



Neutral Citation Number: [2021] EWHC 1702 (QB)

Case No: QB-2019-001115

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/06/2021

Before :

MR JUSTICE JACOBS

Between :

MISS GABRIELLE ALLI-BALOGUN
A child, by her Mother & Litigation Friend, MRS
OBIAGELI ALLI-BALOGUN

Claimant

- and -

(1) ON THE BEACH LIMITED
(2) ZURICH INSURANCE PLC SUCURSAL
EN ESPANA
(3) HOSA HOTEL SL
(4) INSTITUT DE BALEAR D'EMERGENCIES
SL
(5) MAPFRE ESPANA COMPANIA DE
SEGUROS Y REASEGUROS SA

Defendant

Mr Harry Steinberg QC (instructed by **Moore Barlow LLP**) for the **Claimant**
Mr Matthew Chapman QC (instructed by **Hudgell Solicitors**) for the **Defendant**

Hearing date: 17th June 2021

Approved Judgment

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

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MR JUSTICE JACOBS

Mr Justice Jacobs:

Section A: Introduction

1. The 5th Defendant, a Spanish insurer, applies to set aside a judgment in default of acknowledgment of service regularly obtained by the Claimant on 20 December 2019 pursuant to an order of Master Thornett. The 5th Defendant is the insurer of the 4th Defendant, a company which provides lifeguard services. A default judgment against the 4th Defendant was obtained by the Claimant at the same time, and there has been no application to set aside that judgment.
2. The Claimant is a child. She suffered a catastrophic brain injury when on holiday with her parents in August 2015. She was then aged 8 and is now 14. She brings these proceedings with the assistance of her mother acting as Litigation Friend. The proceedings result from an accident which occurred at a hotel in Lloret del Mar Spain on 15 August 2015.
3. In the Particulars of Claim – which are verified by a Statement of Truth and which contain relevant evidence for present purposes – the Claimant’s case is that the family arrived at the hotel on 14 August 2015. This was the day before the accident. On the following morning, she was taken to the hotel swimming pool by her father and she entered the pool and used snorkelling equipment in the pool. It is pleaded that Mikel Zabala Cabezas, a lifeguard, was on duty at the pool, and that the Claimant’s father remained near to the pool while the Claimant was swimming.
4. As to the accident circumstances, the Particulars of Claim allege that at about 11.30 am the Claimant’s father, who had been using the nearby outdoor gym, realised that he could no longer see the Claimant in the pool. He returned to the poolside and enquired with the lifeguard, Mr Zabala, as to whether he knew of her whereabouts, but he did not. They began to search for the Claimant. The Claimant’s father and the lifeguard checked the women’s toilets and that she was not with her mother. They then reported the Claimant as missing to the hotel reception. Only after he had returned from reception did the Claimant’s father discover that she had sunk, without being noticed, to the bottom of the pool. She was discovered by other guests who were using the pool, who then pulled her out. It is then pleaded that a hotel guest, who was a doctor, performed CPR on the Claimant and, following an attempt to use a defibrillator, the Claimant was taken by air ambulance to Girona hospital.
5. The Claimant’s case is that she sustained a catastrophic brain injury as a result of the events described above. The Claimant’s evidence for the present hearing includes medical evidence that she now needs round the clock (day and night) care as a result of her injuries and will have such needs on a permanent basis (at an annual cost of £386,699).
6. The legal basis of the claim against the 5th Defendant is a direct action against the insurer under Article 76 of Act 50/1980 regulating insurance contracts in Spain, by virtue of the fact that the 5th Defendant is liable to indemnify the 4th Defendant. There is no longer any dispute that this court has jurisdiction in respect of this claim, and that therefore such a direct action is potentially available. The only defence identified by the 5th Defendant, for the purposes of showing on the present application that there is a defence which has a real prospect of success, is that the 4th Defendant had no liability

to the Claimant in respect of the accident. No other defence, such as limitation or particular terms of the insurance, has been relied upon for present purposes.

7. As far as the 4th Defendant's liability to the Claimant is concerned, it is common ground that this is to be determined by applying principles of Spanish law. The legal basis of the claim against the 4th Defendant, which then gives rise to the direct action under Article 76, is set out in paragraphs 33 and 34 of the Particulars of Claim. Paragraph 33 pleads that the 4th Defendant is, pursuant to Article 1903 of the Spanish Civil Code, vicariously liable for Mr. Zabala, whom it employed as a lifeguard. Paragraph 34 pleads that the lifeguard was in breach of his duty of care when he failed effectively to supervise the Claimant while she was in the hotel pool. That paragraph contains particulars of the case advanced:

“34. The lifeguard was in breach his duty of care when he failed to effectively supervise the Claimant while she was in the hotel pool. In particular he:

- (a) Failed to notice the Claimant sinking to the bottom of the pool,
- (b) Failed to check or properly check the pool when he was told that the Claimant was missing,
- (c) Left the poolside when he was told that the Claimant was missing,
- (d) Failed to pull the Claimant out of the pool once she was discovered.”

