



Neutral Citation Number: [2019] EWHC 2713 (QB)

Case No: HQ17M01082

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/10/2019

Before :

MR JUSTICE JULIAN KNOWLES

Between :

JONATHAN FOX

Respondent/
Claimant

- and -

(1) HANNAH WIGGINS

(2) REN ALDRIDGE

(3) NADIA JAVED

(4) BRITTANY MCINERNY

(5) CNF

(6) KATHERINE LAWRENCE

**(by her mother and litigation friend, Jill
Lawrence**

Applicant/
Defendant

Zoë McCallum (instructed by **Advocate**) for the **Applicant/Defendant**
Julian Santos (instructed by **Clintons LLP**) for the **Respondent/Claimant**

Hearing dates: 21 May 2019

Approved Judgment

The Honourable Mr Justice Julian Knowles

Introduction

1. In this case the Claimant sues the Defendants for defamation and harassment. He obtained judgment in default against the Sixth Defendant, Katherine Lawrence, when she did not file a Defence within the time permitted under CPR r 15.4 and did not comply with the order of Master Thornett of 4 May 2018. He has settled the case against the Fourth Defendant. The case is proceeding against the other Defendants.
2. There is before me an application dated 31 January 2019 by the Sixth Defendant (by her mother and litigation friend, Jill Lawrence) for:
 - a. a declaration that she lacks capacity within the meaning of CPR r 21.2(2)(c) ('the Capacity Application');
 - b. an order pursuant to CPR r 3.9 and 13.3 setting aside the default judgment and relief from sanctions ('the Set Aside Application').
3. The Claimant also raises outstanding costs matters relating to the Sixth Defendant's default in relation to the order of Master Thornett dated 4 May 2018 and the adjournment of the hearing that was originally listed for 17 December 2018 ('the Reserved Costs Matters').
4. Jill Lawrence became her daughter's litigation friend on 5 December 2018 when she filed a certificate of suitability indicating that she believed her daughter was a protected party (CPR r 21.5). A protected party means a party who lacks capacity to conduct proceedings (CPR r 21.1(2)(d)). If the Sixth Defendant is successful in obtaining a declaration that she lacks capacity, the effect under CPR r 21.3(4) will be that every step taken against her in the proceedings prior to the appointment of her litigation friend (other than service of the claim form) will have no effect unless I order otherwise. This includes the default judgment. Accordingly, she says that depending on the outcome of the capacity application, there may be no need for me to decide upon the Set Aside Application. Whilst the Sixth Defendant concedes that it would be appropriate for me to regularise the position in respect of the filing of the Particulars of Claim, she says that no other step in proceedings should be retrospectively validated. If the Capacity Application is unsuccessful then Jill Lawrence's appointment as litigation friend continues pursuant to CPR r 21.9(2) until it is ended by a court order.
5. The hearing was originally due to be a trial on the issue of damages and other remedies, following the order for default judgment. However, on 13 May 2019 the parties agreed to adjourn the issue of remedies pending determination of the Set Aside Application.
6. The Claimant (who is the Respondent to the application) is represented by Mr Santos. The Sixth Defendant is represented by Ms McCallum, who acts *pro bono* instructed by Advocate (formerly the Bar Pro Bono Unit). I am extremely grateful to her and to them for doing so.
7. There is a Confidential Annex to this judgment which the parties have that contains some redacted sensitive material about the Sixth Defendant's health. In my judgment it is not

necessary for the understanding of this judgment for these short passages to be published. The Claimant did not object to their removal.

The factual background

8. Jonathan Fox, the Claimant, is a well-known musician, singer and songwriter. He is both a solo artist and a band member of 'The King Blues'. He is commonly referred to by his stage name 'Itch'. He has brought proceedings in harassment and defamation against the Defendants. They have accused him online – and therefore publicly - of sexual, physical and emotional abuse. Three of those women, including the Sixth Defendant, are his ex-partners.
9. The Claimant's case is that from late March 2016 onwards the Defendants, both individually and as a group, have engaged in a deliberate and coordinated course of conduct targeting him and so have perpetrated a persistent campaign of harassment, consisting of:
 - a. publishing a series of six false and defamatory publications containing intimate relationship details;
 - b. a prolonged and concerted campaign, mainly using Twitter (an online microblogging and messaging service), in which they have shared the Online Publications and made further statements about the Claimant; and
 - c. further acts by the Defendants against the Claimant, including (i) sending a menacing photograph (which included the Sixth Defendant) and a message to him saying, 'we're gonna take you down'; (ii) messaging the Claimant's current partner about the allegations; (iii) approaching promoters and event organisers to dissuade them from booking the Claimant; (iv) disrupting the Claimant's band's show with a protest against the Claimant, and (v) encouraging direct 'militant' action against him.
10. The Sixth Defendant was 22 when she met the Claimant, and he was 32 or 33. The relationship ended in 2015. The Claimant says that the Sixth Defendant commenced her participation in this campaign by her involvement in the photograph I referred to earlier, which came shortly after the online publication by two of the other Defendants of defamatory material about him.
11. Shortly after these events, on 4 April 2016 the Sixth Defendant published a blog about the Claimant entitled 'Jonny itch Fox/A collection of facts about Itch from the King Blues/Itch the Monster: a warning to the vulnerable' ('the Blog').
12. The wording of the Blog is set out in [4.3] of the Particulars of Claim ('PoC'). The Claimant says the Blog is plainly defamatory of him, accusing him, *inter alia*, of:
 - a. attacking the Sixth Defendant while she was pregnant by kicking her in the abdomen several times in an act of domestic violence aimed at killing her unborn child;
 - b. killing her unborn child by kicking her in the abdomen; and

- c. being a manipulative domestic abuser and sexual predator and monster who preys on vulnerable and weak people.
13. The Second, Third and Fifth Defendants are jointly represented and contend through their pleadings that the allegations are true and were published in the public interest. The Sixth Defendant has yet to file a defence, but it appears from the evidence that her case – should I permit it to proceed on the merits – would be similar.
14. The Claimant seeks damages (including aggravated damages) for libel and harassment, an injunction to restrain the Defendants from further defamatory publications or harassment, and other relief, as well as orders under ss 12 and 13 of the Defamation Act 2013 (DA 2013). The Claimant has filed a witness statement in support, in which he explains that the allegations against him are completely untrue and have had severe consequences for him personally and professionally. He says that the Defendants’ campaign has received attention in a large number of influential music blogs; that it has led to other artists denouncing him and refusing to work with him; that music magazines have refused to publicise his band or review their work; and that his record label has refused to spend further money on his band; and that petitions have been signed and sent to festivals and venues pressuring them to drop the Claimant and his band from their line-ups. He says it has led to him feeling suicidal, and that it has significantly impacted on his relationships with his son and his current partner.
15. The PoC were filed in August 2017, but proceedings were stayed whilst the Fifth Defendant’s allegation of rape and sexual assault against the Claimant were investigated by the police. Accordingly, there has not yet been a substantive trial against any of the Defendants.

The procedural history

16. In summary, judgment in default has been entered against the Sixth Defendant. However, she says that this was at a time when she lacked capacity (and so was a protected person for the purposes of CPR Part 21) and did not have a litigation friend. She therefore seeks a declaration as to her lack of capacity; seeks to have the judgment in default set aside and relief from sanctions; and argues that I ought not to retrospectively regularise any steps in the proceedings pursuant to CPR r 21.3(4), save for the service of the Particulars of Claim.
17. The history is as follows.
18. On 14 December 2016, the Claimant sent a Pre-Action Protocol letter to the Sixth Defendant. This set out the claim in detail and advised her to obtain independent legal advice. The Claimant says that in contrast with the five other defendants, the Sixth Defendant did not reply to this letter.
19. The Claim Form was issued on 28 March 2017. Following issue of the claim, the Claimant’s solicitors say they sought to engage with the Sixth Defendant but without success. Eventually, they obtained an order (a) extending the time for service of the Claim Form and (b) permitting service using the Sixth Defendant’s email address.

