncing his right to challenge the jurisdiction and the application of a "disinterested bystander test" is plainly apt. *Deutsche Bank AG v Petromena* [2015] 1 WLR 4225 at §32.

The Appeal and the grounds

47. By his Notice of Appeal dated 11 July 2024, the Claimant seeks permission to appeal and, ultimately, an order setting aside the Order. He puts forward five distinct grounds of appeal. I deal with each ground in turn.

Ground 1: Procedural irregularity

48. By Ground 1, the Claimant contends that the Deputy Master's decision was rendered unjust by a serious procedural irregularity, namely that she proceeded to hear the Defendants' applications to set aside the Default Judgment without hearing the other applications (and in particular the application to cross examine (Application 5), which would, if granted, have served to establish the underlying facts).

The Parties' submissions

49. *The Claimant* submits that, if, as submitted on Ground 3, the duty in CPR 13.2 can be displaced by considerations of conduct by a defendant, then it would have made more sense for the Court to investigate exactly what happened before moving on to consider the mandatory ground.

50. The Deputy Master's decision was unfair to the Claimant for two reasons. First it had the effect of emasculating most of Application 4. The setting aside of the Default Judgment has prejudged the Claimant's application for an order for alternative service. Secondly it deprives the Claimant of the chance to establish who, on the Defendants' side, knew what and when they knew it. That was sought by Application 5 in relation to cross-examination. It is possible that the Defendants knew of the dismissal of the May 2020 Application at the time but deliberately decided not to challenge it and leave matters until later, thereby improving their position in relation to limitation. The Claimant refers to the passage in the Judgment where the Deputy Master refers to determining factual matters on a preliminary basis only.

51. In so far as the decision on 21 May was a case management decision, the Claimant seeks an extension of time. Moreover, the high threshold for permission to appeal such a decision is met here, because this decision was based on a misapprehension as to the law, namely that the operation of CPR 13.2 could not be impacted upon by questions of conduct.

52. *The First Defendant* submits that there was no procedural irregularity in the Deputy Master's case management decision to hear the mandatory limb of the Defendants' applications to set aside at the hearing on 21 May. There was insufficient time to deal with all of the 11 applications before her. This was a perfectly proper course that was open to the Deputy Master.

53. There is a high threshold for an appeal court to interfere in a case management decision and that threshold is not met in this case. The decision here cut through the issues between the parties disposing of one of the most important issues between them. The case management decision was not based on the Deputy Master's misapprehension as to the law. If the Deputy Master was correct to conclude that CPR 13.2 cannot be overcome by conduct, then factual evidence on the point is academic. In effect Ground 1 stands and falls with Grounds 3 and 4. Further, the Deputy Master was clear that her judgment was confined solely to the application she was dealing with and did not amount to a determination of any facts that might impact on other applications that remained outstanding.

54. *The Second Defendant* submits that, first, whilst the Claimant now submits that the Deputy Master should have first considered the application to cross examine the Defendants "in order to investigate exactly what had happened", this is not the basis upon which Application 5 was brought. Rather, it was brought in order to establish dishonesty on the part of Defendants which would then weigh heavily in the exercise of discretion. Secondly, the Claimant has no proper basis for his speculative assertions that the Defendants acted deliberately and dishonestly in failing to take steps to challenge the Thornett Order. Cross-examination for the purpose of challenging the Defendants' account of their knowledge of what had happened was only of potential relevance to their alternative set aside application under CPR 13.3 where the court was required to consider whether the application had been made promptly and the explanation for any delay.

55. Moreover, the Claimant made clear in advance of the hearing that he was going to invite the Deputy Master to deal with the first part of Application 4, in effect as a preliminary issue in advance of other matters, on the footing that if determined in his favour it would dispose of Defendants' applications in limine. The Claimant can hardly therefore complain that, as a case management decision, the Deputy Master decided to deal with the mandatory parts of Applications 1 and 2 and the first part of Application 4, on the footing that this would short-circuit some of the other ancillary applications. The Claimant cannot get close to the high threshold required to challenge such a case management decision.

Discussion

56. First, the decision in issue here was a case management decision and as such, an appeal court should only interfere where it is satisfied that the decision is so plainly wrong that it must be regarded as outside the general ambit of the judge's discretion; *Royal & Sun Alliance v T & N* [2002] EWCA Civ 1964 at §38.

57. Secondly, the Deputy Master's reasons are set out at paragraph 3 of the Judgment. It was common ground that there was insufficient time on 21 May 2024 to deal with all 11 applications; so that the Deputy Master had to exercise her discretion as to which applications should be dealt with.