Section B: Procedural background

8. Proceedings were commenced against 5 Defendants:
- a) The 1st Defendant is an English-registered limited company and tour operator said by the Claimant to have been in business selling regulated package holidays to consumers.
 - b) The 2nd Defendant is a Spanish insurance company and insurer of the 3rd Defendant. The claim against that insurer has now been settled by a payment which may represent the extent of the 2nd Defendant's insurance cover.
 - c) The 3rd Defendant is a Spanish company and owner/operator of the hotel.
 - d) The 4th Defendant is a Spanish company and provider of lifeguard services to the 3rd Defendant pursuant to a contract between them. The 4th Defendant was the employer of Mr Zabala, the lifeguard.
 - e) The 5th Defendant, which makes the present application, is a Spanish insurance company and, as described above, the insurer of the 4th Defendant.

9. A number of parties have been joined as additional parties by the 1st Defendant, but their presence in the litigation is not material to the issues which arise on the present application.
10. The proceedings overall are at a relatively early stage. Defences have been served by the 1st and 3rd Defendants in which liability is contested on various grounds. Directions for trial have not been given, in part at least as a result of the applications which the 5th Defendant made following the default judgment as described below.
11. The key dates relating to the action against the 5th Defendant can be summarised as follows. The Claim Form was issued on 10 April 2019. On 16 May 2019, the Claimant completed the necessary form relating to service out of the jurisdiction on the 5th Defendant, such service being permissible without leave. Proceedings were properly served on 29 August 2019. The time for acknowledging service expired on 19 September 2019. If the 5th Defendant had done so, its defence would have needed to be filed by 3 October 2019.
12. The explanation as to why service was not acknowledged has been provided in the first witness statement of Mr. Anthony Hey (a litigation executive at the 5th Defendant's solicitors) on behalf of the 5th Defendant. His evidence was that the documents served by the Claimants did not refer to the relevant insurance policy number which created the contractual relationship between the 4th and 5th Defendants. When received at the 5th Defendant's offices in Madrid, the documents were placed on the wrong file, and did not immediately receive attention. As a consequence there was a "regrettable delay" in responding to the claim.
13. In the absence of an acknowledgment of service, the Claimant applied for default judgment by application notice dated 20 December 2019. Master Thornett granted that application on 20 December 2019, and judgment was entered on liability with damages to be assessed.
14. The 5th Defendant's evidence in support of the application did not explain exactly when the proceedings did come to the attention of an appropriate member of staff. However, there is no doubt that after notification of the default judgment obtained on 20 December 2019, the 5th Defendant reacted with reasonable speed, bearing in mind the intervening Christmas period. Service was acknowledged on 7 January 2020. In its acknowledgment of service, the 5th Defendant gave notice of its intention to contest the jurisdiction of the court. On 20 January 2020, an application to contest jurisdiction was made. It was supported by the first witness statement of Mr. Hey. The jurisdictional argument was based on a clause in the insurance policy which contained a territorial exclusion. The relevant clause provided:

"The coverage of the policy will only cover claims made before the Spanish courts for events occurring in Spain, which result in liabilities or other obligations prevailing in accordance with the legal provisions in force in Spanish territory"
15. The application made by the 5th Defendant at that time was confined to the jurisdictional application under CPR Part 11: there was no alternative application to set aside the default judgment in reliance on CPR 13.3. This was a justifiable approach by the 5th Defendant. If the jurisdictional application had succeeded, then it would result in the

proceedings as a whole (including the default judgment) being set aside: see *Newland Shipping & Forwarding Ltd v Toba Trading FZC* [2017] EWHC 1416 (Comm), para [19] (Ms Sara Cockerill QC, as she then was). Accordingly, the default judgment was effectively being challenged through that route. The decision in *Newland Shipping* (at para [18]) also supports the proposition that an application which combined a jurisdictional challenge under CPR Part 11 with an alternative application to set aside a default judgment under CPR 13.3 would run the risk of an argument that the defendant had submitted to the jurisdiction, thereby negating the challenge on jurisdictional grounds.

