Neutral Citation Number: [2022] EWHC 997 (Ch)

Case No: **BL-2020-002255**

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 3 May 2022

Before:

Mr Hugh Sims QC (sitting as a Deputy Judge of the High Court)

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Between:

INCE GORDON DADDS LLP **Claimant**

- and –

MELLITAH OIL & GAS BV **Defendant**

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- -

Mr Patrick Lawrence QC (instructed by **Reynolds Porter Chamberlain LLP**) for the **Claimant**
Mr Eoin O'Shea, of **CMS Cameron McKenna Nabarro Olswang LLP** for the **Defendant**

Hearing dates: 28 and 29 April 2022

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APPROVED JUDGMENT

This judgment was handed down remotely by circulation to the parties or their representatives by email and by release to The National Archives. The date and time for hand-down is deemed to be Tuesday 3 May 2022 at 10:30am.

Mr Hugh Sims QC:

Introduction

1. This is an application by the defendant, Mellitah Oil & Gas BV ("MOG"), to set aside a default judgment entered by Master Pester on 25 January 2021. Judgment was entered in default of a defence under CPR Part 12, requiring MOG to pay the claimant, Ince Gordon Dadds LLP ("IGD"), the sum of US$1,412,296.43.

2. The application was made on 17 March 2021, with a statement in support from Mr Muhammad Shamaka of the same date, and seeks an order that the judgment be set aside under CPR 13.3(1)(a), on the basis that MOG has a real prospect of successfully defending the claim. CPR 13.3 provides as follows:

   "13.3— 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.
   (Rule 3.1(3) provides that the court may attach conditions when it makes an order.)"

3. MOG did not, in its application notice, state there was some other good reason why the judgment should be set aside, or it should be allowed to defend the claim, which is the other potential jurisdictional gateway for setting aside a default judgment under CPR 13.3(1)(b). MOG did however seek to raise this point in its submissions, and I will address it below. The wording at the start of CPR 13.3, and the use of the word "may", makes it clear that if one of those gateway tests are met then the court has a discretion to set aside or vary the judgment. CPR 13.3(2) provides that, in considering whether to set aside or vary, the matters to which the court must have regard include whether the application has been made promptly.

4. It is generally accepted, and was accepted by MOG before me, that an application under CPR 13.3 to set aside a judgment entered in default of defence is an application for "*relief from any sanction*" within the meaning of CPR 3.9. It therefore requires, when exercising a discretion, the consideration of the three stage test as laid down in *Denton v TH White (Practice Note)* [2014] EWCA Civ 906. The application of the *Denton* principles, to an application to set aside under CPR 13.3, was challenged before the Court of Appeal in *Regione Peimonte v Dexia Crediop SpA* [2014] EWCA Civ 1298 and rejected: see at [39]-[[40] per Christopher Clarke LJ, with whom Jackson and Lewison LJJ agreed. The application of the *Denton* principles to an application under CPR

13.3 was accepted, and the three stage test was applied, by the Court of Appeal in *Gentry v Miller (Practice Note)* [2016] EWCA Civ 906. However, in *Cunico Marketing FZE v Daskalakis and another* [2018] EWHC 3382 (Comm) at [39] Andrew Baker J raised the question of whether this is right, because the availability of a judgment under Part 12 carries with it the availability of an order under Part 13 setting such judgment aside. He noted at [40] the contrary view of the Court of Appeal in *Regione Peimonte* and *Gentry v Miller* above, but concluded this was not binding on him because in the former case the view was *obiter* and in the latter case the point was conceded. He also referred to other first instance decisions, one preceding those decisions when a different view was taken, and one after, which adopted the same view as the Court of Appeal in the two above cases. He reasoned at [41] that there was no authority binding on him, but concluded it was not necessary to decide the point, and did not do so. Whilst MOG did not seek to persuade me to adopt this reasoning it nevertheless is a point I need to address in order to satisfy myself as to how I should proceed with this application.

5. I have hesitation in concluding that what was said by Christopher Clarke LJ in *Regione Peimonte* can necessarily said to be *obiter*. The judge at first instance declined to set aside on the basis he was not satisfied that the applicant had real prospects, and this was challenged in the Court of Appeal. In concluding his judgment at [126] Christopher Clarke LJ said as follows:

   "I do not regard Piedmont as having established that the judge's refusal to set aside the default judgment or his grant of summary judgment on the monetary claims were in error. Whilst in limited respects I have found that there was a realistic prospect of establishing non-compliance with Italian law that is not sufficient to justify setting aside the judgment. In my view the extent and character of the delay alone afforded, in this case, good grounds to refuse to set the judgment aside even if the defence had a real prospect of success. In the light of the character and extent of that delay it would require a defence of some considerable cogency, based on pretty convincing evidence, particularly on the question of capacity, to justify setting the default judgment aside. The judge was entitled to take the view that there was no real prospect of Piedmont succeeding or, at any rate, none with a sufficient degree of conviction to justify setting aside the default judgment in the circumstances of the present case."

6. It seems to me at least arguable that a critical part of the reasoning did not depend on the conclusion that the judge was entitled to take the view that there was no real prospect of the applicant succeeding, but included reasoning as to the character and extent of delay, which was informed by the earlier conclusion as to the application of *Denton* principles at [40]. It might be thought that the third sentence is offering that point as a first line of reasoning, though the point is open to some debate as the last sentence might be said to put it the other way round.

7. I am also not persuaded that the approach to the interpretation of CPR 13.3 and 3.9 suggested by Andrew Baker J at [39] in *Cunico Marketing FZE* is the correct one, assuming for present purposes I would be free to depart from the above Court of Appeal decisions. As noted by Christopher Clarke LJ at [40] in

Regione Peimonte, since the overriding objective of the rules is to enable the court to deal with cases justly and at proportionate cost, and since under the new CPR 1.1(2)(f) this includes enforcing compliance with rules, practice directions and orders, it is to be expected that the considerations set out in CPR 3.9 are to be taken into account in the exercise of discretion. This might be thought to be especially so as CPR 3.9 applies on an application for relief from "any sanction". The argument which Andrew Baker J appears to have been attracted to is that the sanction under CPR 12 came with the ability to apply for relief under CPR 13.3 such that an application to set aside should not be viewed as being an application for relief from a sanction at all. Thus, so the argument goes, subject to overcoming the jurisdictional gateway, and subject to the requirement to have regard to promptness, the discretion to set aside is unfettered. The argument, moreover, is it ought not to be fettered by the further application of another layer, based on *Denton* principles. However, simply because the sanction under CPR 12 comes with the bespoke ability to apply to have it set aside under CPR 13.3, it does not necessarily follow that it is not an application for relief from sanction.

8. I read the Court of Appeal's decision in *Regione Peimonte* as being based on a conclusion that the rules have to be read in accordance with the overriding objective, and it would be consistent with the overriding objective to require applications under CPR 13.3 to be scrutinised not only having regard to the framework laid down within CPR 13.3 but also, in addition, with regard to the *Denton* principles. *Gentry v Miller* is to much the same effect, emphasising at [24] (per Vos LJ, with whom Beatson and Lewison LJJ agreed) that the question of promptness is relevant both in considering the requirements of CPR 13.2(2) and also when considering all the circumstances under the third stage in *Denton.*

9. When it comes to considering the discretion to be exercised under CPR 13.3 I consider that is the correct approach for me to take. I do so because I think it is likely to be binding on me and also because I see no reason why a different and perhaps less strict approach should apply to applications to set aside default judgments than other types of default which may be no less terminal for the defaulting party. I see no reason why, simply because the rule makers have spelt out certain requirements within CPR 13.3, including a jurisdictional gateway, and then a particular discretionary factor which needs to be taken into account, the discretion (assuming that stage of the test is reached) should not be approached in a similar way as occurs with other cases (where a sanction is imposed without any express rule providing for a jurisdictional gateway and without specifying a specific additional factor which must be considered as part of the exercise of discretion). It may be little turns on that in this case, for reasons which are apparent below, but that is the approach I will take to this application.

The background

10. IGD is a firm of solicitors with its business office at Aldgate Tower, 2 Leman Street, London E1 8QN, operating as a limited liability partnership. MOG is a company (company number 33284203) registered in the Netherlands (the

registered office is at Strawinskylaan 1725, 1077XX, Amsterdam) with its main office at Dat El Imad Complex, Tower 1, 16th Floor PO Box 91651, Tripoli, Libya. MOG, established in 2007, is a joint venture company partly owned by the National Oil Corporation of Libya and partly by Eni North Africa BV.