58. Thirdly, the Claimant's position as to which applications should have been dealt with has not been consistent. In advance of the hearing, he suggested that, effectively the first part of Application 4 should be dealt with at the outset. By his grounds of appeal, he submitted that the important matter to be dealt with first was Application 5; yet in his skeleton and oral argument, Mr Butler seemed to suggest that the second part of

Application 4 should have been dealt with. This, of itself, indicates that there was no clear alternative to the course which the Deputy Master in fact adopted. Further as regards Application 5, it is far from clear what relevant facts the Claimant was seeking to establish by cross-examining the Defendants. Again, despite the First Defendant seeking clarification, the Claimant's position on the purpose of that application has not been consistent. Moreover, Mr Butler accepts that there is no real need for such cross-examination, if the position is that Mr Ahmad's knowledge of, and conduct in relation to, relevant matters is to be treated as knowledge and conduct on the Defendants' part. I consider that, at least for the purposes of Applications 1 and 2, that is indeed the position as a matter of law. The action or inaction of a party's legal representative falls to be treated under the CPR as the action or inaction of the party itself: see *Training in Compliance Ltd v Dewse* [2001] C.P Rep 46 at §66 CA; *Mullock v Price* [2009] EWCA Civ 1222. In any event, this Ground is linked to Grounds 3 and 4, and for the reasons set out in paragraphs 91 to 102 below, those latter grounds fail. As regards the *second* part of Application 4, contrary to Mr Butler's submission, even if there had been an order regularising service of the claim form at the outset, then as a matter of law, such an order would not have cured any defect in the Default Judgment: see paragraph 45(2) above. As regards the *first* part of Application 4, this was in fact heard and dealt with by the Deputy Master.

59. As regards the extension of time, had there been any merit in the substantive ground, I would have granted an extension of time in which to appeal. Any appeal on this ground could only have been heard at the same time as the grounds challenging the substantive Judgment. However since there is no merit, I do not grant such an extension.

60. For these reasons, it is not arguable that there was any justification for hearing one or more of the other applications before hearing Applications 1 and 2 and the first part of Application 4. This ground therefore has no real prospect of success and accordingly I refuse permission to appeal.

Ground 2: CPR 13.2 did not apply on the facts of this case

61. By Ground 2, the Claimant contends that the Deputy Master was wrong to conclude that the mandatory basis for setting aside judgment in default under CPR 13.2 applied on the facts of this case.

The Parties' submissions

62. *The Claimant* submits that this was not a case where the conditions for the exercise of CPR 13.2 were fulfilled. First, the judgment requested by the Claimant (and thus the judgment as granted) was for judgment in default of defence (not in default of acknowledgment of service). Master Thornett was not misled by the Claimant's express statement that there had been no application to challenge the jurisdiction. Thus, the application to set aside had to be on the basis of CPR 13.2(b). The general rule for filing a defence in CPR 15.4 (14 or 28 days from service of the particulars of claim) was displaced by the provisions of CPR 11. Whilst recognising that Master Thornett did not comply with CPR 11(7), it may well have seemed to him that it would be unjust to let the Defendants have further time to file another acknowledgment of service. Master Thornett considered that, having made but not pursued their application to challenge jurisdiction (the May 2020 Application), the Defendants had abandoned that

challenge and so waived their right to contest jurisdiction. In effect, they had submitted to the jurisdiction.

63. Secondly, it follows that either (a) there was no relevant time limit for filing a defence or (b) if there was a limit, it had expired. The time limit could fairly be treated as having expired 14 days from the acknowledgment of service. The position is analogous to that under CPR 11(5). There is no reason why a defendant who has made an application pursuant to CPR 11(1) but does not pursue it should be in a better position than a defendant who makes no application at all (under CPR 11(5)). They have bought themselves time they should not have been entitled to. Alternatively, the time limit should be treated as having expired 14 days from the date when a disinterested bystander would have treated the May 2020 Application as having been abandoned. Since the Defendants had stopped responding to communications from 3 June 2020 onwards, that time had long since passed by 30 September 2020 when the Thornett Order was made.

64. *The First Defendant* submits that the Deputy Master was correct to find that the conditions in CPR 12.3 were not met and that the duty of the court to set aside an irregular default judgment is mandatory under CPR 13.2. The Claimant does not challenge the findings that there is no evidence of service. Service being the foundation stone of the court's jurisdiction over the parties, this is a case in which no service was effected and there was no certificate of service. Due to non-compliance with CPR 6.17(2)(b) (referred to in CPR 12.3 expressly), the Claimant was not entitled to default judgment. Secondly, the Defendants had not failed to serve a defence in time because, first, the relevant time limit did not start to run, due to want of service of any amended claim form or particulars of claim and, secondly, because no defence was required until disposal of the May 2020 Application to challenge jurisdiction or in the alternative strike out/for summary judgment: see CPR 11(9)(a).

65. There is no evidence that Master Thornett considered that the May 2020 Application had been abandoned and that the Defendants had waived their right to contest jurisdiction. Instead Master Thornett wrongly proceeded to enter judgment in default despite the terms of CPR 11(7)(b) and (c). Given that the Defendants were not permitted to file a second acknowledgment of service and/or a defence, the relevant time limit could not have expired. At that time, and for CPR 12.3 (2) purposes, the relevant time limit for the defence had not even commenced.