16. I was told by Mr. Chapman QC, who appeared for the 5th Defendant, that the jurisdictional issue raised by the application, and the reliance placed on the territorial exclusion, had previously been raised in a number of prior cases involving Spanish insurers. Indeed, within less than a month of the application being made, Andrews J delivered judgment (on 4 February 2020) on precisely that issue in another case involving the 5th Defendant itself: *Hutchinson v Mapfre Espana Compania de Seguros & Reasguaros SA and anr* [2020] EWHC 178 (QB). In broad summary, that judgment upheld the Claimant's argument as to the ineffectiveness, for jurisdictional purposes, of the clause on which the 5th Defendant had relied. A copy of the judgment was immediately sent by the Claimant's solicitors to those of the 5th Defendant.
17. For reasons which were not explained in the evidence, but which in my view ultimately do not affect the outcome of the present application, the decision of Andrews J in *Hutchinson* did not deter the 5th Defendant from pursuing its jurisdictional application in the present proceedings – notwithstanding that it was relying on the same ineffective clause. There was, as I was told, correspondence between the solicitors for all active parties in the litigation relating to the course which the proceedings would take in the light of the jurisdictional application. This culminated in a consent order approved by Stewart J on 17 September 2020. That order contained agreed directions leading to a 2-day hearing of the jurisdictional application, such directions including disclosure and the exchange of evidence on Spanish law. The proceedings against the 1st, 3rd and 4th Defendants were stayed pending the determination of the jurisdictional application. The jurisdictional application therefore clearly had an effect on the overall progress of the present proceedings.
18. In the event, it appears that the directions for disclosure and exchange of evidence were not complied with by the parties, and in December 2020 the 5th Defendant abandoned its jurisdictional challenge. On 4 December 2020, Stewart J made an order that the jurisdictional application be withdrawn, and that the 5th Defendant should pay the Claimant's reasonable costs. On the same day, the 5th Defendant made its present application pursuant to CPR 13.3 to set aside the default judgment. The application was supported by the 2nd witness statement of Mr. Hey.
19. In the week before the hearing of the present application on 17 June 2021, further evidence was served. On behalf of the Claimant, Mr. Trevor Sterling (a partner in Moore Barlow LLP) served a short witness statement responding to Mr. Hey's witness statement. He exhibited a report on Spanish law from Mr. David Sanchez Almagro ("Mr. Sanchez"). On 15 June, the 5th Defendant served a lengthier report on Spanish law from Professor Luis Carreras del Rincon ("Professor Carreras").

20. Written skeleton arguments were exchanged on 16 June. At the hearing, Mr. Chapman QC for the 5th Defendant, and Mr. Steinberg QC for the Claimant, made concise and focused oral submissions in person at the hearing of the application.

Section C: The legal test on applications to set aside.

21. There was no dispute as to the applicable principles. CPR 13.3 provides:

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

13.3

(1) In any other case, the court may set aside or vary a judgment entered under Part 12 if –

(a) the defendant has a real prospect of successfully defending the claim; or

(b) it appears to the court that there is some other good reason why –

(i) the judgment should be set aside or varied; or

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

(2) In considering whether to set aside or vary a judgment entered under Part 12, the matters to which the court must have regard include whether the person seeking to set aside the judgment made an application to do so promptly.’

22. The burden is on the applicant to show a good reason why judgment regularly obtained should be set aside, see *ED&F Man Liquid Products v Patel* [2003] EWCA Civ 472, para [9] per Potter LJ.
23. The starting point is whether the defendant has established that it has a “real prospect” of successfully defending the claim. This means more than ‘merely arguable’. The distinction between a real and fanciful prospect of success is that the defence sought to be argued “must carry some degree of conviction”: *ED&F Man* para [8]. The notes to CPR 13.3 in the White Book describe the “major consideration” on an application to set aside as being whether the defendant has shown a real prospect of successfully defending the claim or some other good reason why the judgment should be set aside
24. A frequently-cited statement of the relevant principles concerning “real” or “realistic” prospect is set out in the judgment of Lewison J. in *Easyair v Opal* [2009] EWHC 339 (Ch) in the context of applications for summary judgment:

“i) The court must consider whether the claimant has a “realistic” as opposed to a “fanciful” prospect of success: *Swain v Hillman* [2001] 2 All ER 91;

ii) A “realistic” claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8]

iii) In reaching its conclusion the court must not conduct a “mini-trial”: *Swain v Hillman*.

iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10]

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because

something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725.”

25. It is not necessarily enough to show that there are real prospects of defending the claim. The decision as to whether a judgment should remain in place is a discretionary decision. An important factor, which is given prominence by CPR13.3(2), is the promptness of the application. The Courts have considered delay in various cases, but there is no defined outer limit and what is considered ‘prompt’ depends on the circumstances of the case. The authorities suggest that, since the advent of the CPR, a claimant will not be lightly deprived of a default judgment; see *Standard Bank Plc v Agrinvest International* [2010] EWCA Civ 1400.