20. The Claimant served the Claim Form and PoC on the Sixth Defendant on 2 August 2017. She acknowledged service on 15 August 2017, meaning that her Defence was due to be served by 1 September 2017.
21. On 29 August 2017, the Sixth Defendant confirmed to the Claimant that she believed her Defence was due on 4 September 2017. On the following day, the Claimant proposed an extension of time for service until 29 September 2017, to allow for settlement discussions. On 4 September 2017 the Sixth Defendant's mother (and now litigation friend), Jill Lawrence, contacted the Claimant's solicitors by telephone, and the Claimant's solicitors forwarded a copy of the email proposing an extension of time for service to her. On 7 September 2017, Ms Lawrence emailed the Claimant's solicitors to confirm her daughter's agreement to the extension of time and to confirm that she had notified the Court of the extension.
22. On 29 September 2017 the Sixth Defendant sought a further extension to serve the Defence. The Claimant responded on the same day, explaining the process that she would have to follow in order to apply for an extension (as required by the CPR for any extension beyond 28 days). The Claimant's solicitors provided a copy of a draft consent order providing for a further month for service of the Defence, until 27 October 2017. No sealed copy of that Order was ever received by the Claimant from the Sixth Defendant.
23. In any event, no Defence was forthcoming. It appears that a number of chasing letters were sent by the Claimant's solicitors.
24. The Claimant applied for default judgment on 14 March 2018, just under a year after service of the PoC and some four-and-a-half months after the last date for service of the Defence. It was necessary for the application to be brought under CPR Part 23, given that the default judgment sought included a permanent injunction as one of the remedies (pursuant to CPR r 12.4(2)(a)). The Claimant served the application on both the Sixth Defendant and Ms Lawrence on the same day. On 5 April 2018, the Claimant's solicitors again wrote to the Sixth Defendant and Ms Lawrence, enclosing a further copy of the application and confirming that a hearing had been listed for 4 May 2018.
25. At the hearing before Master Thornett on 4 May 2018, Ms Lawrence attended on her daughter's behalf and opposed default judgment, raising what she said was her daughter's lack of capacity. She relied on a letter dated 3 May 2018 from Dr Yoram Inspector, the Sixth Defendant's treating psychiatrist (the First Letter). I will return to this later. Master Thornett was not persuaded the Defendant lacked capacity. His order of that date contained the following recitals:

“UPON the Claimant's Application for Default Judgment against the Sixth Defendant by Application Notice dated 14 March 2018

AND UPON the Court not being satisfied that there is any viable explanation for the failure by the Sixth Defendant to file a Defence

AND UPON it being appropriate to enter judgment subject to the question of the Sixth Defendant's capacity

AND UPON considering the evidence submitted, the Court not presently being satisfied that the Sixth Defendant lacks capacity”

26. The Master went on to grant judgment in default for the Claimant’s claim against the Sixth Defendant unless, by Tuesday 5 June 2018 at 16:00, the Sixth Defendant filed and served evidence as to her incapacity.
27. The order also gave directions for a remedies hearing and for the filing and serving of evidence by both parties. The Sixth Defendant was also ordered to pay the Claimant £3500 in costs. She has not paid any of these costs.
28. The draft order was agreed by Ms Lawrence on the Sixth Defendant’s behalf following the hearing, who said that it ‘appears to reflect the Master’s decision’. A sealed copy was served on them both in due course.
29. The Sixth Defendant failed to file and serve any evidence by 5 June 2018, and therefore default judgment was entered in the Claimant’s favour on that date. Ms Lawrence says that evidence in the form of a Second Letter from Dr Inspector was, in fact, sent to the court by email by him on 5 June 2018, but admits that it was not served on the Claimant. That is true, but the order of 4 May 2018 required evidence to be filed with the court in the manner required by the CPR (which did not happen because the rules do not permit e-filing) and also served on the Claimant (which also did not happen). Thus, the Master’s order was not complied with and judgment in default was entered against the Sixth Defendant.
30. The Claimant served his evidence for the purposes of the damages hearing on 3 July 2018. Despite being required to serve evidence in response by the extended deadline of 3 August 2018, the Sixth Defendant did not do so.
31. On 25 September 2018 the Court listed an appointment for 25 October 2018 to fix a date for the damages hearing.
32. On 17 October 2018 Ms Lawrence emailed the Claimant’s solicitors seeking advice as to the Sixth Defendant’s position. The Claimant’s solicitors replied confirming that they could not advise her, but recommended that she obtain independent legal advice, suggesting the Citizen’s Advice Bureau or the Pro Bono Unit (now known as Advocate), and again confirming the listing appointment. Neither the Sixth Defendant nor Ms Lawrence attended the listing appointment, at which the damages hearing was listed for 17 December 2018.
33. The Claimant’s solicitors notified the Sixth Defendant of the hearing date on 20 November 2018. Two days later, Ms Lawrence sent an email in response attaching the Second Letter from Dr Inspector dated 5 June 2018. She said this had been sent to the court by him by email on that date. However, she accepted that the document had not been properly filed as it had not been sent in hard copy form until she sent a hard copy some time later. She also apologised for not serving the evidence on the Claimant.
34. On 2 December 2018 Master Thornett wrote to the parties:

“The enclosure of medical evidence supporting the submission that the 6th Defendant lacks capacity (namely the letter dated 5.6.18 from Dr Inspector) was received by the court under cover of a letter dated 22.11.18. On the face of the letter, it seems the 6th Defendant lacks capacity. An application for her to be represented by a Litigation Friend should have followed by now and certainly should still.”

35. The Master also raised a number of queries with the Claimant.
36. In response, the Claimant’s solicitors confirmed in a letter dated 3 December 2018 that:
 - a. the Sixth Defendant had failed to comply with the Order of 4 May 2018;
 - b. if there was a genuine issue as to capacity the Claimant would be willing to consider the matter fully upon the Sixth Defendant taking the appropriate procedural steps, and therefore it made sense for the approaching damages hearing to be adjourned for those purposes; and
 - c. the ‘appropriate procedural steps’ should include serving proper medical evidence as to capacity and an appropriate application for the Sixth Defendant to be represented by a litigation friend, and to formally adjourn the damages hearing.
37. On 4 December 2018, having considered the communications to the Court from Ms Lawrence and the Claimant, Master Thornett wrote to the parties with the following observations:
 - a. the Sixth Defendant appeared to be in breach of his Order dated 4 May 2018;
 - b. she had never established by way of application that she lacks capacity;
 - c. even her very late compliance with the Order of 4 May 2018 (in the form of Dr Inspector’s Second Letter) had not established that she lacked capacity (in so saying, it appears that the Master had changed the view that he had expressed earlier);
 - d. the requirements of the May 2018 Order were intended to oblige her to better inform both the Claimant and the Court by disclosing evidence as to her asserted position rather than as presented by her mother orally at the May 2018 hearing;
 - e. the Sixth Defendant had failed to formalise her asserted incapacity by a Litigation Friend being appointed to act for her.
38. On the following day, 5 December 2018, Ms Lawrence emailed the Claimant’s solicitors and the Court attaching a further copy of Dr Inspector’s Second Letter of 5 June 2018 and a copy of Form N235 (a certificate of suitability for Ms Lawrence to formally act as the Sixth Defendant’s Litigation Friend). Ms Lawrence also emailed the Claimant’s solicitors a draft application seeking that the damages hearing be adjourned until the determination of matters between the Claimant and all of the Defendants.