66. Furthermore, the May 2020 Application was also an application for strike out and/or summary judgment, which precludes default judgment until determined. Master Thornett did not determine those applications on their merits. Even if he did, the time for serving a defence following their dismissal had not expired.

67. *The Second Defendant* submits that, despite the terms of CPR 11(7)(b), Master Thornett gave no directions for service of a defence. It is impossible to say that the time for a defence had expired; the condition in CPR 12.3(2) could not be satisfied. The Claimant's suggestions of alternative time limits for service of the defence subverts the express provisions of CPR 11(7) or impermissibly seeks to read a time limit into the Thornett Order. In the absence of any time specified, under CPR 11(7)(c), for service of a defence, the relevant time limit for doing so, for the purposes of CPR 12.3(3) could not be said to have expired. The analysis in the *Dubai Financial Group* case (in relation

to time for acknowledging service) necessarily applies with equal force to time for service of a defence.

Discussion

68. First, it is accepted that there was no evidence of valid service of the claim form or the amended claim form or the particulars of claim. It follows that, absent valid service, there was no obligation upon the Defendants either to file acknowledgment of service, or to serve a defence. Time for service of a defence runs from the date of (valid) service of the particulars of claim. It further follows that the absence of such an obligation means that there is no time limit for filing acknowledgment of service or for filing a defence; and so, the conditions in CPR 12.3(1)(b) and/or in CPR 12.3(2) were not satisfied: see paragraph 45(1) above. Having found that there was no valid service on either Defendant, the Deputy Master's conclusion that the Default Judgment had to be set aside under CPR 13.2 was correct, on this basis alone.

69. Secondly, and alternatively, even if there had been valid service of the claim form (or even if the Claimant could have established that the Defendants were estopped from denying valid service), then, subject possibly to the Claimant's argument in paragraph 63 above, upon dismissal of the May 2020 Application challenging jurisdiction, the provisions of CPR 11(7)(a) and (b) applied. As a result there was automatically a further period of 14 days in which the Defendants could acknowledge service. Thus as at 30 September 2020, the date of dismissal of the May 2020 Application, time for acknowledgment of service had not expired. Moreover, having failed to set a time for filing and serving a defence under CPR 11(7)(c), there was no then existing time limit for service of a defence; and on that basis the condition in CPR 12.3(2) could not be met. In my judgment, Master Thornett, even if correct to dismiss the 20 May Application, erred in proceeding directly and at the same time to enter default judgment. As at that date, he had no basis to do so. Additionally, even assuming that the dismissal in paragraph 1 of the Thornett Order constituted the dismissal of the alternative strike out/summary judgment applications, there was no extant time limit for service of the defence: see CPR 24.4(2) and 24.6. Even if the Claimant is correct in relation to abandonment and CPR 11(5), CPR 15.4 remains subject to CPR 24.4(2) and the requirement for time for service of a defence upon dismissal of the summary judgment application under CPR 24.

70. Thirdly, the Claimant's case on Ground 2 essentially turns on his contentions that (1) the May 2020 Application had been dropped, withdrawn or abandoned by the Defendants (as opposed to having been determined) and (2) the position in CPR 11(5) should apply by analogy. I do not accept these contentions. First, the terms of paragraph 1 of the Thornett Order are clear: the Application is dismissed – that assumes that, up to that point, it is maintained. Secondly, the recital to the Thornett Order does not support the Claimant's contention. At its highest, it states that the Defendants have "evidenced no real intention of pursuing" the application. In my judgment, when read in the context of the terms of the paragraph 1 of the Order itself, this does not amount to a finding that the Defendants had withdrawn or abandoned the application. The language of the recital is not sufficiently strong to construe it as a finding of "abandonment" and to displace the meaning of the operative words of paragraph 1 of the Order. Secondly, CPR 11(5) applies in terms where *no* application under CPR 11(1) has been made. But in the present case, such an application was made. CPR 11(5) does not apply even where an application which has been made is subsequently abandoned

or withdrawn. Further, in so far as the Claimant's argument here is, more generally, that by their conduct the Defendants "are to be treated as having accepted that the court has jurisdiction", I do not accept it, for two reasons. First, "common law waiver" of a jurisdiction objection requires an unequivocal act renouncing the right to challenge: see paragraph 46 above. There was no such act here. Secondly, submitting to the jurisdiction does not involve waiving the right to serve a defence or does not amount to submitting to judgment being entered and avoiding the need for due service of the claim form/particulars of claim. Submission to the jurisdiction and whether time for defence has expired such as to warrant judgment in default are two separate concepts. If there has been no due service, there is no time for service of a defence, failure of which could found a default judgment.

