IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

No. QB-2020-001539

[2022] EWHC 2987 (KB)

Royal Courts of Justice
Strand
London, WC2A 2LL

Friday 14 October 2022

Before:

MASTER DAGNALL

B E T W E E N :

MAITHAM SHAMMA — Claimant

- and -

(1) AMEER MOHAMMED JAWAD
(also known as AMIR MOHAMMED JAWAD MOHAMMED RADHA)

(2) ZAINAB MOHAMMED JAWAD
(also known as ZAINEB RIDHA)

(3) THE ESTATE OF SABEIHA SHAKIR SADIQ
(also known as SABIHA AL-BABRANI (deceased)) — Defendants

MR S. ARMSTRONG (instructed by Harold Benjamin Solicitors) appeared on behalf of the Claimant.

MR D. PETRIDES (of Counsel; for the hearing) and MS K. LIPINSKI (Solicitor, Teacher Stern LLP; for the delivery of the oral judgment) appeared on behalf of the defendants.

J U D G M E N T (APPROVED)

(v i a M i c r o s o f t T e a m s)

APPROVED

MASTER DAGNALL:

1 I have before me three applications. The first application is by notice of application dated 12 July 2021 by the second defendant to extend time for compliance with the conditions for the setting aside of a default judgment dated 2 July 2020 which I granted against the first defendant, and of the default judgment itself which I granted on 11 November 2020 against the first defendant and the second defendant, those conditions for set aside being contained in a judgment. Secondly, there is a linked application of 21 October 2021 by the second defendant for relief from sanctions contained in the order of 11 November 2020. Thirdly, there is an application also of 21 October 2021 of the first defendant for relief from sanctions and extension of time for compliance with conditions in the 11 November 2020 order so that the default judgment against the first defendant should be set aside, the default judgment itself again being that of 2 July 2020.

2 The context and the history of this matter is somewhat unusual. The first and second defendants are brother and sister of Iraqi ethnicity and heritage. Both live in this country and have done so since the 1970s. The second defendant owns a flat here and the first defendant may have an interest in a residential property, although that is in dispute. Their father was Mr Mohammed Jawad Mohammed Ridha ("the Father"). At some point in time, he died in Iraq. He left as his surviving family not only the first and second defendants but his widow who has since died and whose estate is the third defendant. He also left a brother Thafir Shakir Sadiq Albahrani who is the uncle of the first and second defendants.

3 The Father's estate passed to his dependent children, the first and second defendants, under Iraqi law. Prior to his death, the Father had been registered with title to a plot of land in Iraq. That land was itself subject to a dispute between the Father and a Mr Abdulwahhab

Abdulamer Hatem ("Mr Hatem"). Mr Hatem's claim was that there existed a purchase deed dating from 1979 by which the Father had agreed to sell the land to Mr Hatem. There are disputes with regards to the validity of the deed and whether the purchase price was paid, and therefore whether it was enforceable.

4 Mr Hatem brought a claim against the first, second, and third defendants in Iraq for damages asserting that they were liable for the failure of the Father to complete the purchase deed and the sale of the land to Mr Hatem. That resulted in a first instance judgment of an Iraqi court sitting in Kadhimiya, Iraq, on 15 May 2016 for various amounts totalling over 4.8 million Iraqi Dinars, being a total of about £3 million, split as between the various defendants as to about £1.9 million against the first defendant, and £950,000 against each of the second defendant and the third defendant.

5 The defendants, by Mr Albahrani, sought to appeal the judgment in Iraq on various bases which included that, firstly, they had never received the papers in the relevant litigation, and, secondly, that they had been located in the United Kingdom, not in Iraq, and had no knowledge of the litigation. Those appeals were dismissed by the Iraqi Federal Court of Appeal located in Baghdad on 15 August 2017 and on 23 October 2017. The written judgment of the Iraqi Court of Appeal of 15 August 2017 said, amongst other things, that, firstly, it had been ascertained that an address in Karada, Iraq, had been used by Mr Albahrani as trustee for the defendants as an address for litigation in Iraq in 2015 and had been an address of the Father featuring on his Iraqi identity card. Secondly, that the first and second defendants now said that they lived in London and that the Karada address was deserted. Thirdly, that the process of the first instance Iraqi court was that a default judgment had been granted, and that that had been served at the Karada address and had been advertised in local newspapers. Fourthly, it was said that:

> "This matter leads the court to conclude that the respondent [that is Mr Hatem] does not know that the address of the appellants [that is the defendants] are residing in London, and that he served [and the word is unclear but appears to be 'warnings'] to their addresses stated in the card of residence and powers of attorneys aforementioned and that the service of process procedures was served duly with respect to provisions of service of process contained in the Civil Proceedings Act. Therefore, the court dismisses the appeal as it was held [the words are then again unclear but are probably 'outside of the legal period']."

6 It would therefore appear, although I will come back to this in this judgment, that the appeal court was proceeding in some way on the basis of the appeal having been brought out of what was ever the necessary time period laid down by the Iraqi law.

7 Iraq is not a relevant country for the purposes of the Foreign Judgments (Reciprocal Enforcement) Act 1933 and, therefore, the process of registering judgments under that Act is not relevant to these proceedings and not available. However, there is a principle of common law that if a person is subject to the jurisdiction of a foreign court or voluntarily submits to its jurisdiction, then that gives rise to a deemed contract between that person and the other parties to the action to abide by any relevant foreign court judgment. That is, however, subject to the foreign judgment not having been obtained or remaining in existence in a way which infringes the view of the courts of England and Wales of what is fundamental and ethical justice.

8 Returning to the history, Mr Hatem died leaving beneficiaries in Iraq who are termed "the Al-Ugaily heirs" but whom I will call in this judgment "the Beneficiaries". The Beneficiaries gave a power of attorney to the claimant to bring a claim based on the Iraqi

judgment against the defendants in this jurisdiction. The claimant then obtained a grant of letters of administration of Mr Hatem's estate from the Winchester Probate Registry by order of 19 November 2019 and formal grant of 8 April 2020. The claimant then issued proceedings on the alleged common-law deemed contract on the basis that the defendants had voluntarily submitted to the jurisdiction of the Iraqi court and were therefore bound to satisfy the Iraqi judgment.

9 The claim form was issued on 30 April 2020 and after some difficulties was served on the defendants in about June 2020. The defendants did not file or serve any acknowledgement of service or defence in accordance with the time periods laid out in the Civil Procedure Rules. They assert that they were vulnerable and confused. The claimant then obtained what seems common ground was a regular default judgment against the first and second defendants for sums of £1.9 million and £950,000 respectively on 2 July 2020 and following that obtaining of the default judgment, a charging order to secure the second defendant's liability over her flat in London. The claimants notified the defendants that they had done this and the defendants then applied, what seems to me to be relatively promptly, on 22 July 2020 to set aside the default judgment.

10 That application came before me on 11 November 2020. The defendants were represented by solicitors Oliver Fisher Solicitors and counsel Mr Richard Granby. Mr Granby relied on CPR 13.3 in inviting me to set aside the default judgment on the basis that he said that the defendants had real prospects of success in defending the common law claim, those submissions being principally based on the following. Firstly, it was said that the defendants were not resident in Iraq and had never been served with the documents in the Iraqi litigation. Therefore, both (a) it would be contrary to natural justice for the judgment to be enforced against them, and (b) that they had not even submitted to the jurisdiction of the courts of Iraq. Secondly, following on from that, that they had not, by appealing or

otherwise, submitted to the Iraqi jurisdiction. All they had done was sought to contest jurisdiction and not to raise any substantive defence. Therefore, it was said that in addition to it being contrary to natural justice to have the judgment obtained and therefore enforced against them, in any event, there is not even jurisdiction to do so because they had not submitted to the jurisdiction of Iraq and were not subject to it. Thirdly, Mr Granby submitted that there had been impropriety in the Iraqi judicial proceedings which tainted the judgment so that it should not be enforced at common law. In particular, first, there had been fraud by Mr Hatem who had produced a version of the alleged deed of purchase, which was in some way forged or fake, and, secondly, that there had been some sort of political interference in the relevant Iraqi judiciary.

11 The evidence at that hearing from the defendants was limited and, in my mind, left many questions unanswered. I saw with some hesitation that there were real prospects of success in the defence but felt that they were shadowy. Therefore, I made an order which was somewhat equivalent to a conditional permission to defend on a refusal of summary judgment under CPR Part 24.

12 My judgment and order was contained in a sealed order dated 11 November 2020. Paragraph 1 provided that the judgments in default would be set aside if, but only if, certain conditions were satisfied. Paragraph 4 was a somewhat unusual order in this context. It was, that the claimant was to provide various documents directed to, firstly, whether there was any real issue with regards to the genuineness of the 1979 deed; and, secondly, as to what had actually been the subject matter in Iraq of the appeal against the Iraqi default judgment as advanced and created by Mr Albahrani. That element of that order was made, in part, because the defendants said they had difficulties in contacting Mr Albahrani and they did not know what documents, if any, Mr Albahrani had or could provide with regards to the appeal. That particular aspect particularly affected the question as to whether or not

there had been a voluntary submission to jurisdiction by way of the appeal. Thirdly, the claimant was to provide documents relating to the Iraqi court's reasoning in granting the default judgment and the appeal, that being particularly relevant to the questions as to whether there had been a voluntary submission to the jurisdiction and as to whether or not principles of natural justice had been infringed in Iraq.

13 Paragraph 4 of the order required that the claimant would provide those documents by 9 December 2020. It did not, however, contain any provision which rendered what the defendants had to do as set out later in the order conditional on compliance with paragraph 4, or at least not expressly. I do not know what was precisely in my mind in terms of creating the order in this particular way and there is no transcript of the 11 November 2020 hearing. On the other hand, I would not have expected paragraph 4 not to be complied with, it having been made an order of the court. Of course, the defendants if they wished to complain about non-compliance could always have made an application, which they have not done. Following paragraph 4, I set out the various conditions which had to be complied with by the defendants for the default judgments to be set aside.

14 In paragraph 5, I provided that the first and second defendants were to file and serve witness statements describing their financial assets and liabilities by 4.00 p.m. on 27 November 2020, a time period which was extended by agreement to 2 December 2020.

15 In paragraph 6, I provided that they were to serve a defence which complied with CPR Part 16 and its practice direction and also complied with the following:

> "...and further in relation to:
>
> (i) Their allegations of fraud and/or other impropriety; and

(ii) Their allegations that what they did in Iraq did not amount to a voluntary submission other than for the purpose of contesting jurisdiction of the Iraqi courts,

pleads all facts relied on in support of those contentions, including why the court should draw any relevant inferences."

16 Paragraph 7 provided that by 4.00 p.m. on 20 January 2020, the first and second defendants were to file and serve witness statements by the second defendant and Mr Albahrani and, if they sought to rely on provisions of Iraqi law, from someone who is an expert in their Iraqi law, and that the statements of the second defendant and Mr Albahrani must address:

(a) What was advanced in the Iraqi litigation, including in the para.4 documents, and to what extent it dealt with the:

(1) Service;

(2) General jurisdiction; and

(3) The underlying merits of the claim before the courts of Iraq.

(b) In respect of fraud, exactly what the fraud alleged is and the matters which were relied upon evidentially to support the contention that fraud occurred and why fraud or impropriety should be inferred; and

(c) In respect of allegations of interference with the Iraqi judiciary, what interference is alleged and what evidence is advanced to support such an allegation;

(d) In respect of the allegations that the defendants were denied the ability to present a substantive defence, precisely what facts are relied on, precisely what timings are relied on, and with a provision that the evidence as to Iraqi law was to be given by an expert."

17 Those, again, were not standard provisions but I believe and proceed on the basis that they were required, firstly because the first and second defendants had not provided material with regards to Mr Albahrani and what he had done purportedly for them in the appeal process in Iraq and it seemed to me that they should be setting out that position. Secondly, because, as I have said, I had found the first and second defendants' defence case to be somewhat shadowy and it seemed to me that it required to be bolstered in order to ensure that it actually got over the hurdle required both for setting aside a default judgment and of resisting any potential counterapplication for summary judgment i.e. of there being real prospects of success.

18 In paragraph 8, I provided that the second defendant was to deliver an equitable charge over her property in England and Wales to give security for the amount of the claim and notwithstanding that the default judgment was, on this hypothesis, to be set aside. I regarded that as being appropriate because what I was effectively giving to the defendants was equivalent to a conditional refusal of an application for summary judgment by a claimant and where it is common to impose conditions. It seemed to me that that was an appropriate condition.

19 No appeal has been brought against that order.

20 It is common ground that there was the agreement to extend the paragraph 5 period to 2 December 2020; and also that the first defendant at this time went to Iraq with at least some assent of the second defendant, and there had dealings with the Beneficiaries with the result that the first defendant and the Beneficiaries felt they had come to a resolution of the dispute, although there is a considerable dispute between them as to what that resolution might have been. The first defendant says, or, rather said, that the resolution was that the first defendant and the Beneficiaries had agreed that the land would be sold and out of its

proceeds 200 million Iraqi Dinars would be paid to the Beneficiaries, and the first and second defendants would take the rest; and, also, that it was agreed that this claim in the courts of England and Wales would immediately come to an end even though the land had not yet been sold.

21 The Beneficiaries' version was that the Beneficiaries were to get a charge over the land for the amount of the Iraqi judgments, that they would sell it, take the Iraqi judgment amounts out of the proceeds, and give the rest to the first and second defendants. That, in the meantime, this claim would not come to an end but would be stayed.

22 There then followed correspondence between solicitors, individuals, and documents by which each side sought to have implemented its version of what had been agreed. On 1 December 2020, the solicitor at Oliver Fisher Solicitors for the defendants wrote to Mr Steven Ross of the claimant's solicitors saying that there had been the defendants' version of the alleged compromise reached in Iraq, attaching a version of what was said to have been agreed, asking for an agreement that time periods under my order of 11 November 2020 would be extended, and that an application be made to this court for this claim in England and Wales to be dismissed by consent. At the same time, they emailed a document supposedly signed by or on behalf of the Beneficiaries suggesting at least the existence of a resolution in accordance with the first defendant's then case but in circumstances where the Beneficiaries have since said that all documents written in English by or purportedly on their behalf, or signed by or purportedly on their behalf were simply written by the first defendant and did not represent what the Beneficiaries intended.

23 On 4 December 2020, Oliver Fisher Solicitors sent a further email to Mr Ross asking for a response and Mr Ross responded to say that he had been informed that the claimant was unwell, and it seems now to be accepted by the defendants, and in any event the evidence is,

that the actual situation was that the claimant was in an induced coma due to having contracted COVID-19. Mr Ross went on to say that, although he understood there had been settlement discussions in Iraq, in view of the claimant's ill health, he was unable to obtain details of any discussions or to agree the terms of any order. He did go on to say that he was acutely aware that there was a court order in place which required steps to be taken by both parties and of which he said that the claimant was currently in breach, and so that there had to be either compliance, or, alternatively, some form of valid agreement to extend time for compliance.

24 Also, on 5 December 2020, the defendants' side produced a document signed by the Beneficiaries which purported to revoke the power of attorney granted by the Beneficiaries to the claimant and to cancel the claim. I note, of course, that the claimant is the individual Mr Maitham Shamma and that, firstly, it was possible that the claimant may have independent rights regarding the claim, independent of the Beneficiaries' rights, such as if the claimant has incurred legal costs or done any work for which he is entitled to charge, he may well have resulting liens over the claim. Secondly, that a mere instruction from a principal to an agent does not of itself stop a claim which the agent is bringing on the principal's behalf, and, likewise, if the relationship is between the beneficiary and trustee. It is not, therefore, necessarily the case that, in those circumstances, it would be an abuse of process for the claimant to continue, or even a breach of any obligation for the claimant to continue, the claim.

25 In any event, on 6 December 2020, an email was sent from an address which at least purported to be that of the Beneficiaries to Mr Ross, the claimant's solicitors, enclosing various documents, including the cancellation of the purported cancellation of a power of attorney and which stated that the Beneficiaries wished the proceedings to be brought to a conclusion and stated:

"So please submit the required documents for the closure of the case."

This is one of the documents which the Beneficiaries assert was drafted by the first defendant and did not represent the Beneficiaries' understanding of what had been agreed or what they were instructing the first defendant to communicate.

26 On 7 December 2020, Oliver Fisher Solicitors wrote to Mr Ross stating that they were anxious that sensible extensions of time should be agreed but asking:

"First, please now urgently confirm your standing in these proceedings."

27 Mr Ross replied on the same day to the Beneficiaries, copied to the claimant individually, stating that this was an internal conversation email on the claimant's side and therefore would not be provided to the defendants, referring to Mr Shamma being in an induced coma due to COVID-19, and noting that the Beneficiaries had purported to terminate Mr Shamma's appointment as attorney on the basis of an agreement to set aside the default judgments. Mr Ross pointed out that merely setting aside the default judgments would not retain the claim. He also stated that his instructions were from Mr Shamma and therefore he could not simply act on the basis of an email, and would need to set up a video call to deal with matters further and also to deal with questions of fees and costs.

28 The time for compliance with paragraph 5 of the order of 11 November 2020, even as extended to 2 December 2020 had already passed at this point. On 9 December 2020, time for compliance with paragraph 4 of the order had passed, that being the responsibility of the claimant who was at that point in an induced coma.