39. A day later, on 6 December 2018, the Claimant's solicitors emailed Ms Lawrence and the Sixth Defendant confirming that she would need to file and serve an application that properly and substantively addressed all of the Sixth Defendant's procedural defaults to date. However, the Claimant agreed to adjourn the damages hearing listed for 17 December 2018 so that the Sixth Defendant could obtain independent legal advice and file and serve appropriate applications. Ms Lawrence agreed to that proposal on the same day. The parties lodged a consent order on the following day providing that the Sixth Defendant would file and serve (a) any evidence for the damages hearing and (b) a proper application for relief from sanctions by 31 January 2019. The damages hearing was subsequently re-listed for 21 May 2019.
40. Under [8] of the order of Nicklin J dated 11 December 2018 the costs of and caused by the Sixth Defendant's defaults in relation to the order of Master Thornett dated 4 May 2018 and the adjournment of the hearing that was originally listed for 17 December 2018 were reserved to this hearing.
41. In late December 2018/early January 2019 the Sixth Defendant instructed *pro bono* counsel via Advocate.
42. On 31 January 2019 the Sixth Defendant issued the Capacity and Set Aside Applications, the hearing of which was also listed for 21 May 2019.
43. In summary, the Claimant says that I should note from these events that (as at the date of this hearing):
 - a. he served his PoC over one year and nine months ago;
 - b. the Sixth Defendant has failed to serve a Defence for seven months before he applied for default judgment;
 - c. he obtained default judgment just under one year ago;
 - d. the Sixth Defendant has not paid any of the costs which she owes;
 - e. nor has she served a draft Defence, despite receiving the PoC some 21 months ago;
 - f. her application relies on two letters from Dr Inspector which are lacking in any detail and are outdated. Both were considered by Master Thornett, who determined that the Defendant had failed to establish lack of capacity.

Evidence of the Sixth Defendant's alleged incapacity

44. I turn to consider in more detail the evidence which the Sixth Defendant relies on in support of her application for a declaration that she lacks capacity and did so at the relevant time.
45. Her case is that she suffers from Crohn's Disease, depression, anxiety and Post-Traumatic Stress Disorder (PTSD) and did so during her relationship with the Claimant. Crohn's Disease is an inflammatory bowel disease which causes inflammation of the digestive tract, which can lead to abdominal pain, severe diarrhoea, fatigue, weight loss

and malnutrition. It is a very unpleasant illness. She also has a history of self-harm. She has been in receipt of incapacity benefits since 2015 and cannot afford legal representation. She says that owing to her mental health, she has been unable to engage with this litigation with the consequence that default judgment has been entered against her. Jill Lawrence, has attempted to assist the court on her daughter's behalf without the benefit of legal advice, including raising her incapacity. Ms Lawrence says she is also able to corroborate the truth of some of the events set out in the Blog. She secured *pro bono* representation for her daughter via Advocate, but not until late 2018/early 2019, ie, after default judgment had taken effect.

46. The two letters from Dr Inspector to which I have referred state the following:
- a. The First Letter of 3 May 2018 confirms that (i) he has been providing the Sixth Defendant with psychiatric and psychological treatment for four years, having been referred to him by her consultant gastroenterologist after struggling to cope with Crohn's Disease; (ii) she suffers from a mixed state of depression and anxiety and 'is at times nearly paralysed with social anxiety'.
 - b. His Second Letter of 5 June 2018 states that (i) being exposed to court proceedings 'triggers anxiety and dissociative symptoms, worryingly with self-harming behaviours, potentially causing a flare-up of Crohn's disease' (it being well-documented in professional literature that her condition can be exacerbated by stress); and (ii) owing to her mental disorders, the Sixth Defendant 'will not be able to weigh information and/or make rational decisions' in relation to this litigation and, indeed, exposure to it may cause a deterioration in her mental health.
47. Jill Lawrence's first Witness Statement states that:

"My daughter is very unwell. She was diagnosed with Crohn's disease at the age of 19 after many years of being ill which were not diagnosed. After an operation in 2012 she developed anxiety, depression and Post Traumatic Stress Disorder (PTSD) from which she has suffered ever since ...

... Since I found out about these proceedings I have tried to assist her. She has always said that what she wrote in the blog post was true. However, when I try to discuss it or the litigation with her, she becomes extremely agitated and upset. At times she tells me she would like to die. It is very difficult to have a discussion with her about it as she becomes immediately distressed. [REDACTED]

[REDACTED] She becomes anxious which in turn exacerbates her Crohn's and a downward cycle begins of both increased physical and mental illness. It is difficult for me to watch this happen so I have kept discussion about the case to an absolute minimum and have tried to deal with the proceedings on her behalf. If I try to ask her to engage with me about the litigation this will often result in her shutting down all contact with me which I find frightening because I don't know what is happening to her. She is not able to engage with the litigation in any

meaningful way and without that I cannot see how she can properly make decisions about it.”

48. Jill Lawrence’s Second Witness Statement states that that her daughter was hospitalised as an in-patient [REDACTED] from December 2016 until mid-January 2017. It also states that Dr Inspector provided his evidence based on contemporaneous knowledge of her daughter. It confirms that the Claimant was aware of her daughter’s Crohn’s Disease and mental health problems during their relationship.
49. Finally, the Sixth Defendant relies on her statement of entitlement to benefits and the associated application dated 12 December 2014 (ie, completed whilst the Sixth Defendant, on his own admission, was in a relationship with the Claimant). The application confirmed that that the Claimant had then been diagnosed with Crohn’s Disease, PTSD, anxiety and depression and that she suffered from social anxiety and panic attacks. It also confirmed that she self-harmed and on bad days did not wash and was afraid to leave home.

The issues to be decided

50. These include:
 - a. Does the evidence displace the presumption in s 1(2) of the Mental Capacity Act 2005 (MCA 2005) that the Sixth Defendant has capacity; in other words, does it show that she lacks capacity and that she did do so at the relevant time when judgment in default was entered against her (the Capacity Issue) ?
 - b. If not, should I grant relief from sanctions by way of setting aside the judgment in default entered on 5 June 2018 (the Set Aside Issue) ?
 - c. If so, what steps taken prior to the appointment of her litigation friend, if any, should be regularised under CPR r 21.3(4) (the Regularisation Issue) ?
51. As a subsidiary matter, I also need to consider issues about costs.

Discussion

The Capacity Issue

(i) Legal principles

52. By CPR r 21.1(2)(d) a protected party is a party or intended party who lacks capacity. The test for lack of capacity is set out in the MCA 2005, as follows:

“1 The principles

- (1) The following principles apply for the purposes of this Act.
- (2) A person must be assumed to have capacity unless it is established that he lacks capacity.

(3) A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.

(4) A person is not to be treated as unable to make a decision merely because he makes an unwise decision.

(...)

2 People who lack capacity

(1) For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.

(2) It does not matter whether the impairment or disturbance is permanent or temporary.

(3) A lack of capacity cannot be established merely by reference to—

(a) a person's age or appearance, or

(b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity.

(4) In proceedings under this Act or any other enactment, any question whether a person lacks capacity within the meaning of this Act must be decided on the balance of probabilities.

3 Inability to make decisions

(1) For the purposes of section 2, a person is unable to make a decision for himself if he is unable -

(a) to understand the information relevant to the decision,

(b) to retain that information,

(c) to use or weigh that information as part of the process of making the decision, or

(d) to communicate his decision (whether by talking, using sign language or any other means).”

53. CPR r 21.2(1) provides that ‘a protected party must have a litigation friend to conduct proceedings on his behalf’. The effect of being a protected party to litigation is specified

by CPR r 21.3(2)(4), which provides:

“(2) A person may not, without the permission of the court –

(a) make an application against a child or protected party before proceedings have started; or

(b) take any step in proceedings except –

(i) issuing and serving a claim form; or

(ii) applying for the appointment of a litigation friend under rule 21.6,

until the child or protected party has a litigation friend.

...

(4) Any step taken before a child or protected party has a litigation friend has no effect unless the court orders otherwise.”

54. There are two ways to become a litigation friend:

- a. Without a court order, by serving a certificate of suitability ‘at the time when he first takes a step in proceedings on behalf of the Defendant’: CPR r 21.5(3) and PD 21, [2]; or
- b. By order of the Court, on the application of the prospective litigation friend: CPR 21.6.

