Case No: QB-2020-003979
Neutral Citation Number: [2022] EWHC 3571 (KB)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London
WC2A 2LL

Date: 6 May 2022

Before:

DEXTER DIAS QC
(Sitting as a Deputy High Court Judge)

- -

Between:

PXC
[Anonymity order granted]

Claimant

- and -

(1) AB COLLEGE
(3) LONDON BOROUGH OF RICHMOND UPON THAMES & OTHERS

Defendants

- -
- -

MR PATRICK KERR for the **Claimant**

MR DAVID PLATT QC for the **Third Defendant**

Hearing dates: 5 and 6 May 2022

- -

APPROVED JUDGMENT

(delivered ex tempore)

If this Transcript is to be reported or published, there is a requirement to ensure that no reporting restriction will be breached. This is particularly important in relation to any case where an order has been made in relation to a young person. ***In this case, an anonymity order has been granted.*** *This Transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.*

DEXTER DIAS QC:

(sitting as Deputy High Court Judge)

1. This is the judgment of the court.

2. I deliver it in eight sections, as set out in the table below, to explain the court's line of reasoning. As is evident from the case name, an anonymity order has been granted to protect the claimant and his family's right to private and family life conferred by Article 8 of the European Convention on Human Rights. I reduce his name, not his essence, to three letters to secure that protection, recognising that this has an inescapably dehumanising effect. However, it is necessary to achieve that legitimate aim. I have also been obliged to anonymise the name of the first defendant, the college the claimant once attended, to reduce the risk of "jigsaw" identification.[1]

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[1] It should be noted that in accordance with practice, I invited submissions from parties and the press before making such an order (*JX MX v Dartford and Gravesham NHS Trust* [2015] EWCA Civ 96 at [35]). The member of the press present objected. While acknowledging the vital "public watchdog" function of the press (*Thoma v Luxembourg* [2001] ECHR 240 at §5), I found that the Art. 8 rights of the claimant and his family, and particularly his child, significantly outweighed the open justice principle and any engaged Art. 10 rights.

[In the text below (B123) etc. denotes the electronic bundle page number]

I. INTRODUCTION

3. Mesothelioma is an aggressive and merciless cancer.

4. It attacks the membranes of vital organs such as the lungs. Usually, it is caused by exposure to asbestos fibres or inhaling them. Medical science recognises that it is a life-threatening or life-ending disease. As far back as April 1983 the Health and Safety Executive provided guidance (EH10) that:

> "*a substantial amount of mesotheliomas are related to exposure to crocidolite (blue asbestos) and amosite (brown asbestos).*

and

> "'*no safe level' of exposure could be identified*."

5. This very sad case involves precisely these consequences. The claimant in the head action is PXC. He is a talented, successful and decent member of the community in his late 40s. This case is unusual because due to mesothelioma's habitually extended latency period, it is often first diagnosed when people reach their sixties and seventies. By contrast, PXC is a husband and a father with a young son. The child is nine years old and will soon lose his father. PXC sues the London Borough of Richmond Upon Thames for exposing him to asbestos fibres. In the 1980s, when he was a schoolboy himself, PXC worked at the weekends and in holidays at world-famous Richmond Ice Rink. The claimant's case rests on two chief claims (1) that the

rink was owned, operated or controlled by the council when he worked there; (2) he was exposed to asbestos at the rink.

6. Tragically for PXC and his family, it is likely that despite his exceptional efforts to fight the disease, which are said to be "punishing", he will shortly die. No one can say with precision when the end will come. I do not for a moment say that with anything other than profound regret, conscious that mere repetition of that devastating fact will inflict fresh distress on all those who love PXC and on PXC himself. This judgment is limited in scope, but has far-reaching implications for all parties to this application. I appreciate that, too.

7. The applicant before me is the London Borough of Richmond Upon Thames ("Richmond"), the Third Defendant in the main action. This local authority is represented by Mr Platt, Queen's Counsel. The respondent is PXC, who is the claimant in the principal action. PXC is represented by Mr Kerr of counsel. I also mention in passing that the First Defendant is AB College (anonymised), but in respect of the College, a stay is in place.

8. The local authority makes two applications:

    (1) Under Civil Procedure Rule 13.3 to set aside the default judgment of Master Thornett dated 9th July 2021;

    (2) To adjourn the assessment of damages. Yesterday, that is 5th May 2022, the case was listed in front of me for a trial on quantum.

    PXC vigorously opposes both applications.