11. The background to this matter is a series of disputes relating to a major civil-engineering project, the design and construction of a floating storage and offloading unit or platform (the "FSO") at the Bouri offshore oil field, off the coast of Libya, also referred to as the Gaza FSO project. MOG ended up in dispute with the project manager, Houlder Limited ("Houlder"), a UK company, and the shipbuilders, STX Offshore and Shipbuilding Co Ltd ("STX"), a Korean company, both of whom commenced international arbitration proceedings against MGO in 2018. MOG were initially represented in the arbitrations by Curtis, Mallet-Prevost, Colt & Mosle LLP (a New York firm), and then by Holman Fenwick Willan LLP and then by IGD, commencing in 2019.

12. On or about 20 December 2019, MOG and IGD entered into a legal services agreement (the "LSA") covering the work to be done by IGD to assist MOG in relation to the arbitrations. IGD's Terms of Business were also incorporated into the LSA. The LSA contained express terms as follows (note that references to ICI and ICI's Terms of Business in the quotation below, and where otherwise referred to below, is to IGD and IGD's Terms of Business):

"[Recital] This Agreement is to be read in conjunction with the ICI Terms of Business attached hereto. References to the Client Care Letter in the Terms of Business are references to this Agreement. In the event of any inconsistency between the terms of this Agreement and the Terms of Business, then this Agreement shall prevail. In respect of payment the Terms of Business should be considered amended to read and have effect on the basis that MOG has a period of 60 days from the date of each ICI invoice to make payment.

"[1 The Services] ICI's goal is to service the needs of MOG promptly and efficiently. ICI shall work in a manner to provide MOG with efficient and high quality legal services. MOG has retained ICI as Counsel in connection with:
a. Houlder Claims (and MOG counterclaims) in ICC arbitration with reference 23534/AYX concerning Project Management of the Gaza FSO Project under Contract CN-611; and
b. STX Claims (and MOD counterclaims) in ICC arbitration with reference 24056/DDA concerning the construction of the FSO for the Gaza FSO Project under Contract CN-604.

The scope of services requested by MOG is to provide legal services related to the dispute and claims arising out of or in connection with the Gaza FSO Project.
Houlder and STX have each initiated the respective Arbitration proceedings in Paris under the auspices and rules of the ... ICC
Further services may be requested by MOG which will be instructed separately for each prospective single lawsuit, legal action or advice for the benefit of MOG. In addition, ICI may be asked to assist with other aspects of the court

order as well. ICI will render its services upon the terms and conditions set forth in this letter and the attachment hereto

[2 (Fees]. The appropriate hourly rates in USD were for Partner (460); Legal Director/Managing Associate (355); Associate (310); Trainee/Paralegals (200).

[4 Costs] MOG shall reimburse ICI for costs incurred as required for proper execution of the work agreed and approved by MOG.

[5 Billing] Unless otherwise agreed, ICI will bill MOG monthly for legal services rendered to MOG and costs incurred. Undisputed payment is made sixty (60) days upon receipt of ICI invoice and should be made by wire transfer to the account noted in each invoice provided however that any cost should be advanced or promptly disbursed upon request from time to time.

Each invoice shall contain a concise summary of all work performed and costs incurred with evidence of all costs related with the Service.

These invoices shall be prepared based upon approved monthly statements which will be submitted by ICI. The monthly progress statement should be outlining hours worked by each individual and the exact type of work that was carried out. This will be submitted for MOG approval. This approval and/or editing of the monthly statement by MOG should be within one month of submission. Absent any such comments on the monthly statement within two weeks of submission, the statement shall be deemed approved by MOG.

[8 Duties of Parties] ICI agrees to perform the Services professionally, maintain and update development of the related issue to MOG effectively and in timely manner. MOG agrees to pay ICI undisputed invoice in time "within (60) days of the received date" cooperatively and truthful as stipulated in this agreement [sic].

[9 Termination] MOG will have the right to terminate ICI's services by written notice at any time. ICI will have the right to terminate its representation and cease performance of further services if (i) MOG fails to timely pay ICI's invoices ...

Upon termination all accrued and outstanding fees and costs not disputed will become due within no more than sixty (60) days of termination"

13. IGD's Terms of Business reiterated the importance of invoices being paid in accordance with the LSA, and provided for contractual interest to be paid on any unpaid amounts, accruing at a daily rate of 8% per annum (term 14.6). They also recognised and preserved the right of the client, MOG, to apply to the court of an assessment under the Solicitors Act 1974 (term 17.2). They also provide that the LSA and Terms are subject to the laws of England and Wales and that the courts of England and Wales have jurisdiction (term 34).

14. IGD provided services under the LSA in relation to the arbitrations and duly raised invoices for their work on a monthly basis. However by in or about June 2020 Mr Shamaka, on behalf of MOG, started to raise complaints about the services provided by IGD and raise questions in relation to their invoices, albeit without seemingly invoking the contractual dispute procedure in accordance with the LSA. Mr Shamaka is a consultant contracted to the National Oil Corporation, one of the co-venturers in MOG, and was authorised to act on behalf of and represent MOG in relation to the instructions to IGD and similarly also in these proceedings, under the instruction of the Chairman of MOG. The MOG set up an arbitration committee to deal with the arbitrations and Mr Shamaka is the chairman of the same. He is a Libyan national whose first language is Arabic, but who has a sufficient knowledge of English to be able to communicate readily in English.

15. In an email from Mr Shamaka to Mr Simon Hems of IGD on 26 June 2020 concern was expressed about the quality and usefulness of certain witness statements produced in the Houlder arbitration, though Mr Shamaka expressed appreciation for the efforts put in on the rejoinder and the work done by the overall team, including in particular the experts. Concern was also expressed about Mr Hems leaving IGD and what would happen when he left. He indicated that IGD would wish to continue to work with Mr Chris Kidd and other members of the IGD team after Mr Hems left. Further dialogue took place between IGD and MOG in relation to the concerns expressed, including involving counsel. By 27 July 2020 Mr Shamaka wrote to Mr Kidd to seek to reassure Mr Kidd that approval from the finance department had been obtained to proceed with payment and that whilst payment in full was being made on the STX file but monies were being withheld on the Houlder file, representing the hours claimed by Mr Hems on that invoice, due to what they considered a lack of a satisfactory response to the earlier complaints they had raised. The email went on to raise various points of concern about the invoices in general, and sought clarification on the names and time sheets, amongst other things. For its part IGD was concerned about the late payment of invoices and what it saw as a pattern of delays in payment which it considered was worsening.

16. Ultimately IGD raised six invoices during July to September 2020 in relation to the STX and Houlder arbitration work, which IGD failed to pay, totalling US$1,332,168.55. MOG had not invoked the contractual dispute resolution procedure in relation to those invoices so as to dispute the same. MOG also withheld US$30,682 from the 23 April 2020 Houlder arbitration invoice (for work done in March 2020; invoice no 235516). It is common ground that the retainer with IGD was terminated in September 2020. IGD served a letter dated 11 September 2020 indicating its intention to terminate the retainer on 25 September 2020, noting the breakdown in relations and the failure to make payments as requested, though keeping open the idea of continuing with the retainer if payments were brought up to date and payments on account made. MOG did not accept those proposals, and suggests it terminated the retainer shortly before the 25 September 2020, but nothing turns on that. MOG instructed new solicitors, Dentons Rodyk and Davidson LLP ("Dentons") in October 2020, and also retained the services of junior counsel of Atkin

Chambers (counsel had also been instructed from Atkin Chambers, including leading counsel, during IGD's retainer).

17. Whilst no fee charging structure appears to have been agreed for handover work from IGD to the new solicitors, it is common ground that IGD assisted with that handover work. IGD contend that this work was also performed under the LSA (clause 1) but in any event contend that a sum is due for the work they did in this respect. IGD raised invoices between 30 October 2020 and 2 December 2020 for this work in the total sum of US$46,672.36.

18. Thus the total amount claimed by IGD is in sum of US$1,409,522.91 (a sterling equivalent at date of issue of £1,049,294.06).