Section D: The factual evidence

26. There is limited factual evidence served by the 5th Defendant in relation to the application. There are no statements from the lifeguard or any other person within the 5th Defendant’s assured. Some evidence has been served by Mr. Hey on behalf of the 5th Defendant, and I refer to its material parts below. However, that evidence is not based on any information given to the 5th Defendant by its assured, nor based on any evidence from anyone else with knowledge of the relevant events. I was told in the course of Mr. Chapman’s submissions that there had been a lack of co-operation on the part of the 4th Defendant with its insurer.
27. There was no evidence of what the lifeguard said at the time of the events in question, or when they were investigated, except as described below. Such evidence as does exist clearly does not suggest that the lifeguard is a reliable witness in relation to the events which took place. Mr. Steinberg referred me to a police report produced in November 2015 which followed the opening of proceedings by an examining magistrate in Spain. The report contains a number of statements from individuals to whom the police spoke. It includes the following in relation to Mr. Zabala, the lifeguard:

“REPORT PROCEEDINGS to record that obtaining a witness statement from Mr Mikel Angel ZABALA CABEZAS, holder of Spanish national identity card number 78982157L was extremely difficult. He incurred a lot of contradictions, incoherence and statements that did not seem true. It does not seem true that he had not seen the child at any moment, if that is not the case, it is not very professional.

Nor is it very professional for him to leave the resuscitation to someone who “said” he was a doctor, that being an obligation for him due to his post.

Nor is it very professional for him not to see fit to fully check the pool but, on the other hand, spend time looking in other parts of the building which are not his remit and where it would be hard for the girl to be at risk.

We must add that this reporting officer considers that the way Mr Zabala expressed himself and explained the events was not

that of a normal witness statement. He appeared to be very nervous, insecure, stubbornly insisting on blaming the father, evasive and contradictory.”

28. No defence has been served, even in draft, which would enable the court to see whether there are any particular facts on which the 5th Defendant is relying by way of defence. In his skeleton argument, Mr. Chapman indicated that the 4th and 5th Defendant’s factual case will follow (in essence) the same course as that plotted by the 1st and 3rd Defendants. However, the claim against those parties (the tour operator and the hotel) is not made on exactly the same basis as the claim against the lifeguard company and its insurer. It is also clear that the defences advanced by the 1st and 3rd Defendants raise issues which would not be relevant or available to the claim against the 4th Defendant. The fact that summary judgment has not been sought against the 1st or 3rd Defendants does not therefore lead to the conclusion that the 4th Defendant has a defence with a real prospect of success.
29. As far as the facts relied upon by those parties are concerned, the position can be summarised as follows. The 1st Defendant does not set out any real factual case. Paragraph 16 of the 1st Defendant’s defence pleads that it has no knowledge of any of the relevant matters relating to the incident, and in fact makes no admission as to whether the Claimant was injured in the pool at all. Paragraphs 16 – 18 make various points by reference to the Claimant’s case pleaded in the Particulars of Claim. In so far as facts are set out in paragraph 36 (g) – (j), such facts are also essentially comment on the factual case advanced by the Claimant in the Particulars of Claim.
30. The 3rd Defendant’s defence does admit that the accident occurred on the date alleged. The defence does set out certain facts, essentially relating to the conduct of the Claimant’s father, not the Claimant herself. It does not address the conduct of the lifeguard. The 3rd Defendant’s essential case is that it took steps to ensure that there was a safe swimming environment, including contracting with a specialist lifeguard company. The 3rd Defendant specifically reserved its right to claim indemnity or contribution from the 4th or 5th Defendants.
31. In his witness statement in support of the application to set aside, Mr. Hey said as follows:
 - “22. In my submission, even on the face of the Claimant’s pleaded factual case (which is not admitted) there is little (if any) basis for criticising the conduct of the Fourth Defendant’s employee, Mr Zabala and the Fifth Defendant would plainly have reasonable prospects of successfully defending the claim:
 - a. It is not alleged (at least *in terms*) that the Claimant’s father was present when the Claimant entered the swimming pool and hence whether he can say whether Mr Zabala was also present at that time;
 - b. It appears to be the Claimant’s case that her father checked the pool immediately before asking Mr Zabala

to help look for her, but he could not see her, indicating that she was not present at that time;