55. Ms Lawrence became a litigation friend without a court order, pursuant to CPR r 21.5(3) and PD 21, [2].

56. CPR r 21.3(4) permits the court to regularise a step taken before a protected party has a litigation friend. This power was considered by the Court of Appeal in *Masterman-Lister v Brutton & Co (Nos 1 and 2)* [2003] 1 WLR 1511. In that case Kennedy LJ said at [31] that the ‘rules as to capacity are designed to ensure that claimants and defendants who would otherwise be at a disadvantage are properly protected and in some cases that parties to litigation are not pestered by other parties who should be to some extent restrained’. He also said that the power under CPR r 21.3(4) to regularise the position retrospectively should be exercised provided (a) everyone has acted in good faith and (b) there has been no manifest disadvantage to the party subsequently found to have been a patient.

57. The decision whether or not to regularise pursuant to this power requires a fact-specific determination. In *Dunhill (a protected party by her litigation friend) v Burgin (No 2)* [2014] 1 WLR 933, [20]-[21], Baroness Hale said:

“... everything must depend upon the particular facts. It might be appropriate retrospectively to validate some steps but not others.

In this case, we have not been asked to validate anything, but no doubt we could do so of our own motion if we thought it just.

I would not think it just to do so. While every other step in the proceedings might be capable of cure, the settlement finally disposing of the claim is not.”

58. Where a protected party regains or acquires capacity then a litigation friend’s appointment continues until it is ended by a court order (CPR r 21.9(2)).

(ii) *Submissions on the capacity issue*

59. The Sixth Defendant submits that, having regard to CPR Part 21 and the accompanying Practice Direction, she has filed sufficient evidence to show that she lacks capacity and so is a protected party to proceedings. She says that the two letters from Dr Inspector are consistent with the evidence of her mother, who has detailed knowledge of her mental and physical disabilities and, like, Dr Inspector has directly observed her inability, owing to her mental health, to engage in discussions about (still less make decisions about) the conduct of proceedings. She says the Second Letter in particular addresses the legal test for incapacity under the MCA 2005.
60. Second, she says that for me to accept this as evidence of incapacity would be consistent with the principle (articulated in *Masterman-Lister*, supra, at [66] and reflected in CPR Part 21) that in the ordinary case the question of whether a party is required to act through a litigation friend is to be determined by the party himself or those caring for him, without the need for medical evidence. She says that it is relevant that Jill Lawrence raised the issue of her capacity at the outset of her engagement with the Court in an effort to help her. She says the reality is that had Jill Lawrence filed a certificate of suitability at that point, the Court would have accepted the Sixth Defendant’s incapacity and made the appointment without further enquiry. It should do so now.
61. Third, she says that the Claimant’s stance on the capacity application is misconceived. Whilst purporting to maintain a neutral stance on the question of capacity, she says that the Claimant through his Second Witness Statement has sought to undermine the quality of the Sixth Defendant’s evidence, largely on the basis of irrelevant considerations. Having neither sought nor obtained medical evidence of his own (when it was open to him to do so), he has attempted to call into question the professional evidence of Dr Inspector by reference to an evidential standard higher than the CPR in fact requires. She says that he has also relied upon matters at best plainly irrelevant to the test of under the MCA 2005 Act (such as how frequently she socialises), which is directed at a litigant’s capacity to understand, retain, weigh and communicate information in relation to proceedings only.
62. Finally, she says that it is recorded in the preamble to the consent order of 17 December 2018 (drafted by the Claimant’s solicitors), that she is a protected party. She says that pursuant to CPR r 21.3(4), the effect of this concession is that every step taken against her in proceedings prior to appointment of her litigation friend (other than service of the claim form) had no effect unless the Court orders otherwise – including the default judgment.

63. In response, the Claimant submits that the evidence relied upon by the Sixth Defendant is sparse and insufficient to overcome the presumption of capacity in s 1(2) of the MCA 2005. He says that the two letters from Dr Inspector are very brief and do not provide a sufficient basis for me to find that the Sixth Defendant lacks capacity. Whilst he has sympathy for the Sixth Defendant's medical conditions (at least some of which he accepts and was aware of during their relationship) he says there is evidence which contradicts some of what has been said by Ms Lawrence about her daughter's conditions.

(iii) Capacity: my conclusions

64. The MCA 2005 made major changes to the law with the object of protecting and empowering those who lack capacity. Section 1 sets out five key principles:
- a. a person must be assumed to have capacity unless it is established that they lack capacity;
 - b. a person is not to be treated as unable to make a decision unless all practicable steps to help them do so have been taken without success;
 - c. a person must not be treated as unable to make a decision merely because they make an unwise decision;
 - d. an act done, or decision made, under the Act for or on behalf of a person who lacks capacity must be done, or made in their best interests;
 - e. before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.
65. Paragraph 21.0.2 of Volume 1 of the *White Book 2019* says that the assumption of capacity can only be overridden if the person concerned is assessed as lacking the mental capacity to make a particular decision for themselves at the relevant time. The formula to be used in making that assessment is set out in s 3. A person may have capacity in relation to some matters but not others. In the context of CPR Part 21 the question is whether the person lacks capacity to conduct proceedings. If such capacity is lacking, the person is a 'protected party'.
66. Under s 3(1), a person is 'unable to make a decision for himself' if they are unable to:
- a. understand the information relevant to the decision;
 - b. retain that information;
 - c. use or weigh that information as part of the process of making the decision; or
 - d. communicate their decision (whether by talking, using sign language or any other means).
67. The fact that a person can only retain the information for a short period only does not prevent them from being regarded as able to make the decision (s 3(3)). The information

relevant to a decision includes information about the reasonably foreseeable consequences of deciding one way or another or failing to make a decision (s 3(4)).

68. The principles applying to an assessment of capacity were helpfully summarised by Baker J in *A Local Authority v P* [2018] EWCOP 10, at [15]:

“15. The general legal principles to be applied when determining whether a person has capacity are set out in the Mental Capacity Act 2005 and in the Mental Capacity Act 2005 Code of Practice, supplemented by a series of reported cases. Those principles can be summarised as follows:

(1) A person must be assumed to have capacity unless it is established that she lacks capacity: s.1(2). The burden of proof therefore lies on the party asserting that P does not have capacity. The standard of proof is the balance of probabilities: s 2(4).

(2) A person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or disturbance in, the functioning of the mind or brain: s 2(1). Thus the test for capacity involves two stages. The first stage, sometimes called the ‘diagnostic test’, is whether the person has such an impairment or disturbance. The second stage, sometimes known as the ‘functional test’, is whether the impairment or disturbance renders the person unable to make the decision. S 3(1) provides that, for the purposes of s 2, a person is unable to make a decision for himself if he is unable (a) to understand the information relevant to the decision; (b) to retain that information; (c) to use or weigh that information as part of the process of making the decision, or (d) to communicate his decision whether by talking, using sign language or any other means.

(3) Capacity is both issue-specific and time-specific. A person may have capacity in respect of certain matters but not in relation to other matters. Equally, a person may have capacity at one time and not at another. The question is whether at the date on which the court is considering the question the person lacks capacity in question.

(4) A person is not to be treated as unable to make a decision unless all practicable steps to help her to do so have been taken without success: s 1(3). The Code of Practice stresses that ‘it is important not to assess someone’s understanding before they have been given relevant information about a decision’ (para 4.16) and that “it is important to assess people when they are in the best state to make the decision, if possible” (para 4.46).

(5) It is not necessary for the person to comprehend every detail of the issue. It is sufficient if they comprehend and weigh the

salient details relevant to the decision (per Macur J, as she then was, in *LBL v RYJ* [2010] EWHC 2664 (Fam)).

(6) A person is not to be treated as unable to make a decision merely because she makes an unwise decision: s 1(4).

(7) In assessing the question of capacity, the court must consider all the relevant evidence. Clearly, the opinion of an independently instructed expert will be likely to be of very considerable importance, but as Charles J observed in *A County Council v KD and L* [2005] EWHC 144 (Fam) [2005] 1 FLR 851 at paras 39 and 44, ‘it is important to remember (i) that the roles of the court and the expert are distinct and (ii) it is the court that is in the position to weigh the expert evidence against its findings on the other evidence... the judge must always remember that he or she is the person who makes the final decision’.