29 It seems that what then happened was that some Zoom call took place involving the Beneficiaries and the claimant's solicitor Mr Ross on 10 December 2020. That resulted in an email being sent by Mr Ross to the Beneficiaries setting out, first, that Mr Ross had been

instructed by Mr Shamma, who held letters of administration, and that the Beneficiaries therefore were not a party to the proceedings and could not take part in the proceedings or settle the proceedings. It went on to say that Mr Shamma was in an induced coma, that his power of attorney had been terminated, and that Mr Ross saw the way forward as having the Beneficiaries substituted as claimant in place of Mr Shamma but that there would still need to be dealt with such matters as the claimant's legal fees and Mr Ross's firm's entitlements. He also requested the sum of £10,000 plus value added tax in order to fund further work. Around this time, it seems that the Beneficiaries paid some money to the first defendant to carry out some work to assist with what they regarded as being the agreed resolution of the matter regarding both the land and settlement.

30 Then, on 23 December 2020, Oliver Fisher Solicitors for the defendants created a form of application notice seeking to have the claim struck out as an abuse on the basis of the alleged settlement which they asserted meant that the claimant, as past attorney for the Beneficiaries, would or should no longer now be allowed to progress the claim. Oliver Fisher sent the draft application notice to Mr Ross on 23 December 2020 saying that they would give Mr Ross a period of fourteen days before issuing such an application notice.

31 Mr Ross responded by email of 24 December 2020 stating that Mr Shamma the claimant was still in hospital, that he hoped to have more news, at least with regard to Mr Shamma, in the New Year, his office being closed for the Christmas and New Year period until 6 January and:

> "So I would be grateful if you would please refrain from taking any steps until I can take instructions. I am not currently instructed by the principals [that is to say the Beneficiaries]."

32 Nothing more was passed between the solicitors and the application to set aside the default judgment was issued at some point in January 2021 with a hearing of it listed before me on 19 May 2021. In the meantime, matters had proceeded to an extent but then broken down in Iraq. The first defendant says that the Beneficiaries required him to sign documents which he thought was just an authority to sell the land so that they could take the agreed 200 million Dinars from the proceeds but which documents he says was or would have been a full transfer of the land to the Beneficiaries.

33 The Beneficiaries say that the documents which were created were only the first stage of a process by which they could create a charge over the land with a power of sale which they could then exercise so it could be sold and they could collect what they said was the agreed 4.8 million Dinars from the proceeds of sale. They have referred to various documents seemingly signed in Iraq to the effect: firstly, that the first and second defendants conceded that the land may be sold to enforce the judgment debt of the Iraqi court; and, secondly, that the land had been registered in the name of the Ministry of Finance although with a note of the interests of the first and second defendants and which the Beneficiaries say is the exercise of a procedure somewhat equivalent to a caution in the law of England and Wales, that is to say a means of preventing the land being sold without notice having first been given to the Beneficiaries.

34 It is common ground that the relationship, such as it was between the defendants and the Beneficiaries in Iraq, broke down. The Beneficiaries say that this was for a number of reasons. Firstly, the first defendant had failed to obtain possession of the land so that it could be sold. Secondly, the first defendant reneged on what the Beneficiaries say was the agreement that the land should be sold and the proceeds used to discharge the full amount of the Iraqi judgment debt. Thirdly, that the first defendant had taken money provided by the Beneficiaries to enable the claim to be resolved and the land to be sold, and had simply

decamped with it for his own purposes. Fourthly, that the first defendant generally repudiated the agreement which the Beneficiaries say they had made with him.

35 The first defendant says that matters broke down because the Beneficiaries had sought more than the 200 million Dinars which had been agreed and/or had misled the first defendant into signing a document which purported to be a full transfer of the land. He also said that the land was controlled by militia in Iraq who were associated with the family of the Beneficiaries and which meant he could not obtain possession.

36 I note that in a very recent witness statement of Mr Fawzi Al-Khafaji, dated 2 April 2022, there is reference to various proceedings in Iraq by which the Beneficiaries have sought to have the land sold. It seems that there was a first instance decision of the court in Kadhimiya of 12 January 2022 to such an effect and that Mr Albahrani had sought to have that decision appealed purportedly acting for the first defendant and the second defendant. Some of the wording in the translation of the documents from Iraq is unclear but at first sight, although I do not have to decide this, it looks as if the Iraqi Court of Appeal held: firstly, that Mr Albahrani had not proved that he had proper authority for the second defendant to bring the appeal; and, secondly, in relation to the first defendant, that the argument on behalf of the first defendant was that the land was owned by the first and second defendants and therefore was not to be subject to any debt or financial obligation of the Father, but that the Court of Appeal had rejected that contention on the basis that the judgment debt actually arose from the Father's failure to comply with the 1979 purchase deed.

37 There are further documents which seem to suggest that the Iraqi lawyers who were purporting to act for the first and second defendants had raised further challenges to enforcement against the land and which had involved challenges to the original first instance

decision granting the Iraqi default judgment for debt and including on limitation grounds. I do note in passing that there appears to have been no attempt in that appeal on the defendants' part to say that there had been some binding compromise for there to be a sale and payment of the limited sum of 200 million Dinars to the Beneficiaries.

38 That was what was happening in Iraq but, in any event, the application to strike out the proceedings which the defendants have now issued in this country was listed for hearing before me on 19 May 2021, that application being based on the alleged agreement between the defendants and the Beneficiaries. However, on 28 April 2021, Oliver Fisher Solicitors, who had issued the application, decided that they must go off the record as acting for the defendants on the basis that there was some conflict between the first defendant and the second defendant and they obtained a declaratory order under CPR Part 42 to that effect. The fact that Oliver Fisher decided there was a conflict between the first and second defendants may seem somewhat curious in that the first and second defendants now again share solicitors and counsel but there are various explanations which may exist for this and there has been no application or suggestion by the claimant that I should in any way seek to pierce the veil of legal professional privilege.

39 The result, though, was that on 19 May 2021, when I held a remote hearing of the defendants' application, there were no legal representations for the defendants. The first defendant did not appear either in person, his evidence subsequently being that he felt overwhelmed by the litigation and so simply had decided not to attend. The second defendant, however, appeared in person. She said that throughout she had left matters to, but had been abandoned by, the first defendant. She did not seek any adjournment but, rather, that the court should exercise some mercy in her regard. I dealt with the application which was before me and there is a full transcript of my judgment.

40 As regards the question before me as to whether or not there had been or still was some binding settlement agreement, I considered both the evidence from the solicitor at Oliver Fisher Solicitors contained in the application that there had been such a settlement and evidence from the Beneficiaries to the effect that the only agreement which did exist had been repudiated by the defendants and, in any event, was not to bring the claim to an end but only to have it stayed pending compliance with the settlement agreement in Iraq.

41 I set out in paragraphs 29 - 33 of my judgment my analysis and conclusion to which I had come bearing in mind the fact that the second defendant was now a litigant in person who herself said that she only had limited knowledge of what had happened. In paragraph 33, I held that there was no agreement in existence which would require the proceedings to be dismissed and including because: firstly, any agreement which did exist had only been a suspensory agreement pending whether the first defendant would comply with his obligations; and, secondly, that for whatever reason, it was clear that the first defendant had neither complied nor was going to comply with any obligations which existed upon him.

42 I then proceeded in paragraph 34 to hold that the various conditions for setting aside the default judgment had not been complied with and that, although the claimant had also not complied with paragraph 4 of my order of 11 November 2020, the defendants' obligations were not conditional upon the claimant complying with it:

> "The next question is as to what happens next with regards to these proceedings. Mr Armstrong's submission is that the judgment in default has not been set aside because the relevant conditions have not been complied with. It seems to me that it is quite clear that those conditions have not been complied with. Neither side has complied with paras.4 - 8 of my order, but the previous paragraphs of the order made clear that the judgment is not

being set aside unless the defendants complied with those conditions, which has not occurred."

43 After considering and setting out submissions which had been made, including with regards to relief from sanctions, in paragraphs 49 - 51 of the judgment, I decided that the second defendant should have a limited period of time in which to seek to apply for relief from sanctions and for an extension of time to comply with the various conditions on the defendants set out in the 11 November 2020 order:

> "49. I think, having viewed matters in the round, that the most appropriate course is for Ms Jawad effectively to have (to use a colloquialism) to put up or shut up in terms of whether she is going to make an application for an extension of time and for a variation of my order which would enable her to pursue the defences, which I regarded previously as having some real prospect of success. I propose to give her that opportunity but, effectively, only to give her a limited time to take advantage of it.
>
> 50. While Mr Armstrong may say it is always possible to apply for an extension of time for an extension of time, it does seem nonetheless to me that making such an order in sufficiently strict terms would have the effect of providing something of a final time limit. It seems to me that if I make an order of that particular force and include certain further protective provisions that Mr Shamma is not going to be unduly disadvantaged and that resource cost is likely to be saved.
>
> 51. Therefore, what I am going to do is this: I am going to provide that Ms Jawad, if she is going to make any application for an extension of time

and for relief from the sanctions imposed by my order of 11 November and/or to vary that order, must make that application within a particular period of time, and that that application must be accompanied by a full statement as to her assets and liabilities."

44 In paragraphs 50 - 53, I provided that as a condition of that, the second defendant would, rather than providing an equitable charge, have to provide a legal charge over the flat:

"52. Also, if the date is going to be some period away, I am going to provide that by a particular period of time before then the claimant shall provide Ms Jawad with a form of legal charge over the flat, so as to provide the claimant security over the flat for the amount secured by the interim charging order and any further interest or costs of this litigation, and that Ms Jawad must by whatever is the time for making the application either have executed and delivered such legal charge or have provided full reasons as to why it is not appropriate. The interim charging order shall continue unless and until such a legal charge is executed and delivered.

53. If no such application is made, then Ms Jawad shall be barred from making any application to such effect and the interim charging order shall be made final; in other words, either the application is made by that point in time and, in effect, supported by a legal charge which Mr Shamma can then seek to enforce if the application fails, or the interim charging order is made final, in which case Mr Shamma can then decide as to how he wishes to seek to enforce it. If the judgment

> is eventually set aside then the legal charge will end with that set aside."

45 At paragraph 54, I pointed out again that the claimant had not complied with para.4 of my earlier order and might wish to consider doing so, and in paragraph 58, I provided that the second defendant would be able to seek to argue at a later stage that she should not have to continue to provide security:

> "I appreciate that a legal charge is something which is more serious than an equitable charge, but it seems to me that in the particular circumstances of this case that is a fair way of dealing with matters between the parties as a final charging order merely has the effect of an equitable charge and has rather different provisions with regards to enforcement. If Ms Jawad is going to object to the continuance of having to provide security, then she is going to have to object to that as part of her application, but Mr Shamma will in any event be protected in the meantime and, if an argument exists about the form of the legal charge, it can all be dealt with at the August hearing."

46 In paragraph 59, I provided that matters simply remained as against the first defendant that there was a default judgment, the conditions for the setting aside of which had not been complied with and, therefore, the default judgment remained in place.

> "What I am not doing is making any provision with regards to the first defendant. So far as the first defendant is concerned, the set aside of the judgment does not occur. Judgment therefore remains in existence against the first defendant. Whether or not that assists Mr Shamma is another

> matter, but the first defendant is not here, he has chosen not to be here, and the judgment remains in force."

47 I then went on to consider what should happen with regards to costs. Again, there is a full transcript of my judgment and I concluded that in the circumstances, the first defendant should pay costs assessed on the indemnity basis, which I then summarily assessed, and that the second defendant should pay costs on the standard basis and, again, I summarily assessed them, at a lower figure than my indemnity basis assessment. That resulted in a formal order encapsulating my various decisions of 19 May 2021. That order provided that the second defendant, if she was to make an application for relief from sanctions or extensions of time, should have to comply with various procedural steps at various points in time and provide a legal charge over her residential property.

48 Thereafter, firstly, the second defendant did comply with various orders for disclosure which I made, albeit in circumstances where, firstly, she had to obtain an extension of time and, secondly, she omitted various bank accounts initially but then provided details of them saying that they only held small sums which were effectively deposits of child benefit which she wished to apply for her children's upkeep and that she had not realised that my disclosure orders provided that even such bank accounts had to be disclosed.

49 Secondly, the second defendant did not initially pay the amount of summarily assessed costs from the previous hearing and that resulted in the claimant obtaining an interim third party debt order relating to the bank account, the second defendant applying to have it set aside on the basis, she said, that the result was to cause her hardship. In any event, the summarily assessed costs were eventually paid and there was then delays in freeing the bank account due, first, to the claimant saying that the claimant needed to be assured that the claimant had no liability to High Court Enforcement Officers who had been instructed, and then, second,

the claimant (according to the claimant) not realising that an order was required to actually terminate the interim third party debt order so as to enable the bank account to be again operated. The first defendant remained liable for the unpaid difference between the indemnity basis and standard basis costs assessments.

50 Thirdly, the second defendant and the claimant liaised with regards to the form of legal charge which I had directed should be executed but were unable to reach an agreement about it. The second defendant says that the claimant insisted on a number of clauses being inserted within the legal charge which would be distinctly unusual and outside my order, including that there would be a charge over furniture at the flat. It seems to me that there is some force in what the second defendant was saying with regards to that.

51 Fourthly, the second defendant applied for the relevant extension of time on 12 July 2021 but omitted to expressly make any application for relief from sanctions and only did that by application of 12 October 2021.

52 In the meantime, the claimant had obtained an order for an examination under CPR Part 71 of the first defendant and which he had attended. The claimant also obtained a charging order against any interest which the first defendant had, or has, in a property which is apparently in his name but where there is apparently a dispute as to whether or not he merely owns legal title or actually has any benefit interest.

53 The second defendant's application for relief from sanctions was 21 October 2021.

54 The first defendant also applied for extensions of time in relation to the conditions of the setting aside of the original default judgment order (i.e. for satisfying the conditions in paragraphs 5-8 of the November 202 Order), and for relief from sanctions by application notice of 21 October 2021.

55 It appears that the first defendant and second defendant now have some financial support albeit they say that it is support provided by way of gift from an unnamed family friend.

56 The progress of those applications was somewhat delayed for a number of matters. Firstly, that they needed a longer listing than had originally been given. Secondly, the claimant sought more time to consider what does seem to me to have been voluminous evidence which the defendants had advanced in order to decide as to how to respond, this leading to the vacation by agreement of a hearing listed for December 2021 albeit that the claimant was only then to file and serve a witness statement of some three pages in length. Thirdly, there was pressure on court listings and also counsels' availability. Fourthly, the first stage of the hearing before me of 26 April 2022 proved to be inadequate.

57 The defendants now say that they have complied with all of paragraphs 5 - 8 of my order of 11 November 2020 and, therefore, that the default judgment should be set aside without condition and without them having to provide any continuing security. They say that they have complied, firstly, with paragraph 5 on the bases that: the second defendant has produced full disclosure of assets which the claimant accepts is the case, albeit the claimant says that the second defendant was late even in relation to my order of May 2021; and the first defendant says that he has produced the financial information by way of answers to Part 71 questions, a situation which the claimant, it seemed to me, roughly accepted at the hearing.

58 Secondly, in relation to paragraph 6 of my November 2020 order, the defendants say they have now provided defences. The claimant says that the defendants have failed to comply technically with my order because they have not set out defences with regards to various aspects, in particular, fraud and judicial impropriety and also voluntary submission to the jurisdiction. The defendants' response to that is that they are not now advancing those

defences and so there is no need to set them out, although during the hearing they provided a revised defence which they say set out their position with regard to those matters. The claimant disputes that that is compliance and I deal with that later on in this judgment.

59 Thirdly, in relation to paragraph 7 of the November 2020 order, the defendants have provided some evidence from Mr Albahrani and some evidence with regards to Iraqi law. That Iraqi law evidence, firstly, does deal with what is said to be the substantive defence of limitation which the defendants say would succeed in Iraq if a relevant court allowed it to be advanced. The claimant has not produced any evidence contrary to those assertions and all I can do, it seems to me, is proceed on the basis that the assertions are arguable and that the defendants would have some real prospect of success if the limitation argument was allowed to be run. Secondly, though, the Iraqi law evidence does not deal with Iraqi procedure in relation to any of a number of material matters, being: firstly, as to how the initial claim should have been or was served; secondly, with regards to whether the default judgment was properly obtained in Iraqi law; thirdly, as to what would be the time for appealing or applying to set aside a default judgment in Iraqi law; and fourthly, as to how in Iraqi law the appeal or application to set aside was actually dealt with.

60 There was originally some evidence from Mr Albahrani but which did not really address the sub-paragraphs of paragraph 7 of my order of November 2020 at all. Those subparagraphs have now been somewhat better addressed in the fourth witness statement of Mr Albahrani of 1 July 2022, which was served only a few days before the adjourned second day of the hearing before me, and the claimant complain about the lateness of that witness statement although it did not seek to resist it being admitted albeit that it says it is still inadequate.

61 Fourthly, with regards to paragraph 8 of my order of November 2020, there is continuing debate over the terms of the legal charge, albeit I have already said that it seems to me that

there is some force in the second defendant's complaints about certain of the clauses which the claimant is seeking to have included within it. The defendants do though say that I should no longer require security as a condition of setting aside the default judgments.