71. For these reasons, the Deputy Master was clearly correct to conclude that the mandatory basis for setting aside judgment in default under CPR 13.2 applied on the facts of this case. An appeal on Ground 2 has no real prospect of success and for that reason I refuse permission to appeal on Ground 2.

Ground 3: CPR 13.2 can be displaced by a defendant's conduct

Ground 4: CPR 13.2 was displaced in this case by the Defendants' conduct

72. I deal with Grounds 3 and 4 under the same heading.

73. By Ground 3, the Claimant contends that, even if the Deputy Master was right to conclude that CPR 13.2 prima facie applied on the facts of this case, she was wrong to hold that its application could not, as a matter of law, be displaced by (a) a failure to comply with a time limit imposed for the making of the necessary application; (b) abuse of process; and/or (c) estoppel.

74. By Ground 4, the Claimant contends that the Deputy Master was wrong to conclude, in the alternative, that there was, in these particular circumstances, no sufficient failure to comply with a time limit and/or abuse of process and/or estoppel so as to impact on the operation of CPR 13.2.

The Parties' submissions on Ground 3

75. *The Claimant* submits that the Deputy Master's decision that, as a matter of principle, conduct could not be relevant to the operation of CPR 13.2 is clearly unsustainable.

76. A claimant who had committed an error of service could never safely rely on a submission to the jurisdiction. It would always be open to a defendant to go back on that and allege that the conditions of CPR 12.2 or 12.3 were not met and to be entitled to set aside a judgment in default as of right. A defendant against whom judgment in default had been entered could remain inactive for many years, safe in the knowledge that it could set that judgment aside as of right at any time including after the validity of the claim form and perhaps limitation had expired. Moreover, a defendant could even mislead a claimant into believing a claim had been properly served when in fact it had not and obtain an advantage by doing so.

77. There are three ways in which the conduct of a defendant can impact on what would otherwise be its entitlement to invoke the mandatory ground in CPR 13.2. First, non-

compliance with a time limit imposed by the court for the making of the application. Where a litigant is given a particular time in which to take a step which it would otherwise be at liberty to take at any time that places a valid constraint on the freedom it would otherwise have to act at a time of its choosing. The approach of the Deputy Master to Master Thornett's direction denudes it of any meaning or force. The Thornett Order was still an order and until successfully challenged it had to be complied with. Secondly, the doctrine of abuse of process operates in relation to interim applications. That alone is enough to demonstrate that the Deputy Master was wrong wholly to exclude questions of conduct from the operation of CPR 13.2. If the Defendants' conduct was an abuse, it should not have been open to them to invoke CPR 13.2 as a ground for setting aside, even though it is mandatory. The third way in which the question of conduct can potentially be relevant is by the operation of the doctrine of estoppel. Such an application involves, or can involve, assertions of fact as to the validity of service or otherwise. If it is an abuse or the Defendants are estopped from denying due service, then the Defendants cannot establish "not properly served" and the duty under CPR 13.2 is not engaged.

78. *The First Defendant* submits that the Deputy Master was right to hold that, as a matter of principle, the matters raised could not circumvent the Court's duty to set aside an irregular default judgment. It is fundamental to confidence in the justice system that default judgments - which are not subject to any scrutiny on the merits and which may be flawed - are either properly founded by compliance with CPR Part 12 and, where not, not maintained. CPR 13.2 is expressed in mandatory terms such that it is the duty of the Court to set aside an irregular default judgment. First, this is supported by the case authorities. Secondly, there are other ways in which the Court can have regard to conduct (for example, through CPR 6.15 or 6.16). Allowing considerations of conduct could lead to complex factual issues giving rise to extensive satellite litigation.

79. *The Second Defendant* submits that the Deputy Master was correct to hold that CPR 13.2 is a complete, mandatory, code. That is clear from the language of CPR 13.2 itself – "must". There are no qualifications or conditions or time limits. The mandatory nature has been affirmed in many cases: see *Credit Agricole, Shiblaq*, and *Olafsson*. It is important, in the international context, that strict rules of service in a foreign jurisdiction are observed, in the interests of comity and the attractiveness of English jurisdiction. Any injustices which the Claimant suggests might arise may fall to be addressed by an application under CPR 6.15 or 6.16 to regularise service, as happened in *Olafsson (No 2)* and *Shiblaq (No 2).* Further CPR 13.2 imposes a duty on the Court.

80. As to the three routes relied upon by the Claimant, first, as to paragraph 4 of the Thornett Order, the Court's duty under CPR 13.2 could not be made subject to a requirement for an application nor to time limit in which to make an application. The Court can act of its own motion; there is no need for any application. Further, and in any event, it did not have the effect of placing a 7-day time limit upon a challenge to the Default Judgment. It was a standard provision required by CPR 3.3(5), which Master Thornett was bound to insert. Secondly, abuse of process and estoppel by conduct cannot apply, because CPR 13.2 imposes a duty upon the Court and not a right for a defendant and is thus not subject to issues of conduct. Overall this ground cuts straight across the clear language of CPR 13.2.