(8) The court must avoid the ‘protection imperative’ – the danger that the court, that all professionals involved with treating and helping P, may feel drawn towards an outcome that is more protective of her and fail to carry out an assessment of capacity that is detached and objective: *CC v KK* [2012] EWHC 2136 (COP).”

69. Further guidance as to the application of the test was provided by HHJ Hilder in *London Borough of Hackney v SJF and JJF* [2019] EWCOP 8. [55]-[56]:

“55. As I have noted on other occasion, in the complicated business of being human, there may be a number of factors operating on one's decision-making processes at any particular time. The Mental Capacity Act is so framed that, unless the Court is satisfied on the balance of probabilities that impairment/disturbance of mind or brain itself causes an inability to perform the thinking processes set out in section 3, the statutory test for incapacity is not made out:

“...for the Court to have jurisdiction to make a best interests determination, the statute requires there to be a clear causative nexus between mental impairment and any lack of capacity that may be found to exist (s2(1)). ”

“The core determinative provision within the statutory scheme is MCA 2005, The remaining provisions of s2 and s3, including the specific elements within the decision making process set out in s3(1), are statutory descriptions and explanations which support the core provision in s2(1)... Section 2(1) is the single test, albeit that it falls to be

interpreted by applying the more detailed description given around it in ss 2 and 3."

Per McFarlane LJ in *PC & NC v. City of York Council* [2013] EWCA Civ 478 at paragraphs 52 and 56 to 58.

70. To determine whether, at the date on which the court is considering the matter, the person has or lacks capacity to make the decision in issue, the Court must consider all the relevant evidence, including but not limited to evidence from an independent expert:

“Clearly the opinion of an independently-instructed expert will be likely to be of very considerable importance, but in many cases the evidence of other clinicians and professionals who have experience of treating and working with P will be just as important and in some cases more important. In assessing that evidence, the court must be aware of the difficulties which may arise as a result of the close professional relationship between the clinicians treating, and the key professionals working with, P,.....in cases of vulnerable adults, there is a risk that all professionals involved with treating and helping that person — including, of course, a judge in the Court of Protection — may feel drawn towards an outcome that is more protective of the adult and thus, in certain circumstances, fail to carry out an assessment of capacity that is detached and objective.”

71. Hence, the question for me is whether the Sixth Defendant has adduced sufficient evidence to overcome the presumption in s 1(2) of the MCA 2005 that she has capacity. In doing so, I have to bear in mind that those who are close to her, and those who have the responsibility of treating her, may feel drawn towards an outcome that is more protective of her than the evidence properly warrants.

72. The entirety of the relevant part of Dr Inspector’s First Letter of 3 May 2018 is as follows:

“I have been providing Katherine with psychiatric and psychological treatment and support for the last four years.

She was originally referred to me by her Consultant Gastroenterologist at St Mark’s Hospital as she was struggling to cope with her Inflammatory Bowel Disease – Crohn’s Disease, from which she has been suffering since her teens. At some stage the flare ups did not respond to medical treatment and she had to undergo a surgical resection of part of her intestines.

She has been suffering from a mixed state of depression and anxiety.

Her self-esteem is very fragile and therefore she is at times nearly paralysed with social anxiety.

During the last period due to the ongoing court case and the legal procedures she has to attend to, she is especially emotionally vulnerable.”

73. Dr Inspector’s Second Letter of 5 June 2018 was slightly longer, but still very brief. Some of it repeats what was in the First Letter. The relevant parts are as follows:

“Further to my letter dated 3/5/2018 I would like to provide you with additional information regarding Miss Lawrence’s mental capacity.

I have been providing psychiatric and psychological support to Miss Lawrence for the last four years, firstly at St Mark’s Hospital whilst she was an in patient and subsequently as a private patient. Miss Lawrence has been suffering from an inflammatory Bowel Disease (Crohn’s Disease) since her early teens.

At the age of 18 the severe flare up of her disease did not respond to pharmacological treatment and needed to be treated surgically by performing (*sic*) a Right Hemi-Colectomy.

This period was emotionally extremely traumatic for her and she developed symptoms of Post-Traumatic Stress Disorder, Depression and anxiety.

She could not cope with the academic demands of her Art School and withdrew from social activities and interactions. She was unable to regulate her overwhelming feeling (*sic*) and used to self harm very frequently.

Miss Lawrence told me yesterday what she experiences when she is reminded of the events related to Mr Fox:

‘Whenever I think about the details surrounding the events, I feel like I shut off from them and start to become upset and anxious and I think about it for too long, I start to hurt myself – [REDACTED]

Clearly being exposed to the past traumatic events through the court proceedings triggers extreme anxiety, and dissociative symptoms, worryingly with serious self-harming behaviours with potentially causing also a flare up of her Inflammatory Bowel Disease (It is well documented in the professional literature that Inflammatory Bowel Disease can be exacerbated by stress).

Therefore in my professional opinion Miss Lawrence due to her mental disorders will not be able to weigh information and or make rational decisions herself in relation to this matter.

Moreover I am extremely concerned that exposing her to the court proceedings might cause an acute deterioration in her mental and physical state.”

74. The Claimant submits that neither of Dr Inspector’s letters comply with the requirements of CPR Part 35 in relation to expert evidence. He says that the Sixth Defendant has not provided Dr Inspector’s *curriculum vitae* or any evidence as to his specialisms. He also says that there has been no compliance with CPR r 35.10.
75. These criticisms are misplaced. I accept Dr Inspector is a duly qualified psychiatrist who has been treating the Sixth Defendant for a number of years. And he is not purporting to act as an expert: he is the Sixth Defendant’s doctor and his duty is to advance her best interests.
76. No-one disputes that the Sixth Defendant has a number of medical problems, and on a human level she therefore is entitled to sympathy. However, she is presumed to have capacity pursuant to s 1(2) of the MCA 2005 and so the burden is on her to demonstrate otherwise. It seems to me that the quality of the evidence she has adduced falls some way short of being capable of overcoming the statutory presumption of capacity. In other words, her evidence does not permit me to be satisfied that she meets the test under ss 2 and 3. That is for the following reasons.
77. Despite the complexity of the Sixth Defendant’s medical problems, Dr Inspector’s First Letter was very brief. It provided no real information as to the Sixth Defendant’s capacity. It was considered by Master Thornett at the 4 May 2018 hearing. He determined that it did not establish lack of capacity. No appeal was brought by the Sixth Defendant against Master Thornett’s decision. It did not engage with the question of capacity under the MCA 2005. In my judgment the Master was obviously right.
78. Dr Inspector’s Second Letter was only slightly longer. A lot of it repeated what was in his First Letter. It provided very limited information as to the Sixth Defendant’s capacity. It merely asserted that the Sixth Defendant ‘will not be able to weigh information and or make rational decisions herself in relation to this matter’, almost entirely by reference to what the Sixth Defendant herself told him. There was no discussion of the diagnostic test or the functional test referred to by Baker J in *A Loyal Authority v P*, supra, at [15(2)]. Nor was there any discussion of the statutory requirement in s 1(3) of the MCA 2005 of what, if any, practical steps could be taken to assist the Sixth Defendant to take decisions in relation to the litigation.
79. Although on 2 December 2018 Master Thornett said that ‘on the face of it’ this letter suggested the Sixth Defendant lacked capacity, he did not make any final determination (nor could he), and he said that a formal application would have to be made to the Court in order to establish lack of capacity. Later, on 4 December, he suggested that the letter did not prove her incapacity. Of course, I am not bound by the Master’s views, but I consider that the Master was right in his later opinion. With respect to Dr Inspector, neither of his letters adequately addressed the questions which need to be considered before I could

consider making a declaration of incapacity, in light of the statutory presumption in favour of capacity.