62 I note that in paragraph 4 of my November 2020 order, I required the claimant to produce a copy of the 1979 deed. The claimant says that such a copy has now been produced but not the other material which paragraph 4 required.

63 I have been supplied with voluminous witness statements and more than 1,500 pages of documents, some of which are repetitious. I have also had various skeleton arguments from counsel, heard two days of oral submissions, and had a number of authorities produced to me. I have taken all the material fully into account.

64 However, firstly, it seems to me that only certain of the material, being essentially what I identified above and what I refer to below, is of particular importance. Secondly, I need to keep this judgment in terms of length within limits in order to achieve the overriding objective. If I do not mention all matters expressly, that does not mean that I have not considered them and borne them in mind. I have sought to consider all matters which have been adduced before me. If anyone ever wishes to obtain a transcript me and ask me to flesh out or specifically deal with any point which they say has not been fully dealt with, then I will consider such an application.

65 Before dealing with the actual applications before me, it seems to me that it is necessary to deal with the Defences which are now sought to be advanced and some related points on the defendants' evidence from Mr Albahrani and with regards to Iraqi law.

66 The Defences for the first defendant and the second defendant are very similar. Two have been produced in view of their separate applications and history. In each case, paragraph 2 of the defence refers to the asserted settlement agreement in Iraq and says that it is a

settlement but: firstly, does not mention its terms; secondly, does say that therefore these proceedings are an abuse and should be struck out; and, thirdly, is not supported by any application to strike out.

67 Paragraph 3 mentions the fact of the allegations of fraud with regards to the 1979 deed and the question of voluntary submission to the jurisdiction of Iraq and simply says that the defendants reserve the right to advance these matters once key documents have been produced.

68 Paragraph 4 raises the defence of breach of natural justice which I will revert.

69 Later paragraphs deal with what actually happened in Iraq, paragraph 10 dealing with the fact of first instance proceedings; paragraph 11 saying the defendants had no notice of the proceedings; in paragraph 11.3 saying that they were not able to defend the proceedings in consequence; and in paragraph 11.5 that therefore what happened in those proceedings and the default judgment was contrary to natural justice.

70 In paragraph 15, they refer to the appeals. That paragraph seems to contain some vague complaint about the Iraqi proceedings and which judges heard the matter. Paragraph 15.4 asserts that the basis of the appeals had been that there was not valid service of the original proceedings but I do note that there is no mention in those paragraphs as to the fact that the appeals were apparently dismissed, as I have already said, because they were brought out of time. Indeed, the defence says very little about the appeals, or what contentions were advanced within them, or why the result of the appeals was unjust and contrary to natural justice. There are also paragraphs relating to the letters of administration granted to the claimant and where there is advanced an argument that the letters of administration were not valid once the power of attorney had been cancelled by the Beneficiaries.

71 As far as Mr Albahrani's evidence is concerned, in his latest witness statement, in para.7(b) he says the appeal was based on: firstly, the fact that the first and second defendants did not reside in Iraq; but, secondly, that it was based on substantive challenges to the Iraqi judgment including that the underlying claim should fail and that the appeal should have succeeded on the basis that the underlying claim had been brought by Mr Hatem too late and outside the relevant Iraqi limitation period.

72 In his paragraph 8, some allegations of fraud appear to be made and in his paragraph 9, a complaint with regards to the Iraqi judiciary.

73 In his paragraph 10, Mr Albahrani complained that the Iraqi Court of Appeal had no valid reason to refuse the appeal but did not deal in any way with what the judgment said about the appeal having been brought out of time. The Iraqi law evidence before me has been directed towards the substantive limitation defence and other substantive defences but says nothing about the procedure, including as to whether or not the appeal either failed or was bound to fail on the basis of it being brought out of time.

74 The position then is that the defence raises a number of matters. Firstly, it raises the alleged settlement agreement and says that that gives rise to these proceedings being an abuse and to a potential application to strike out. I see a number of problems with this, some of which are fundamental. Firstly, it is not a proper pleading of a settlement agreement. It does not satisfy CPR Part 16, Practice Direction 7.3 with regards to the formation of a contract, albeit that that provision of the rules strictly relates only to particulars of claim but it seems to me are a formulation of the ordinary rule that if someone is going to rely on a contract in a statement of case then the statement of case has to say how the contract was formed. Secondly, it does not plead any terms of that contract or any material terms; which is crucial if it is to be relied on in a dispute as containing a term which in some way or other is

relevant to the dispute. Thirdly, it does not in any way say as to how such a settlement agreement could bind the claimant.

75 The second set of difficulties are matters as to which I have already made findings on 19 May 2021. Firstly, that there is no operative settlement agreement and that any settlement agreement which was entered into has ceased to have effect due to the defendants having failed to comply with the terms; albeit that I also held that, even if it did exist and had effect, it would not result in a dismissal of these proceedings but only a stay while those terms were complied with. Secondly, that I have already dismissed an application to strike out these proceedings on the grounds that they are an abuse of process because of such a settlement agreement.

76 In my judgment, it seems to me to be clearly an abuse to seek to raise again this settlement agreement. There is no appeal by the first defendant or the second defendant against my judgment or orders made on 19 May 2021. The second defendant was actually present at that hearing. In theory, the first defendant, who was not present, could apply under CPR 23.11 to relist that hearing but there is no such application, and, in any event: firstly, it seems to me it would be far too late to do that now; secondly, I do not regard the first defendant as having any good justification for not appearing on 19 May 2021 – this is notwithstanding the fact that the says that he has poor English and was scared, because without any further explanation that seems to me to be no justification for not appearing as he could still simply have appeared before me, have explained all that, and asked for an adjournment or some other solution. Thirdly, it seems to me that the first defendant at least is blowing hot and cold as far as this settlement agreement is concerned. I have already mentioned the fact that it has not been deployed in the Iraqi litigation, a matter which gives rise to my mind to some suspicions that the first defendant is not mentioning it in Iraq for one of a possible combinations of reasons, being that:, firstly, the first defendant has no

confidence in being able to justify his assertions with regards to it, and; secondly, the first defendant does not want to make some sort of admission to the Iraqi court that the defendants have agreed to pay at least 200 million Dinars. However, in any event, it seems to me that this defence cannot be advanced because I have already decided against the defendants in relation to the relevant points at the May 2021 hearing.

77 Secondly, there is the raising of or the possible raising of fraud. That is supported by some of Mr Albahrani's recent witness statement but there is no allegation of fraud in the draft defence. What it does is it expressly reserves the position. Mr Petrides in oral submission accepted that he did not have reasonable grounds to plead fraud.

78 It seems to me, therefore, that again this is not a proper matter to be included in a statement of case. Firstly because it is not proper, in my judgment, simply to preserve a position with regards to a possible fraud claim. That is a classic example of someone being prepared to wound but not to strike. It seems to me from all the case law with regards to fraud that one cannot simply float such an allegation with regards to the future. Either one makes it or one does not make it; and if one does make it, one has to make it subject to the normal rules of stating precisely what the alleged fraud is and the facts and matters relied on. It does not seem to me that this is a proper pleading of fraud.

79 I do bear in mind that it is said that the claimant has still not complied with paragraph 4 of my November 2020 order with regard to the provision of documents; but it does not seem to me that, in circumstances where the claimant has disclosed what is said to be a copy of the 1979 deed, what has not been disclosed would make any difference to the defendants' ability or inability to plead fraud. Mr Petrides, counsel for the defendants, was unable to point to what any such material might be, and I simply do not see it. It therefore seems to me again that this aspect off the defence is an abuse.

80 Thirdly, there is raised again the question of whether or not the defendants voluntarily submitted to the jurisdiction of the Iraqi court. Firstly, again, there is no allegation to this effect but, rather, simply a statement that they reserve their position. I see that as dubious and while it is not in the same class as fraud, again it seems to me to be at first sight improper pleading. One either pleads a matter or one does not, particularly when it is a matter of defence. Secondly, looking at what are said to be the reasons for reserving the position, they say, first, that the defendants wished first to see the paragraph 4 of the November 2020 material. There is some force in that and that is, of course, in part why I ordered that the paragraph 4 material should be provided. However, that was in November 2020 when I had no evidence from Mr Albahrani, and where I could not see from the judgment delivered on the appeal as to whether or not there had been any attempt by the defendants' side on the appeal to advance what they said were the merits of the case rather than just to contest the jurisdiction of the Iraqi court.

81 However, Mr Albahrani now says in his recent witness statement, as a matter of his own recollection, that he raised the substantive merits on the appeal, namely questions with regards to the limitation defence and potentially also the validity of the 1979 purchase deed and what would be its consequences in Iraqi law. If that is correct then that would amount to a voluntary submission to the jurisdiction, as Mr Petrides indeed accepted, because it would have involved the appeal raising not merely the question of the jurisdiction of the Iraqi court but also the substantive merits of the claim of Mr Hatem and now the Beneficiaries in Iraq. It therefore seems to me on the defendants' own evidence and which emanates from the directions which I made in November 2020, which were encapsulated in paragraph 7 of that order, that the argument that the defendants did not voluntarily submit to the jurisdiction at the Iraqi court is simply unsustainable.

82 Fourthly, there is raised a possibility of some impropriety as far as the Iraqi court and judges are concerned. That is alluded to in some sort of way in paragraph 15.3 of the draft defences. However, I do not see such a mere allusion as being a proper way of advancing such a contention if that is indeed the aim. If a serious matter with regards to impropriety of a foreign court is to be advanced, then it needs to be firstly clearly advanced and, secondly, with grounds for the making of such an allegation which grounds perform the important functions of not merely informing the court and the other side as to what they are but requiring whatever legal representative has pleaded the case to be satisfied that they are reasonable grounds which justify such a serious allegation. It seems to me again that this also is a pleaded matter which to allow it to be pursued would involve an abuse.

83 Fifthly, there is paragraph 19 of the Defence's reserving of an argument that the revocation of the power of attorney would in some way or other undermine the letters of administration and prevent the claimant advancing the case. Again, I do not see this as being a proper pleading. It is entirely unclear to me, firstly, as to whether or not such a case is being advanced and, secondly, if so, what it is. Further, it seems to me that it is not for this court to go behind the Winchester Probate Registry. If there is to be an attack on the letters of administration, such an attack should be made there and not here in what is now the King's Bench Division of the High Court. Thirdly, in any event, on the evidence before me, the Beneficiaries quite clearly support the claimant proceeding with the claim and I cannot see on that basis as to how the defendants can hope to upset the letters of administration or suggest that the claimant is not now authorised to proceed.

84 That then leaves the question of natural justice. Here, paragraphs10 - 14 of the draft Defences do advance the case with regards to the first instance Iraqi court default judgment. The oddity, to my mind, is that paragraph 15 refers to the appeal but does not say either why that (a) did not amount to a cure of any previous deficiency of natural justice, or (b) as to

why in the light of there being an appeal at which the defendants were heard, as to why the overall result is contrary to natural justice. Mr Albahrani and the Iraqi law expert also do not deal with this. However, Mr Petrides for the defendants says that they can assert that the first instance Iraqi court default judgment process contravened natural justice as far as they were concerned, and submits that it is for the claimant then to say as to why the appeal procedures would have cured the problem and deficiency of natural justice which the defendants rely on. I am not sure as to for whom it is to first raise the question as to whether the Iraqi appeal process cured or removed any non-compliance with natural justice of the Iraqi first instance process. However, in the light of my previous orders as to what the defendants had to do to set out their case; I regard the fact that the defendants have not dealt with the appeal process and as to why it is said that notwithstanding the appeal, the overall process lacked natural justice, as not being satisfactory.

85 On the other hand, the wording of the appeal judgment itself may suggest that the appeal was dismissed because it was out of time; and it therefore seems to me that it may well be possible for the defendants to say that the procedural provisions of Iraqi law (whatever they may be) meant that they could never successfully challenge the default judgment because they only learned of it after a relevant and absolute time period for launching a challenge to it had expired. That may well, in the light of the wording of the appeal judgment, be a possible sustainable contention. Although it has various difficulties, being in particular, at least at present: firstly, the absence of any Iraqi law evidence with regards to the matter, and; secondly, an absence of their own evidence about how or when they learned of the default judgment, when they sought to appeal, and how that related to whatever are the Iraqi law time periods for making an appeal against a default judgment.

86 I turn next to the question of relevant principles of private international law and natural justice. Mr Petrides submits for the defendants that it is a principle of public policy of the

common law of England and Wales that a foreign judgment absent a relevant statute will only be enforced, even where the defendant in England and Wales has made a voluntary submission to the jurisdiction of the foreign court, if the relevant foreign process is consistent with the England and Wales concept of natural justice. In particular, that the relevant defendants have been given a real ability in the foreign jurisdiction to defend the case rather than simply having a foreign judgment simply entered against them without them having any proper opportunity to contest it.

87 The defendants rely on various passages in **Dicey & Morris: The Conflict of Laws**, and, in particular, first Rule 43 which sets out that a foreign court will only have jurisdiction against a particular defendant if one of various cases are satisfied, the relevant one here being the third case that the defendants had, according to the claimant, submitted to the jurisdiction of the Iraqi court by voluntarily appearing in the proceedings:

> "14R-054 RULE 43 - Subject to Rules 44 to 46, a court of a foreign country outside 14R-054 the United Kingdom has jurisdiction to give a judgment *in personam* capable of enforcement or recognition as against the person against whom it was given in the following cases:
>
> *First Case* - If the person against whom the judgment was given was, at the time the proceedings were instituted, present in the foreign country.
>
> *Second Case* - If the person against whom the judgment was given was claimant, or counterclaimed, in the proceedings in the foreign court.

Third Case - If the person against whom the judgment was given, submitted to the jurisdiction of that court by voluntarily appearing in the proceedings.

Fourth Case - If the person against whom the judgment was given, had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court or of the courts of that country."

88 Secondly though, Mr Petrides refers me to Rule 52 as set out in **Dicey & Morris** at paragraph 14R-162 and then the subsequent paragraphs 14-163 - 14-167:

"14R-162 RULE 52 - A foreign judgment may be impeached if the proceedings in which the judgment was obtained were opposed to natural justice.

14-163 In a celebrated passage in his judgment in *Pemberton v Hughes* (a case on the recognition of a foreign divorce decree), Lord Lindley observed:

> 'If a judgment is pronounced by a foreign court over persons within its jurisdiction and in a matter with which it is competent to deal, English courts never investigate the propriety of the proceedings in the foreign court, unless they offend against English views of substantial justice.'

This passage refers to irregularity in the proceedings, for it is clear that a foreign judgment, which is manifestly wrong on the

merits or has misapplied English law or foreign law, is not impeachable on that ground. Nor is it impeachable because the court admitted evidence which is inadmissible in England or did not admit evidence which is admissible in England or otherwise followed a practice different from English law. In *Jacobson v Frachon*, Atkin LJ, after referring to the use of the expression 'principles of natural justice' said:

> 'Those principles seem to me to involve this, first of all that the court being a court of competent jurisdiction, has given notice to the litigant that they are about to proceed to determine the rights between him and the other litigant; the other is that having given him that notice, it does afford him an opportunity of substantially presenting his case before the court'."

14-164 *Adams v Cape Industries Plc* appears to have been the first English case in which the defence of breach of natural justice was established in relation to a judgment *in personam*. The Court of Appeal held that the defence of breach of natural justice was not limited to the requirements of due notice of the hearing to a litigant and opportunity to put a case to the foreign court. It confirmed that the basic question was that stated in *Pemberton v Hughes*, namely whether there was a procedural defect which constituted a breach of the English court's view of substantial justice, which would depend on the nature of the

proceedings under consideration. The principle was applied in *Masters v Leaver*, where the Court of Appeal considered that a substantial failure to follow its own procedure for an assessment of damages meant that proceedings before a Texas court had led to a judgment in denial of substantial justice.

14-165 A mere procedural irregularity would not offend English concepts of substantial justice. In *Adams v Cape Industries Plc* the foreign judgment was for damages in default of appearance, and notice was given to the defendants of the application for a default judgment on an unliquidated claim. Under United States law (as under English law) the assessment of damages is effected (even in cases of default) by the court, but the United States judge did not hold any form of hearing, and the judgment was not based on an objective assessment by the judge of the evidence. The Court of Appeal did not decide that a lack of judicial assessment of damages is *per se* a breach of natural justice; but it is a breach where the foreign legal system contains provision for judicial assessment and the judgment debtor therefore has a reasonable expectation that there will be a judicial assessment.