19. On 3 December 2020 IGD sent a letter of claim, in accordance with the Practice Direction on Pre-Action Conduct and Protocols. That demanded payment of the outstanding invoices claimed in the proceedings (and another invoice, relating to counsel's fees, ultimately not pursued in the claim). The letter stated "*We reasonably require your detailed response and/ or payment of the amount due from you within 7 days.*" The letter concluded by noting that IGD reserved the right to commence legal action after 9 December 2020, and asked MOG to nominate solicitors in England and Wales to accept service.

20. This letter was sent by email to Mr Shamaka, Mr Gashout and Mr Aljatlawe, the latter being two other members of the arbitration committee involved in managing the arbitrations. Mr Shamaka has confirmed he received this email and consideration was given to sending a response, but pressure of work in relation to the arbitrations more generally meant that nothing got sent.

21. Having received no response to the letter of claim, IGD issued proceedings on 22 December 2020. Service was effected on MOG at its registered office in the Netherlands on 24 December 2020 by a duly instructed bailiff leaving the necessary documentation at the offices (by pushing them under the front door as the office did not have a letterbox). The Chairman of MOG received a copy of the court documents on 4 January 2021. Mr Shamaka has stated that the Chairman, Mr Shatwan, took office on 19 November 2020, had little or no experience of the disputes relating to the Gaza FSO and relied heavily on the arbitration committee and Mr Shamaka. Mr Shamaka states he did not receive the court documents until 20 January 2021. This was after the date when MOG should have filed and served an acknowledgement of service or defence, which was due by 14 January 2021. On 22 January 2021 IGD applied for default judgment, on a without notice basis, with a witness statement in support from Mr Nicholas Yapp of IGD. The matter came before Master Pester on 25 January 2021, who entered judgment in default, as recited in paragraph 1 of this judgment.

22. Mr Shamaka caused CMS Cameron McKenna Nabarro Olswang LLP ("CMS") to be instructed on 26 January 2021 unaware that default judgment had been entered. CMS wrote to IGD on 27 January 2021 confirming their recent instruction and asking for copies of any applications made to court, no doubt alive to the fact that their client was already in default. The letter acknowledged

service of the claim form and particulars at the offices in Amsterdam and asked whether or not the fact of issue of proceedings was drawn to the attention of MOG by email or otherwise. It suggested a minimum of eight weeks would be required to obtain full instructions, analyse the facts and draft and serve a defence.

23. On 28 January 2021 the order of Master Pester of 25 January 2021 was sealed and under cover of a letter of reply from IGD this was sent to CMS, together with the application for default judgment, and supporting evidence. In IGD's letter the suggestion that the matter was of some complexity was challenged on the basis that the claim was for invoices which had not been challenged under the contract. It also referred to the fact that the letter of claim on 3 December 2020 had been sent by email without any suggestion that this had not been received. By letter of 3 February 2021 CMS complained about the manner in which service had been effected, the impact of a COVID-19 lockdown in the Netherlands, the absence of any accompanying email, though ultimately no allegation has been pursued that service was not regular or valid. This letter also explained that the claim would be defended based on the invoices being disputed and allegations of professional negligence, and that a counterclaim would also be made. The letter suggested a series of directions, including that the default judgment order be set aside. IGD did not respond and a chaser letter was sent on 8 February 2021.

24. IGD responded on 9 February 2021 making it clear that IGD would not agree for the default judgment to be set aside and the proposed directions in the term suggested. It was suggested MOG could pay the judgment debt without waiving its proposed counterclaim, which it could then pursue, if so advised. Alternatively, it was suggested that the application to set aside be prepared and IGD would reconsider the matter again following receipt of the same, and suggested a 10 day period for CMS to do so. On 18 February 2021 CMS responded complaining about IGD's approach and indicating that the application to set aside would be made by 26 February 2021. On 24 February 2021 IGD reiterated the same stance as before.

25. On 25 February 2021 CMS raised the question of the need to maintain confidentiality in relation to documents on the court file in view of the fact that the subject matter of the dispute included work done on two arbitrations which remained ongoing. On 2 March 2021 CMS issued an application seeking to impose confidentiality restrictions on inspection of the court file, pursuant to CPR 5.4C(4)(d) and 5.4D(2). Ultimately, after some negotiation the parties agreed an order, which was made by Master Pester on 11 March 2021 in the following terms at paragraph 1:

"A non-party may not inspect or obtain a copy of statements of case or any other document on the Court file in this action from the Court file without the consent of both parties until both of the following arbitration references have been completed and any appeals have been determined, or further order:
a. ICC arbitration claim no. 23534/AYZ Houlder Limited & Anor. V Mellitah Oil & Gas B.V. (Libyan Branch) (State of Libya) and

b. ICC arbitration claim no. 24065 STX Offshore and Shipbuilding Co. Limited v Mellitah Oil & Gas B.V (Libyan Branch)"

26. This order was made on MOG providing an undertaking as follows:

"AND UPON the Defendant undertaking to notify the Claimant and the Court (1) within 7 days of the fact of an award in the arbitration references referred to in paragraph 1(a) and (b) below and (2) within 7 days after any appeals, if any, against the arbitration awards have been made and (3) within 7 days after any such appeals have been determined"

27. This second order of Master Pester was sealed on 16 March 2021. Shortly after, on 17 March 2021, the present application, to set aside the default judgment under CPR 13.3, was filed and served, on the basis that MOG has a real prospect of successfully defending the claim for the reasons set out in the supporting statement and exhibit of Mr Shamaka of the same date. Included within the exhibits to Mr Shamaka's statement was a draft defence and counterclaim, which summarised the allegations of breach of duty against IGD as then formulated. This does not have counsel's name on it, though Mr Shamaka refers to solicitors and a barrister being retained to advise on the pleadings. Mr Shamaka also refers to complaints about the invoices raised by IGD, stating that MOG were in the process of reviewing the detail and it was necessary for them to have specialist advice to do and the process was likely to take several more weeks for them to be fully scrutinised.

28. Progress on the application thereafter was slow. By May 2021 the parties had provisionally agreed a time estimate of 2 hours, with 30 minutes pre-reading. In the event the hearing time estimate was later enlarged. By 13 May 2021 IGD suggested a listing, and a chaser email was sent on 24 June 2021. On 15 July 2021 CMS replied, apologising for the delay and stating that they were in the process of finalising instructions and instructing counsel and they would revert with dates to avoid for September. Meanwhile IGD had instructed external solicitors, Reynolds Porter Chamberlain LLP ("RPC"), to represent them, and on 16 July 2021 RPC wrote to CMS stating that leading counsel had been instructed and the application would be defended. There was a discussion about the need for a revised time estimate bearing in mind the volume of the evidence and the nature of the allegations made. The letter also noted:

"Under the terms of the order of Master Pester dated 11th March 2021, your client gave undertakings to notify the Court and our client within 7 days of the fact of an award in relation to both of the underlying arbitrations between your client and STX / Houlder and any appeals from such awards. No such notifications have been provided to our client. Please confirm the current status of the underlying arbitrations."

29. It is now known that a final award was made on 5 July 2021 in the STX arbitration ("STX1"). CMS did not respond to the 16 July 2021 letter. On 10 September 2021 RPC chased for a response and requested again that the position in relation to the arbitrations be confirmed. On 14 September 2021

CMS responded that they were in the process of obtaining instructions and hoped to revert to RPC as soon as possible.

30. In the event no listing was organised in September. Instead the parties appear to have had some discussions, involving Curtis (the New York firm) acting on behalf of MOG, who contacted IGD on 16 September 2021, with a view to seeing if they could resolve matters, though those negotiations were unsuccessful.

31. Matters having not progressed, on 14 December 2021 RPC wrote to the court to seek a listing of MOG's application to set aside, as well as coming on to the court record on the same date on behalf of IGD. On 15 December 2021 CMS indicated it was in the process of obtaining instructions but questioned the proposed new time estimate of 2 days. RPC replied shortly after, explaining that detailed evidence was being prepared by IGD in order to respond to the various vague allegations made and therefore they decided to err on the side of caution in relation to the time estimate, and they asked CMS what their instructions were.

32. On 13 January 2022 CMS wrote confirming that MOG had instructed them to update IGD as to the arbitral proceedings. They confirmed that the final STX1 award had been made but stated that MOG understood that it had yet to be served in accordance with French law, so that they considered the time for mounting a possible challenge had not yet begun to run. They confirmed a second reference had been made in relation to STX seeking to advance certain claims not advanced or determined in STX1. RPC responded on 11 February 2022 asking for a copy of the award and asking what the position was in relation to the Houlder arbitration. This letter also noted that MOG was in breach of its undertaking to the court and IGD under the order of 11 March 2021 and reserved their position in that respect, but nevertheless confirmed that they agreed to the continuation of that order. A copy of the STX1 award, dated 5 July 2021, was provided by CMS to RPC under cover of a letter of 18 February 2022. This is some 6 months after the date when it should have been disclosed.