9. Put shortly, the stances of the parties are as follows. The applicant accepts that in this case the delay is "not ideal" (Mr Platt QC's tactful term), but the strength of evidence indicates that Richmond has a viable defence, certainly satisfying the Rule 13.3 set aside test. There is, it is submitted, a "real prospect" of successfully defending the claim. This because the allegedly culpable venue, Richmond Ice Rink, was not owned by the local authority; it was not occupied by it; it had no management or control of it. Thus, it had no duty of care and has not been in breach of any duty, which did not in fact exist. Mr Platt QC submits that this claim has proceeded on (a) an *assumption* that the local authority did in fact own this rink because it was a "public" ice rink and (b) a corresponding *assertion* to the same effect by (or on behalf of) PXC (the significance of that distinction will become evident). But this is a fallacy. It is not substantiated evidentially. To the contrary, the documents filed by the Third Defendant clearly indicate that Richmond did not own, control or manage in any respect this renowned facility.

10. Mr Kerr submits otherwise. He makes three essential points. First, that the applicant's evidence does not disclose a real prospect of successfully defending this claim. Second, there has been an abject and inexcusable delay. Third, if the court finds that it does have a discretion, it should unhesitatingly exercise that in favour of PXC.

II. FACTS

11. Even a most rudimentary statement of the facts is stark.

12. PXC was born in 1974 and is presently 48. On 14th September 2017 he was diagnosed with mesothelioma – that was when he was 43. On 12th November 2020 he issued a claim, then aged 46. On 13th November a letter of claim was sent to the Third Defendant. On 9th July 2021, judgment was entered against Richmond because of its default: no acknowledgement of service, no defence entered. On 11th October 2021 the claim against the First Defendant, which is AB College, was stayed. On 19th December 2021 the trial was fixed for 5th May 2022. That was exclusively a trial on quantum. This is how the case was initially listed in front of me yesterday - for that quantum trial.

13. The immediately pertinent background is that PXC says that for at least two years, from 1986 until about 1989, he worked at weekends and in the summer holidays at Richmond Ice Rink. He was exposed to asbestos dust through back-of-house pipework lagged with shabby coverings containing asbestos. That is how the council unlawfully exposed him to asbestos fibres. He was diagnosed with mesothelioma, as I have indicated, in 2017. PXC is an exceptionally young victim of this terrible disease. It has been because of the severe exercise regime he has put himself through that he has managed to stave off the inevitable consequences of the cancer, persevering courageously even as his health deteriorated. As a gifted entrepreneur and successful businessman, this claim is high. A Schedule of Loss is in front of the court. It puts his claim at £6,183,368.22, plus the costs of and associated with private medical treatment, should this be recommended by a treating clinician in the future. This level of damages is a reflection of two things: first, PXC's relative youth and thus extensive loss of years; second, his undoubted productivity as provider for his wife and son and the success of his business ventures.

III. ESSENTIAL ISSUES

14. To recapitulate, there are two applications in front of the court (1) that the default judgment be set aside; (2) that the assessment of damages be adjourned so they can be contested. Mr Platt QC identified various challenges that the Third Defendant would level at the assumptions that underpin the forensic accounting expert report. It is submitted they are overly optimistic and have resulted in inflated figures.

15. It seems to me that if the first application succeeds (and I emphasise "if"), the inevitable consequence is that a second application does not need determination because it must necessarily be adjourned. If, however, the first application does not succeed, then the court is duty-bound to consider Mr Platt QC's second application for an adjournment. He has made it quite clear that the Third Defendant would seek a full trial on the questions of both liability and quantum.

16. In relation to the first issue then - the question of set aside - it strikes me that it is intellectually divisible into three constituent elements (see my analysis of each issue at VI. below):

    (1) Whether there is a real prospect of success;

    (2) The promptitude question;

(3) The factors listed as part of the overriding objective and the overall discretion of the court.

IV. LAW

17. It is often said in a case that the governing legal principles are well-established and uncontroversial. That is not the position here. There is a conflict in the authorities that must be resolved. Thus, I divide Section IV. into the following subsections:

(1) Core legal principles;

(2) *Denton*;

(3) *Regione Piemonte*;

(4) Promptitude.