14-166 The case is therefore an example of a breach of natural justice outside the categories of notice and opportunity to be heard, because the judgment debtors were given notice and had an opportunity to contest the quantum of damages; they did not take the opportunity because they did not wish to submit to the

jurisdiction of the foreign court. This decision also puts into context those decisions which were thought to be the authority for the view that, if the defendant agrees to the jurisdiction of the foreign court, he cannot take the objection that he did not receive sufficient notice. If the defendant has agreed, or is deemed to agree, a particular method of service (such as service at an address in the foreign country notified to a company of which he is a member) then it is immaterial that he did not receive actual notice. If the defendant has agreed to submit to the jurisdiction of the foreign court, and service has been effected in accordance with the foreign law, but actual notice has not been given, then the question will be whether substantial injustice has been caused by the lack of notice, including consideration of whether the defendant had a remedy in the foreign court. The objection that the defendant did not receive sufficient notice of the foreign proceedings to enable him to defend them tends to become confused with the objection that the foreign court had no jurisdiction. If the defendant is resident in the foreign country at the time when the proceedings were commenced, or if he voluntarily appears in the proceedings, it is difficult for him to take the objection that he did not receive sufficient notice, for in such circumstances any notice is sufficient which is in accordance with the law of the foreign country, provided that the foreign procedure does not offend against English views of substantial justice. If the defendant agrees in advance to submit to the jurisdiction of the foreign

court and service is effected in accordance with the method of service to which he has agreed (or is deemed to have agreed) he cannot complain if he did not receive actual notice:

> 'It is not contrary to natural justice that a man who has agreed to receive a particular mode of notification of legal proceedings should be bound by a judgment in which that particular mode of notification has been followed, even though he may not have had actual notice of them.'

14-167 May the defence of breach of natural justice be raised before the English court if the objection could have been taken before the foreign court? In *Jet Holdings Inc v Patel*, Staughton LJ said, obiter, that logically the foreign court's view should be neither conclusive nor relevant as to the propriety of its own proceedings. In *Adams v Cape Industries PLC* the evidence was that the judgment debtors had the right to apply in the United States to set aside the default judgment on the ground that the assessment of damages was irregular, and it was recognised that such an application would have been allowed if made in due time. The Court of Appeal thought that where the objection came within the two categories mentioned by Atkin LJ, want of notice or lack of opportunity to be heard, the judgment debtor may raise the objection in England even if there is a remedy in the foreign country. But in other categories (as in the one under consideration in that case) the existence of a remedy in the

> foreign court is not wholly irrelevant in determining whether the proceedings in the foreign court, viewed as a whole, offend against English views of substantial justice: it would be anomalous if the English court were obliged to disregard the existence of a remedy under a foreign system of procedure in considering whether the defective operation of that procedure had led to a breach of natural justice. The judgment debtor cannot justify a failure to avail himself of the remedy by reference to his unwillingness to submit to the jurisdiction of a foreign court. But in that case the defendants had no way of knowing from the judgment served on them that the judgment had been entered without a judicial assessment of damages, since the recitals in the judgment indicated there had been a hearing. In *Masters v Leaver*, the Court of Appeal held that, on the evidence before it, it was not incumbent on the judgment debtor to have pursued his complaint before the foreign court. It appears that there is no general answer, and that in each case the plea that the judgment debtor should have complained to the foreign court will be assessed in the context of the broader merits. But where the issue or procedural error has been raised before the foreign court and rejected, it is less likely that an English court will entertain arguments concerning natural or substantial justice which are based on it."

89 Mr Petrides cites the decision of *Buchanan v Rucker* (1809) 9 East 192 where the foreign process leading to the granting of the relevant foreign judgment had involved only a nailing

of a writ on to a door of a property in the foreign country when the relevant defendant was not present in the particular country, and without there having been any other notification to the defendant, and where it was held that that process had resulted in a foreign judgment which the England and Wales court should not enforce. Lord Ellenborough CJ's judgment at page194 of the East Reports contains the following:

> "Lord Ellenborough CJ - There is no foundation for this motion even upon the terms of the law disclosed in the affidavit. By persons absent from the island must necessarily be understood persons who have been present and within the jurisdiction, so as to have been subject to the process of the Court; but it can never be applied to a person who for aught appears never was present within or subject to the jurisdiction. Supposing however that the Act had said in terms, that though a person sued in the island had never been present within the jurisdiction, yet that it should bind him upon proof of nailing up the summons at the Court door; how could that be obligatory upon the subjects of other countries? Can the island of Tobago pass a law to bind the rights of the whole world? Would the world submit to such an assumed jurisdiction? The law itself, however fairly construed, does not warrant such an inference: for 'absent from the island' must be taken only to apply to persons who had been present there, and were subject to the jurisdiction of the Court out of which the process issued and as nothing of that sort was in proof here to shew that the defendant was subject to the jurisdiction at the time of commencing the suit, there is no foundation for raising an assumpsit in law upon the judgment so obtained. *Per Curiam*. Rule refused."

90 However, it seems to me that that judgment of Lord Ellenborough was more about voluntary submission to the jurisdiction, or, rather in that case an absence of such voluntary submission, as opposed to considerations of natural justice; and therefore more about and an application of **Dicey & Morris**'s Rule 43, rather than Rule 52, leading to a determination that the foreign judgment should not be enforced in this jurisdiction.

91 Mr Petrides, however, also went on to cite the decision of *Jacobson v Frachon* (1927) 138 LT 386 where the judgment contains the following:

> "Atkin LJ, having stated the facts, proceeded. The question is whether or not the French judgment affords a defence to Mr Jacobson's action in this case. *Prima facie* a foreign judgment would be a defence to an action brought in respect of the same subject matter. It is not that the debt is merged in the judgment; that is not the rule, but in fact it constitutes a debt due from the one party to the other, and the parties are estopped from litigating again the subject matter which has given rise to the debt by reason of the decision of a court of competent jurisdiction. The reply that is raised here is that the foreign judgment, when the proceedings are examined, was given in a manner which shows that the proceedings were contrary to natural justice, or to accept the phrase which is used by Lord Lindley in *Pemberton v Hughs* (*sup.*):
>
> > 'If a judgment is pronounced by a foreign court over persons within its jurisdiction and in a matter with which it is competent to deal, English courts never investigate the propriety of the proceedings in the foreign court, unless they offend against English views of substantial justice.'

By that it is quite plain from the context that Lindley MR is dealing with proceedings offencing against English views of substantial justice. He is not dealing with the merits of the case or the actual decision, because he goes on to say in the same case at page792:

> 'A judgment of a foreign court having jurisdiction over the parties and subject - i.e. having jurisdiction to summon the defendants before it and to decide such matters as it has decided - cannot be impeached in this country on its merits.'

It is plain that the Master of the Rolls is dealing only with the proceeding, because it is obvious if a court gives judgment on the merits for the plaintiff, when it is plain it ought to have given judgment for the defendant, or vice versa, that is a judgment which offends against the English views of substantial justice. Nevertheless as the Master of the Rolls says, it cannot be impeached upon that ground, but it can be impeached if the proceedings, the method by which the court comes to a final decision, are contrary to English views of substantial justice. The Master of the Rolls seems to prefer, and I can quite understand the use of the expression 'contrary to the principles of natural justice'; the principles it is not always easy to define or to invite everybody to agree about, whereas with our own principles of justice we are familiar. Those principles seem to me to involve this, first of all that the court being a court of competent jurisdiction, has given notice to the litigant that they are about to proceed to determine the rights between him and the other litigant; the other is that having given him that notice, it does afford him an opportunity of substantially presenting his case before the court.

Both these considerations appear to be essential if they are to be in accordance with natural justice. I think the expression of opinion of the late Professor Dicey in his great book on **The Conflict of Laws**, dealing with this subject matter is a little narrowly expressed. He says in r.107 (4th edit., p.441):

> 'A foreign judgment may sometimes be invalid on account of the proceedings in which the judgment was obtained being opposed to natural justice.'

Then he says that is owing to want of due notice:

> 'But, in such a case, the court is generally not a court of competent jurisdiction.'

It may be that the court is generally not a court of competent jurisdiction, but that seems to me by no means the whole of the rule. A court of competent jurisdiction, as I have said, may very well, either in accordance with its rules or in violence of them, refuse a substantial hearing to the party, and if so, it appears to me that the judgment would be invalidated on the ground that it was contrary to natural justice for the reason I have already to give. That gives quite free play for a variation between the different countries and different jurisprudences of the method in which they shall hear the parties and the nature of the evidence to be given in the court. The case here depends upon whether or not the procedure of this foreign court did offend against our principles of substantial justice."

92 It seems to me that those paragraphs do set out that with regards to enforcing foreign judgments, the courts of England and Wales will insist upon there having been foreign

proceedings which were consistent with the England and Wales concepts of natural justice, including, in particular, firstly that notice of the proceedings was given to the defendants, and, secondly, that they had been afforded an opportunity to contest the proceedings substantively by presenting a case, that all being an additional requirement (as recognised by **Dicey & Morris** Rule 52) notwithstanding that the foreign court had jurisdiction for one reason or another (i.e. it is one of the **Dicey & Morris** Rule 43 cases) over the relevant defendants in relation to the relevant case.

93 Mr Petrides further cited to me the decision on *Adams v Cape Industries PLC* [1990] Ch 433 which raised the question as to whether the common law would refuse to enforce the foreign judgment by reason of a failure to comply with natural justice notwithstanding that the relevant party had had an opportunity within the foreign process to make applications enabling them to be substantively heard, and in which the following appears at pages 568-570:

> "We accept that no authority binding this court has been cited to us establishing the proposition for which Mr Falconer has contended. It is at least clear that our law does not oblige a defendant who can show that a foreign judgment has been obtained by fraud to have used any available remedy in the foreign court with reference to that fraud if he is successfully to impeach that judgment in our courts: see *Abouloff v Oppenheimer & Co.* (1882) 10 QBD 295 and *Jet Holdings Inc v Patel* [1990] 1 QB 335. The position may well be the same in cases where there has been a breach of natural justice of the two primary kinds considered by Atkin LJ in *Jacobson v Frachon* 138 LT 386, 392, namely, absence of notice of the proceedings or failure to afford the defendant an opportunity of substantially presenting his case.

In this judgment, however, we are dealing with a case where, although there was in our view a departure from the basic principles of natural justice in the assessment of the amount of a default judgment, nevertheless (a) the error which led to this departure was an honest error on the part of all concerned; (b) the defendants had proper notice of the proceedings and could have presented their case on its merits if they had chosen to do so, but chose not to do so; (c) the procedural rules applicable in the Tyler court were themselves fair and just; (d) the defendants had the right to apply to set aside the judgment on the grounds that the procedure for the assessment of damages was irregular under the relevant rules and such application would presumably have been allowed if made in due time.

Against this background, we are not persuaded that possession of and failure to exercise this right by the defendants can be disregarded as being wholly irrelevant in determining whether the proceedings in the Tyler court, which we think must be viewed as a whole, offend against English views of substantial justice, within the principles stated by Lindley MR in *Pemberton v Hughes* [1899] 1 Ch. 781, 790, as the plaintiffs would submit.

It is well established that a defendant, shown to have been subject to the jurisdiction of a foreign court, cannot seek to persuade our court to examine the correctness of the judgment whether on the facts, or as to the application by the foreign court of its own law or, when relevant, of the law of this country. A foreign judgment is not impeachable merely because it is 'manifestly wrong:' *Godard v Gray* LR 6 QB 139; *Castrique v Imrie* (1870) LR 4 HL 414 and *Robinson v Fenner* [1913] 3 KB 835, 842. In any such case it could be said that there has been a breach of natural justice, but it is

not a type of breach which our courts will consider relevant. In effect, their attitude is that the only way in which the defendant can seek to correct an error of substance made by the foreign court is by using such means for correction of error as may be provided under the foreign system.

This being the position where there has been an error of substance, it would, in our judgment, be anomalous if our courts were obliged wholly to disregard the existence of a perfectly good remedy under a foreign system of procedure in considering whether the defective operation of that procedure has led to a breach of natural justice. And, indeed, from some of the cases on procedural defects, support can be derived from the proposition that, at least with reference to defects known to the defendant before judgment, the defendant can be required to have made use of any remedy available in the foreign court: see, for example, *Reynolds v Fenton* (1846) 16 LJCP 15 and *Crawley v Isaacs* (1867) 16 LT 529, see particularly at p.531, where Bramwell B said (obiter):

> 'If the proceedings be in accordance with the practice of the foreign court, but that practice is not in accordance with natural justice, this court will not allow itself to be concluded by them, but on the other hand, if the procedure be in accordance with natural justice, the foreign court itself will interfere to prevent the plaintiff taking advantage of the judgment irregularly and improperly obtained.'

> Mr Falconer relied strongly not only on that passage but on dicta of Fry J in *Rousillon v Rousillon* 14 ChD 351, 370, and of Bray J in *Jeannot v Fuerst* (1909) 100 LT 816, 818.
>
> Since the ultimate question is whether there has been proof of substantial injustice caused by the proceedings, it would, in our opinion, be unrealistic in fact and incorrect in principle to ignore entirely the possibility of the correction of error within the procedure of a foreign court which itself provides fair procedural rules and a fair opportunity for remedy. The court must, in our judgment, have regard to the availability of a remedy in deciding whether in the circumstances of any particular case substantial injustice has been proved. However, the relevance of the existence of the remedy and the weight to be attached to it must depend upon factors which include the nature of the procedural defect itself, the point in the proceedings at which it occurred and the knowledge and means of knowledge of the defendants of the defect and the reasonableness in the circumstances of requiring or expecting that they made use of the remedy in all the particular circumstances."

94 It seems to me that this is laying down that the Court will conduct an holistic analysis of all the circumstances to see whether or not the defendant having an ability within the foreign court procedure to correct a previous failure to comply with what this jurisdiction regards as substantial natural justice is sufficient to correct the situation, and so that, in the individual circumstances, the defendant who has not taken advantage of that ability may not be able to complain as to what has occurred and the foreign judgment may be enforced here.

95 Mr Petrides further cited to me the decision *in Jet Holdings Inc v Patel* [1990] 1 QB 335 in this regard:

> "I have said that in the alternative the defendant also relies on r.46 in **Dicey & Morris**, **The Conflict of Laws**. The rule itself refers to proceedings opposed to natural justice. In the comment, at p.474, the authors cite the observations of Lord Lindley MR in *Pemberton v Hughes* [1899] 1 Ch. 781, 790:
>
> > 'If a judgment is pronounced by a foreign court ... English courts never investigate the propriety of the proceedings in the foreign court, unless they offend against English views of substantial justice.'
>
> The way Mr Swift puts the point is that the proceedings in this case, he says, 'Offended against English views of substantial justice'.
>
> Once again one would expect that the foreign court's views would logically be neither conclusive nor relevant as to the propriety of its own proceedings. If the English court considers that the foreign court did not observe the rules of natural justice - for example, the rule *audi alteram partem* or *nemo judex in rem suam* - why should it make any difference that the foreign court thought that it was observing the rules of natural justice? But *Dicey & Morris* take the contrary view, at p.475, where there is a passage which says that a foreign judgment cannot be impeached on this ground if the objection could have been and was taken before the foreign court. The authority cited to support that is *Jacobson v Frachon* (1927) 138 LT 386. It is by no means clear to me that that case is authority for the proposition stated in **Dicey &**

> **Morris**. But I do not find it necessary to decide this appeal on the basis of r.46 or on procedural failure to comply with the rules of natural justice or with, as Lord Lindley MR puts it, English views of substantial justice. It can be decided in my judgment on r.44, fraud. It is plain, as I have said, that when considering fraud the English courts have to consider the facts afresh without regard to the decision of the foreign court.
>
> The defendant's case before us was not that there was fraud in the cause of action itself. He does not resist enforcement on the ground that he had misappropriated none of the plaintiffs' money, and that the plaintiffs were fraudulent in asserting that he had misappropriated money. So, in a sense, his allegation here is of collateral fraud asserts that the plaintiffs' conduct was fraudulent in (1) assaulting him with violence and threats, so that he was afraid to go to California; (2) obtaining $100,000 from him by those means, so that he was unable to afford continuing legal representation in California; and (3) failing to invite the Californian court to take that $100,000 into account against the plaintiffs' claim. Factually ground (3) seems to be not supported by the evidence. Alternatively, the defendant says that the Californian court was misled by the plaintiffs as to the true reason for his default."

96 It seems to me this holds in effect that, while the English court will give some latitude to the foreign court with regard to its ability to decide its own process, it is nonetheless for the England and Wales court to decide whether or not what has happened abroad is consistent with England and Wales considerations of natural justice.

97 Mr Armstrong for the claimant did not really seek to contest the various principles which Mr Petrides was advancing but did point to the fact that under the procedure in England and Wales being under the Civil Procedure Rules made under the Civil Procedure Act 1997, that it is possible for a claim form to be validly served at a last known residence of someone even when the claimant knows that the defendant does not live there if the claimant does not know of any alternative place at which the defendant might be served (see CPR 6.9(6)). Mr Petrides responded to say that that does not apply if the relevant defendant is outside the jurisdiction as to which reply Mr Armstrong would counter by saying that, although that rule does exist, that is a matter not of procedural natural justice law but simply a matter of comity as made clear in the decision in *Chellaram v Chellaram* [2002] EWHC 632 (Ch) at [37] and [47]. Mr Armstrong would still say that CPR does allow for service and then a default judgment notwithstanding that the service has taken place in a way which has not come and will not come to the defendants' attention.