33. On 17 February 2022 a partial award was issued in the second STX reference ("STX2"). Notwithstanding letters from RPC on 23 February 2022 and 11 March 2022 seeking an update as to whether any award had been made in the STX references or Houlder arbitration, it was not until 21 March 2022 that CMS wrote to RPC enclosing STX2. I noted in passing that it is readily apparent that the STX2 partial award required consideration of the STX1 award of 5 July 2021 and so any previous potential argument there might have been about effective service must have fallen away.

34. IGD served its evidence in response to this application on or about 12 April 2022, including a statement from Ms Howell of RPC dated 11 April 2022, setting out some of the procedural history, and a statement of Mr Kidd of IGD which sets out a detailed rebuttal of the evidence of Mr Shamaka and response to the allegations advanced in that evidence.

35. On the first day of the hearing before me MOG sought to adduce further evidence in support of its application, in the shape of a witness statement of Mr Gatanesh, the head of the legal department of the Libyan branch of MOG. The purpose of this statement was to evidence the costs which MOG had incurred to date in the STX2 arbitration, to date, and estimates those in the sum of US$315,000. No objection was taken by IGD to the late production of this statement and I admitted it into evidence.

36. By the time of the hearing it was common ground that MOG had, during 2021, paid sums to two expert firms retained in connection with the Houlder arbitration, and which had previously been included as disbursements which formed part of the invoices raised by IGD and relied on in the claim. Thus MOG had made payments to third parties which formed part of the judgment sum thus relieving IGD of any obligation in that respect. It was agreed before me that this should result in the judgment sum being varied, and reduced to US$1,201,491.91, but IGD otherwise resisted any further variation to the judgment sum, or to it being set aside.

Real prospect of success?

37. Where gateway CPR 13.3(1)(a) is relied on the applicant must show a real prospect of defending the claim. The only difference between this test and that for summary judgment, under CPR 24, is that in applications to set aside the burden is on the applicant to satisfy the court why a regularly obtained judgment should be set aside; see *ED&F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472. Thus the guidance provided in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15] applies, with suitable adjustment to reflect the different burden of proof. I remind myself that the applicant must demonstrate the merits are more than merely arguable, and carry some degree of conviction, but that I should not conduct a mini-trial. That does not mean I am required to take at face value, and without analysis, what it is said in the evidence. In other words I am not required to be gullible (to adopt a phrase used by the late John Weeks QC, when sitting as the Specialist Chancery Circuit Judge in Bristol). But when assessing the evidence I need to have in mind the evidence which can reasonably be expected to be available at trial.

38. In MOG's submissions it was identified that there are two limbs to its case. The first is that the invoiced amounts are disputed, that MOG has a right to assessment, and it wishes to be able to pursue that assessment. The second is that the invoiced amounts are in any event outweighed by the claims MOG has against IGD for breach of duty, pleaded by way of set off and counterclaim. MOG referred me to the evidence of Mr Shamaka and in particular to the articulation of the key points relied on by MOG in the draft defence and counterclaim. IGD contended that neither limb had real prospect of success, and invite me to look beyond the bare assertion of a case to the documents said to support it in order to test whether it carries any real degree of conviction. I shall now consider the two limbs.

Limb 1 - Amounts Invoiced

39. Before considering some of the allegations it is useful to consider, briefly, the relevant provisions of the Solicitors Act 1974 (as amended by the Legal Services Act 2007). It is important to do so because MOG retains no contractual right to challenge the invoices under the LSA and the Terms of Business. Instead it only retains the statutory right under the 1974 Act. Section 70(2) preserves the ability of a client to apply to seek an assessment of their solicitors' invoices, if more than one month has elapsed, and provides that the court may order an assessment and for any action to be stayed until the assessment is completed, subject to subsections (3) and (4). Subsection (3) provides that no such order shall be made after (a) the expiry of 12 months from the delivery of the invoice (or bill), or (b) after a judgment has been obtained on the same, or (c) after the invoice (or bill) has been paid, within 12 months from the date of payment, except in "special circumstances". The combination of subsection (3) and (4) is to provide that no application can be made after 12 months after payment, and in this respect an inherent jurisdiction of the court to be able to order an assessment is curtailed.

40. The significance of these provisions is that the same "special circumstances" test applies here, whether or not the judgment is set aside, because more than 12 months has now expired from the delivery of all the invoices relied on. Discussion of the relevant case law and principles in Vol 2 of The White Book at 7C-118 suggests there is no hard and fast rule as to what are "special circumstances" and each case depends on its own circumstances. "Special circumstances" are not restricted to fraud or misconduct, and cases where it may be said special circumstances arise include where a client is able to point to obvious items of overcharge, charges said to be unreasonably large, or are such as to call for explanation, or where there are appear to be gross blunders. Those examples tend to suggest that the approach does not require the circumstances to be exceptional (as effectively confirmed by Sales LJ when considering the same words used in the context of section 70(10) in *Stone Rowe Brewer LLP v Just Costs Ltd* [2015] EWCA Civ 1168 at [66]-[71]). As noted in the *Stone Rowe Brewer* case, in the context of section 70(3), Lewison J (as he then was) observed in *Falmouth House Freehold Co. Ltd v Morgan Walker LLP* [2010] EWHC 3092 (Ch); [2011] 2 Costs LR 292, at [13]:

"Whether special circumstances exist is essentially a value judgment. It depends on comparing the particular case with the run of the mill case in order to decide whether a detailed assessment in the particular case is justified, despite the restrictions in section 70(3). In Re Cheeseman [1891] 2 Ch 289 the Court of Appeal held that it would not interfere with the decision of the first instance judge on whether special circumstances existed except in a strong case. All the more so, in my judgment, where the value judgment has been made by a specialist costs judge. ..."

41. The most detailed articulation of the case in support of an assessment under the 1974 Act, or the inherent jurisdiction of the court, is set out in the evidence of Mr Shamaka at paragraphs 7.1 to 7.18. These are also set out at a fairly high level in the draft defence and counterclaim at paragraphs 31 to 39.

42. I remind myself that of the, now reduced, sum of US$1,201,491.91, the sum of US$30,682 represents a sum withheld from the 23 April 2020 Houlder arbitration invoice (for work done in March 2020; invoice no 235516). It is clear that this sum of money was withheld by MOG due to their alleged dissatisfaction with the work done by Mr Hems on the witness statements in the Houlder arbitration and the lack of an explanation from Mr Hems at the time. I also note that another sub-category of work relates to the invoices after the termination of the retainer, where there is a dispute as to what terms apply to the same. In this category the sum of US$46,672.36. So far as the nature of the complaints made in relation to the remaining category, which represents the bulk of the sum in issue, my overall impression is that they do raise questions which might be said to be outside the "run of the mill" case, but it is difficult for me to gauge on the basis of Mr Shamaka's evidence, or the pleading, how significant a reduction this might lead to, assuming the court were to accept that some of the complaints raised do properly constitute a "special circumstance". I remind myself that I am not deciding that point myself, but merely assessing whether or not there is a realistic prospect of such an assessment resulting in some or all of the judgment sum being found to be not payable.

43. A major difficulty that MOG now face on this application is that Mr Shamaka referred to the fact, in a witness statement served over a year ago, that his committee was in the process of reviewing the detail of the IGD invoices, that it was necessary to have specialist advice to do so, and the process would take several more weeks. Notwithstanding that statement, and the apparent acceptance that some of the invoices may be payable, no further evidence has been adduced by MOG to develop its case in this respect, over 12 months later. In order to meet this point MOG submits that this application is not an application for a detailed assessment, and it is right and proportionate for a party such as MOG to take matters in stages and not be required to engage in the potentially costly task of such a more detailed review. The problem I have with this submission is that MOG could pursue such an application irrespective of whether or not the judgement is set aside. It hardly serves to instil any confidence or conviction into points which may be arguable to not provide further detail as to the criticism, or the amounts involved. I remind myself that the burden of proof is on the applicant on a summary judgment application to demonstrate to the court that there are real merits in the points raised and this requires, in this context, not simply to be satisfied that there are genuine points which may be raised, but some conviction of what sum or reduction might reasonably be anticipated arising from them. I am left without any great assistance from MOG in this respect.