(a) Core legal principles

18. The starting-point is to consider the default judgment itself for the purposes of Part 12. In the White Book, 2022 edition at page 541 (paragraph 12.0.1), the editorial introduction states:

> "*A default judgment is a judgment without trial and is (with some exceptions) obtained by an administrative procedure rather than by a judicial decision. A defendant who fails to file an acknowledgement of service or a defence or, having filed an acknowledgement of service then fails to file a defence, is liable to have a default judgment entered against them save in those specific cases where it is prohibited. If the claim is for a specified sum the claimant can usually enter judgment for a sum of money and no judicial decision is required. However, where a claim is for an unspecified sum, the judgment is final as to liability but there will need to be a trial to decide the quantum of damages.*"

19. That is precisely the position here. The default judgment is an administrative act without judicial scrutiny of the intrinsic merits of the case – that much is clear. I turn to Part 13. Part 13, insofar as it is material, provides:

> "*13.3: Cases where the court may set aside a judgment entered under Part 12.*

> *(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.*"

20. The effect of the rule is as follows. The use of the word "may" shows that the court has a discretion, but that discretion must be exercised in accordance with the overriding objective. The commentary in the White Book states at page 558, paragraph 13.3.5:

> "*The defendant seeking to come within rule 13.3 (a) or (b) is not enough to show he has a defence, the defendant must show that they have a 'real prospect of successfully defending the claim.' It is essentially the same test as a summary judgment application under Part 24. This test is more fully covered in paragraph 24.2.3.*"

I turn briefly to Part 24, summary judgment. There is a comparable "real(istic) prospect" test (or lack of them). The White Book states at page 795, paragraph 24.2.3:

> "*The following principles applicable to applications for summary judgment were formulated by Wilson J in Easyair v Opal Telecom Ltd [2009] EWHC 339 (Chancery) at paragraph 15 and approved by the Court of Appeal in A.C. Ward & Sons Ltd v Catlin (Five) Ltd [2005] EWCA Civ 1098.*
>
> "*(i) the court must consider whether the claimant has a 'realistic' as opposed to a 'fanciful' prospect of success: Swain v Hillman [2001] at AER 91.*
>
> "*(ii) a 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ, 472 para 8.*
>
> "*(iii) In reaching its conclusion the court must not conduct a 'mini-trial': Swain v Hillman.*

> "*(iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court.*"

[I interject that for Part 13, that must be the party seeking set aside.]

> *"...In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel, para 10.*"

21. Therefore, returning to Part 13, it is clear that the discretion to set aside a judgment is unconditional. The purpose is to avoid injustice. A fundamental consideration for an application to set aside is whether the defendant has shown a real prospect of successfully defending the claim or some other good reason why judgment should be set aside and/or they should be allowed to defend the claim. The reason for the requirement is that defendant is seeking to deprive the claimant of a regular judgment which the claimant has regularly obtained in accordance with Part 12. Then the White Book adds this, at page 159: "This is not something which the court will do lightly."

22. Looking at the question of promptitude, it is clear that Rule 13.3.2 gives added emphasis to the need to act promptly in seeking to set aside, indeed the need to generally to act promptly is a feature of the Civil Procedure Rules. In applying to set aside, the court has always considered delay and the reasons for it (*Evan v Bartlam* [1937] AC, 473). Promptness will always be a factor of considerable significance and if there has been a marked failure to make the application promptly, a court will be justified in refusing relief, notwithstanding the possibility that the defendant could well succeed at trial (*Standard Bank plc v Agrinvest International Ltd* [2010] EWCA Civ 1400).

23. However, in certain circumstances the court may conclude that judgment may be set aside even when there has been excessive delay (*Fern Advisers Ltd. v Burford & Ors.* [2014] EWHC 762 QB). In *Fern*, His Honour Judge Mackie QC, sitting as a Judge of the High Court, set aside a judgment from several years earlier. There were very serious conflicts of evidence between parties and the defendant was alleging she was the victim of fraud. The case had not been progressed since judgment was entered. Given the importance of the issue and the facts, the judge held that justice demanded the judgment be set aside.

24. In argument before me, a variety of decisions were cited by counsel. However, I consider these essentially fact-specific. I find no definitive magical "cut-off" point. Mr Platt QC cited *Hussain v Birmingham City Council (2) George Coulson and (3) The Governors of Small Health Grant Maintained School* [2005] EWCA Civ 1570. This was the judgment of Chadwick LJ. Mr Platt QC submitted that *Hussain* was, as he put it, a "useful analogy". There had indeed been a delay in that case of a similar but not identical magnitude to this case. Nevertheless, again I view this as an intensely fact-specific decision. That said, what can usefully be gleaned from *Hussain* is the precept that the discretion of the court should not be exercised to

"punish" a party's incompetence or lassitude. Instead, it is exercisable to promote the overriding objective. I take that approach. I cannot find the utility Mr Platt QC argues for beyond that limited respect.