98 Secondly, Mr Armstrong went on to refer to the fact that if a default judgment is obtained in such circumstances, then the default judgment is regular and cannot be automatically set aside under CPR 13.2 notwithstanding that the relevant defendant knew nothing about the relevant proceedings and did not, perhaps, have any remaining connection at all with the place at which the proceedings had been served. He accepted that the default judgment would, in those circumstances, be capable of being set aside under CPR 13.3 if there were real prospects of success in defending or some other good reason for the matter to be allowed to proceed. However, he pointed out that that is not an automatic outcome even in those circumstances. There is still a discretion in the court and that the relevant defendant might well lose the right to contest the judgment if they had failed to act promptly.

99 Mr Armstrong therefore submits that it is not necessarily contrary to natural justice as seen by the common law of England and Wales for there to be a method of service of

proceedings which results in a defendant knowing nothing about them; or at least if there is a method to challenge the resultant default judgment, albeit that under those procedural rules the ability to challenge the default judgment may be lost by delay. He submits that if that is the law of England and Wales, then by extension, one must ask as to why should the courts of England and Wales, and the common law of England and Wales, be concerned about an equivalent situation existing in Iraq. He submits that it cannot be the case that a situation which is allowed for by the CPR could be a situation in which the common law would regard as being contrary to natural justice.

100 I do not have to, and I specifically do not, determine the full legal position with regards to these various contentions especially as it very much seems to me to be fact specific as to what would occur in any particular instance. However, it does seem to me to be in general distinctly arguable, but without finally deciding the point, the case that: firstly, there is a rule that the England and Wales courts will refuse to enforce foreign judgments notwithstanding a voluntary submission to the jurisdiction if the judgment and its process offends the England and Wales concept of natural justice; and, in particular, if the defendant has had no proper opportunity to substantively defend the foreign process, and especially if the matter has simply proceeded with the defendant knowing nothing at all about it – that all being in a way which would result in "a substantial injustice".

101 Secondly, that the England and Wales courts will respect foreign law and foreign courts at least to the extent that they may choose their own procedures, and that there is no requirement that those procedures be in any way equivalent to the procedures of England and Wales procedural law. However, nonetheless for the judgment to enforced here, the procedure will still have to have met what the courts of England and Wales consider to be substantial justice and thus have complied with the essential rules of natural justice.

102 Thirdly, that notwithstanding that a judgment of the foreign court may have been obtained in circumstances which offend England and Wales's considerations of natural justice, the England and Wales court will still consider whether the contravention of natural justice has been or was capable of being overcome by there being, notwithstanding the existence of the relevant judgment, some sufficient opportunity to challenge it. That is very much a fact specific question but the principle, it seems to me, is clearly stated in the *Adams v Cape Industries* case and, in particular, at page 570C-D. That could potentially include a situation where there was a proper ability to challenge the foreign judgment in the foreign court, but where the defendants had lost their opportunity through their own fault, that is to say inaction, at a time when they knew of the foreign proceedings and what had happened. It seems to me that all of that is perfectly consistent with and, indeed, equivalent to the CPR provisions in Part 13.

103 The defendants' case in their statement of case and evidence is that the Iraqi proceedings were contrary to natural justice because they were served on a property that the defendants had no, or at least had ceased to have any, connection with - although it seems to me that their case as far as detail as to that is distinctly unclear - and the defendants go on to say that they were out of the jurisdiction and did not see any advertisement or notification of the first instance proceedings. However, although I consider that they have not dealt with their factual positions as to their connection with the property or as to their learning of the proceedings in any detail in their evidence, it also seems to me that they have not dealt with the appeal. In particular, they have not produced evidence which would go to such questions as to whether what really happened was simply equivalent to what might well happen under CPR 13.3, namely someone not knowing of the proceedings learning of them, having a real prospect of successfully defending them, but having culpably delayed with the result that the application to set aside fails as a matter of discretion. It seems to me that this

is something which is simply not dealt with to a proper degree in their draft defence document or, indeed, their evidence.

104 On the other hand, I have to bear in mind that the passage which I read from the appeal judgment in Iraq may well suggest that the appeal was simply out of time and that Iraqi law creates a situation that, if there is a default judgment and a defendant does not learn about it within a particular period of time, the defendant is simply barred from contesting it because the time period for appealing does not depend on their knowledge. Such a time period to appeal might just be one simply calculated from the date of the original judgment; and the appeal judgment may will suggest that that is the case. I have the difficulties here though that, firstly, the defendants have failed to advance in their Iraqi law evidence anything with regards to: first, what is the time limit for bringing such an appeal or challenge to default judgment; second as to when they knew of the default judgment and how that would factor into the relevant time period; and, thirdly, what is said to have been the actual basis of dismissal by the appeal court of the appeal. Secondly, those matters also do not appear in the proposed defence except that paragraph14.4 says that the appeal was dismissed as:

> "The claim had been validly served on the defendants under Iraqi law."

That is stated in the appeal judgment but, as I have already said, the appeal judgment goes on to say that the appeal was held out of the legal period and that matter is simply not dealt with in the defence.

105 I do, on the other hand, accept that it is not part of the defendants' case that the appeal was out of time. Rather, their case is that the appeal was dismissed due to it being held that the Iraqi proceedings had been originally validly served and thus that the Iraqi default judgment was regular even though the defendants then knew nothing about the proceedings. Nonetheless, it seems to me to be an unfortunate omission. I also feel that the spirit of

paragraph 7(d) of my order of 11 November 2020 would have extended to the defendants setting out the relevant timings and provisions of Iraqi law regarding this aspect, that is to say the appeal, even if the letter of the words perhaps does not require that.

106 I note also that the claimant's case is that the Iraqi judgment proceeded on the basis that the defendants, by using the Karada address for the purposes of their granting powers of attorney to be used in the 2015 litigation had rendered it a proper address for service in Iraq for the purposes of the later 2016 litigation; and the claimant's submission is it is the defendants' own fault if, having done that, they failed to keep up a connection with the address. That, however, raises a number of difficult factual questions about what happened over the relevant period. I also bear in mind in all of this that the defendants' Iraqi law evidence, which has not being contradicted, at least at this stage, by evidence from the claimant, is that the defendants have or potentially had a limitation defence in Iraqi law (assuming that they were allowed to advance it) to the substantive claim brought against them on the 1979 purchase deed.

107 Having considered all of the above, I arrive at the point that, firstly, in relation to the challenges to the default judgment other than those based on breach of natural justice, matters have moved on from the position in this litigation as they appeared to be in November 2020 and: firstly, it is unclear if they are being advanced at all; and, secondly, for the reasons which I have already given, if they are being advanced, they are being pleaded in a fashion which is impermissible and also that, at best, I have very real doubts as to whether they have any real prospects of success on the evidence and material before me.

108 Secondly, in relation to the challenge based on breach of natural justice: firstly, that there is a real prospect that a defence could have succeeded in Iraq if the Iraqi courts had allowed that to be advanced, that is to say the limitation defence leaving aside anything else; and,

secondly, that the defendants have a real prospect of showing that there has been such a breach of natural justice in Iraq so as to cause substantial injustice which would mean that in common law, the courts of England and Wales would not enforce the Iraqi judgment in this country.

109 On the other hand, it is altogether unclear what is the defendants' case as to why the Iraqi appeal failed and as to why the existence of the appeal process did not cure what might otherwise have been an absence of natural justice resulting in substantial injustice; and as far as both the appeal judgment and the defence is concerned, it is unclear as to on what basis the appeal failed, what is the defendants' case in Iraqi law with regards to this, and what is the defendants' case on relevant timings with regards to this. Further, the defendants have also failed to explain their previous use of the Karada address and what has happened in the meantime with regards to that, albeit that the Karada address, at first sight, seems to be only a limited part of this.

110 In the light of all of that, I consider the defendants' applications for extensions of time and relief from sanctions. It is common ground that the defendants have breached my unless order of November 2020 and require relief from sanctions, although there is a dispute as to what the breach(es) actually was or were. I find that dispute somewhat unhelpful but I do need to go through that matter.

111 As far as paragraphs 1 - 2 of my order are concerned, they make it clear that the default judgment will only be set aside if the defendants comply with paragraphs 5 - 8. As far as paragraph 5 is concerned, it is common ground that the period for provision of the relevant financial statements was extended to 2 December 2020 and which extension by agreement is, at first sight, permissible under CPR 3.8(1). However, it is also common ground that the defendants simply did not comply with the revised date.

112 The claimant has not complied with paragraph 4. The claimant's first submission was that there was no need to do so by 9 December 2020 simply because the application to set aside the default judgments had already failed because the defendants had failed to comply with paragraph 5 of the order, which even under the extension had to be complied with the earlier date of 2 December 2020. As far as this is concerned, firstly, it is true that paragraph 4 did not say that it was conditional on the defendants first complying with paragraph 5 and it does not seem to me that I should apply the law of implication to, in some way or other, include such an implication within paragraph 5. This is a matter where the claimant, in circumstances of the defendant failing to comply with the earlier time period, could always have applied to be released from paragraph 5. Therefore, it does not seem to me that the conditions for such an implication, being that it is obvious or necessary to give the order business efficacy, are satisfied here.

113 Secondly, it is true that paragraph 4 remains in existence as an order notwithstanding non-compliance with paragraph 5. On the other hand, as far as this order and also, indeed more importantly, the applications before me are concerned, it seems to me that once the defendants' application stood as being struck out for non-compliance with paragraph 5, then paragraph 4 lost its technical purpose notwithstanding it still stood as a court order. It seems to me that if any application had been made by the claimant to be released from it then it would simply have been granted.

114 However, the fact that the relevant information was not provided by the claimant (being that identified in paragraph 4) could have a potential impact on various questions which arise on the relief from sanctions application, in particular with regards to whether the defendants had good reason for any breach of my order and also to the key overriding question as to whether it would be just in all the circumstances to grant relief from sanctions. Hence the non-compliance by the claimant with paragraph 4 might have some effect with regards to

the defendants' subsequent non-compliance. With regards to that non-compliance, it does seem to me to be clear that the defendants did not comply with any of paragraphs 6 - 8 of the order in accordance with its terms.

115 Mr Petrides submitted that paragraphs 6 - 8 were conditional on the claimant complying with paragraph 4. However, it seems to me that there are a number of problems with that. The first, of course, is that the defendants' application had already been struck out for non-compliance with paragraph 5. The second is that paragraphs 6 - 8 did not say that they were conditional on the claimant complying with paragraph 4, and, again, I do not see as to why it would be appropriate to imply such a provision within paragraphs 6 - 8. In the event of non-compliance by the claimant with paragraph 4, the defendants could always have made an application either to set aside or modify, or extend time for compliance with, or modify what was required by, paragraphs 6 - 8. The third reason for rejecting Mr Petrides's submissions is that I have already effectively held in paragraph 34 of my judgment of 19 May 2021 that the defendants' obligations were not conditional on the claimant complying with paragraph 4. Finally, I do not see as to why it would follow in any event that the claimant's failure to produce the documents under paragraph 4 would have prevented the defendants complying with paragraphs 6 - 8. It therefore seems to me that I should reject Mr Petrides's submission that in some way or other, the defendants were not in breach of paragraphs 6 - 8 (as well as of paragraph 5) for this reason, although again, for the reasons already given, the claimant's non-compliance might affect such questions as to whether the defendants had good reason for a breach and as to what is just in all the circumstances.

116 I also need to see all of this in the context of what happened in December 2020 and January 2021 and following, and note the following points. Firstly, the parties could not alter the time limits or resultant sanctions by consent, or at least not beyond a period of twenty-eight days. That is what is set out by CPR 2.11 and 3.8. Secondly, it is clear that the parties and,

for that matter, those behind the claimant, even if they could not bind the claimant, thought that some resolution was being achieved; although everyone is bound by paragraph 33 of my judgment of 19 May 2021 to the effect that: any agreement which had been made was only suspensory; and was subject to the first defendant complying with conditions with which the first defendant did not comply; and came to an end, at least as far as primary obligations were concerned, when the first defendant refused to take the matter further. Thirdly, as Mr Ross for the claimant correctly pointed out to the defendants, only the court could stay the conditions as set out in my order of 11 November 2020. Fourthly, at the time, Mr Ross was having difficulties because of the claimant's coma and ill health, and at one point he did ask for the defendants to hold off doing something although only for a short time. Fifthly, after that, the defendants did nothing except to issue their application to strike out the proceedings which application then failed.

117 I also need to see all this in the context of what has now happened with regards to purported compliance with the conditions in my order of 11 November 2020. As far as condition 5 with regards to financial statements are concerned, for the reasons already given, the second defendant has satisfied this although only in a gradual way and, in at least one case, somewhat late, although the defaults of the second defendant seem to me to have been relatively minor. As far as the first defendant is concerned, the condition has been satisfied but only as a result of the claimant bringing a Part 71 application and in circumstances where the claimant may still properly seek, if the claimant so desires, that the first defendant should confirm various matters.

118 Secondly, with regard to condition 6 and the question of defence, the defendants, it seems to me, have now satisfied that. As I said earlier, the claimant has contended that the defendants have not satisfied it because the claimant's position is that the defendants should have to plead their various cases out on the points mentioned in paragraph 6 even where

they are no longer advancing those particular cases. I disagree with that. It seems to me that, as a matter of obvious construction, if the defendants are not advancing a case then they should not be seeking to allege it; and therefore, if they are not seeking to allege it, they should not seek to particularise it. On the other hand, I bear in mind and will come back to the fact that it seems to me that the defence as now produced is unsatisfactory in various respects in so far as it now seeks to plead a case which either is not being advanced or is being advanced in an impermissible manner or a combination of both.

119 As far as condition 7 is concerned and the provision of witness statements by the second defendant Mr Albahrani and an Iraqi law expert; until a considerable way through the hearing, the defendants had not satisfied it. It seems to me that they have now satisfied it in so far as they are advancing allegations; but that there is force in Mr Armstrong's complaints that, firstly, they have not explained why in 2015 they provided the Karada address for their attorney but that they say they had no connection with it in 2016; and, secondly, that the defendants have not dealt with what is their case with regards to the appeal, why it failed, what were the relevant timings, and whether or not the appeal process satisfied, and if not why it did not satisfy, the overall considerations of natural justice so as to mean that the Iraqi procedure did result in a situation where there was no substantial injustice to the defendants.

120 As far as paragraph 8 is concerned and the equitable charge, that has been overridden by my later order with regards to legal charge. There, there is a dispute between the parties as to what should be the appropriate terms of the legal charge which dispute requires resolving, but, at first sight, it seems to me that some of what the claimant seeks, for example, that it should include a charge over furniture at the flat, simply goes too far and that the defendants are raising legitimate or at least arguable legitimate points about that.

121 In the context of all the foregoing, I turn to the applications for relief from sanctions and extension of time. CPR 3.8 and 3.9 provide as follows:

> "Sanctions have effect unless defaulting party obtains relief
>
> 3.8
>
> (1) Where a party has failed to comply with a rule, practice direction or court order, any sanction for failure to comply imposed by the rule, practice direction or court order has effect unless the party in default applies for and obtains relief from the sanction.
>
> (Rule 3.9 sets out the circumstances which the court will consider on an application to grant relief from a sanction)
>
> (2) Where the sanction is the payment of costs, the party in default may only obtain relief by appealing against the order for costs.
>
> (3) Where a rule, practice direction or court order –
>
> (a) requires a party to do something within a specified time, and
>
> (b) specifies the consequence of failure to comply,
>
> the time for doing the act in question may not be extended by agreement between the parties except as provided in paragraph (4).
>
> (4) In the circumstances referred to in paragraph (3) and unless the court orders otherwise, the time for doing the act in question may be extended by prior written agreement of the parties for up to a maximum of 28

days, provided always that any such extension does not put at risk any hearing date.

Relief from sanctions

3.9

(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."

122 The overriding objective at CPR 1.1 includes for a party to be able to advance their case, although CPR 1.1 must be read very much in the context of CPR 3.9 which lays down the regime for seeking relief from sanctions. CPR1.1 reads as follows:

"The overriding objective

1.1

(1) These Rules are a procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost.

(2) Dealing with a case justly and at proportionate cost includes, so far as is practicable –

(a) ensuring that the parties are on an equal footing and can participate fully in proceedings, and that parties and witnesses can give their best evidence;

(b) saving expense;

(c) dealing with the case in ways which are proportionate –

(i) to the amount of money involved;

(ii) to the importance of the case;

(iii) to the complexity of the issues; and

(iv) to the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly;

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and

(f) enforcing compliance with rules, practice directions and orders."

123 I bear in mind CPR 3.1A, that, at various previous stages, the defendants have been in person:

"Case management – unrepresented parties

3.1A

(1) This rule applies in any proceedings where at least one party is unrepresented.

(2) When the court is exercising any powers of case management, it must have regard to the fact that at least one party is unrepresented.

(3) Both the parties and the court must, when drafting case management directions in the multi-track and fast track, take as their starting point any relevant standard directions which can be found online at www.justice.gov.uk/courts/procedure-rules/civil and adapt them as appropriate to the circumstances of the case.

(4) The court must adopt such procedure at any hearing as it considers appropriate to further the overriding objective.

(5) At any hearing where the court is taking evidence this may include—

(a) ascertaining from an unrepresented party the matters about which the witness may be able to give evidence or on which the witness ought to be cross-examined; and

(b) putting, or causing to be put, to the witness such questions as may appear to the court to be proper."

124 I also bear in mind the Supreme Court decision in *Barton v Wright Hassall LLP* [2018] 1 WLR 1119 to the effect that those provisions give very little license to defendants who do not comply with rules and court orders.