44. I do not think I can discount the weak possibility, however, that some special circumstances may be established so as to justify an assessment which could lead to some as yet unidentified reduction. Doing the best I can on the limited information I have been provided with by MOG it does not seem to me this would be very substantial.

Limb 2 – the counterclaim (and set off)

45. MOG also invites me to conclude that the draft defence and counterclaim discloses a credible counterclaim which has real prospects. It is noted by MOG that if I were not minded to set aside the default judgment MOG could pursue these points in a fresh claim, but that it would be more efficient for the issues to be dealt with in a single proceeding. In my view this begs the question rather than answering it: if the default judgment is not to be set aside then there will be only the counterclaim proceeding and it does not seem to be that it makes much difference, in terms of efficiency, whether or not that is dealt with in these proceedings or by way of a new claim. As to whether or not MOG could pursue these points in a fresh claim IGD reserved its position as to whether there might be a possible abuse of process argument in this respect.

46. MOG submitted, by way of overview points, that the complaints gave the appearance of being genuine, that the arbitration proceedings involve very substantial sums of money and that it is not fanciful to conceive that any alleged negligence on the part of IGD could result in a substantial counterclaim. The late evidence of Mr Gatanesh was served to make good this point, illustrating that the costs of MOG in the STX2 arbitration, to date, are potentially in the region of US$315,000. MOG recognises that some of the points it has made in the draft defence and counterclaim may appear to have been adversely affected by the STX1 final arbitration award, but submits MOG intends to appeal that award and until such an appeal is known it would be wrong to draw specific conclusions against MOG. I have some difficulty in accepting that submission bearing in mind there is no indication of an appeal to date and also bearing in mind MOG's active participation in STX2 which involves review and consideration of STX1. I am also asked to ignore the suggestion that MOG is a serial offender so far as failure to pay its solicitors, and that I cannot possibly make any findings in relation to other files involving other parties.

47. Two specific examples were given in MOG's submissions to demonstrate that the proposed counterclaim carried real conviction and prospects and involved sums which might over-top the judgment. I shall consider each of those here in further detail.

48. The first relates to the issue of the use by STX of welded T-bars in place of rolled sheets for the hull of the FSO, alleged to be contrary to specifications. MOG's claim is that although the issue of rolled versus welded steel was included as an issue in the STX Terms of Reference, it was omitted from the relevant Defence and Counterclaim by IGD. My attention has been drawn to this claim as set out in the draft defence at counterclaim at paragraphs 10.3 and 11. The suggestion, against IGD, therefore is that this element of the claim is either lost or additional cost has been generated by the need to pursue it in a second arbitral reference.

49. MOG draws my attention to the fact that Mr Kidd seeks to justify the omission of this claim from the Defence and Counterclaim, drafted by or with the assistance of IGD in STX1, by relying on various matters, including a claim that the use of the welded T-bars was approved by MOG's project managers, and a

claim that MOG has admitted that there is as yet a lack of evidence of the long-term harm to which use of T-bars might give rise. I can see the former point may give rise to an issue which is not readily capable of determination summarily, but in my judgment the latter falls into a different category. MOG commenced a second arbitration in order to pursue this claim, and other claims which MOG submit were wrongly omitted from the first arbitration. The partial award in the second STX arbitration (STX2) specifically allows MOG to pursue this claim against STX. Notwithstanding this, MOG submits that, on the face of it, the omission of such a claim from the STX1 pleading appears to be a serious omission. It is recognised by MOG that this is not the same as a finding that the claim against IGD is likely to succeed, and Mr Kidd gives evidence as to various reasons which he claims go to justifying the decision to omit this claim from the pleading. However, MOG submitted there is clearly here a serious issue and that a claim against IGD on that ground is realistic and more than merely arguable.

50. I do not accept those submissions. In the partial award issued on 17 February 2022 it was noted at paragraph 157 of the award that MOG had raised nine additional claims, including "*Claim 2: Damages for, and/or the diminution in value of the FSO, due to STX's use of welded T-bars instead of rolled T-bars*". At paragraph 308 of the award the tribunal noted the submission of MOG that "*it could not have pursued the Claim in Arbitration I since it was incapable of providing adequate evidence with respect to the concerns arising out of the use of the T-bars in Arbitration I as the long-term effects of T-bars were still being investigated."* The tribunal accepted this explanation and noted at paragraph 319 that: "*This conclusion is not arrived at simply on the basis that MOG advances it. The Tribunal takes into account that Claim 2 was explicitly pleaded in Arbitration I. The Tribunal infers that MOG would have proceeded with it if, at the time, the required evidence had been available. The Tribunal does not consider MOG's action in withdrawing it to be unreasonable or merely tactical*." It is not credible for MOG to pursue the point in the STX2 that it could not properly proceed with the point due to lack of evidence and then seek to pursue the polar opposite case in these proceedings. It cannot be credibly submitted that there was any omission in the pleading in STX1 let alone a serious omission. I am not required to be gullible.

51. The second specific example given of a matter which could give rise to a claim for more than the judgment is the contention that there was potential evidence of alleged corrupt payments being made to a Libyan agent by Houlder, which constituted a secret commission. This point is pleaded as an allegation against IGD at paragraphs 26-30 of the draft defence and counterclaim on the basis that a document disclosed in the course of the Houlder arbitration (called Exhibit C-469) disclosed that a payment of a very substantial sum in excess of the judgment sum had been or was to be made to a Libyan agent. It is noted that the contract between Houlder and MOG, governed by Libyan law, provided that payment of any secret commission or bribe was a breach of contract which would justify termination. It is complained that this document should have alerted IGD to the potential claim and they should have carried out a detailed investigation before service of the rejoinder or surrejoinder pleadings and the relevant statements and by failing to do so the opportunity to make this point was lost. In MOG's submissions the point is made that this point presented with

real potential, even if it cannot be shown it would have succeeded. MOG submits that the fact that counsel were also involved and did not spot the point either is nothing to the point and that IGD were under a duty to review the disclosure.

52. I note there is a point at the outset on this issue as to whether or not Libyan law is accurately described in the evidence of Mr Shamaka. Mr Kidd also notes in his evidence that he is not an expert in Libyan law and nor was IGD retained to advice in that capacity. No expert evidence was adduced on this point from an independent lawyer or was any attempt made by MOG to seek to reach some agreement as to a suitable way to deal with this point with IGD. All that said for present purposes I will proceed, in MOG's favour, on the basis that a secret commission or bribe may provide MOG with a basis to pursue a claim against Houlder, as it seems to be a real prospect this could be established. More significantly Mr Kidd also points out that even though another year has elapsed since Mr Shamaka's evidence, and notwithstanding the fact that it is alleged that MOG became alive to this point at about the time of IGD's retainer ceased, there is no evidence showing as to whether an alleged secret commission or illicit payment was made. He also notes that he does not know whether or not the point has been investigated further by IGD and if so to what effect. He also notes that he does not know how the tribunal has dealt with it. Mr Shamaka's witness statement explains (at paragraph 6.39) that after Dentons had been retained MOG applied for further disclosure of relevant material on this point but states the application was refused. He goes on to assert that "*I believe that had the point been raised by Ince when it should have been, this would not have occurred*." He goes on to note that on the basis of a contract price of US$38.7 million a 10% secret commission would be as much as US$3.87 million.

53. Assuming for present purposes that it is arguable that there was a culpable failure on the part of IGD to spot this potential point at the time in issue, and I note that it is not suggested the point was spotted by IGD or leading or junior counsel either, which hardly inspires great confidence in the point, a major problem with this claim is that Mr Shamaka has not put in evidence as to the reason why the tribunal rejected this claim. All I have is the bare assertion of a belief from Mr Shamaka that the tribunal would not have rejected the disclosure application if the point had been raised by IGD at some unspecified earlier point in time. This is a document which MOG has in its possession and control, and I would have expected this document to have been produced, even if only in evidence in reply, if it supported the proposed claim, in order to show that any alleged breach was causative of the alleged loss suffered. Otherwise the claim has no teeth as a counterclaim or set off.

54. It can be seen from the above that investigation of the two examples given does not give me any great conviction as to the merits of the proposed claims.