25. In *Standard Bank,* Moore-Bick LJ stated at [22]:

> "*The Civil Procedure Rules were intended to introduce a new era in civil litigation, in which both the parties and the courts were expected to pay more attention to promoting efficiency and avoiding delay. The overriding objective expressly recognised for the first time the importance of ensuring that cases are dealt with expeditiously and fairly and it is in that context that one finds for the first time in rule 13.3(2) an explicit requirement for the court to have regard on an application of this kind to whether the application was made promptly. No other factor is specifically identified for consideration, which suggests that promptness now carries much greater weight than before. It is not a condition that must be satisfied before the court can grant relief, because other factors may carry sufficient weight to persuade the court that relief should be granted, even though the application was not made promptly. The strength of the defence may well be one. However, promptness will always be a factor of considerable significance, as the judge recognised in paragraph 27 of his judgment, and if there has been a marked failure to make the application promptly, the court may well be justified in refusing relief, notwithstanding the possibility that the defendant might succeed at trial.*"

Then at paragraph 24:

> "*Mr de Lacy drew our attention to a number of cases decided since the introduction of the Civil Procedure Rules which he submitted support the conclusion that the court will set aside a default judgment despite a delay of several months, or in some cases years, in making the necessary application. It is clear, however, that much is likely to depend on the particular circumstances of the case. Therefore* ***promptness is a vital consideration, there can be no question about that***."
>
> (emphasis provided)

26. In the White Book on the same page (561) at paragraph 13.3.5 the learned editors state:

> **"*An application under r 13.3 to set aside a judgment entered in default of defence is an application 'for relief from any sanction' within the meaning of r 3.9.*** *The tests for the application of r. 3.9 laid*

> *down in Denton v T.H. White Ltd (Practice Note) [2014] EWCA Civ, 906* ***are therefore engaged****. Gentry v Miller (Practice Note) [2016] EWCA Civ, 141 per Vos LJ; Regione Peimonte v Dexia Crediop SpA [2014] EWCA Civ, 1298 per Christopher Clarke LJ; Redbourn Group Ltd v Fairgate Development Ltd [2017] EWHC 1223 (TCC) (Coulson J) at [17] and [18]; Hockley v North Lincolnshire and Goole NHS Foundation Trust [19th September 2014) unreported (Judge Richardson, QC). See further commentary on r. 3.9 at paragraph 3.9.8.*"
>
> (emphasis provided)

27. Is this commentary correct? The controversy about it continues. Indeed, in the hours immediately before I was due to deliver this judgment, Mr Kerr brought to my attention a further intervention in this forensic discourse (*Ince Gordon Dadds LLP v Mellitah Oil & Gas BV* [2022] 3 May, per Hugh Sims QC, sitting as a Deputy High Court Judge). The judge heard the case on 28th and 29th April 2022. The date of the judgment, 3 May, is this Tuesday, and it is a testament to the diligence of Mr Kerr that he was able to put this latest authority - hot off the press - in front of the court. I deal with it now as it introduces a question I must resolve. I gave both parties an opportunity to make submissions upon it. They took that chance. I am grateful to counsel on both sides for making written submissions at such short notice. In short, Mr Kerr submits that in PXC's case, there is the addition of the *Denton* test. Mr Platt QC submits, as he put it, "nothing changes", and the implication of his argument, though he was extremely courteous, is that the decision in *Ince* is wrong. I need to reach a conclusion on this.

28. In *Ince*, the judge states at [1]:

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

Then critically, the learned judge states at [4]:

> "*<u>It is generally accepted, and was accepted, and was accepted by MOG before me, that an application under CPR 13.3 to set aside a judgment entered in default of defence is an application for 'relief from any sanction' within the meaning of CPR 3.9</u>. It therefore requires, when exercising a discretion, the consideration of the three-stage test as laid down in Denton v T.H. White (Practice Note) [2014] EWCA Civ 906. The application of the Denton principles, to an application to set aside under CPR 33, was challenged before the Court of Appeal in Regione Peimonte v Dexia Crediop SpA [2014]*