- c. The only reason Mr Zabala left the poolside was at the insistence of the Claimant's father and he therefore had good reason to do so;
 - d. Whilst it is not admitted in any event that the Claimant was rescued by anyone other than Mr Zabala, there is no evidence that this caused or contributed to her injuries.
23. Further, there are strong grounds for believing that her injuries were caused by the acts and omissions of the Third Defendant (the index hotel) and/or her parents.
24. I note the Claimant's allegations pleaded at paragraph 29 of the Particulars of Claim, particularly against the Third Defendant and would submit the following:
- a. If article 17(3) of Royal Decree 95/2000 constituted the local standard applicable to the index hotel at the time of the material time, the Third Defendant's rules permitting children aged between 7 and 13 to use the pool without being supervised by an adult, were contrary to the local standard;
 - b. The Third Defendant employed only one lifeguard to supervise both the adult and child swimming pool yet it was impossible to see the whole of the adult and children pool from any one position because of a fixed barrier between the two pools;
 - c. Security staff at the hotel were not employed to arrive until midday and so at the time the Claimant's father reported her to be missing, there were no security staff to assist in the search.
25. In respect of any fault on the part of her parents, I note that the Claimant was only eight years old at the time of the incident but had been left to go swimming without the supervision of either parent. I note that her father is alleged to have gone to an outdoor gym which is said to have been 'nearby'. It is not said where the Claimant's mother was but it is tolerably clear from paragraph 13 of the Particulars of Claim that it is not alleged that she was at the poolside. I also note that the Claimant had taken snorkelling equipment with her and so it must have been apparent to either or both of her parents that she was intending to swim fully or partially submerged under the water. I do not propose to enumerate the grounds on which these things, taken together, might be regarded as falling below the standard of care required of a

parent of an eight year-old child, but in my respectful submission, they are clear.”

32. In response, Mr. Sterling described the history of the litigation, and referred to the Claimant’s case against the 5th Defendant as being “extremely strong”. He exhibited the expert report of Mr. Sanchez.

Section E: The Spanish law evidence

33. Both parties provided reports from very well-qualified Spanish law experts. Apart from one matter (concerning where the burden of proof lay), there was no significant dispute between them in relation to the relevant principles of Spanish law which will govern issues as to the liability of 4th Defendant to the Claimant (and hence the liability of the 5th Defendant) in the context of this case. Indeed, again apart from the burden of proof point, there appeared to be no substantial difference between the basic approach of Spanish law and English law to the liability issues.
34. The basic principles under Spanish law were summarised by Professor Carreras in his report. The starting point is Article 1902 of the Civil Code which provides that: “he who by action or omission causes harm to another person, by his fault or negligence, is obliged to repair the damage”. The jurisprudence of the Spanish Supreme Court is that this requires three elements that make up responsibility of “one’s own actions”: a wrongful act or omission, a harmful result and a cause-effect relationship between them.
35. Spanish law therefore operates, in the present context, on the basis of fault or negligence. It is not a strict liability regime. The application of the law is, as the evidence of the Spanish experts showed and as Mr. Chapman submitted, fact and context specific. In the body of his report, Professor Carreras was able to point to cases where claims against a lifeguard or lifeguard company had failed on the facts. For his part, Mr. Sanchez was able to identify a larger number of cases where the claim had succeeded on the facts. Ultimately, neither Mr. Chapman nor Mr. Steinberg encouraged me to approach the present case by seeking to compare the present facts with those in the cases to which the experts had referred.
36. Mr. Sanchez referred to some aspects of the decisions, within the line of Supreme Court authority on which he relied, in support of the proposition that there is a reversal of the burden of proof: ie that the 4th Defendant will be liable unless it proves that he acted diligently and put in place all the measures required to prevent the injury. Professor Carreras’s evidence was that the burden remained on the victim. Mr. Steinberg accepted that it would be inappropriate, within the context of the present application, to try to resolve that issue of Spanish law. I therefore proceed for present purposes on the basis that, if the matter were to proceed to trial, the Claimant would bear the burden of proving the fault/negligence of the lifeguard.
37. If the fault/negligence of the lifeguard is proven, then Spanish law provides that the company which employs him will be vicariously responsible for his failure to properly perform his surveillance duties.

38. Cases may arise where other parties are also potentially liable. The evidence of Mr. Sanchez was to the effect that there was joint liability of each responsible party for the injury. He said that:

“The type of liability applying to swimming pool owners and lifeguard companies is joint liability, meaning that the victim may address the claim against any of them or both (jointly). If the claim is addressed against both, the pool owner and the lifeguard company will be held jointly liable vis a vis the victim.”

39. This proposition was not disputed in the evidence of Professor Carreras, and Mr. Chapman indicated that “joint and several” liability accorded with his understanding of Spanish law. As between those responsible, the Spanish court would allocate responsibility as appropriate. This would not, however, affect the Claimant’s entitlement to recover against a joint wrongdoer in full.