The Parties' submissions on Ground 4

81. *The Claimant* submits that the Deputy Master's assessment was necessarily flawed. She denied herself the material she needed on which to carry out a full evaluation of the circumstances. In any event her assessment was flawed. The Court can and should interfere even though this was an evaluative exercise or exercise of discretion. The Claimant responds to each of the three factors relied upon by the Deputy Master (see paragraph 31 above) as follows.

82. First, the Claimant did not accept that there were shortcomings in service and therefore could not be accused of lack of candour in failing to draw them to the Court's attention in 2020. The Claimant's conduct did not cause the Defendants to wait over three years before pursuing their application. Secondly, it was impossible to characterise Mr Ahmad's conduct as anything other than wilful. He knew of the Thornett Order, knew that he had concealed it from the Defendants and knew that the Defendants did not make a timely application to challenge it. Thirdly, abuse of process is by definition always procedural. For these reasons, the exercise of the Deputy Master's evaluative judgment was plainly flawed and cannot stand.

83. The Claimant goes on to submit, by way of primary position, that the Defendants are well beyond the time limit contained within the Thornett Order and further that abuse of process and estoppel are established. Accordingly, this displaces the operation of 13.2. The abuse comprises (1) not pursuing the May 2020 Application, (2) not complying with paragraph 4 of the Thornett Order and (3) not doing anything for three years until enforcement was threatened. As regards estoppel, the Claimant relies on the following factors.

    (1) The Defendants must be taken to have known of the Thornett Order and the 7-day period within which to challenge it.

    (2) They must be taken to have consciously decided not to make a challenge within that period or at any time within the following three years.

    (3) The Defendants were under a duty to speak. Becoming inactive after the rejection of an application conveys a position that that person is no longer intending to challenge the status quo.

    (4) As a result of the Defendants' failure to speak, the Claimant assumed that his rights were finally established (reliance).

    (5) If the judgment were to remain set aside, the Claimant would have to litigate his claim long after the event and may be exposed to arguments based on limitation to which he would not have been exposed had the Defendants asserted their position with anything approaching promptness. This is the detriment for estoppel purposes.

84. *The First Defendant* submits that the Deputy Master was right as to the lack of factual basis for the Claimant's argument.

85. First, in relation to the time limits, the Thornett Order was made on the papers of the Master's own initiative pursuant to CPR 3.3(4). It included a provision for setting aside

or varying as required by CPR 3.3(5)(b). These are provisions of general application not related to the regime for default judgment. It was operative as a time limit in respect of matters it determined beyond the Default Judgment. For default judgment, the relevant rules are in CPR 13 which in the case of the mandatory ground imposes no time limit (whereas for the discretionary ground an applicant must act promptly).

86. Secondly, in relation to abuse of process, the Deputy Master correctly applied the law by reference to *Aktas v Adepta*. She found that the conduct of Mr Ahmad in failing to progress the listing of the May 2020 Application was properly characterised as negligent, rather than wilful.

87. Thirdly, all factors point against the First Defendant being estopped from denying service. The Defendants have been consistent throughout the proceedings that service was not effected on them. The Deputy Master applied the broad merits-based assessment as required by the *LA Micro Group* case. Further the detriment stemmed solely from the Claimant's own decisions as to how and when to effect service and obtain judgment by request for default judgment with his eyes wide open as to the alleged failings in service (as shown by the May 2020 Application).

88. The Claimant's argument confuses the Defendants' alleged abuse in the May 2020 Application with attempts to elevate mere silence to positive representations of good service, in circumstances where the Defendants' active representations were that service were not effected. Finally the Deputy Master was right to take into account the Claimant's failure to comply with the duty of candour imposed on it when applying for default judgment. He should have drawn to the attention of the Court facts relevant to its jurisdiction to award a default judgment and the fact that matters on which the Court had to be satisfied arguably were not satisfied.

89. *The Second Defendant* submits that the Deputy Master's evaluative judgment that neither abuse of process nor estoppel should operate to disapply the rule in CPR 13.2 was one she was entitled to reach, having correctly directed herself by reference to the relevant case authorities.

90. First, the Deputy Master was entitled to conclude that it was the Claimant's own conduct in failing to effect valid service and to bring to the Court's attention that the Defendants had disputed valid service which was the source of the Claimant's misfortune. As regards estoppel, the Defendant had not previously maintained, nor obtained any relief based on, a contrary position. Merely failing to obtain a listing does not amount to accepting that there was valid service. As regards abuse of process, the Deputy Master was entitled to conclude, as a matter of evaluative judgment, that there was no inordinate and inexcusable delay or intentional or contumelious default, as opposed to negligent or mistaken conduct on the part of Mr Ahmad. Whether the circumstances in which the May 2020 Application had been dismissed rendered the present applications abusive did not require any investigation beyond the facts set out in the recitals to the Thornett Order. Any delay since then was irrelevant. Finally, any case based on the Defendants' failure to speak within the 7-day period or for three years thereafter is misconceived. There is no arguable basis to support a positive duty, on the part of the Defendants, to speak.