> *EWCA Civ 1298 and rejected: see at paragraphs 39-40 per Christopher Clarke LJ, with whom Jackson LJ and Lewison LJJ agreed. The application of the Denton principles to an application under CPR 13.3 was accepted, and the three-stage test was applied by the Court of Appeal in Gentry v Miller (Practice Note) [2016] EWCA Civ 906. However, in Cunico Marketing FZE v Daskalakis & Another [2018] EWHC 3382 (Commercial) at paragraph 39 Andrew Baker J raised the question of whether this is right, because the availability of a judgment under Part 12 carries with it the availability of an order under Part 13 setting such judgment aside. He noted at paragraph 40 the contrary view of the Court of Appeal in Regione Peimonte and Gentry & Miller above, but concluded this was not binding upon him because in the former case the view was obiter and in the latter case the point was conceded. He also referred to other first instance decisions, one preceding those decisions when a different view was taken, and one after, which adopted the same view as the Court of Appeal in the two above cases. He reasoned at paragraph 41 that there was no authority binding on him, but concluded it was not necessary to decide the point, and did not do so. Whilst MOG did not seek to persuade me to adopt this reasoning it nevertheless is a point I need to address in order to satisfy myself as to how I should proceed with this application.*"
>
> (emphasis provided)

29. As I have indicated, I take the view that it is essential for me to resolve this point independently and during the course of this judgment I shall do so. I will cite the judge at some length because he sets out the nature of the forensic debate.

> "*5. I have hesitation in concluding that what was said by Christopher Clarke LJ in Regione Piemonte can necessarily be said to be obiter. The judge at first instance declined to set aside on the basis he was not satisfied that the applicant had real prospects, and this was challenged in the Court of Appeal. In concluding his judgment at paragraph 126, Christopher Clarke LJ said as follows:*
>
> > *"'I do not regard Piemonte as having established that the judge's refusal to set aside the default judgment or his grant of summary judgment on the monetary claims were in error. Whilst in limited respects I have found that there was a realistic prospect of establishing non-compliance with Italian law that is not sufficient to justify setting aside the judgment. In my view the extent and character of the delay alone afforded, in this case, good grounds to refuse to set the judgment aside even if the defence had a real prospect of success. In the light of the character and extent of that delay it would require a defence of some considerable cogency, based on pretty convincing evidence, particularly on the question of capacity, to justify setting the default judgment aside. The*

> *judge was entitled to take the view that there was no real prospect of Piemonte succeeding or, at any rate, none with a sufficient degree of conviction to justify setting aside the default judgment in the circumstances of the present case.'*

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

"*7. I am also not persuaded that the approach to the interpretation of CPR 13.3 and 3.9 suggested by Andrew Baker J at paragraph 39 in Cunico Marketing FZE is the correct one, assuming for present purposes I would be free to depart from the above Court of Appeal decisions. As noted by Christopher Clarke, LJ at paragraph 40 in Regione Piemonte, since the overriding objective of the rules is to enable the court to deal with cases justly and at proportionate cost, and since under the new CPR 1.1(2)(f) this includes enforcing compliance with rules, practice directions and orders, it is to be expected that the considerations set out in CPR 3.9 are to be taken into account in the exercise of discretion. This might be thought to be especially so as CPR 3.9 applies on an application for relief from 'any sanction'. The argument which Andrew Baker J appears to have been attracted to is that the sanction under CPR 12 came with the ability to apply for relief under CPR 13.3 such that an application to set aside should not be viewed as being an application for relief from a sanction at all. Thus, so the argument goes, subject to overcoming the jurisdictional gateway, and subject to the requirement to have regard to promptness, the discretion to set aside is unfettered. The argument, moreover, is it ought not to be fettered by the further application of another layer, based on Denton principles. However, simply because the sanction under CPR 12 comes with the bespoke ability to apply to have it set aside under CPR 13.3, it does not necessarily follow that it is not an application for relief from sanction.*

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

30. As a result, the learned judge approached the case on the basis that *Denton* applies. I now consider this question. Beginning with first principles, I find that I am not bound by the decision of the judge in *Ince*. It is the judgment of another court at the same jurisdictional level. It is of course persuasive, but is an equivalent court and thus not binding upon me. So while persuasive, with great respect, I am not persuaded. Instead, I make it plain that I prefer the approach of Andrew Baker J in *Cunico*. In particular, Andrew Baker J states at [38] to [41] as follows:

> "*38: CPR Part 13 provides for the setting aside of a default judgment obtained under Part 12. CPR r. 13.2 mandates setting aside where the judgment 'was wrongly entered' because either (i) any of the conditions under CPR r. 12.3 was not satisfied or (ii) the claim was satisfied in full before judgment was entered. CPR r. 13.3 provides for a discretion to set aside where the defendant has a real prospect of defending the claim successfully or where for other good reason the judgment should be set aside or varied or the defendant should be allowed to defend the claim. Where application is made to set aside a default judgment as a matter of discretion under CPR r. 13.3, on the basis that there is a real prospect of success for a defence on the merits (or other good reason), the question arises whether that amounts to seeking relief against the availability of judgment under CPR r. 12.3 as a sanction for the defendant's original procedural default.*
>
> "*39: If unconstrained by authority, I would have said it does not, because the availability of a judgment under Part 12 carries with it the availability of an order under Part 13 setting such judgment aside. That is to say, the burden, by way of sanction upon the defendant, of a default judgment regularly entered, is the obligation to persuade the court that there is a real prospect of successfully defending the claim (or other good reason for there not to be summary disposal) and that the just result is therefore that the default judgment be set aside. In the latter respect, the discretion is unfettered except, (if this be a fetter) that CPR r. 13.3(2) enjoins the court to consider as one relevant factor whether the application to set aside was made promptly. To make an application to set aside under CPR r. 13.3, accepting and seeking to discharge that burden, to my mind is to accept and operate under the CPR sanction for the original procedural default, not to ask for relief from it. The application that would involve relief from sanctions in the arena in which CPR r. 13.3 also operates would be an application, after default judgment had been entered, at the time regularly, for an extension of time for the filing of acknowledgement of service (or defence) whereby retrospectively to undo the basis for that judgment so as then to require the judgment to be set aside (i.e. set aside under CPR r. 13.2).*
>
> "*40: However, the contrary view was adopted by the Court of Appeal, obiter, in Regione Piemonte v Dexia Crediop SPA [2014] EWCA Civ 1298 at 29-40 (followed, but where the point was conceded and*

> *therefore not argued, in Gentry v Miller (Practice Note) [2016] 1.WLR, 2696). The view that an application under CPR r 13.3 is an application for relief from sanctions in respect of the original procedural default that enabled the default judgment to be entered was also taken, obiter, by Coulson J in Redbourn Group Ltd v Fairgate Development Ltd [2017] EWHC 1223 (TCC) at paragraphs 17-18. In Hockley v North Lincolnshire and Goole NHS Foundation Trust [19th September 2014], Judge Richardson QC took the view that an application under CPR r. 13.3 is not an application for relief from sanctions, but that the principles governing such applications should be applied none the less.*
>
> "*41: There is thus no authority binding me to the view that on an application under CPR r. 13.3, the approach to relief from sanctions either CPR r. 3.9 and Denton v T.H. White Ltd (De Laval Ltd, Part 20 defendant) (Practice Note) [2014] 1.WLR 3926 applies, with reference to the failure to file acknowledgement of service (or defence) upon the basis of which the default judgment was regularly granted. It would be open to me to adopt, rather, the analysis in paragraph 39 above. I take this aspect no further in this judgment, however, as it is not necessary to resolve it.*"

31. Therefore, it is clear that Andrew Baker J carefully considered this issue. However, this is a judgment of the High Court and again, whilst persuasive, is not binding on me. I do find the reasoning persuasive. This sense is reinforced by another judgment I judge of high significance. It concerns almost identical procedural rules, but in Trinidad and Tobago, and is a judgment of the Privy Council. Again, then, it is not binding in the conventionally recognised sense. The case is *Attorney-General of Trinidad and Tobago v Matthews* [2011] UKPC 38. The judgment was delivered by Lord Dyson. Lord Dyson stated at [17]:

> "*If the claimant's argument is correct, where a judgment in default of defence is obtained by the claimant and the defendant wishes to have it set aside, he must apply to have the judgment set aside under rule 13.3 and apply under rule 26.7 …*"

[I interject that 26.7 is the equivalent of rule 3.9 in that jurisdiction]

> "*… for relief from a sanction imposed by the rule for failure to comply with the rule. The conditions necessary for the exercise of the court's discretion to set aside a default judgment under rule 13.3 are that (i) the defendant has a realistic prospect of success in the claim and (ii) the defendant acted as soon as reasonably practicable when he found that judgment had been entered against him. The criteria for a successful application under rule 26.7 for relief from a sanction imposed for a failure to comply with a rule are quite different. Here, the question of whether the defendant has a realistic prospect of success in the claim is not a relevant condition for the exercise of the court's discretion. Moreover, an application for relief from a sanction*

> *must fail unless all three of the conditions precedent specified in rule 26.7(3) are satisfied. These are that (i) the failure to comply was not intentional; (ii) there is a good explanation for the breach ...*"

[I observe here that in my judgment there is no good explanation for the lack of promptitude in PXC's case]