Section F: The parties’ arguments

40. The principal argument addressed by both counsel was whether the 5th Defendant had a realistic prospect of successfully defending the claim.
41. On behalf of the 5th Defendant, Mr. Chapman submitted that the 5th Defendant had a real prospect of successfully defending the claim on the basis that the 4th Defendant had no liability to the Claimant. Although no draft defence had been served, he submitted (as previously described) that it would follow the same course plotted by the 1st and 3rd Defendants. He referred to the Particulars of Claim, identifying what he said were gaps in the Claimant’s account which would need to be completed by way of further particulars or amendment, and which would need to be explored at trial. He said that whilst the chronology was unclear from the Particulars of Claim, it appeared that the Claimant could not initially be seen in the pool, and it was therefore likely that she was not there at the time. The lifeguard then appears to have left the pool, to check the women’s toilets and report the Claimant missing at reception, at the request of the Claimant’s father. He referred, in both his written and oral submissions, to the pleadings served on behalf of other parties, and to the expert evidence of Professor Carreras. He submitted that cases of the present kind depended upon an assessment of the facts; the facts would only become clear at trial; and the 5th Defendant (standing in the shoes of the 4th Defendant) had a realistic prospect of success, bearing in mind that the Claimant bears the burden of proof under Spanish law.
42. In his oral submissions, Mr. Chapman said (correctly) that there is no requirement that a draft defence should be served. If such a defence were to be served by the 5th Defendant in this case, it would likely say that: the Claimant is put to proof of the factual circumstances; the 5th Defendant has no direct knowledge of the facts; that information should be provided under CPR Part 18 as to where people were at various times, with a reservation of the right to plead further on receipt of that information; and that reliance was placed on Professor Carreras’ report in relation to Spanish law.
43. In response in relation to this issue, Mr Steinberg said that the material available suggested that the 5th Defendant had no real prospect of successfully defending the claim. The evidence of Mr. Hey, that there was little if any basis for criticising the

conduct of the lifeguard, was mere assertion and in any event was an unrealistic suggestion in circumstances where the lifeguard almost allowed an 8 year old child to drown on his watch, and where she suffered catastrophic injuries. The possible liability of the hotel, and the possibility (floated in Mr. Hey's evidence) of a claim against the Claimant's father, would not exonerate the 4th/5th Defendants in circumstances where liability was joint. The police report gave a contemporaneous assessment of the lifeguard and the quality of his evidence. There was, however, no evidence at all from the 4th Defendant or the lifeguard as to how the relevant events occurred.

44. Mr. Steinberg submitted that it was inherently more likely that the Claimant was already in the pool when the father first came back and alerted the lifeguard. On that basis, the lifeguard had failed to see her get into the pool and start to drown: this could only be attributed to a lack of attention on his part. He was a lifeguard in name only. However, if she was not in the pool at that time, and only went into the pool and started to drown when the search for her was underway, the lifeguard was still at fault. It was his responsibility to look after pool users, including the Claimant. He should not have left his post with the result that the pool was unguarded. On either basis, the 4th/5th Defendants could not possibly or reasonably hope to avoid liability on the present facts. The Claimant's advisers had been hoping to see a draft defence, in order to know exactly what the position of the 5th Defendant was. As matters stand, the position reached nearly 6 years after the accident, and nearly 2 years after the Particulars of Claim were served, is that the 5th Defendant is relying on the position of others who have served defences. Overall, Mr. Steinberg submitted that there was no reason why the Claimant almost drowned unless the lifeguard was not paying attention.
45. The parties' submissions also addressed the question of whether the application to set aside had been made promptly. Mr. Chapman said that it had, bearing in mind that an application under CPR 13.3 could not safely be made at the same time as a jurisdictional challenge. Mr. Steinberg submitted that it was appropriate to look at the facts overall. Here, the default judgment was obtained in December 2019 and there was no application to set aside until a year later. The jurisdictional challenge did not provide an answer: this had become unsustainable as a result of the judgment of Andrews J in February 2020, and it was then only abandoned – and without any explanation – in December 2020.
46. Each party also addressed discretionary considerations. Mr. Chapman submitted that there was in any event “some other good reason” why the judgment should be set aside, even if the defence had no realistic prospect of success. He said that the Claimant could not recover the entirety of her pleaded claim from the 5th Defendant: although there was substantial insurance coverage, the Claimant's loss would likely exceed it. In the circumstances, and regardless of the outcome of the present application, the Claimant would be likely to continue the action against the 1st and 3rd Defendants. The factual basis for the case will therefore fall for consideration and determination at the trial, as part of the continuing case.
47. The 5th Defendant also relied upon the fact that substantive case management had not taken place. There is no timetable for directions. Matters of contribution are still arising, with claims being made by the 1st Defendant against additional parties. If the default judgment remains in place, this will result in an artificial situation in which the same issues (as between Claimant and 5th Defendant) will, in any event, require resolution between other parties to these proceedings. There was no other prejudice, absent the

loss of the “windfall” represented by the default judgment, which would result from the grant of the application.