Discussion on Ground 3 and Ground 4

Ground 3

91. As regards Ground 3, there are strong arguments to support the proposition that the duty in CPR 13.2 to set aside a judgment in default can never be displaced by a defendant's conduct. First, CPR 13.2 is expressed in mandatory terms, and has been so described in the previous cases. By contrast, CPR 13.3 is expressed in discretionary terms ("may"). Secondly, CPR 13.3 refers to an application by a defendant to set aside; there is no reference to any "application" in CPR 13.2. Thirdly, and importantly, by contrast to CPR 13.3, there is no reference to any application being made "promptly". In my judgment, there is no time limit upon the Court carrying out its duty under CPR 13.2 and, for that reason, where a defendant applies for an order under CPR 13.2, mere delay in making such an application would not be a basis for the Court not to set aside the default judgment. In principle a default judgment which did not satisfy the conditions in CPR 12.3 falls to be set aside at any time. Moreover, in these circumstances and given the terms of CPR 13.2, I do not consider that it is permissible for the Court to impose a time limit for any application to set aside (certainly at least on mandatory grounds in CPR 13.2) when it grants judgment in default under CPR 12.3(1) or (2).

92. However, as regards conduct which might amount to an abuse of process or give rise to an estoppel, I am not finally satisfied that, in the very clearest of cases, these doctrines could never apply and prevent the Court from applying its duty under CPR 13.2. I accept that such arguments could have arisen, but were not made, on the facts of earlier cases (such as *Olafsson* and *Shiblaq*); and a factual inquiry limited to issues of service is not necessarily narrower in scope than an inquiry into wider conduct said to give rise to abuse or an estoppel. I remain wary of making a ruling which would apply to any and all cases regardless of what factual circumstances might arise in the future. However, ultimately on the facts of the present case, I do not need to make a definitive ruling that in all cases these doctrines cannot apply. For the reasons set out below in relation to Ground 4, I am satisfied that on the facts of *this case*, there was no reason not to apply CPR 13.2 and that the Deputy Master was correct. I agree with her conclusion at paragraph 12 of the Judgment.

Ground 4

93. As regards the "time limit" said to arise from paragraph 4 of the Thornett Order, I do not accept that the effect of that paragraph was to impose a bar on the setting aside of the Default Judgment under CPR 13.2, in the event of failure to apply within 7 days. First, I consider that paragraph 4 was merely the standard "liberty to apply" provision required by CPR 3.3(5) made in any case of any order made in the absence of the parties. It applied to all the provisions of the Thornett Order. Paragraph 4 of the Thornett Order does not distinguish between an application under CPR 13.2 and one under CPR 13.3 or indeed other applications relating to other parts of the Thornett Order. It was not intended to displace the general position under CPR 13.2, that there is no time limit upon the Court carrying out its duty under that provision and where the Court may act of its own motion – nor even to override the exercise of discretion under CPR 13.3 (where delay is merely a factor to be taken into account). As indicated above, in my judgment, the Court did not have power to place a time limit on the application of CPR 13.2. In these circumstances, paragraph 4 is to be construed as applying to the dismissal of the May 2020 Application, but not to the Default Judgment.

Abuse of process and estoppel by conduct

94. I have been referred to *Woodhouse v Consignia* [2002] 1 WLR 2558 §§55 to 58; *Aktas v Adepta* [2011] QB 894; *LA Micro Group (UK) Ltd v LA Micro Group Inc* [2021] EWCA Civ 1429 at §§18 to 26; and *Malik v Malik* [2024] EWCA Civ 1323 at §§61 to 64. The following principles emerge.

95. First, in the context of conduct in litigation, and in particular interlocutory matters, the concepts of abuse of process and estoppel by conduct are very closely connected.

96. Secondly, as to *abuse of process*,

(1) There is a public interest in discouraging a party who makes an unsuccessful interlocutory application from making a subsequent application *for the same relief*, based on material which was not, but could have been deployed, in support of the first application. However the rule in *Henderson v Henderson* should be applied less strictly than in relation to a final decision of the court, at any rate where the earlier pre-trial application has been dismissed. It may be that the overriding objective of dealing with cases justly might demand that the second application should succeed. The doctrine of abuse of process does not apply in exactly the same way as it applies to final decisions.

(2) A second action will not be struck out as an abuse of process where a first action has been struck out as a result of negligence, rather than abuse of process. For later conduct to amount to an abuse of process, there must have been prior inordinate and inexcusable delay, intentional or contumelious default or wholesale disregard of the rules. Subsequent conduct will not be an abuse of process where the earlier conduct arose from negligence, dilatoriness, mistake or lethargy.