80. Another difficulty is this: the Capacity Application was made six months after Dr Inspector's Second Letter. No up-to-date report was served by the Sixth Defendant in support of her application. There obviously should have been one. Capacity, or the lack of it, is not a fixed state but can vary over time, which was another point emphasised by Baker J in *A Local Authority v P*, supra, [15(3)]. The question for me is whether the Sixth Defendant lacked capacity in May 2019, when this hearing took place however the medical evidence before me was nearly a year out of date.
81. Turning to the evidence from Ms Lawrence, I do not doubt its veracity. But, as I have explained, I need to approach it on the basis that she is the Sixth Defendant's mother and therefore not uninterested in the outcome for her daughter. Her evidence does not establish that her daughter is *never* able to give instructions. It merely suggests that there are times when her daughter becomes very emotional and finds it hard to communicate with her. Again, there is no discussion of what other steps have been, or could be, taken in order to assist her daughter. To find that an adult lacks capacity is a significant step with far reaching consequences. For example, it deprives her of civil rights, in particular her right to sue or defend in her own name, and her right to compromise litigation without the approval of the court. These are important rights, long cherished by English law and safeguarded by the European Convention on Human Rights: *Masterman-Lister*, supra, [17]; *In re Cumming* (1852) 1 De GM & G 537, 557. Such a decision should therefore only be taken on the basis of cogent evidence. I find that cogency is lacking here. The evidence is sparse.
82. Furthermore, I am conscious that I am being asked to decide this issue on the basis of written evidence alone. It is therefore important that I test the Sixth Defendant's evidence against that of the Claimant. Pursuant to that approach, I consider that there is force in the evidence produced by the Claimant's solicitor, Sebastian Jones, at [18 – 23] of his Second Witness Statement in opposition to the Sixth Defendant's applications. That evidence is to the following effect:
 - a. The Claimant is concerned that his knowledge and experience of the Sixth Defendant is inconsistent with some of the statements in Dr Inspector's evidence, most notably those relating to her alleged withdrawal from social activities and interaction.
 - b. As explained by Mr Jones (based on information provided by the Claimant), the Sixth Defendant has had, in recent years, an active social life, both in person and through various social media channels (including Facebook, Instagram, Tumblr and via her own YouTube channel). Mr Jones produces evidence of her apparently active social life which shows her interacting and posting photographs on social media, visiting art galleries, clubs, cocktail bars, restaurants and hotels. The material he produces dates from late 2017 and into 2018.
 - c. Contrary to Jill Lawrence's evidence that her daughter has not worked since 2015, the Claimant says through Mr Jones that she is employed as a model, is a photographer, and engages in online work too, receiving payments in relation to these activities.

- d. Ms Lawrence also refers to a Statement of Entitlement dated 27 May 2015 (her daughter having applied for the applicable benefits payment, Personal Independence Payment (PIP)) in or around October 2014, two months before the Claimant and the Sixth Defendant met. Despite that statement asserting that the Sixth Defendant needs prompting to prepare or cook a simple meal or to eat and drink, [REDACTED] and needs assistance with getting dressed or undressed, the Claimant's evidence is that throughout the period that he and the Sixth Defendant were dating (December 2014 to June/July 2015), the Sixth Defendant spent a significant amount of time at the Claimant's flat and he had no cause to be concerned about her ability to carry out such activities independently and without assistance. He also points out that in the Blog itself the Sixth Defendant confirmed that (i) she had baked a cake for the Claimant's son, (ii) she had furnished the Claimant's flat, and (iii) she had accepted a modelling job in New York shortly after her relationship with the Claimant ended.
83. I have noted the Sixth Defendant's submission that this evidence is not relevant to the claim of incapacity. But it seems to me to be relevant. The Sixth Defendant put these matters in issue, and I therefore must have regard to the evidence which contradicts that which she has adduced. Overall, the Claimant's evidence is that his experience of living with the Sixth Defendant is inconsistent in many ways with the position presented by Ms Lawrence about her daughter, and some of the matters referred to by Dr Inspector (which he says may be based on historic and/or incorrect information).
84. Having regard to the evidence that is before me, I am not satisfied that the Sixth Defendant has discharged the burden on her to show on the balance of probabilities that she currently lacks capacity, or did so between 4 May 2018 and now. I accept that she has a number of physical and mental ailments. I accept that being confronted with this litigation is stressful for her. However, at a minimum, I would have expected that Dr Inspector would have had a full consultation with the Sixth Defendant and considered the litigation with her, and then reported properly, fully and completely on his findings as to her ability to conduct litigation with reference to the tests for capacity under the MCA 2005 and the principles to which I have referred. He did not do that, but merely provided a brief opinion based upon what appears to have been a short discussion with his patient. Given the time which has passed since May 2018 (at the latest) when this issue first emerged I would also have expected expert evidence about the Sixth Defendant's mental state. There is none. I agree with the Claimant's submission that I am prevented from carrying out any detailed analysis of the evidence with regard to the tests under the MCA 2005, because there is no evidence to analyse other than Dr Inspector's bare assertions and Ms Lawrence's generalised evidence.
85. The Capacity Application before me therefore fails. It is open to the Claimant, if he wishes, to seek an order under CPR 21.9(2) ending Jill Lawrence's appointment as a litigation friend. Equally, it is open to the Sixth Defendant and her mother to file better evidence on the issue of incapacity. It will then be for the judge to make a decision on the basis of that evidence. But, for the reasons I have given, I am not satisfied on the material before me that the Sixth Defendant has overcome the presumption that she has capacity.
86. I turn to the issue whether I should set aside judgment in default.

The Set Aside Issue

(i) *Legal principles*

87. CPR r 13.3 governs the Court's discretion to set aside default judgment, as follows:

“(1) [T]he 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.”

88. The inclusion of the word ‘real’ in CPR r 13.3(1)(a) means ‘better than merely arguable’: it means realistic, as per the test in opposing summary judgment, although the person applying is not required to show that their case will probably succeed at trial (see *White Book* 2019, Vol 1 at [13.3.1] and [24.2.3]).

89. The notes to this rule in the *White Book* Vol 1 make clear that the discretionary power to set aside is unconditional. Its purpose is to avoid injustice. The major consideration on an application to set aside is whether the defendant has shown a real prospect of successfully defending the claim or some other good reason why they should be allowed to defend the claim. The Court's discretionary power is to be exercised to further the overriding objective, not to punish a party for incompetence: *Hussain v Birmingham City Council* [2005] EWCA Civ 1570, [39]. That said, however, the power to set aside is not to be exercised lightly. That is because its effect is to deprive the claimant of a regular judgment which s/he has validly obtained.

90. CPR r 3.9 provides:

“(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –

(a) for litigation to be conducted efficiently and at proportionate cost; and

(b) to enforce compliance with rules, practice directions and orders.

(2) An application for relief must be supported by evidence.”

91. An application to set aside judgment entered in default of defence is an application for relief from any sanction within the meaning of CPR r 3.9. The three-stage test laid down in *Denton v TH White* (Practice Note) [2014] 1 WLR 3926 is therefore engaged. The stages are as follows: the identification and assessment of the seriousness or significance of the failure (stage 1); the reasons why the failure or default occurred (stage 2); and all the circumstances of the case (stage 3).
92. In *Gentry v Miller* [2016] 1 WLR 2696, [23]-[24], Vos LJ (as he then was) explained the inter-relationship between CPR r 13.3 and the three-stage *Denton* test:

“23. It is useful to start by enunciating the applicable principles. Both sides accepted that it was now established that the tests in *Denton's* case [2014] 1 WLR 3926 were to be applied to applications under CPR r 13.3: see paras 39 - 40 of the judgment of Christopher Clarke LJ in *Regione Piemonte v Dexia Crediop SpA* [2014] EWCA Civ 1298, with whom Jackson and Lewison LJ agreed. It seems to me equally clear that the same tests are relevant to an application to set aside a judgment or order under CPR r 39.3.

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

93. Hence I need, first, to consider the two elements of CPR r 13.3(1) and then, in light of my conclusions on those issues, apply them to the three stages referred to in *Denton*: see *Redbourn Group Limited v Fairgate Development Limited* [2017] EWHC 1223 (TCC), [20], [74], for an example of this approach.