55. In order to make good the submission that the counterclaim has no real prospect of success Mr Lawrence QC picked out a further item from the counterclaim for deconstruction and, as he would have it, destruction. The draft defence and counterclaim contains an allegation that a number of matters were not pleaded when they should have been, in the Houlder arbitration, and this included, at

paragraph 17.5 that "Houlder was guilty of over-charging". He points out however that, as explained by Mr Kidd at paragraph 57 in his evidence in reply, this is obviously not correct and that the allegation was pleaded in various places, as well as featuring in the evidence adduced. In particular my attention was drawn to a heading in one of the pleadings of MOG which is headed "Houlder Overcharged MOG" and which complains about overcharging from paragraphs 81 to 90.

56. Moreover, he invites me to stand back and look at the matter overall. He invites me to compare the detailed rebuttal of each of the points raised in the draft defence and counterclaim, by Mr Kidd, including by reference to the underlying documents, and draws my attention to paragraphs 30 and following of Mr Kidd's statement where he points out either where the matter was identified, and pleaded, or why the point can still be pursued or why the point is obviously a bad one by reference to findings made in the STX1 and STX2, or why it is clear that any alleged deficiencies were due to a lack of instruction. There has been no attempt by MOG to engage with any of this detail in order to show that it is wrong let alone obviously wrong. He also drew my attention to the failure by MOG to prove its case on causation even if, which was denied, there was anything in the allegations of breach – this required an analysis and proof that the allegedly overlooked or abandoned points, or alleged wrong turns (such as in relation to witness sequestration, for example) would have made any significant difference to the outcome. He invites me to conclude that the evidence of Mr Shamaka is mainly bare assertion and unsupported by the documents exhibited. He also notes that it was not IGD who was acting alone: counsel were also instructed and involved and my attention has been drawn to the defence that is commonly employed in the context of pleadings allegations – which the claim heavily concentrates on – that of reasonable reliance on counsel.

57. Finally, Mr Lawrence invited me to note the apparent pattern of behaviour with MOG of seeking to raise points of complaint against each of its solicitors in order to justify non-payment of invoices. He also refers to the fact that MOG did not put CMS in sufficient funds to instruct counsel to appear to make oral submissions, and Mr O'Shea of CMS was left to do his best with written submissions in circumstances where it was apparent that CMS was acting under a limited retainer which would not pay it for all the work it did. Mr O'Shea did also emphasise to me the limited nature of his retainer, which was not intended to cover oral advocacy before me, though he did seek to assist the court on any points raised by the court and also provided helpful brief oral submissions on certain points. He also sought to emphasise in both his oral and written submissions that I should be cautious about drawing too much from other cases involving other solicitors. I accept those latter submissions, and I think it would be unsafe for me to draw sweeping conclusions from the fact that MOG has complained about its other solicitors or counsel in the past.

58. In broad terms, however, I am sympathetic to the submissions of IGD on the lack of any cogency of the proposed counterclaims, both as to allegations of breach and also as to causative relevance, at least on the evidence currently before me. It is important to understand in this context that whilst a judge

hearing a summary judgment application, or the equivalent argument in the context of an application to set aside, must be wary of not conducting a mini-trial, and must have in mind the evidence which may be available at trial, the assessment is to be conducted at the time of the hearing having regard to evidence reasonably available to the party seeking to discharge the burden. If evidence which could support a claim is reasonably available to that party and is not adduced then an inference can be drawn adverse to that party that it is not likely to assist that party at trial.

59. So, on all the points which have been considered in detail in submissions on the counterclaim, I conclude there is no real prospect of them succeeding on the evidence before me. The more difficult question is whether I can safely conclude that this should apply to all of the proposed counterclaims, as referred to in the draft defence and counterclaim and the evidence of Mr Shamaka. On these points I note that the burden lies on MOG, as the party which wishes me to set aside a regular judgment, and MOG has not done much to discharge that burden. Equally, however, my concern is that I would, at least arguably, effectively have to embark on a mini-trial to conclude they are all wholly without merit. Mr Kidd's evidence shows me some of them, probably most, if not all of them, are doomed to fail, but I cannot safely conclude that this necessarily applies to all of them, albeit all of them appear to me to be at best shadowy, even making due allowances for difficulties caused by the complaints relating to ongoing arbitrations, which means that the case might be more difficult to develop. In my judgment, I conclude the counterclaims are either shadowy/flimsy, or have no real prospect of success.

Overall

60. Overall therefore, that means MOG's application just, but only just, passes the jurisdictional gateway test under CPR 13.3(1)(a), because there is a very thin basis on which it might succeed in some limited respects, in some as yet unquantified way. That is very much a "limp over the line" in circumstances where the disclosure of the awards, very late, and in breach of undertakings to the court and to IGD, have shown some of the claims to be wholly lacking in merit. This has some significance when I come to consider the exercise of my discretion.

Some other good reason?

61. The second jurisdictional gateway relied on by MOG, at least in submissions, is the "some other good reason" gateway under CPR 13.3(1)(b). MOG submitted that unnecessarily aggressive conduct on the part of a person who obtained a default judgment was relevant not only to the exercise of discretion but also could constitute "some other good reason". In this context MOG relies on the decision in *Hart Investments Ltd v Fidler* [2006] EWHC 2857 (TCC) at [22(c)]. In that case it was noted that there was clear confusion over whether or not service had been or could be validly accepted by fax and the recipient was a liquidator who was acting without legal representation. The unreasonable conduct identified was in filing an incorrect certificate of service and a request

for default judgment which was on any view premature. This unnecessarily aggressive conduct was made worse, in the judge's view, by the fact that it was directed at a liquidator acting in person, not another firm of solicitors. Given that I have already concluded that the jurisdictional gateway has been crossed, albeit only just, under CPR 13.3(1)(a), I will deal with this point quite briefly.

62. The two particular factors relied on by MOG in this context are the conduct of IGD in the service of a letter of claim, or letter before action, which provided for an inadequately short period for a response of only 7 days, and, secondly, the failure to provide notice of the issue of the claim by email in circumstances where this was a reasonable expectation of MOG.

63. There is little in the first point; it does not carry MOG very far. I recognise that in the Practice Direction on Pre-Action Conduct and Protocols at paragraph 6(b) it is stated the letter of claim should provide a defendant with a reasonable period of time to respond and it goes on to suggest that this might be 14 days in a straight-forward case and no more than 3 months in a very complex one. IGD contended that this was a very straight-forward debt claim based on invoices which had not been challenged under a contra actually agreed proceed and therefore sought to justify the 7 day period. I accept this may be said to have been aggressive on the part of IGD. However, as it happens IGD did not issue proceedings until 22 December 2021, over 2 weeks later, having heard nothing back from MOG. MOG and Mr Shamaka accept they received the email, but state other pressures meant they did not get a response out. It would not have been difficult for Mr Shamaka or another officer or agent of MOG to have replied to IGD suggesting that they considered 7 days was too short to respond, that they wished to mount the two challenges which have since been articulated but needed more time to prepare those. If they had and IGD had charged on regardless I consider this point would have carried some weight but in the event in my judgment it does not provide some other good reason to set aside the default judgment.

64. I also consider there is little in the second point, and it also does not assist MOG in the events which turned out. Again for present purposes I would accept the point that it might have been wise for IGD to have communicated by email, again, at the same time as proceeding with formal service, as required, on the registered office in the Netherlands, especially given the difficulties posed by COVID-19 at the time (albeit no specific evidence was adduced to show that this was a factor). Two points may be said to mitigate and ultimately eliminate it of any lasting relevance however: The first is that the email sending the letter of claim on 3 December 2020 was not responded to by MOG, at all. The second is that IGD had requested in the letter of claim for MOG to nominate solicitors to accept service. If MOG had responded constructively to that point then any alleged difficulties in processing the documents internally within MOG would have been avoided. But even more significantly however for present purposes is the fact that the evidence of MOG was that its Chairman had received a copy of the court documents by 4 January 2021 and there was still time then to ensure an acknowledgment of service was filed and/or a defence entered. MOG did not do so in the remaining 10 days available to it. Mr Shamaka suggests this may have been down to the inexperience or lack of knowledge on the part of the

Chairman, and I am willing to accept that may be so, but it does not provide for an auspicious start to a submission that the unreasonable conduct of IGD is in some way responsible in any relevant sense to default judgment being entered against MOG.

65. I do not consider therefore that either of these factors on their own or taken together provide MOG with "some other good reason" for the default judgment to be set aside.