48. Mr. Steinberg made various points in response, and his submissions encompassed the proposition that the judgment should remain in place, as a matter of discretion, even if the 5th Defendant had a real prospect of success. His central point was that the Claimant remained in need of resolution of this litigation. At the moment, she has a valid judgment in her favour. She needs new accommodation and a range of equipment. The judgment against the 5th Defendant gave rise to the possibility of settlement or an interim payment. This would enable her to move back to her parents’ house, which would (on the medical evidence) be beneficial to her. Someone in her situation should not be deprived lightly of her judgment.
49. In addition, Mr. Steinberg referred to the manner in which the 5th Defendant had chosen to contest jurisdiction, persisting with the application despite the decision of Andrews J and then abandoning it much later. There was no explanation of why this had taken so long. It had resulted in a slowdown (indeed a formal stay) of the action against other defendants.

Section G: Discussion

50. I consider that the most important question is whether the 5th Defendant has shown that it has a real prospect of a successful defence on liability. I shall address that central issue in due course, but will first deal with the arguments based on promptness and other discretionary matters.

Promptness and other “discretionary” arguments

51. If a real prospect of a successful defence on liability did exist, then I do not consider that lack of promptness, or any of the other discretionary considerations relied upon by Mr. Steinberg, would lead to the conclusion that the judgment should remain in place. As the notes to CPR 13.3 in the White Book say, the purpose of the power to set aside is to avoid injustice. Even taking full account of the tragic personal circumstances of the Claimant, it would in my view be unjust to deprive the 5th Defendant of the opportunity of defending the proceedings if there is indeed a real prospect of a successful defence on liability.
52. Mr. Steinberg’s principal argument on discretion concerned promptness. It will be apparent from my discussion of the facts in Section B above, including the decision in *Newland Shipping*, that this was not a simple case where a default judgment was obtained in December 2019 and no application was made to set it aside until a year later. In fact, the 5th Defendant reacted quickly to the default judgment. There was no material delay between notification of the judgment and the 5th Defendant’s jurisdictional application, of which notice was given in early January 2020 very shortly after the Christmas holiday period. The effect of that application was to challenge the judgment: if successful, it would have been set aside, albeit as a result of the jurisdictional route of CPR Part 11 rather than the different route of CPR 13.3.
53. There was, rightly, no suggestion in Mr. Steinberg’s argument that the jurisdictional challenge made in January 2020 was in any way unprincipled or abusive or without substance. The judgment of Andrews J indicates that there was a substantial point to be

argued, and indeed there was an existing judgment of HHJ Halbert in the Chester County Court which had been decided in the 5th Defendant's favour. The judgment of Andrews J in *Hutchinson*, rejecting the 5th Defendant's argument, is powerful and closely reasoned. I do not know whether permission to appeal was sought, either from the judge or the Court of Appeal, although it is clear that no appeal was ultimately pursued. It does not automatically follow, however, that the 5th Defendant acted unreasonably in its decision to continue to challenge jurisdiction in the present case. Even if no appeal was pursued in the *Hutchinson* case, it is possible that the 5th Defendant took the view that it wished to reargue the issue, and possibly try to take the present case to appeal or seek a reference to the CJEU, notwithstanding the existence of the first instance judgment of Andrews J. I cannot say that this was unreasonable, and indeed there was no application to dismiss the jurisdictional application on the basis that it was unsustainable in the light of the decision of Andrews J.

54. Ultimately, the 5th Defendant decided not to pursue its jurisdictional argument. It then promptly made the present application under CPR 13.3. For reasons discussed in Section B, it could not safely have made that application earlier, at a time when it was challenging jurisdiction.
55. I therefore do not consider that the 5th Defendant failed to act promptly in all the circumstances. As I have said, none of the other discretionary considerations relied upon by Mr. Steinberg would have led me to allow the default judgment to remain in place, if the 5th Defendant has a real prospect of a successful defence on liability.
56. Equally, if there were no real prospect of a successful defence, then I do not accept Mr. Chapman's argument that there is some other good reason for a trial. On the contrary, I think that there would be every reason to allow the judgment to remain in place, thereby giving the Claimant the possibility of a settlement or interim payment which would enable her to move home. The fact that litigation against other parties may continue does not in my view provide a reason why the Claimant should be deprived of a judgment against a party who had no real prospect of a successful defence. Nor does the fact that the claim against other parties is not well advanced. That is itself due, at least in part, to the delay which resulted from the 5th Defendant's jurisdictional challenge, which was abandoned in December 2020. I should also say that I do not regard the default judgment as a "windfall". It was a regular judgment properly entered and one which in principle, if there is no real prospect of a successful defence, cannot be regarded as a windfall or indeed should lightly be set aside.

Real prospect of success

57. I do not accept Mr. Steinberg's argument that the absence of a draft defence is fatal to the present application. Paragraph 13.4.1 of the commentary in the White Book indicates that is preferable to exhibit a draft defence. However, there is no requirement to do so. A draft defence is potentially important, however, because it would enable the court to see clearly what, if any, facts are relied upon by a party in support of its defence. That is in turn important because, as the authorities make clear, the assessment of "real prospect of success" does not require the court to accept at face value the factual case advanced by a party: the court can assess whether that factual case itself has a reasonable prospect of success.