(ii) *The parties' submissions*

94. The Sixth Defendant submits that she has a real prospect of successfully defending the claim (r 13.3(1)(a)). She denies, as do the other Defendants, that they are part of a

concerted campaign to damage the Claimant. She says the pleaded publications are not sufficiently serious to amount to harassment under the Protection from Harassment Act 1997, which she says makes plain that conduct must be of an order that could sustain *criminal* liability: see *Majrowski v Guys and St Thomas's* [2007] 1 AC 224 at [30]. She also points to what she says are the difficulties of succeeding in an action for harassment by publication generally, see *Trimingham v Associated Newspapers* [2012] 4 All ER 717. In any event, she says that her conduct was reasonable (s 1(3) of the 1997 Act). In relation to the defamation claim, she says she has a defence under s 2 of the DA 2013 (substantial truth), s 3 (honest opinion) and s 4 (publication on a matter of public interest).

95. Further or alternatively, she says that there is some other good reason why she should be allowed to defend the claim (r 13.3(1)(b)). That is because, firstly, she says it was both reasonable and correct for her (through her mother) to have prioritised resolution of the issue of incapacity over other steps taken in proceedings. She said she made every effort to do so promptly and in good faith and that this is clear from her First and Second Witness statements, the contemporaneous communications with the court and the Claimant exhibited thereto.
96. Secondly, she says it is relevant that the claims against the other Defendants are yet to proceed to trial. If the pleaded claim of a coordinated campaign of harassment is successfully defended, it necessarily follows that default judgment against the Sixth Defendant will have amounted to the imposition of liability upon an innocent person.
97. As to CPR r 13.3(1)(c) (promptness), the Sixth Defendant says she acted promptly in that she sought to set aside default judgment as soon as she obtained the assistance of pro bono counsel and was assisted in both the steps necessary in so doing and in making her application. She met counsel for the first time on 25 January 2019 and this application was made on 31 January 2019.
98. As to the *Denton* principles, she says that her default was one of form and not substance, in that she served her medical evidence by email rather than in hard copy form; she says that it is plain from the email of 17 October 2018 (and from other communications with the Court on 5 June, 15 June, 20 July, 2 August and 9 October 2018 that her mother did not intentionally fail to serve. She invites me to find that had the Claimant's solicitors inquired with her mother at any point whether medical evidence had been served, it would have been provided to them. Thus, she says that it is unnecessary to spend much time on the second and third stages of the *Denton* test and that this is a clear case for relief.
99. In response, the Claimant submits as follows.
100. First, he says that the Sixth Defendant has failed to establish that she has a real prospect of defending the claim. He says that the Sixth Defendant has failed to adduce any evidence in order for me to apply this test, let alone to satisfy it. She has failed to serve even a draft Defence.
101. Similarly, he says that the Sixth Defendant has failed to put forward any other 'good reason' why the judgment should be set aside and the Sixth Defendant allowed to defend the claim. He says that whatever the position is with regard to the Sixth Defendant's capacity, her mother has been involved for a considerable period of time and her defaults

cannot therefore be blamed on a lack of assistance in that regard. He points out that Ms Lawrence was engaged in correspondence with his solicitors at the time when the Defence was due in October 2018, and even agreed extensions of time on her daughter's behalf. He says they were therefore perfectly aware that the Defence was due on 29 September 2017. Jill Lawrence was also present when default judgment was entered against her daughter, and was made fully aware of the consequences of any failure to comply with the 4 May 2018 order. He says, in short, that the Sixth Defendant's repeated and serious procedural defaults cannot be blamed on her or her mother's lack of familiarity with the Court's procedure. The Supreme Court recently emphasised in *Barton v Wright Hassall* [2018] 1 WLR 1119 (per Lord Sumption at [18]) that the balance of the interests of both parties created by the CPR should not be disturbed by affording greater indulgence to an unrepresented party.

102. He submits that there is no explanation for the Sixth Defendant's defaults for the reasons set out in Sebastian Jones' First Witness Statement at [26]-[29] and that Ms Lawrence's evidence as to her and her daughter's difficulties in complying with directions is unsatisfactory, at best. He points to a number of contradictions, eg, Ms Lawrence's evidence that she was unaware of Advocate's services until December 2018, when the Claimant's solicitors recommended that she seek advice from the Bar Pro Bono Unit (Advocate's previous name) in an email dated 25 October 2018.
103. As to promptness, the Claimant points out that the Defence was due at the end of September 2017, no Defence was filed for over five months and the Claimant applied for default judgment in March 2018. Default judgment became effective on 5 June 2018. The Sixth Defendant then failed to apply to set that judgment aside until 30 January 2018, almost seven months later. Overall, he says that the Sixth Defendant's conduct of the litigation is not consistent with that of a litigant keen on pleading a Defence and defending the claim.
104. In respect of the *Denton* three stage test, he says that these matters mean that the first two stages of the test weigh heavily against granting relief from sanctions. As for the third stage, the overall circumstances, he says I am bound to consider the impact that granting the Sixth Defendant relief from sanctions would have on him, and any prejudice that he would suffer. As to that, he says the prejudice is clear – he would lose out on a judgment that he entered appropriately, and following repeated attempts by his solicitors to engage with Sixth Defendant. He says that 'unravelling the history of the case' would be manifestly unfair to him. He has given compelling (and unchallenged) evidence as to the impact of the Sixth Defendant's actions towards him. Given the seriousness of those actions, he says he is entitled to finality, and to proceed to a remedies hearing after the lengthy delays to date.

The Set Aside Issue: discussion

105. I begin with the conditions in CPR r 13.3(1) and (2).
106. Taking the question of promptness first, I am not satisfied that the Sixth Defendant acted promptly in seeking to have the judgment against her set aside. As I have explained, the order in question was made on 4 May 2018; it provided that judgment in default would take effect on 5 June 2018 unless the necessary evidence was served. It would have been obvious to Ms Lawrence and her daughter what they needed to do. They failed to do it.

If they were unsure they could and should have taken advice from those who act for unrepresented litigants. Although I accept that Ms Lawrence emailed the court, as she said she did in her first Witness Statement, she should have done more to find out the position. Much time had already passed. The onus was on her to ensure that there had been compliance with the Master's order. The application to set aside the default judgment was not made for many months after that.

107. Next, I accept the Claimant's submission that I cannot, on the material before me, conclude that the Sixth Defendant has a real prospect of successfully defending the claim. True it is that there is a denial by the Sixth Defendant, through her mother in her First Witness Statement, that what she said in the Blog was true. However, that is not evidence from the Sixth Defendant herself, verified by a statement of truth. Nor does the assertion by her mother in her witness statement that 'my daughter may well have a defence along the lines of the Defences of the Second, Third and Fifth Defendants' carry the Sixth Defendant's case much further on this aspect. The short point is that neither the Sixth Defendant nor her mother has adduced any evidence as to the truth of the allegations in the Blog, which I set out earlier, including that (i) the Claimant viciously attacked the Sixth Defendant when she was pregnant, kicking her in the abdomen several times in an act of domestic violence and an attempt to kill her unborn child, and (ii) the Claimant succeeded in killing their unborn child by kicking her in the abdomen. It hardly needs be said that these allegations are of the utmost seriousness, and in default of a pleaded Defence it cannot be said that there is a real prospect of defending them. The Claimant's pleaded case is obviously potentially libellous, and capable of amounting to the tort of harassment.
108. I accept the Claimant's submission that I cannot reverse the default judgment based on real prospects of successfully defending the claim without such serious actions and allegations being addressed in evidence. The fact is that the Sixth Defendant and Ms Lawrence have ignored these matters, despite having had a significant period of time to address them. I agree that the Claimant is entitled to know what the Sixth Defendant's defence is likely to be and to have the opportunity to address it before I can be satisfied that any defence put forward by her has a real prospect of success. I also note that no draft Defence had been served as at the date of the hearing even though the Sixth Defendant had had a litigation friend and legal assistance for a significant period of time before then.
109. The Sixth Defendant's attempt to establish that the condition in CPR r 13.3(a) is satisfied therefore fails.
110. However, I consider that the Sixth Defendant has established, pursuant to CPR r 13.3(b), that she has some other good reason why the judgment in default should be set aside.
111. First, this is a defamation and harassment claim. In *Berezovsky v Russian Television and Radio* [2009] EWHC 1733, [18], Eady J held in respect of CPR13.3(1)(b) that in a defamation claim involving serious allegations it was in the interests of both sides that a proposed plea of justification should be properly addressed. That is because the primary object of most libel actions is to achieve vindication of reputation, and if a claimant obtained relief purely on judgment obtained in default, it would be easy for those ill-disposed towards him to undermine the effectiveness of that vindication.