97. As to estoppel by conduct:

(1) The question whether a party is estopped by its own conduct from assuming in legal proceedings a position which was inconsistent with the position which it had taken in earlier proceedings is to be approached by means of a broad, merits-based assessment, and is not constrained by strict rules. When conducting that assessment (1) the party's later position has to be clearly inconsistent with its earlier position; (2) the court may enquire whether the party had succeeded in persuading a court to accept its earlier position, so that judicial acceptance of an inconsistent position in later proceedings would create the perception that either the first or the second court was misled; and (3) the court may ask whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. Further it will be material to ask whether it was apparent that the earlier decision had been obtained on the footing of, or because of, the stance taken by the party in the earlier proceedings since, absent that factor, there would not be an impression that one or other court was misled into giving its decision so that the administration of justice risked being brought into disrepute.

(2) As observed by Floyd LJ in *LA Micro* at §§22 and 24, the authorities suggest that the party must have "taken a position" or taken "a stance" earlier; that the

party must have been seeking "to persuade the court" to accept that position. There is also the suggestion that the party has "procured" the court to adopt a position/order as a result of its earlier "stance". Similarly in the US case there cited again there is a reference to the party "assuming a certain position and succeeding in maintaining that position". Finally the doctrine will apply where the party is "deliberately changing positions – playing fast and loose with the court".

(3) However there is no requirement for the party said to be estopped to have made an objectively unequivocal statement: *Malik* §63.

(4) *Malik* §63 goes on to summarise the position, as follows:

> "If a party sets out to persuade the court that it holds a certain position, the court is so persuaded, and the court acts on the footing that the party holds that position then that creates risks of unfairness and of bringing the administration of justice into disrepute which underpin the estoppel by conduct principle".

98. Thus, even if there is no requirement for an objectively unequivocal statement, there remains a requirement for some form of positive conduct on the part of the party said to be estopped. At the least that party should be seeking to persuade the court that it holds a certain position. In my judgment mere inactivity or silence or failure to respond is not sufficient to amount to "taking a position" and thus be the foundation of estoppel by conduct.

99. Applying these principles to the present case, it appears that the Deputy Master dealt with the two concepts (abuse of process and estoppel) compendiously at paragraphs 12 to 16. In my judgment that was an appropriate course. In any event considering each concept in turn, the same result ensues.

100. First, in relation to abuse of process, the relevant first application is the 20 May Application and the second application is Applications 1 and 2. The abuse principles do not apply. First, by Applications 1 and 2, the Defendants were not seeking "the same relief". Secondly, the "default" in relation to the 20 May Application on the part of the Defendants is not properly characterised as arising from inordinate and inexcusable delay, intentional or contumelious default or wholesale disregard of the rules. I do not agree with Master Thornett's characterisation of the 20 May Application as an abuse. The Court when considering whether the second application is an abuse of process is entitled to reach its own view of the nature of the default on the first application. The Deputy Master's evaluative conclusion (at paragraph 14) was that the Defendants' conduct was negligent or mistaken. She was entitled to reach that conclusion (with which I agree in any event).

101. Secondly, in relation to estoppel by conduct, in my judgment the Defendants have not "taken a position" in earlier proceedings which is *inconsistent* with the position they have taken on Applications 1 and 2. At all times, the "position they have taken" is that there was no valid service of the claim form. Prior to and up to the point of the Thornett Order (here, the earlier proceedings), the Defendants maintained that service had not been properly effected; and that is the position they have taken on the Applications 1 and 2. I do not accept that failure to pursue the 20 May Application amounts to

accepting that service was valid. The high point of the Claimant's case appears to be that, *following* the Thornett Order and until November 2023, the Defendants took no action and, as a result of that absence of action, their position was that they accepted that service was valid or at least waived any objection to service. It is that position which is said to be inconsistent with their position on Applications 1 and 2. In my judgment, that contention does not establish any estoppel by conduct. First, it does not meet the requirement for some "positive conduct or stance" or of "taking a position". There was no duty upon the Defendants to speak; and their mere inactivity or silence or failure to respond is not sufficient to amount to "taking a position". Secondly, in so far as some form of waiver is alleged, it does not meet the requirements of an unequivocal renouncing of a right to challenge. Finally, the Defendants' alleged inconsistent position *after* the Thornett Order was not adopted in order to persuade a court to make a decision and indeed did not result in the Court making any prior and inconsistent decision.