125 I also bear in mind that CPR 3.1 entitles the court to make a wide range of orders, including under CPR 1.3 imposing conditions, although again this has to be seen in the context of the specific sanctions regime laid out by CPR 3.9.

126 I should say it is common ground that in the light of my order of November 2020, and I in any event determine for the reasons given above that, there are relevant sanctions for which the defendants need to seek relief. Both sides have taken me to the decision of *Denton & Ors v TH White Ltd* [2014] 1 WLR 3926 and especially [23] - [38]:

> "23. In understanding the correct approach to the grant of relief from sanctions, it is necessary to start with an examination of the text of r.3.9(1) itself. The rule contains three elements (which are not to be confused with the three stages in the guidance that we give below). First, it states when the rule is engaged by providing that it applies:
>
> > '[o]n an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order.'
>
> This makes it clear that the court's first task is to identify the 'failure to comply with any rule, practice direction or court order', which has triggered the operation of the rule in the first place. Secondly, it provides that, in such a case:
>
> > 'the court will consider all the circumstances of the case, so as to enable it to deal justly with the application.'
>
> Thirdly, it provides that the exercise directed by the second element of the rule shall include a consideration of factors (a) and (b).
>
> *Guidance*
>
> 24. We consider that the guidance given at paras.40 - 41 of *Mitchell* remains substantially sound. However, in view of the way

in which it has been interpreted, we propose to restate the approach that should be applied in a little more detail. A judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the 'failure to comply with any rule, practice direction or court order' which engages r.3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate:

> 'all the circumstances of the case, so as to enable [the court] to deal justly with the application including [factors (a) and (b)].'

We shall consider each of these stages in turn identifying how they should be applied in practice. We recognise that hard-pressed first instance judges need a clear exposition of how the provisions of r.3.9(1) should be given effect. We hope that what follows will avoid the need in future to resort to the earlier authorities.

The first stage

25. The first stage is to identify and assess the seriousness or significance of the 'failure to comply with any rule, practice direction or court order', which engages r.3.9(1). That is what led the court in *Mitchell* to suggest that, in evaluating the nature of the non-compliance with the relevant rule, practice direction or court order,

judges should start by asking whether the breach can properly be regarded as trivial.

26. Triviality is not part of the test described in the rule. It is a useful concept in the context of the first stage because it requires the judge to focus on the question whether a breach is serious or significant. In *Mitchell* itself, the court also used the words 'minor' (para.59) and 'insignificant' (para.40). It seems that the word 'trivial' has given rise to some difficulty. For example, it has given rise to arguments as to whether a substantial delay in complying with the terms of a rule or order which has no effect on the efficient running of the litigation is or is not to be regarded as trivial. Such semantic disputes do not promote the conduct of litigation efficiently and at proportionate cost. In these circumstances, we think it would be preferable if in future the focus of the enquiry at the first stage should not be on whether the breach has been trivial. Rather, it should be on whether the breach has been serious or significant. It was submitted on behalf of the Law Society and Bar Council that the test of triviality should be replaced by the test of immateriality and that an immaterial breach should be defined as one which:

> 'neither imperils future hearing dates nor otherwise disrupts the conduct of the litigation.'

Provided that this is understood as including the effect on litigation generally (and not only on the litigation in which the application is made), there are many circumstances in which materiality in this sense

will be the most useful measure of whether a breach has been serious or significant. But it leaves out of account those breaches which are incapable of affecting the efficient progress of the litigation, although they are serious. The most obvious example of such a breach is a failure to pay court fees. We therefore prefer simply to say that, in evaluating a breach, judges should assess its seriousness and significance. We recognise that the concepts of seriousness and significance are not hard-edged and that there are degrees of seriousness and significance, but we hope that, assisted by the guidance given in this decision and its application in individual cases over time, courts will deal with these applications in a consistent manner.

27. The assessment of the seriousness or significance of the breach should not, initially at least, involve a consideration of other unrelated failures that may have occurred in the past. At the first stage, the court should concentrate on an assessment of the seriousness and significance of the very breach in respect of which relief from sanctions is sought. We accept that the court may wish to take into account, as one of the relevant circumstances of the case, the defaulter's previous conduct in the litigation (for example, if the breach is the latest in a series of failures to comply with orders concerning, say, the service of witness statements). We consider that this is better done at the third stage (see para.36 below) rather than as part of the assessment of seriousness or significance of the breach.

28. If a judge concludes that a breach is not serious or significant, then relief from sanctions will usually be granted and it will usually be unnecessary to spend much time on the second or third stages. If, however, the court decides that the breach is serious or significant, then the second and third stages assume greater importance.

The second stage

29. The second stage cannot be derived from the express wording of r.3.9(1), but it is nonetheless important particularly where the breach is serious or significant. The court should consider why the failure or default occurred: this is what the court said in *Mitchell* at para.41.

30. It would be inappropriate to produce an encyclopaedia of good and bad reasons for a failure to comply with rules, practice directions or court orders. Paragraph 41 of *Mitchell* gives some examples, but they are no more than examples.

The third stage

31. The important misunderstanding that has occurred is that, if (i) there is a non-trivial (now serious or significant) breach and (ii) there is no good reason for the breach, the application for relief from sanctions will automatically fail. That is not so and is not what the court said in *Mitchell*: see para.37. Rule 3.9(1) requires that, in every case, the court will consider:

> 'all the circumstances of the case, so as to enable it to deal justly with the application.'

We regard this as the third stage.

32. We can see that the use of the phrase 'paramount importance' in para.36 of *Mitchell* has encouraged the idea that the factors other than factors (a) and (b) are of little weight. On the other hand, at para.37 the court merely said that the other circumstances should be given 'less weight' than the two considerations specifically mentioned. This may have given rise to some confusion which we now seek to remove. Although the two factors may not be of paramount importance, we reassert that they are of particular importance and should be given particular weight at the third stage when all the circumstances of the case are considered. That is why they were singled out for mention in the rule. It is striking that factor (a) is in substance included in the definition of the overriding objective in r.1.1(2) of enabling the court to deal with cases justly; and factor (b) is included in the definition of the overriding objective in identical language at r.1.1(2)(f). If it had been intended that factors (a) and (b) were to be given no particular weight, they would not have been mentioned in r.3.9(1). In our view, the draftsman of r.3.9(1) clearly intended to emphasise the particular importance of these two factors.

33. Our view on this point is reinforced by the fact that Sir Rupert recommended at para.6.7 of Chapter 39 of his report that r.3.9 should read as follows, including a factor (b) referring specifically to the interests of justice in a particular case:-

> '(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 including –
>
> (a) the requirements that litigation should be conducted efficiently and at proportionate cost; and
>
> (b) the interests of justice in the particular case.'

This recommendation was rejected by the Civil Procedure Rule Committee in favour of the current version. In our opinion, it is legitimate to have regard to this significant fact in determining the proper construction of the rule. It follows that, unlike Jackson LJ, we cannot accept the submission of the Bar Council that factors (a) and (b) in the new rule should 'have a seat at the table, not the top seats at the table', if by that is meant that the specified factors are not to be given particular weight.

34. Factor (a) makes it clear that the court must consider the effect of the breach in every case. If the breach has prevented the court or the parties from conducting the litigation (or other litigation) efficiently and at proportionate cost, that will be a factor weighing in favour of refusing relief. Factor (b) emphasises the importance of complying with rules, practice directions and orders. This aspect received insufficient attention in the past. The court must always bear in mind

the need for compliance with rules, practice directions and orders, because the old lax culture of non-compliance is no longer tolerated.

35. Thus, the court must, in considering all the circumstances of the case so as to enable it to deal with the application justly, give particular weight to these two important factors. In doing so, it will take account of the seriousness and significance of the breach (which has been assessed at the first stage) and any explanation (which has been considered at the second stage). The more serious or significant the breach the less likely it is that relief will be granted unless there is a good reason for it. Where there is a good reason for a serious or significant breach, relief is likely to be granted. Where the breach is not serious or significant, relief is also likely to be granted.

36. But it is always necessary to have regard to all the circumstances of the case. The factors that are relevant will vary from case to case. As has been pointed out in some of the authorities that have followed *Mitchell*, the promptness of the application will be a relevant circumstance to be weighed in the balance along with all the circumstances. Likewise, other past or current breaches of the rules, practice directions and court orders by the parties may also be taken into account as a relevant circumstance.

37. We are concerned that some judges are adopting an unreasonable approach to r.3.9(1). As we shall explain, the decisions reached by the courts below in each of the three cases under appeal to this court illustrate this well. Two of them evidence an unduly draconian

approach and the third evidences an unduly relaxed approach to compliance which the Jackson reforms were intended to discourage. As regards the former, we repeat the passage from the 18th Implementation Lecture on the Jackson reforms to which the court referred at para.38 of its judgment in *Mitchell*:

> '[i]t has changed not by transforming rules and rule compliance into trip wires. Nor has it changed it by turning the rules and rule compliance into the mistress rather than the handmaid of justice. If that were the case then we would have, quite impermissibly, rendered compliance an end in itself and one superior to doing justice in any case.'

38. It seems that some judges are approaching applications for relief on the basis that, unless a default can be characterised as trivial or there is a good reason for it, they are bound to refuse relief. This is leading to decisions which are manifestly unjust and disproportionate. It is not the correct approach and is not mandated by what the court said in *Mitchell*: see in particular para.37. A more nuanced approach is required as we have explained. But the two factors stated in the rule must always be given particular weight. Anything less will inevitably lead to the court slipping back to the old culture of non-compliance which the Jackson reforms were designed to eliminate."

127 I remind myself of the three stage approach which is set out initially in [24] and that even if under the first two stages it is held that the breaches are serious or significant and that there is no good reason for them, then, as set out in [31] onwards, that does not mean that the

application for relief from sanctions will fail but that there is a heavy burden on the defendants to show that there should be relief granted in all the circumstances. I bear in mind, in particular, the specific factors set out in CPR 3.9 of the importance of compliance with rules, practice directions, and orders, and of the need for litigation to be conducted efficiently and at proportionate cost, which latter matter also leads me to have to ask myself as to what effect the breaches have had on the progress of the litigation. I also bear in mind very much in mind what is set out in [36] as to the need for the court to look at all the circumstances, including the degree of promptness shown by the defendants, and to ask itself as to whether or not justice requires relief from sanctions to be granted.

128 As far as the first stage is concerned as to whether the breaches were serious or significant, Mr Petrides did not seek to contest Mr Armstrong's submissions that they were, although he did suggest that certain breaches such as with regards to financial disclosure under paragraph 5 of my November 2020 order were not as serious as those in paragraphs 6 - 8. It seems to me that these breaches are serious and significant and that I should not really accept Mr Petrides's various submissions to seek to suggest that any of them were anything but that. Firstly, each of the breaches were of an unless order and for a substantial period of time, a number of months, and, in relation to some, for more than a year. Secondly, I do not think that it is right in this case that I should just look at the first breach as: firstly, the court needs to see the matter holistically; and, secondly, as I have already said, I do not accept that the conditions in paragraphs 6 - 8 of the order were either generally or in this context conditional on the claimant performing what was required by paragraph 4. On the other hand, it does seem to me that I should not pay particular attention to the breaches of paragraph 8 which is now in a state of suspension and which, it seems to me, have not caused any particular problem; and where, if there is a problem, that is at least partly the

fault of the claimant, or at least arguably the fault of the claimant, in seeking to impose certain clauses in the forms of charge to be granted.

129 Secondly, as to the question as to whether or not there is good reason for the breaches, all that has been suggested is the fact of the dealings in Iraq in December and January and then that the first defendant panicked and put his head in the sand, and that the second defendant is a litigant in person who left matters up to the first defendant. As I have already said, it is somewhat puzzling that Oliver Fisher Solicitors seem to have seen a conflict between the defendants where they are now acting in tandem together. However, it does seem to me that I should not speculate as to matters which are behind the veil of privilege. Nonetheless, I do not see there as being any good reason in this case. Even if events in Iraq had properly caused a delay; it was clear by the end of January that any agreement was at an end. Secondly, the defendants did not even seek to advance the case at the May 2021 hearing that the agreement had, in some way or other, terminated the English proceedings. I do not see the defendants as having acted reasonably even if they had taken the view that the agreement was still in operation after the end of January.

130 Thus, even if there was possibly some initial excuse to start with, it seems to me that the defendants simply failed to comply with my orders and conditions. The fact that the first defendant put his head in the sand seems to me to be exactly the opposite of a good reason. The fact that the second defendant panicked as a litigant in person with lawyers who say they have a conflict and can no longer act, as they often do, is somewhat more understandable; but still, the second defendant ought to have done something, either approached other lawyers or, if not, made an application to the court. It seems to me that there is no real good reason advanced here.

131 I do, however, now have to come to the circumstances of the case where the parties have drawn various matters to my attention and I pick up their various submissions in what follows. Firstly, I look at the effect of what has happened and which requires particular attention in view of the terms of CPR3.9(2)(a). The claimant has pressed on me that the litigation has been delayed by eighteen months or more, although the claimant accepts, it seems to me rightly, that some of the adjournments since May 2021 have been due to the claimant needing more time to consider and respond to what is advanced by the defendants.

132 It is true that there has been a substantial effect but it does seem to me that I also need to look at this in the context of two matters. Firstly, the underlying contractual dispute dates from 1999 which is a distinct curiosity and does not suggest that the claimant's side in general, that is including Mr Hatem and the Beneficiaries, have sought to progress the matters quickly. It seems to me that this is all a distinctly drawn out matter, drawn out over many years, and the effects in terms of delay on this litigation should be seen in that context. Further, I bear in mind that this litigation has only reached a very early stage in England and Wales as opposed to in Iraq.

133 Secondly, I must consider under *Denton*, as with the first point, the importance of compliance with rules and orders, and which requires particular attention under the terms of CPR3.9(2)(b). The claimant has pressed that on me, together with the facts that: firstly, even in November 2020, I regarded the defences being advanced as being somewhat shadowy and therefore put in place stringent conditions; and, secondly, that those conditions were simply not complied with by the second defendant until at least summer 2021 and then only gradually up to 5 July 2022 and the further provision of further evidence from Mr Albahrani, and were complied with even more slowly by the first defendant. I bear all that in mind, although also, which seems to me to go in the other direction, that: firstly, from the start the absence of natural justice in the Iraq case was advanced and has real prospects of

success, which is a matter to which I will turn; and, secondly, that I see my orders in terms of conditions, subject to the question of timing, as either having been complied with or capable of being complied with if I impose further conditions now, a matter to which I will return.

134 Thirdly, Mr Petrides for the defendants has referred to the size of the judgments. They are for very substantial, effectively, seven figure sums and against individuals. This is litigation which is potentially deserving of the application of significant court and other resources.

135 Fourthly, Mr Petrides referred to the strength, or what he said was the strength of the case, with regards to both natural justice as far as England and Wales law was concerned and the limitation defence in Iraqi law (assuming that he can persuade a court to allow that defence actually being advanced). It seems to me that the fact that there is a real prospect in Iraqi law of their being a defence is a relevant consideration and that I cannot say anything more than it has a real prospect of success should any court ever allow it to be advanced. On the other hand, it is only relevant to a limited extent bearing in mind that this is an application for relief from sanctions in relation to the England and Wales judgment.

136 However, the fact that the natural justice argument, it seems to me, is arguable in England and Wales law is also relevant. Again I am in a position where I am unable to assess its strength; but if it is allowed to be allowed to proceed, it seems to me that it clearly needs to be clarified in relation to the aspects which I consider as either lacking or being deficient in a way in which the defendants are advancing it presently. The fact that the enforcement of the Iraqi judgment is being resisted on grounds of natural justice does also seem to me to be relevant for other reasons to which I will come. I also very much bear in mind the fact that the defendant has a defence with a real prospect of success does not, of itself, justify the grant of relief from sanctions. It is merely a circumstance to be borne in mind.

137 Fifthly, Mr Petrides says that the conditions, and at least so far as they are relevant, have been complied with. I have already dealt with the contentions with regard to that and it seems to me that that is not entirely the case as at present. On the other hand, it does also seem to me that it should be possible to comply with them; and also that the degree to which they have not been complied with at this appointed time is a result, at least in part, of legitimate questions of interpretation by the defendants, and where paragraph 8 has also, it seems to me, been superseded. On the other hand, I am not altogether satisfied that the defendants have tried as hard as they possibly can to comply with the conditions, at least as far as the various Iraqi appeal questions are concerned.

138 Next, Mr Petrides submits that there has been no real prejudice caused by the defendants to the claimant from all this, or at least not prejudice which is incapable of being compensated in costs. Mr Armstrong counters this, in particular, by pointing to the amount of time which has elapsed. On the other hand, that is in the context of a history of this dispute which, even if this litigation has been delayed by, let me say, eighteen to twenty-four months, that is, in the context of the overall history of this dispute dating from 1999, not that long; and with the result that it seems to me that the delay is not as significant as it might be but is still a distinctly substantial delay. Costs, of course, have been distinctly substantial. I do note also that the effect of a charging order over the flat and the other charging order over any interest in the property of the first defendant, which the claimant has identified, has preserved some security at least over those property interests, and there is no suggestion that anything has happened so as to have the result that the defendants have in some way or other been able to dissipate or get rid of other substantial sums or interests of their own.