112. Although, for the reasons that I have given, I cannot find on the material before me that the Sixth Defendant has a realistic prospect of defending the claim, I can ascertain that her defence will include a plea of truth under s 2 of the DA 2013. Eady J’s principle is therefore engaged. I consider that allegations of such seriousness as are involved in this case cannot be allowed to go by default. Although I cannot find the Sixth Defendant lacks capacity, at the relevant time she did not have legal representation and she does certainly suffer from a number of serious medical issues. Taken together, I am satisfied that the nature of the claim and the allegations involved, and the nature of the suggested defence, are such as to satisfy the test in CPR r 13.3(b).

113. In reaching this conclusion I attach great weight to the very important point that the Claimant accuses the Sixth Defendant of (in effect) being part of a conspiracy with the other Defendants against whom the trial is proceeding. This is made clear *inter alia* by [3] and [5] of the PoC:

“From late 2016 onwards, the Defendants, both individually and as a group, have engaged in a deliberate and coordinated course of conduct targeting the Claimant, and so have engaged in a persistent campaign of harassment against him (‘the Campaign’) ...

5. As part of the Campaign, the Defendants engaged in a prolonged and concerted course of conduct on the social network Twitter in which the Defendants shared each others’ Online Publications widely and made further false and abusive statements about the Claimant ...”

114. To my mind it would obviously be unsatisfactory if the other Defendants were to successfully defend the claim, whilst the judgment in default against the Sixth Defendant should remain. That would be an inconsistent outcome which would not be in anyone’s interests, least of all the interests of justice.

115. In light of these conclusions, I turn to the three-stage *Denton* test.

116. Stage 1 requires me to identify and assess the seriousness and significance of the failure to comply which engages CPR r 3.9(1). If the breach is neither serious nor significant, it is unnecessary to spend much time on the second and third stages. It is well-established that a mistake of form, rather than substance, is a case where the non-compliance can be regarded as ‘neither serious nor significant’ (see *White Book 2019* at [3.9.12]).

117. In my judgment the breaches here were both serious and significant. The Sixth Defendant and her mother both well understood, or should have done, what their obligations were about filing a Defence. It is unnecessary to do more than refer back to what the Master said in his communication of 4 December 2018, namely that (i) the Sixth Defendant appeared to be in breach of his Order dated 4 May 2018; (ii) she had never established by way of application that she lacks capacity; (iii) even her very late compliance with the order of 4 May 2018 (in the form of Dr Inspector’s Second Letter) had not established that she lacked capacity; (iv) the requirements of the May 2018 Order were intended to oblige her to better inform both the Claimant and the Court by disclosing evidence as to her asserted position rather than as presented by her mother orally at the

May 2018 hearing; and (v) the Sixth Defendant had failed to formalise her asserted incapacity by a Litigation Friend being appointed to act for her.

118. Stage 2 requires me to consider why the defaults occurred. The evidence of Jill Lawrence in her witness statement of 30 January 2019 is to the effect that that was because she did not have legal representation until January 2019; her daughter is ill; and she did not properly understand court procedures.
119. In *EDF Energy Customers Ltd v Re-Energised Ltd* [2018] EWHC 652 (Ch), it was held that the granting of special indulgence to a litigant in person may be justified in a case where a rule is hard to find or difficult to understand, or ambiguous; and some leeway may be given to a litigant in person at the margins when the court is considering relief from sanctions or the promptness of setting aside an order. I do not accept that this is such a case. Ms Lawrence's evidence makes clear she understood what the Master's order of 4 May 2018 required her to do. There was much to-ing and fro-ing, but the upshot is that it was not until nearly the end of January 2019 that the Sixth Defendant made the application that is before me, in other words nearly eight months after 4 May 2018 and nearly two month after Master Thornett had indicated at the beginning of December 2018 what the issues were. Hence, what Lord Sumption said in *Barton v Wright Hassall LLP* [2018] UKSC 12, [18], is relevant:

“Turning to the reasons for Mr Barton’s failure to serve in accordance with the rules, I start with Mr Barton’s status as a litigant in person. In current circumstances any court will appreciate that litigating in person is not always a matter of choice. At a time when the availability of legal aid and conditional fee agreements have been restricted, some litigants may have little option but to represent themselves. Their lack of representation will often justify making allowances in making case management decisions and in conducting hearings. But it will not usually justify applying to litigants in person a lower standard of compliance with rules or orders of the court. The overriding objective requires the courts so far as practicable to enforce compliance with the rules: CPR rule 1.1(1)(f). The rules do not in any relevant respect distinguish between represented and unrepresented parties. In applications under CPR 3.9 for relief from sanctions, it is now well established that the fact that the applicant was unrepresented at the relevant time is not in itself a reason not to enforce rules of court against him: *R (Hysaj) v Secretary of State for the Home Department* [2015] 1 WLR 2472, para 44 (Moore-Bick LJ); *Nata Lee Ltd v Abid* [2015] 2 P & CR 3. At best, it may affect the issue “at the margin”, as Briggs LJ observed (para 53) in the latter case, which I take to mean that it may increase the weight to be given to some other, more directly relevant factor. It is fair to say that in applications for relief from sanctions, this is mainly because of what I have called the disciplinary factor, which is less significant in the case of applications to validate defective service of a claim form. There are, however, good reasons for applying the same policy to applications under CPR rule 6.15(2) simply as a matter of basic

fairness. The rules provide a framework within which to balance the interest of both sides. That balance is inevitably disturbed if an unrepresented litigant is entitled to greater indulgence in complying with them than his represented opponent. Any advantage enjoyed by a litigant in person imposes a corresponding disadvantage on the other side, which may be significant if it affects the latter's legal rights, under the Limitation Acts for example. Unless the rules and practice directions are particularly inaccessible or obscure, it is reasonable to expect a litigant in person to familiarise himself with the rules which apply to any step which he is about to take."

120. Stage 3 requires me to evaluate all the circumstances of the case, so as to enable me to deal justly with the application. Thus far, as the Claimant submits, the factors weighing in the exercise of my discretion point away from my granting relief from sanctions. However, I come back to my determination on the issue under CPR r 13.3(b). I have carefully taken into all of the points made by the Claimant about the dilatory way in which the Sixth Defendant and her mother have conducted aspects of this litigation. However, in my judgment, this special factor requires me to grant relief from sanctions by way of setting aside the judgment in default that has been entered against the Sixth Defendant. It is very important in a case such as this, where the Claimant's case is that he has been the victim of a coordinated campaign or, put another way, a conspiracy, at the hands of the Defendants, that the claim be tried on the merits against all of the alleged co-conspirators, including the Sixth Defendant. It would be a recipe for injustice to deny her the chance to defend her case on the merits, whilst allowing that chance for her alleged co-conspirators. As I pointed out earlier, such a scenario invites the risk of inconsistent verdicts. I also place great weight on the features identified by Eady J in *Berezovsky*, supra, about the potential need for vindication for a claimant in libel proceedings by way of a judgment on the merits and all the more so where the allegations in question are as serious as they are in this case. As I have said, the Claimant stands accused of seriously assaulting the Sixth Defendant and killing their unborn child.
121. For these reasons, I set aside the judgment in default and grant relief from sanctions to allow the Sixth Defendant to file a defence.
122. This makes it unnecessary to consider at any length the question of regularisation especially as it is uncertain, for the reasons that I have given, whether Jill Lawrence will continue as the Sixth Defendant's litigation friend.

Costs and disposal

123. I invite the parties to draw up an order reflecting the terms of this judgment. I also invite submissions on costs to date. Unless it appears otherwise, I propose to deal with all consequential matters on the papers.