58. The absence of a draft defence in the present case reflects, at least in part, the fact that the 4th/ 5th Defendants have not been able to set out a factual case as to what happened. The evidence of the police report indicates that there has not been a coherent account from the lifeguard as to what happened. There is no realistic prospect that any such account will now be forthcoming, some 6 years after the incident, particularly bearing in mind the lack of cooperation to which Mr. Chapman referred. In so far as any account was given by the lifeguard, it appeared that he blamed the Claimant's father. (He did not blame, for example, any visual difficulties caused by the barrier in the pools referred to by Mr. Hey in his statement). However, as discussed below, whether one is looking at the barrier in the pools, or the actions of the Claimant's father, these would at best give rise to possible contribution claims identified in Mr. Hey's witness statement.
59. Although I do not accept that the absence of a draft defence is fatal, I accept his submission that – essentially for the reasons which he gave and which are summarised above – the 5th Defendant has failed to show that a real prospect of a defence on the issue of the liability of the 4th Defendant.
60. I accept that the Spanish case-law shows that the mere fact that a person has drowned in a swimming pool, when a lifeguard is on duty, does not automatically mean that the lifeguard is at fault/negligent. The question of liability depends on the particular facts of the case. However, it does not follow that because liability depends on the facts, a lifeguard's proposed defence must have a real prospect of success on the basis that the full facts will not be known until they are investigated at trial. In the present case, there are sufficient facts which have been pleaded in the Particulars of Claim (evidenced by a Statement of Truth) which give rise to the legitimate question: what exactly is the defence which it is said to have a real prospect of succeeding at trial?
61. Here, a young child almost drowned whilst the lifeguard was on duty, whilst “on his watch” (as Mr. Steinberg put it), and suffered catastrophic injuries in consequence. One feature of the case, which does not appear to be substantially disputed, is that the lifeguard at one point was not carrying out his responsibility for the safety of all those who may have been in the pool, including the Claimant, because he was inside the hotel looking for the Claimant at the request of her father. Another feature of the case, pleaded in the Particulars of Claim and not positively denied by the 5th Defendant, is that the Claimant was discovered by other guests who were using the pool (ie not by the lifeguard) who then pulled her out.
62. Mr. Hey's argument is that the Claimant's pleaded case gives rise to little (if any) basis for criticising the conduct of the lifeguard. That submission is, as Mr. Steinberg submitted, unrealistic. It seems to me that the grounds for criticism are obvious. There are two possibilities, canvassed in the arguments of counsel. The first (which Mr. Steinberg suggested was inherently more probable) was that the Claimant was already in the pool and in difficulty when her father alerted the lifeguard that he could not see her, and that she was then missed. On this basis, the lifeguard failed, as pleaded, to notice the Claimant sinking to the bottom of the pool and failed to check or properly check the pool when he was told that the Claimant was missing. The second (which Mr. Steinberg said was unlikely, but which appeared to be the case advanced for the 5th Defendant) was that the Claimant got into the pool, and started to sink, when the lifeguard had left the poolside after being told that the Claimant was missing. On this basis, the Claimant's catastrophic injuries occurred when the pool was completely unguarded, notwithstanding that the lifeguard had responsibility for guarding the pool.

63. On either basis, there is in my view an obvious case against the 4th Defendant, and there is no defence which carries any degree of conviction. The Claimant was either in the pool in difficulty when her father came back and alerted the lifeguard, in which case no explanation has been provided as to why she was not seen at that time or earlier when getting into difficulty. The obvious explanation, as Mr. Steinberg submitted, is inattention. Alternatively, the relevant events all happened when the lifeguard had left his post notwithstanding that he was the person with responsibility for the safety of not only the Claimant but others who might get into the pool. The proposed defence, that the lifeguard was acting reasonably in effectively abandoning his lifeguard duties at that time, carries no conviction. As the police report says, it was not “very professional for him not to see fit to fully check the pool but, on the other hand, spend time looking in other parts of the building which are not his remit and where it would be hard for the girl to be at risk”.
64. Mr. Chapman’s summary of what might be said in a defence consisted of little more than putting the Claimant to proof. Against the background described above, a defence which simply puts the Claimant to proof is, in the light of the above matters, not a defence which carries any degree of conviction.
65. In reality, it seems to me that the defence largely consists of the 4th/5th Defendant blaming others: see paragraphs 23 – 25 of Mr. Hey’s second witness statement set out above. However, in view of the joint liability that exists under Spanish law, it is no answer to the claim for the 4th/5th Defendants to say that others were also responsible. It does not absolve them of the fault/negligence of the lifeguard.
66. In all the circumstances, the 5th Defendant has no defence which has a realistic prospect of success, and the default judgment should remain in place.