139 Next, Mr Petrides submits that where there is a reasonably arguable case and little prejudice, that this is a situation where the court may well consider granting relief from sanctions to avoid the claimant obtaining an unjustified windfall even if the relevant defendant has acted

or failed to act in litigation in something of a stupid manner. He referred me first to the decision of *Workman v Deansgate 123 LLP* [2019] EWHC 360 QB; [2019] PNLR 18 at [31]:

> "The overall circumstances of the case clearly justify relief from sanctions. All that occurred between the entry of the judgment and the application for relief from sanctions was the service by those representing Mr Workman of a costs budget and an agenda for a CCMC in relation to the trial in respect of quantum. That was done after the solicitors had been informed by the solicitors acting for Deansgate that they intended to apply for summary judgment and/or a striking out of the claim. This is not a case in which relief from sanctions will affect the true progress of the proceedings. The only real consequence will be to deprive Mr Workman of a fortuitous windfall. Moreover, it is a case in which there is more than an arguable defence. The proposition that the claim has no foundation at all requires careful consideration, but it has apparent merit. This is of high importance in terms of the overall circumstances of the case."

140 I note what was said in that case, but it seems to me that it was all very case specific and in circumstances where the relevant breach had only had a minimal effect on the continuation of the proceedings so that the factors identified as being of particular importance in CPR 3.9(2), in fact, had little weight in the relevant circumstances. Mr Petrides also took me to passages in the decision in Riley v Reddish (2019) (unrep.), a decision dated 7 June 2019:

> "17. The judgment for £1.6 million which was served at his home and which arrived on 14 April is, Mr Riley says, the first time that he became aware of the existence of these proceedings. I have no

material on which to reject that evidence, although, as I have said, I will come back to what happened when Ms Noakes telephoned him on 13 November. He then applied to set the default judgment aside, and that application was supported by his witness statement. The hearing to set aside came before Deputy Master Cousins in July - I cannot put my finger on the exact date, but at some stage in July - and he then reserved his judgment and delivered a written judgment on 18 October. On the morning of the hearing, for the first time, Mr Riley produced a draft defence to the claim. I will have to come back to the reasoning of the Deputy Master, but at this stage I note that he rejected the application to set aside, expressing himself as follows:

> '[41] In my judgment, I do not consider that there is any justification whatsoever for relief from sanctions to be granted in the circumstances. It has taken several months for Mr Riley to produce a draft defence, which occurred at the door of the court in July. I therefore consider that it would be quite inappropriate for the court to exercise its discretion in favour of Mr Riley in such circumstances.
>
> [42] I therefore have come to a conclusion that Mr Riley has no good prospects of success in pursuing his defence and that there is no other good reason to set the default judgment aside.
>
> [43] Accordingly, I dismiss the application.'

18. The application is brought under rule 13.3 of the CPR. There was originally linked with that an application under CPR 13.2, which is the rule that applies where a judgment entered in default was wrongly entered because the conditions permitting a default judgment were not satisfied, and Mr Riley put forward in his original application and witness statement a number of contentions as to why the judgment was irregular, but those were not persisted in, and before the Deputy Master it was accepted by counsel then appearing that he would not ultimately pursue the point that the judgment was irregular. The note of the hearing is not as clear as it might be, but I was told that Mr Riley did not persist in the contention that the judgment was irregular.

19. For his part, Mr Pickering, who appeared then, as he does before me, for Reddish, accepted in the light of the draft defence which had just been served that there was a real prospect of successfully defending the claim within the meaning of CPR 13.3 and the argument was therefore on the exercise of a discretion. I should explain that by referring to the terms of the rule. Rule 13.3 reads:

> '(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.'

...

21. I was referred to two decisions of the Court of Appeal which have given guidance in relation to CPR 13.3. One is a decision called *De Ferranti & Anor v Execuzen Limited* [2013] EWCA Civ 592, where the reasoned judgment was given by Sir John Chadwick, where at [52] to [53] he says this:

'[52] For the reasons which I have set out, I am of the view that - on a correct analysis of the position as it had developed - the judge should have approached the application to set aside the default judgment with the provisions of CPR 13.3 in mind. That is to say, he should have asked himself: (i) whether the defendants had a real prospect of successfully defending the claims against them; or, if not, (ii) whether there was some other good reason why the judgment should be set aside or varied; or the defendant

should be allowed to defend the claim. If he reached the conclusion that one or other of those conditions were satisfied, then he should have asked himself whether, as a matter of discretion, this was a case in which to exercise the discretionary power conferred upon him by CPR 13.3(1); and, in addressing that question, he was required, by CPR 13.3(2), to consider whether the defendants had acted promptly in seeking to have the judgment set aside.

[53] The judge did not adopt a structured approach of that nature. His reasons for dismissing the application to set aside the default judgment are succinctly expressed in a single sentence of his judgment:

> 'There is no merit in it whatsoever in circumstances where the defendants have delayed for so long to seek to set aside the judgment (and, having engaged at least in knowledge of the quantum hearing they may have waived their rights in any event).
>
> He should have asked himself - at the least - whether the defendants had a real prospect of successfully defending the claims against them; and, if so, whether the defence was of such merit that the defendants should be allowed to pursue it notwithstanding the quite exceptional delays

> which had occurred in these proceedings. He did not do so: understandably, perhaps, in the circumstances that he had no formal defence before him on 19 January 2012. But, in failing to do so, he fell into error.'

22. The other judgment which I was referred to was in a case called *Regione Piemonte v Dexia Crediop SpA* [2014] EWCA Civ 1298. There, the reasoned judgment was given by Christopher Clarke LJ, and he said at [33] - [36] a number of things. For present purposes, he largely approved the way in which the judge, Eder J, had dealt with it, but he qualified that, and at [36] he said:

> 'The qualification is that it does not seem to me that the merits of any defence are ever irrelevant if by that the judge meant that the court will not even consider them. When it does consider them, it may conclude that they are of little or no weight. The court is engaged in an exercise of weighing delay against merits, which will include considering the nature and extent of the delay, the reason and any justification for it, the strength of the supposed defence and the justice of the case. The stronger the merits (and any justification for the delay) the more likely it is that the court may be prepared to exercise its discretion to set aside a judgment regularly obtained despite the delay and vice versa. That is not to say that a real or even a good case on the merits will usually lead to

> the judgment being set aside despite significant delay since delay is now a much more potent factor than heretofore. If there is a marked and unjustified lack of promptness, that (in) itself may now justify a refusal of relief because the delay is a factor that outweighs the defendants' prospect of success...'

23. That judgment also makes it clear that the principles laid down in *Mitchell v News Group Newspapers Limited* [2013] EWCA Civ 1537, amplified in *Denton v White* [2014] EWCA Civ 906, which are the principles that apply to relief from sanctions under CPR 3.9, should also apply to an application under CPR 13.3, and that was common ground before me.

24. The first question therefore, adopting the structured approach which is recommended by Sir John Chadwick, is whether there was indeed a reasonable prospect of success. It is apparent from those two judgments that this is not simply a threshold condition that once passed ceases to have any further part to play. As I have said, it is accepted before me - and was accepted before the Deputy Master - that there is a reasonable prospect of success here but that is not, as I understand those authorities, the end of the consideration of the potential merits of the defence. As those judgments indicate, the court should have some regard to the apparent strength of the defence as it is one of the factors that should be taken into account in the exercise of the discretion, so I should have a look at what is apparent from the

material before me as to the strength or otherwise of the suggested defence.

...

60. I agree with Mr Pickering that Mr Riley's conduct is both stupid and to a large extent responsible for the misfortune he now finds himself in. It would have been very easy for him to say to Ms Noakes: 'Please tell me what these important documents are.' She had read the letter and she could have read it to him over the telephone. It would have been very easy for him to tell Ms Noakes not to accept the envelope but to ask Mr Davies to redirect it to either his home address or to his office address at St Christopher's House. It would have been very easy to ask Ms Noakes to accept the envelope and to forward it to him or to hold it for him to collect. He did none of those things. He asked her to reject it. That, I think, was a very stupid thing to do. It does not seem to me to be the way in which litigation should be conducted.

61. I accept that there is no evidence that on that occasion Mr Riley was told that they were court documents, but he was told that they were very important documents. In circumstances where he knew that a year before there had been correspondence about litigation, where it is at least possible that he had been told in November that the claimant was going to proceed with litigation and had asked his solicitors if they would accept service, it cannot have been difficult for him to imagine that one thing they might be might be court documents. That is, I am satisfied, not a sensible or appropriate way to behave. To a

large extent, therefore, I accept Mr Pickering's characterisation of Mr Riley's attitude to these very important documents, which is not an appropriate one.

62. I should say that in the complaint to the SRA Ms Noakes' own account of what had happened on that day is as follows:

> 'I came and spoke to the agent and repeated what the receptionist had told him - that Andrew Riley does not work in this building and so this was not where papers should be delivered to him. The agent became aggressive and intimidating, and so I took the papers, unaware of what they were or who he was, informing him that I would not be able to pass them on to Andrew Riley because he does not work here.'

63. As I say, I cannot resolve whether Mr Davies was aggressive or not, although it is notable that another statement in that complaint - that he stayed for several hours - is demonstrably incorrect.

64. Nevertheless, the question for me is not whether Mr Riley behaved appropriately or not. As I have said, I am satisfied that he behaved both stupidly and in a way which people should not be encouraged to think is an acceptable way to deal with any important documents, let alone documents which I have concluded he should have understood - and probably did understand - might include court proceedings. The question for me is how to balance the strength or apparent strength of

the defence to the claim which has been pleaded against this frankly stupid behaviour of Mr Riley's.

65. In circumstances where I am satisfied that the Deputy Master's discretion is flawed and it falls to me to perform the balancing exercise, I have come to a conclusion that this judgment should be set aside. Had there been more apparent merit in the claim at this stage I might very well have come to a different decision for the reasons that I have sought to explain. But as I set out earlier, not only is the claim actually pleaded plainly demurrable, but I have not been provided with the material which would enable me to conclude that there is likely to be anything in the claim at all. In those circumstances, to impose a liability to pay £1.6 million on an individual as in effect a punishment for him telling the person who had received documents not to accept them seems to me wholly disproportionate.

66. The usual way to decide claims in the civil litigation system is to have them tried. The whole purpose of the CPR and the rules which govern the trial of claims is to enable a just disposal. Sometimes those who flout the rules have to take the consequences, but sometimes the sanction for failure to comply with the rules is so egregious that it is itself unjust to impose it as a penalty.

67. In the structured approach mandated by rule 3.9, and the guidance from the Court of Appeal in *Mitchell* and *Denton v White*, Mr Beswetherick accepted that the default was a serious one. He explained that the reason was that Mr Riley did not know about the

default judgment until he received the order quantifying the sum at £1.6 million on 14 April and that he had then - and this is admitted to be reasonably prompt - only taken eleven days to bring the matter before the court.

68. Then one passes to the third aspect of the case, which is 'all the circumstances'. I accept on the material before me that Mr Riley did not in fact know about the judgment until 14 April. As I have said, I think to some extent he has only himself to blame for being in that position, but when it comes to the final analysis and the third limb of *Denton v White*, I do regard it as unjust to visit on him liability under a judgment of £1.6 million, in circumstances where I have no confidence at all that he ever had any liability to Reddish, as a penalty for his frankly indefensible behaviour when told that there were very important documents for him.

69. According to CPR 13.3(2) I have to have regard to whether he made the application to set aside promptly. I do think that Mr Beswetherick is right that 'promptness' means acting quickly once one knows there is something that needs to be done and that, strictly speaking, Mr Riley did act promptly because he only knew about the judgment on 14 April, and it is accepted that the eleven days he took to bring this application was in those circumstances reasonably prompt. But that is only one of the factors that go into the exercise of a discretion. For the reasons I have sought to give, in this particular case I do not regard the question of promptness as of significance.

> 70. Nor do I regard the failure to serve a draft defence before the morning of the hearing, something which the Deputy Master appears to have placed some weight on, as carrying any particular weight. The defects in the pleaded claim are apparent, as Mr Beswetherick demonstrated, whatever the factual defence - and, as I have said, Mr Riley did in fact, through the medium of Gordon Dadds' letter of July 2016, indicate that he had a defence on the merits, as well as a technical defence to the claim. There is no obligation on a person applying under rule 13.3 to provide a defence or draft defence, even though it may be common practice and good practice and something which makes the judge's life slightly easier in assessing the strength of the merits of any possible defence. But it is not a requirement.
>
> 71. In those circumstances, for the reasons I have sought to give, what is really significant in this case is weighing up the apparent strength of the defence against the conduct of Mr Riley, and I have decided that the balance does come down in favour of allowing Mr Riley to defend this claim, or any amended claim, on its merits. I will therefore allow the appeal."

141 There, it is true that there was a large claim and a reasonably arguable defence with the result that the judge applying the third stage of the *Denton v White* analysis favoured the defendant in setting aside the relevant judgment in default. On the other hand: firstly, this was a pure application under CPR 13.3 where there is no express sanction (although there are conflicting authorities as to whether there is an implied sanction) but which is different from the case before me where the relevant breaches are of an unless order following a judgment in a 13.3 application; and, secondly, in that case the application was particularly

prompt. On the other hand, that decision does emphasise that the third stage of *Denton v White* involves a balancing exercise, and that strength of defence and amount of prejudice are important as well as other considerations such as delay.

142 Next, Mr Petrides further relied on the conduct of the claimant which he said had been oppressive and cited reasoning within the decision in *ST Shipping & Transport Inc v Vyzantio Shipping Limited, 'The Byzantio'* [2004] EWHC 3067 (Comm), a case where a claimant's conduct in not pursuing a particular claim had resulted in a default judgment being set aside:

> "32. It does not follow that there is no good reason under CPR 13.3(1)(b) why the default judgment should be set aside or the defendant be allowed to defend the action. Although the challenge to the extensions of time for service has been unsuccessful, and the defendant must bear some of the responsibility for the fact that CDRA did not notify it immediately of the proposed service of the claim form in Malta, I consider that the circumstances in which the default judgment was obtained do provide a good reason why the judgment should be set aside. The circumstances I have in mind are (1) the claimant's decision to serve the claim form in Malta without mentioning the existence of the action to the defendant or to Aegean, and (2) the fact that by virtue of the three extensions of time for service there was a very considerable interval between the correspondence about the claim in September 2002 and the date on which the claim form was eventually served in April 2004. This lapse of time was likely to, and I find did, lull the defendant into believing that the claim was not being pursued or at least induce the defendant

> to forget all about it. Subject to whether any conditions should be imposed, I will set aside the default judgment under CPR 13.3(1)(b). But service of the claim form will stand."

143 Mr Petrides says the claimant has acted oppressively here: firstly, in the way in which he dealt with the second defendant's bank account and the interim third-party debt order in failing to get an order to the bank to unfreeze it quickly once the costs debt had been paid; secondly, in the way in which what are said to be extravagant clauses have been and are sought to be inserted in the draft legal charge for the second defendant to grant; thirdly, in the way in which a Part 71 application has been made and a charging order been sought against the first defendant; fourthly, in the way in which information had been sought from the first mortgagee of the second defendant's flat as to the level of amount owing under that mortgage; and, fifthly, in the way in which an adjournment had been sought and obtained for the claimant to consider the defendants' evidence and create the claimant's own evidence, and in circumstances where the claimant only then advanced a three-page witness statement.

144 I see nothing of force or weight in any of those particular points. *ST* was a case that proceeded on its own facts where the claimant had lulled the defendant into a false sense of security that the case was not being pursued and that the defendant did not need to take any action. That is simply not the case here. Secondly, with regards to the defendants' bank accounts and the third-party debt order, the defendant could always have made her own applications; and, in any event, the problems which ensued seem to me to have been merely administrative. With regards to the legal charge, the claimant was entitled to seek particular terms and for the defendants to oppose those. Those are simply a matter of argument and do not impinge on relief from sanctions. With regards to asking for information from the first mortgagee, that is something which is ordinarily done by somebody who has a charging

order over a property; and, indeed, there would generally be an obligation under the first charge for the second defendant to reveal to the first mortgagee the existence of a charging order. In any event, someone who has a charging order is perfectly entitled to ask somebody else who has an interest in the property as to what it is, including, in the case of a mortgage, as to how much is secured.

145 As far as enforcement and the taking of various steps, a Part 71 examination and then obtaining a charging order, against the first defendant are concerned; the claimant was perfectly entitled to do that, and all the more so in circumstances where the first defendant has still not satisfied the costs judgment against him.

146 As far as the adjournment is concerned, the claimant was entitled to review substantial evidence which had been advanced against the claimant ,and the fact that the claimant's review then resulted in the claimant only producing a short witness statement in response, it seems to me, is entirely standard within litigation. The claimant did not, indeed, have to provide any witness evidence at all, but the claimant had to be able to take a proper decision about what to, or not to, do.