Discretion

Promptness

66. The first matter I must consider is whether or not MOG has made the application promptly, as required to be considered under CPR 13.3(2). In *Gentry v Miller* above it was confirmed at [19] that this question is to be assessed from the date the person applying to set aside first had knowledge of it. In this case that was on 28 January 2021 when IGD served CMS with a copy of the sealed order, and the application was not made until 17 March 2021, over 6 weeks later. In *Regency Rolls Ltd v Carnall (Security for Costs)* [2000] 6 WLUK 576 it was held by Simon Brown LJ that 30 days was too long a delay before making an application. However, it must be noted that what "promptly means" cannot simply measured by reference to comparing the time length in one case with another but requires an analysis of whether or not there was "reasonable celerity in the circumstances" (*Khan v Edgbaston Holdings* [2007] EWHC 2444 (QB)).

67. There are two factors to be born in mind when assessing promptness in this case. The first is that there was the complication of needing to secure the confidentiality in documents filed and which might become available for inspection by third parties without some protection being obtained in that respect. This point was raised by CMS on 25 February 2021 and the subsequent delay in making the application can largely be said to be down to the reasonable need to seek some protection on this point. The second factor worth noting is that IGD itself appears to have contemplated that it was willing to consider any application to set aside and suggested itself a timetable which required it to be served by 26 February 2021. Whilst I do not consider the parties can be the final arbiter of what is prompt it does inform me when assessing what objectively might be said to constitute reasonable celerity in this case.

68. Accordingly I conclude that the application in this case has been made promptly, or in any event not involving any significant periods where MOG did not act with reasonable celerity such as to cause this point to be of any significant weight when assessing my discretion. There are however, in this case some more significant discretionary factors which tell against MOG's application. In my judgment these would apply whether I was considering an unfettered discretion under CPR 13.3 or a discretion which includes consideration of the *Denton* three stage test. I intend to adopt the latter approach given the reasons I have already set out in the introduction to this judgment, but I note that stage 3 of the *Denton* test, at least in cases which get to stage 3, require the court to take

into account all the circumstances of the case so as to deal with the case justly. On an application to set aside a default judgment the merits, or otherwise, of the case will always be a very important factor, if not it may not in all cases be the most important factor.

Stage 1 – serious and significant?

69. This is focussed on the original default in failing to enter the defence by the deadline required and which resulted in default judgment being entered. I remind myself that it is the right of a foreign defendant to decline to accept jurisdiction and chose not acknowledge service or submit a defence. However if the defendant does not do so then it must accept the consequences of a failure to comply if it later wishes to contest the case. It will normally be expected that a failure to submit a defence in time will be considered to be serious and significant, at least where the party was properly served in time and had sufficient time to acknowledge service or enter a defence (cf. *Gentry v Miller* above at [36]). In this instance the Chairman of MOG had received the relevant court documentation by 4 January 2021, some 10 days before the relevant deadline. See paragraph 64 above.

70. In my judgment the failings on the part of MOG were also serious and significant given that they failed to respond, at all, to the 3 December 2020 email, enclosing the letter of claim, which invited them to accept service via a firm of solicitors. See paragraph 63 above. If they had responded or nominated a solicitor then any difficulty involving the Chairman not recognising the urgency of the matter, from 4 January 2021, would have been avoided. That said I do not view the failing in this case as the most serious: the delay is relatively short and no significant adverse impact on the proceedings was caused by the original default. Different considerations apply, in my judgment, when assessing the later conduct of the application, but that is not the focus of the enquiry here.

Stage 2 – why the default occurred

71. The fault occurred in this case, on the basis of MOG's own evidence, based on its officer's own incompetence. I refer to paragraphs 21, 64, 70 and 71 above. It is submitted however, relying on the decision of Stuart-Smith J in *Tideland Ltd v Westminster City Council* [2015] EWHC 2710 (TCC) that internal disorganisation which led to the original default should not be visited again against the defendant in default when considering promptness. It seems to me however that the reasoning adopted in that case (see at [33]) was before the receipt of the guidance of the Court of Appeal in *Gentry v Miller* which makes clear that in considering whether or not there was a good reason for the default it is the default in filing a defence which is the subject of examination (see, in applying the principles, at [36] in *Gentry v Miller*). I decline to accept, therefore, that internal disorganisation is a good reason, or, to put it another way, is not a factor against MOG in this instance. However it is not a deciding factor, as all the circumstances of the case must be considered.

Stage 3 – all the circumstances of the case

72. I start by noting that all the circumstances of the case require me to consider the need for litigation to be conducted efficiently and at proportionate cost (see CPR 3.9(1)(a)) and the need to enforce compliance with rules, practice directions and orders (see CPR 3.9(1)(b)).

73. So far as the need to conduct litigation efficiently a significant factor against MOG is their failure to prosecute this application after it was issued. I refer to the matters set out in the background section of this judgment and in particular to paragraphs 28 to 35. Even making some due allowance for a period when the parties were in negotiations it is apparent that many months went by when CMS were failing to obtain instructions to enable the application to be proceeded with. This is interlinked to some degree with the second factor, concerned with compliance with rules, compliance and orders. MOG served, very late, evidence during the course of the hearing. I do not criticise CMS for this lateness and I note that it was relatively modest in its significance and scope. Perhaps of greater significance for present purposes is the lack of any responsive evidence to assist the court in understanding how the original draft defence and counterclaim could be sustained, or provide the court with an update of how and by how much a challenge to an assessment would impact on the judgment sum based on the invoices or bills already raised by IGD and which form part of the judgment sum.

74. As regards the need for compliance with court orders of particular concern in this case is that the delay which I have described above was coupled with the failure, in breach of the undertaking given to the court and to IGD, in the recitals to the second order of Master Pester, made on 11 March 2021. MOG undertook "*to notify the Claimant and the Court (1) within 7 days of the fact of an award in the arbitration references"* but it singularly failed to do this over many months. No explanation was provided by MOG in its evidence as to why this default occurred or to apologise for it. Mr O'Shea did, on enquiry from me during the course of the hearing, tender an oral apology on behalf of MOG. However in my judgment if such a serious and persistent breach of an undertaking occurs it is incumbent on the party who gave that undertaking to provide the court with a full and frank explanation in evidence. This is all the more important where the delay overlaps with a period of withholding material information for a 6 month period (see paragraph 32 above) and when that material is then scrutinised it is apparent that the content of the awards are harmful to MOG's case (see the analysis of limb 2 of the submissions on real prospects, considering the counterclaim points, at paragraphs 46 and following above).

75. I also remind myself of the submissions of MOG in this context who emphasise that the default arose after the termination of a professional relationship, involves an overseas defendant and occurred at a time when COVID-19 was causing difficulties around the world. I bear all those points in mind but I note that MOG has its own legal department (according to the evidence it served during the hearing) and it has not been shy in accessing external legal resources when required. Nor has it been suggested there has been any resource

difficulties in it doing so at the time, or any illness due to COVID-19 which was material to the above events. For reasons which are apparent from what I have already said I reject the submission that this is an instance of lawyers stealing a procedural march over the non-lawyer.

76. I remind myself that I have found that MOG does have real prospects of making some potential in-roads into the judgment sum and this is an important factor to bear in mind. But weighed against that are that the merits of those points are flimsy or shadowy on the material MOG provided to me and it lay in MOG's hands to provide a more convincing case and evidence, particularly bearing in mind more than a year has now elapsed since the original application was made.

77. There is also the unusual factor in this case that in relation to the two limbs forming the defence and counterclaim which MOG wish to have the opportunity to pursue, subject to one point, they can pursue them whether or not I set aside this regular judgment. The one point is whether or not it might amount to an abuse of process for it do so in later proceedings. IGD suggested in oral submissions that they seek to reserve their right to argue that point in the future. I was somewhat troubled by that last suggestion as it seemed to me to be storing up further argument and unnecessary expense for the future, and I bear in mind the proportionality and impact of any order I might make when assessing what is the appropriate order to make. Preventing a party from being able to pursue a case on its merits in the future must always be considered very carefully unless the court is satisfied there is no real merit in any of it.