102. Finally, adopting the broad merits-based approach, the Claimant's own conduct provides some support for the conclusion that the suggested estoppel is not established (as suggested by the Deputy Master at paragraph 13). Upon finding out about the 20 May Application (at the latest in some time in early September), the Claimant did not expressly correct his statements in his 15 June applications that there was no challenge to the jurisdiction. However, it is clear that by that time the Court itself was fully aware of that challenge, and, moreover in its 8 September letter the Claimant did refer to the fact of the 20 May Application. Nevertheless, despite this knowledge, the Claimant did not draw to the Court's attention the fact that, as a result of the May 2020 Application, there was no time for acknowledgment of service and no extant obligation upon the Defendants to serve a defence and thus that the Master was not at that time in a position to grant judgment in default. At that stage, the application for default judgment remained "*ex parte"*. Whilst I do not accept that the Claimant's breaches were as extensive as the First Defendant suggests, nevertheless, to this extent, the Claimant did not comply with his duty of candour.

103. For these reasons, the Deputy Master's conclusions at paragraphs 12 and 16 were correct.

Conclusion on Grounds 3 and 4

104. In relation to Grounds 3 and 4, whilst I conclude that Ground 3 on its own is arguable, in order for the appeal to succeed on that ground, the Claimant would have had to have succeeded on Ground 4 as well. However in my judgment Ground 4 has no real prospect of success. For that reason, no purpose would be served by granting permission on Ground 3 alone. I therefore refuse permission to appeal on Ground 3 and on Ground 4.

Ground 5: Payment on account of Costs

105. By Ground 5, the Claimant contends that the Deputy Master was, in any event, wrong to order that there should be an interim payment on account of costs. The fact that there were multiple applications on foot, all directed towards the same underlying question (namely, whether service had been correctly effected and what the Court should do, if it had not been) was a good reason for not ordering such a payment to be made, until all the applications had been determined.

The Parties' submissions

106. *The Claimant* submits that there was good reason within CPR 44.2(8) not to order a payment on account of costs. The overall picture as to success or otherwise may have looked very different after all the applications had been heard and decided. This case is to be distinguished from *Benyatov v. Credit Suisse Securities (Europe) Ltd* [2020] Costs LR 379. A further good reason is the fact that both Defendants gave their addresses as overseas and a payment on account might not be readily recoverable. Finally reliance is placed on the Review of Civil Litigation Cost Final Report at paragraph 5.10 which refers to good reason as including where there "may be a real prospect of a set off at a later stage".

107. *The First Defendant* submits that there was no objectively good reason not to make an order for payment on account of costs. The Deputy Master's order reflected her determination on the matters which she actually decided only. The fact that the Claimant's outstanding application to remedy service may mean that the Claimant is able to proceed with the claim is no answer to him having lost on Applications 1 and 2, and the first part of Application 4. An application for mandatory setting aside of a default judgment is wholly separate from an application for alternative service or for dispensation of service. *Benyatov* supports the approach adopted by the Deputy Master. In any event there is a broad discretion in matters of costs and the Deputy Master cannot be criticised in finding that there was no good reason not to make an order for payment on account of costs. It would be wrong to deny the Defendants their costs in favour of an uncertain future liability to the Claimant. In those circumstances no set off or netting can properly take place.

108. *The Second Defendant* submits, additionally, that the decision to order payment on account was a discretionary or evaluative decision. The Deputy Master was well aware that the question of retrospective validation of service remained to be decided. On the one hand, the Claimant is under a certain and immediate costs liability (if not finally quantified); on the other hand any liability of the Defendants was contingent and uncertain and depended on the Claimant succeeding on the second part of Application 4.

Discussion

109. First, CPR 44.2(8) provides that "where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so". The issue is whether there was good reason not to make the order. The decision to order payment on account was an exercise of the Deputy Master's discretion - and whether there was good reason not to order a payment on account was an evaluative judgment of the Deputy Master which will not readily be disturbed on appeal.

110. Secondly, the Applications were not all directed at the same underlying question - even if the issue of whether service had been effected correctly might be common - ultimately whether the default judgment should be set aside and whether, even if it is set aside, the proceedings could continue, are distinct questions.

111. Thirdly *Benyatov* supports the Deputy Master's decision. On the facts it was a stronger case for refusing such an order; yet an order for payment on account was made. The

party ordered to make the payment on account had, in its favour, a cross-order for payment of costs in principle, but which could not be quantified until conclusion of the claim as a whole; a contingent and uncertain entitlement. In the present case, there is not even an order in principle in favour of the Claimant and whether there will ever be such an order will depend on the outcome of the remaining Applications, which as at the date of the Order was not known. It was, and remains, far from clear that there will ever be such an order in the Claimant's favour, that could be the subject of a set off.

112. For these reasons, Ground 5 has no real prospect of success and I refuse permission to appeal.

Conclusions

113. In the light of my conclusions at paragraphs 60, 71, 104 and 112 above, permission to appeal is refused on all Grounds.

114. I shall hear the parties as to the form of the order, costs and any other consequential matters that may arise. Finally, I am grateful to counsel for their assistance and for the detail and quality of the argument placed before the Court.