147 I do note that in [32] and [42] if the *ST* decision, the court considered whether or not, in the circumstances, it was appropriate to impose conditions on setting aside the relevant default judgment even though in the circumstances of that case it did not, and concluded:

> "42. It is plain that the defendant has a case to answer on the exercise of due diligence: but I do not consider that on the present evidence the issue is so clear cut that it can be determined summarily. In my judgment, therefore, this is a case where the court should exercise its discretion to set aside the default judgment under CPR 13.3(1)(a) as well as under CPR 13.3(1)(b). Whether a condition should be

> imposed, as the claimant suggests, is a more difficult question. However, I am persuaded by the fact that the defendant has succeeded under both limbs of rule 13.3 that a condition of securing the claim is not appropriate."

148 Mr Petrides further submits that the communication on 24 December 2020 from Mr Ross, asking the defendants to hold off, in some way lulled them into a false sense of security as in the *ST* case. However, firstly, I regard that as a dubious position to start with bearing in mind that Mr Ross's email flowed from the fact that the claimant was in a coma and the defendant had threatened to apply to strike out. Secondly, it seems to me that the request to hold back was really with regards to the threat to apply to strike out, not the question of compliance with the November order, which Mr Ross made perfectly clear remained in existence unless and until varied by the court or by some valid agreement. Thirdly, in any event, the defendants did decide to go ahead to strike out on the basis of the Iraqi agreement, which argument I have held was misconceived and failed. Fourthly, in any event, it soon, in my judgment, became clear to the defendants that the claimant did not accept that the claimant was barred by the agreement which had been made in Iraq and therefore, it must be the situation that the claimant was pursuing the case, but, notwithstanding that, the defendants still did not seek to comply with my order. I therefore regard this is all being very different from the *ST* case; and, of course, in any event, the defendants had already been struck out before the 24 December 2020 email was sent, simply because they had, by then, already failed to comply with at least paragraph 5 of the November order.

149 Next, Mr Petrides again relied on the claimant having failed to comply with paragraph 4 of the November order. I have borne that in mind but I do not give it much weight because I see little connection between it and the various breaches on the defendants' part, and where it is the defendants who are seeking relief from sanctions.

150 Next, Mr Armstrong relied on what he said were still failures by the defendants to comply with the November 2020 order. As against that, in my judgment, they have complied with the majority of it; and as far as the rest of it is concerned, so far as they have not complied with it, it seems to me that they were not doing so on the basis of a reasonable interpretation of what it meant, and that, if relief is to be granted, they can be ordered to take further steps.

151 Next, Mr Armstrong relied on various lapses of time and said the application was not prompt. It seems to me that the second defendant did act promptly in so far as she effectively complied with my various orders as to making the application, albeit in a history where she was some months in default in relation to the provisions of the November Order. Although the first defendant has not been so prompt, in a sense his application can follow that of the second defendant's. This is particularly because, if the second defendant is able to defend the case, the question as to whether or not natural justice was afforded to the defendants in Iraq will have to be gone into and determined by the England and Wales court and that question will then effectively be answered for both defendants. It is also, albeit only to a minor extent, relevant to this aspect, that it is the second defendant who has, or at least appears to have, the major assets in this jurisdiction and against which enforcement is being sought.

152 Next, Mr Armstrong submits that the defendants have not cooperated in Iraq. He submits they have blown hot and cold on whether they accept that there should be enforcement in Iraq having first taken the position that that would be the case and then disputing it. He refers to the fact that they have sought to rely on the alleged settlement agreement in England and Wales; but have not sought to advance it in Iraq; and have seemed to contest in Iraq not only their having to pay, or at least have paid out of the proceeds of the Iraqi land, 4.8 million Iraqi Dinars but even the much lesser sum of 200 million Iraqi Dinars which, in December 2020 and January 2021, they were saying that they had agreed to have paid out of

sale proceeds. It does seem to me that the defendants' attitude has been somewhat inconsistent.

153 On the other hand, I also bear in mind in relation to Iraq: firstly, that the claimant has security in Iraq over a property which the claimant's case in Iraq is that it has a value which would enable the damages award to be satisfied out of it - the damages award having been calculated on the claimant's version as to how much the property is actually worth. Although it is Mr Shamma who is the technical claimant in these proceedings, the real underlying claimant in these proceedings appears to be the Beneficiaries and their claim in Iraq is secured over the Iraqi land which their own Iraqi judgment assumes is worth enough to satisfy it.

154 Secondly, that to allow the claimant to enforce here, or simply to enforce here, may raise some inconsistency with the Beneficiaries also enforcing in Iraq and a possibility of double recovery; although it seems to me that I would be able to make orders to protect against that, and so I give that consideration distinctly little weight.

155 Next, Mr Armstrong submits that the defendants' non-compliance with the order of November 2020 was, in fact, deliberate rather than accidental. Now, that is true to an extent as this is a situation where they simply did not try to comply with it rather than a situation of a defendant seeking to comply with an order and simply getting it wrong. However, it seems to me that this is more of a matter of delay, albeit a substantial delay, rather than a set of assertions that they would simply never comply with my order.

156 On the other hand, as far as the defendants' reasons for non-compliance are concerned, I have already held that they were not good reasons; and it seems to me that on any basis, their attempt to rely on what they said had happened with the Beneficiaries to excuse their non-compliance with an order which had been made in litigation between them and the

claimant was a dubious way of proceeding even in 2020 and early 2021. Firstly, because the order was clear as to its dates; and the rules made clear that either a consent, which can only be given for a limited period, or an actual order is required in order for the default unless conditions not simply to apply. Secondly, Mr Ross, in a number of emails as I have already set out, made clear that that was the legal position. Thirdly, the defendants did not even seek to advance at the May 2020 hearing, for one reason or another, that they had an agreement in Iraq which would actually assist them. In any event, the defendants had no excuse for non-compliance following the May hearing; and the first defendant's position is worse than the second defendant's as the first defendant did not even choose to attend the hearing in May 2021.

157 Mr Armstrong also submits that the first defendant has simply failed to comply with my costs order made in May 2021 where he remains liable for the difference between indemnity costs and the standard basis costs which the second defendant has paid. Mr Armstrong submits that the first defendant appears to have moved money around accounts, and may well have undisclosed other finances, and has managed to finance the making of these applications in circumstances where the first defendant appears to be prepared to pay the defendants' lawyers but not the balance of the costs judgment. I bear all that in mind, albeit that I also bear in mind that this is simply a financial point and I can make relevant orders arising from it; but also that, if a person simply does not have money and can demonstrate that to the satisfaction of the court, the court will not normally require that money to be paid as a condition of granting some permission to defend.

158 Mr Armstrong has also pointed me to the notes in para.3.9.14 of the **White Book** and that, in the cases referred to there, it is clearly stated that the court can refuse to grant relief from sanctions for all sorts of reasons, including if there is some substantial delay. It seems to me that that is right and that the third stage of *Denton* simply involves looking at all the

circumstances of the case and balancing them all together with particular importance being given to the CPR 3.9 factors, and that the burden is on the defendants in the circumstances to show why it is just for relief from sanctions to be granted. Delay is one of the circumstances to be borne in mind in carrying out that approach.

159 I do also bear in mind that Mr Armstrong's secondary position is that if, contrary to his primary submission, relief from sanctions is to be granted, conditions should be imposed. Mr Petrides says that they should not. He says that conditions should not be imposed where there are real prospects of success. It seems to me that quite apart from the *ST* case and CPR 3.2(3), Mr Petrides's submissions ignore the fact that the defendants are seeking the mercy of the court here to defend at all, and that conditions can be highly appropriate not only in relation to applications to set aside default judgments but also in relation to applications to seek relief from sanctions.

160 I have weighed all the parties' contentions and submissions together. I have been particularly concerned with regard to these applications to the following matters, and I have borne in mind all Mr Armstrong's contentions. Firstly, the defendants' abject failures to comply with my coercive orders within the time periods set out in them. Secondly, the defendants, and, in particular, the first defendant's, failure to engage with the litigation and the court, and, in particular, the first defendant's failure to attend the 19 May 2021 hearing. Thirdly, that the defendants' only real justification at the time for not complying with my orders was on the basis of an alleged agreement made in Iraq which I have held did not contain the terms on which they rely, and, in any event, where it became clear that it was at an end in January 2020. Fourthly, the defendants' mixed positions in the way in which they have sought to advance the arguments other than those relating to absence of natural justice. Fifthly, their overall delays involving the loss of some eighteen to twenty-four months, and where the first defendant has delayed more than the second defendant.

161 On the other hand, it seems to me that there are sizeable considerations going in the other direction and which, taken together, outweigh those I have mentioned above such that I am satisfied that it is just to grant (on conditions) relief from sanctions notwithstanding that the burden is very much on the defendants and the importance of the CPR3.9 factors (the need to conduct litigation efficiently and at proportionate cost and the importance of compliance with rules, practice directions and, especially here, orders). Firstly, there is the size of the judgments, where these are very substantial judgments.

162 Secondly, the fact that the main and essential defence advanced is an allegation that the defendants have not been afforded natural justice in Iraq and which allegation, it seems to me, has real prospects of success; and where this litigation is all about the question as to whether or not a default judgment in Iraq, in proceedings which arguably lacked natural justice, should be enforced. That leaves me as the court distinctly concerned as to whether there should be a procedural knockout in favour of the claimant by way of refusal to grant relief from sanctions, which would have the effective practical result that a court would then enforce a judgment, which, at least arguably, had been obtained, and the enforcement of which, is at least arguably, contrary to public policy and the essential common law. Also such judicial enforcement would, by extension of those foregoing points, involve a possible contravention of human rights, and which include (e.g. in Article 6 of the Convention) considerations of natural justice.

163 Thirdly, there is the fact that the claimant, or rather the Beneficiaries who are behind the claimant, have apparent security in Iraq; and which on the Beneficiaries' own Iraqi case should, at first sight, afford an adequate security; and also where, at first sight, the Iraqi courts will simply enable the Beneficiaries to enforce against that security.

164 Fourthly, that, although the first defendant's position on promptness is distinctly unattractive, to allow the second defendant to argue the natural justice case but not the first defendant to do so, also seems somewhat unattractive. If this court was eventually to come to the conclusion that the Iraqi judgment should not be enforced because of considerations of natural justice as far as the second defendant is concerned, it is somewhat difficult to see why the outcome should be the opposite as far as the first defendant is concerned.

165 Finally, that I can impose various conditions which can reduce or deal entirely with such prejudice as has been caused; this being apart from the delay, but in circumstances where, as I have already said, the delay, although substantial, is in the context of a dispute that supposedly dates from 1999. Moreover, the entire history of the dispute would suggest that the claimant's side, being originally Mr Hatem, does not seem to have pursued it with any great expedition.

166 In all the circumstances, it seems to me that I should grant relief from sanctions but only on the basis of imposing stringent conditions, which will be conditions on such relief actually being afforded. For the reasons given already, it seems to me that I can impose those conditions. It seems to me also that the decision in *Perrucci v Orlean Invest Holding Ltd* [2022] EWHC 2038 (Comm) at [66] - [71] makes it all the more clear that such conditions can include security.

167 It seems to me, therefore, that I should grant relief from sanctions on the following bases. Firstly, the defences will be confined to the natural justice point. The other arguments are either not being advanced, or if they are, then it seems to me that they are both sought to be advanced in an impermissible fashion and that, in relation to certain of them, they would have no real prospect of success in any event. It seems to me that the defences should

simply be limited to the natural justice point and that that is an appropriate condition to impose.

168 Secondly, it seems to me to be an appropriate condition that the defendants should have to comply with what I regard as being at least the rest of the spirit of the November 2020 order within a specific time and that there should be a further unless order that relief from sanctions will be refused unless, by a particular date, the defendants serve: (1) factual evidence with regards to their connection over the relevant time with the Karada address, why it was used in 2015 and for what purpose and on what basis, and why they lost their connection and so that they subsequently did not receive material provided to that address; (2) factual evidence as to when they learned of the existence of the default judgment, and as to what they then did, and as to how and when they applied to set aside or appeal the default judgment; (3) Iraqi law evidence: (i) as to what time, other requirements, and jurisdiction existed with regards to making an application to set aside or appeal the default judgment and (ii) as to whether the appeal was always bound to fail for timing reasons; (4) Iraqi law evidence as to why whatever they did was insufficient for them to succeed in their appeal; (5) which will probably be Iraqi law evidence, as to what they say was meant by the appeal court determining, or at least stating, that the appeal was held out of time and to what time reference is made; (6) a statement of case, and which could be by way of Part 18 information, as to why any ability to apply to set aside or appeal in Iraq did not cure any defects in the Iraqi procedure as far as natural justice was concerned.

169 I am also going to provide that this grant of relief from sanctions is provisional in the sense that the claimant can seek to set aside the grant of the relief if the claimant considers that the defendants' material renders the natural justice defence unarguable, and, therefore, the claimant will have a period of time following the provision of that material in which to do that.

170 As further conditions, I am going to continue my requirement that there be a legal charge executed over the flat, although it does seem to me it should only be a legal charge over the flat itself and no more; and, if the parties continue to be in dispute as to its terms, they will have to be resolved by the court. The legal charge will secure what I said already has to be secured, which is effectively any liability that the defendants may have to the claimant enforceable in this jurisdiction.

171 There will also continue to be a charging order over whatever is the first defendant's interest in the property which is in his name, but it seems to me that that will need to be converted into an equitable charge because, again, the aim is to preserve the position which would otherwise be the case, namely that if I had refused relief from sanctions, the judgment and charging order would exist. It seems to me, that I should require, as a condition of granting relief from sanctions, that the first defendant should accept that he provides the equivalent (to a charging order) security in the form of an equitable charge for whatever liability he may owe which is enforceable in this jurisdiction.

172 I require these various security matters essentially for the same reasons which I gave in support of my original conditional setting aside of default judgment where I saw the defendant's case as being shadowy; and in circumstances where there has been this much delay caused by the defendants. It does not seem to me to be right that I should in some way or other enable the defendants to deal with or dissipate assets to the potential great prejudice of the claimant if the claimant is right in this litigation and succeeds eventually in having the Iraqi judgment recognised and enforced in this jurisdiction.

173 It seems to me also that I should impose conditions with regards to costs, and which is usual in relief from sanctions applications. The conditions though which it seems to me I should impose as to costs differs between the second defendant and the first defendant. As far as

the second defendant is concerned, it seems to me the condition, or, rather, costs order which I should impose is this. The costs of the litigation so far should be the claimant's costs in the case. That will also apply to the costs of these applications and this hearing unless the claimant manages to persuade me that there should be an order that this second defendant pay the claimant's costs of those in any event. It seems to me that; in circumstances where (1) what has happened so far in this litigation, albeit it is still at a comparatively early stage, has involved what I regard as being substantial breaches of an unless order and considerable delay being afforded to the litigation, and (2) the defendants have, it seems to me, only at recent times sought to advance their natural justice case at all properly but where it is still deficient for the reasons which I have already given; it is proper to make that sort of order against the second defendant. That will have the practical effect that, if she succeeds in this litigation eventually, she will not get any of her costs so far from the claimant; but, if the claimant succeeds, then he as the successful party ought to and will get his costs from the second defendant. It seems to me that that is an appropriate condition to impose which both reduces the potential prejudice of all this to the claimant and also is, in my judgment, consistent with a relief from sanctions regime and the principle that the court should recognise, even if granting relief, the fact that a serious breach has occurred.

174 As far as the first defendant is concerned; it seems to me for all of the various reasons given throughout this judgment, that the first defendant's position, he not having attended the hearing in May 2021, he having been the person responsible for both the dealings in Iraq and their eventual outcome, he having been responsible for other delays, and he having not satisfied and thus being also in breach of my indemnity costs order, is such that I should impose a much more stringent condition. What I am going to impose as a condition is that the first defendant pays the claimant's costs of these proceedings (including of these

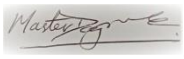
applications and this hearing) so far in any event. It seems to me that, in reality, the first defendant has only succeeded because the second defendant has, and that I should recognise what has happened by imposing such a condition.

175 At the moment, although I have reached no final decision on this, I am minded to order an immediate interim payment, and an immediate detailed assessment, and with compliance with those provisions being made the subject of an unless order against the first defendant. However, I will consider all that further at the next hearing in this matter because I have not been in a position where I can consider what, if any, the first defendant's assets and liabilities are. If the first defendant is going to submit that he is impecunious and that such orders, in terms of interim payment and immediate detailed assessment, should not be made or that it should not be an unless order with regard to the first defendant satisfying whatever is ordered to be paid; then the first defendant is going to have to both provide full disclosure of his assets and liabilities and also provide full disclosure as to how he is funding this litigation.

176 In those circumstances, I am going to grant provisional relief from sanctions, and setting aside of the default judgment, subject to the following conditions and matters. Firstly, only allowing the natural justice defence to be advanced. Secondly, which will be an unless order and a condition of the relief from sanctions, the defendants providing the further information or material identified. Thirdly, which will also be a condition, the provision of a legal charge by the second defendant and an equitable charge by the first defendant. Fourthly, as far as costs is concerned, the particular costs matters which I have mentioned, and where my provisional view is that they will include an unless order condition in relation to the first defendant.

APPROVED

177 That then is my judgment. I am now going to adjourn this hearing including (and with extensions) all questions of, and for applying for, permission to appeal and time for filing of any appeal notices.

APPROVED  23.11.2022

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