Conclusion on discretion

78. Bearing in mind all the factors and circumstances of this case, including the matters I have expressly mentioned above, I conclude it would not be just to leave MOG in the position where it cannot pursue a claim or application for an assessment, under the 1974 Act, if on further scrutiny it can be shown that the "special circumstances" test is satisfied. Equally if MOG considers, after further investigation, it can mount a fresh claim against IGD it should be permitted to do so, if so advised. In the circumstances I indicated to the parties in advance of handing down this judgment, when circulating the draft, that I proposed to order that if IGD was willing to abandon any reservation of its position in relation to mounting an abuse of process argument based on what has happened to date in these proceedings, then I would decline to set aside the default judgment and MOG would be left to pursue the above steps, if so advised, in separate proceedings. I also confirmed that if IGD was not willing to provide the necessary confirmation I would be inclined to make some form of other conditional order, reminding myself of the ability to do so by reference to the words in brackets at the end of CPR 13.3 and the decision of Males J (as he then was) in *Newland Shipping and Forwarding Ltd v Toba Trading FZC* [2014] EWHC 1986. In the event, when I heard the parties following the circulation of this draft judgment IGD provided the confirmation required by me.

79. In the circumstances, subject to the variation I have referred to in paragraph 36 above, I dismiss the application to set aside the default judgment.

Recusal

80. After reading into the papers in this case the day before the hearing I identified a previous professional engagement I had with the predecessor firm of IGD. After considering the circumstances of that previous engagement, and investigating the position with my clerks, I considered that I should make a disclosure to the parties in advance of the hearing as I considered that it was potentially arguable it might lead a fair-minded and informed observer, having considered the facts, to conclude that there was a real possibility of bias, particularly if I did not make the disclosure. Accordingly I caused an email to be sent to the parties, which was circulated to the parties before the hearing started, in the following terms:

"The Deputy has started to look at the papers in this matter. He has noticed that the solicitor who was originally handling this matter for the claimant, before they instructed RPC, was Mr Nicholas Yapp. Mr Yapp, then of Gordon Dadds LLP, instructed the Deputy in a number of connected matters which ran between c. 2014 and 2018 on behalf of two clients called Rollerteam Limited and Mr Aidiniantz. That is a matter of public record, though it may not be immediately obvious to the defendant (see various judgments reported under neutral citations as follows: [2015] EWHC 1545(Ch), [2016] EWHC 1392 (Ch), [2016] EWHC 1076 (Ch) and [2016] EWCA Civ 1291). There is no ongoing instruction in those cases involving the Deputy and instructions ceased in 2018. The Deputy has asked his clerks to check and on one of the files the case record is indicating that fees of £7,700 plus VAT are outstanding. There are no other ongoing instructions or cases between the Deputy and Mr Yapp or the claimant.

The Deputy is satisfied there is no actual bias arising from the above, but has considered the question of apparent bias, and asked himself whether or not a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased, and has considered what information he should disclose to the parties having regard to the guidance given by the Supreme Court in Halliburton Co v Chubb Bermuda Insurance Ltd [2020] 3 WLR 1474. The Deputy has concluded he should disclose the information as set out in this email as, at least without disclosure in advance of the hearing, it is potentially arguable it might lead a fair-minded and informed observer, having considered the facts, to conclude that there was a real possibility of bias. The Deputy wishes to draw these matters to the attention of the parties so that they can consider the matter in advance of the start of the hearing and make such representations or observations as they may wish to make before, or at the start, of the hearing."

81. At the start of the hearing before me Mr O'Shea asked me to recuse myself having regard to this disclosure. Having heard his submissions, and those of Mr Lawrence, I declined to recuse myself and indicated I would give my reasons when giving my judgment on the application overall. I shall now briefly summarise the submissions and my reasons for declining to recuse myself.

82. Mr O'Shea helpfully drew my attention to the authorities on the question of judicial bias which are conveniently collected together in Vol 1 of The White Book at 1.1.3. Mr O'Shea made it clear he was not suggesting that any actual bias arose from the matters disclosed but submitted that the combination of the unpaid fee and the fact that MOG's arguments on the application involved criticism of the conduct of IGD, and that included direct or indirect criticism of Mr Yapp who had conduct of the pre-action and post-action conduct in December 2020 to May 2021, were such that a fair-minded and informed observer would conclude there was a real possibility or a real danger that the tribunal was biased (see *Porter v McGill* [2001] UKHL 67, as affirmed more recently in the *Halliburton* decision, cited in my email in paragraph 80 above). He emphasised that this test was not to be assessed by what is known by members of the legal community. He emphasised that the unpaid fee was not de minimis. When it became apparent that it was the combination of the fee and the potential this might influence me in some unspecified way in favour of Mr Yapp I thought it appropriate to disclose to the parties during the course of oral submissions that the fee represented c. 1% of my outstanding debt/work in progress, in order to assist Mr O'Shea understand the context better, and why I had to make enquiries of my clerks to be reminded of what the position was so far as any outstanding fees were concerned.

83. Mr O'Shea also submitted that the question of any inconvenience caused to other court users or the parties should not be taken into consideration and I confirmed with him at the hearing that I did not and would not take that factor into account. I reminded myself that efficiency and convenience are not the determinative values in this context (see *AWG Group Ltd v Morrison* [2006] EWCA Civ 6).

84. Mr Lawrence submitted, in response, that the matters which I had disclosed were borderline for disclosure but certainly did not mean that a fair-minded and informed observer would conclude that there was a real possibility or a real danger of bias. I explained to him at this juncture that the purpose of the disclosure was because it was quite possible that I might be faced with an application by IGD for me to recuse myself. I note that a potential animus towards a party or their legal representatives is a potential basis for recusal (see *Howell v Lees Millais* [2007] EWCA Civ 720 and see also more recently in *Re C (a child)* [2020] EWCA Civ 987). When considering the matter before the hearing it seemed possible that IGD might arguably be concerned I would have a potential animus towards IGD by reason of the unpaid fee, whereas I could not possibly be said to have that animus towards MOG. Disclosure was intended for the benefit of all and both parties.

85. The earlier decision of *Locabail (UK) Limited v Bayfield Properties Ltd* [2000] 1 QB 480 provides helpful guidance on matters which might or might not give rise to a real risk or danger of bias, albeit it needs to be borne in mind in all cases that every recusal application is fact sensitive. At [25] of *Locabail* it is made clear that ordinarily an objection cannot be based on previous receipt of instructions to act for or against a party, solicitor or advocate.

86. When assessing the reasonable or fair-minded observer they are not unduly sensitive or suspicious: *Helow v Secretary of State for the Home Department* [2008] UKHL 62. In addition the reasonableness of the apprehension must be assessed in the light of the oath of office taken by judges to administer justice without fear or favour, and the ability to carry that out by reason of their training or experience. So whilst I accept that the reasonable or fair-minded observer is not taken to be a lawyer, as Mr O'Shea submitted, who it was implicitly accepted would not consider there was a real possibility or a real danger of bias, the reasonable and fair-minded observer is taken to know about the judicial oath and the training and experience of a judge. I do not think Mr O'Shea felt able to express this point expressly but the implicit thrust of what was being submitted was that in some way because there was an outstanding debt in the sum disclosed a reasonable and fair-minded observer would conclude that this would in some way induce a judge to act in favour of the person owing the debt, presumably on the basis it might in some way curry favour. Put in that way it seems to me a reasonable and fair-minded observer would discount that being a real danger, knowing about the judicial oath and the training and experience of a judge, and I also reject it. I am not persuaded that it would justify my recusal.

87. I add to this that I have also given consideration to the factor that the application involved some criticism of the conduct of IGD/Mr Yapp. The fact sensitive nature of the apparent bias test does require the tribunal to consider the nature of the application before it and what type of allegations it involves, and against who. However the nature of the criticism was relatively insubstantial and it can readily be seen from the above judgment had no relevant or significant causative impact on the events which led to the default judgment, even if one assumes the worst against IGD and Mr Yapp in relation to that conduct. So this additional factor did not ultimately add much, if anything, to the submissions on recusal.

88. It seemed to me the greater risk might be if there was a risk of inadvertent communication between my clerks and IGD in relation to the debt which could result in a communication which resulted in a real danger of bias. I instructed my clerks to ensure there was no communication and I have ensured this judgment was circulated in draft, and handed down, in short order to remove any potential outside risk there might be of such communication whilst the matter remained before me. It should go without saying, but I say it, that I have not had any recent contact with IGD or Mr Yapp and nor have I had any contact with them outside the court room whilst this application was being heard or pending handing down of judgment. I stress these points mainly having regard to the fact that MOG is a foreign defendant.