> "*... and (iii) the party in default has generally complied with all other relevant rules, practice directions, orders and directions.*
>
> "*18: But it cannot have been intended that, where a defendant wishes to set aside a default judgment, it must satisfy the conditions of both rule 13.3 and 26.7. Part 13 is concerned with setting aside a default judgment. That is clear from the content of the Part and is spelt out in rule 13.1 ('the rules in this Part set out the procedure for setting aside or varying a default judgment entered under Part 12 [default judgments]'). Part 26 is concerned with the court's general powers of management. It cannot have been intended that a defendant who wishes to set aside a default judgment must satisfy the requirements of both rules. If a defendant satisfies the two conditions specified in rule 13.3, his application to set aside the judgment should succeed. The court cannot refuse the application on the grounds that, although the rule 13.3 conditions have been satisfied, the further conditions specified in rule 26.7(3) have not been. If it had been intended that, unless a defendant satisfies these further conditions, the court may not set aside a default judgment, this would have been stated in rule 13.3. The fact that it is not stated in rule 13.3 indicates that the rule 26.7(3) conditions have no part to play when the court decides whether to set aside a default judgment. It follows that an application to set aside a default judgment is not an application for relief from a sanction imposed by the rule.*"

32. I have concluded that PXC's case is not a relief from sanctions case. Why? Most obviously because there is no reference to CPR 3.9 in Part 13. But also because there is an existential question about the nature and function of a regime under Part 13.3. I judge that the purpose of Part 13.3 is to promote justice. That is its goal. More acutely, as the White Book says at 13.3.1: "to avoid injustice." What does that mean? It should surely include, where possible, that the "right" or "just" result is reached. That is, that a party which is liable in law is held liable in law; that a party that is not liable in law, because it never had a duty to the claimant, is not held liable. A default judgment, unless disturbed, is terminatory on liability. A defaulting defendant carries the weight of such judgment, whether objectively liable or not. If such defendant is not actually liable, it can seek to set aside that judgment. It can avoid that 'injustice'. There are three steps to such rebalancing of the scales. First, it must demonstrate for CPR 13.3 purposes that it has a real prospect of succeeding in its ambition of defending the claim. Second, it must persuade the court that, weighing all the factors, including the character and extent of the delay and its impact on the claimant/respondent, the court's discretion should be exercised in favour of set aside.

Third, lest it be forgotten, even if granted the set aside desired, it must still prevail at trial. It may or may not.

33. I take the policy of Part 13 to avoid injustice as an expression of the overriding objective requirement to deal with the case justly and fairly. Fairly includes ensuring the rights of parties are respected procedurally; justly includes substantive justice, that someone who is not legally 'responsible' is not held legally responsible. How does it accomplish this objective?

34. It is useful here to look more closely at *Denton*. There are two aspects to it. First, what is the proper approach to the test for relief from sanctions in CPR 3.9, as explained by the Court of Appeal in *Denton*. Second, whether the decision about set aside and relief from sanctions in *Regione Piemonte* was indeed *obiter* or, conversely, was binding *ratio*.

(b) *Denton*

35. By way of necessary introduction, CPR 3.9 provides:

> "***Relief from sanctions***
> *(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.*"

36. In *Denton,* the Court of Appeal clarified the proper approach to relief from sanctions. It may be summarised as follows:

> 1. Identify the default and assess its "seriousness or significance": relief will usually be granted for breaches which are neither serious nor significant (the word "trivial" used in *Mitchell* has been dropped);
>
> 2. Consider why the default occurred – is there is a good reason for it?;
>
> 3. Consider "all the circumstances of the case, to enable [the court] to deal justly with the application". An application for relief from sanctions for a non-trivial breach for which there was no good reason will not automatically fail. The specific factors listed in the

> rule - the need for litigation to be conducted efficiently and at proportionate cost and to enforce compliance with rules, practice directions and court orders - "may not be of paramount importance [but] are of particular importance and should be given particular weight"

37. *Denton* was a conjoined appeal. The approach of the court in the *Denton* case itself is illuminating. Permission had been given by the trial judge to adduce six statements a long time after the permitted date and granted relief from sanctions. He adjourned the trial so the other party could deal with the new evidence. The Court of Appeal held at [53] that the judge was "plainly wrong". The court continued at [54]:

> "*54. The judge's first task was to consider the seriousness and significance of the claimants' breach in filing new witness statements so long after they had been ordered to do so. This was a significant breach, because it caused the trial date to be vacated and therefore disrupted the conduct of the litigation. The next question was whether there was good reason for the breach. There was not, because the issue as to the spacings for the cattle had been known about since Mr Williams's first report in 2012. The effect of the modifications made in August 2013 was not a justification in itself; and even, if relevant, there was significant delay imperilling the trial caused by the claimants' failure to respond quickly to that development.*
>
> "*55. In the light of the answers at the first and second stage of the inquiry, it was very likely that relief would be refused. But that did not mean that the third stage did not have to be undertaken. In addressing the third stage, the judge ought to have considered all the circumstances of the case, but given particular weight to factors (a) and (b). Factor (a) militated heavily in favour of refusing relief from sanctions and holding the trial date. Factor (b) also militated strongly in favour of refusal, because the delay was a most serious or significant breach of the court's earlier orders for the exchange of witness statements, which impacted upon the orderly progress of the litigation.*
>
> "*56. There was very little to weigh in the balance on the other side under the heading of "all the circumstances of the case" and the need to deal with the application justly. The claimants had had ample opportunity to serve their additional evidence long before December 2013. Moreover, the judge's idea that allowing the trial to go ahead would mean conducting it on an "artificial basis" was, in our view, incorrect. It was the claimants' own fault that they had not chosen to serve such evidence earlier, and to admit such evidence at that late stage necessitated the adjournment of the 10 day trial. Six experts and numerous factual witnesses were due to attend the trial. An adjournment would result in the protraction of proceedings which had already dragged on for far too long. It would cause a waste of court resources and generate substantial extra costs for the parties. It would cause inconvenience to a large number of busy people, who had carved out space in their diaries for the anticipated trial.*

> "*57. Accordingly, the third stage analysis ought to have weighed heavily in favour of refusing relief from sanctions. The judge's order of 23 December 2013 must, therefore, be set aside.*"

38. The third stage is critical for the purposes of the case before me. At [31], the court in *Denton* stated:

> "*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.*"

39. The Court of Appeal concluded at [81] that:

> "*It seems that some judges have ignored the fact that it is necessary in every case to consider all the circumstances of the case (what we have characterised as the third stage).*"

40. To review briefly, the question of whether the general approach in *Denton* is applicable to applications to set aside under Part 13 was considered in *Regione Piemonte* and this was in turn considered in *Cunico*, where Andrew Baker J stated at [40] that the pronouncements about relief from sanctions in *Regione Piemonte* were *obiter*. I must consider this question.

(c) *Regione Piemonte*

41. It is essential to understand what actually happened in *Piemonte* and what the court in fact decided. This is vital. If the court's *Denton* observations in *Piemonte* were part of its *ratio*, I must find myself bound by the decision under the orthodox rules of precedence. That, it seems to me, is inescapable. I regard respect for precedence as fundamental to the rule of law.

42. In *Piemonte,* the Court of Appeal considered an application for leave to appeal the decision by Eder J where he refused to set aside a judgment of Cooke J. Therefore, it must be emphasised at the outset that *Piemonte* as considered by the Court of Appeal was about permission. The factual circumstances were set out by the Court of Appeal immediately:

> 1. On 16 November 2006 Regione Piemonte, the Italian Regional Authority (hereafter "Piedmont"), entered into certain derivative

> transactions (the "Transactions"), in connection with the issue by it of two bonds. Two of the Transactions were with Intesa Sanpaolo S.p.A ("Intesa") (previously named Banca Infrastrutture, Innovazione e Sviluppo S.p.A ("BIIS")) and one was with Dexia Crediop S.p.A ("Dexia") (together "the Banks"). The agreements for the Transactions provided that they were to be governed by English law and each party irrevocably submitted to the jurisdiction of the English Courts.
>
> 2. In August 2011 the Banks brought two separate actions seeking declarations as to the validity of the Transactions ("the Declaratory Actions"). The proceedings were served on Piedmont. Piedmont did not file any Acknowledgment of Service. On 24 July 2012 Cooke J made the declarations sought ("the Cooke judgment"). In February 2013 the Banks brought new actions claiming substantial sums said to be due under the Transactions and sought summary judgment. Shortly before the hearing Piedmont applied to set aside the Cooke judgment. In July 2013 Eder J declined to do so and gave monetary judgments in favour of the Banks. The question in this appeal is whether he was in error in so doing.

43. I would add, as pointed out at first instance by Eder J, the purpose of these transactions was to manage the interest rate risk to which Piedmont was exposed under the bonds it issued (*Intesa sanpaola s.p.a. v Regione Piemonte* [2013] EWHC 1994 (Comm) at [2]). On 10 August 2011, the Banks each commenced proceedings in the High Court seeking declaratory relief in respect of the transactions. Piedmont did not file any acknowledgement of service in or otherwise engage with the Declaratory Actions. The banks sought declaratory judgment. In the event, the declaratory relief sought by the Banks was granted by Cooke J for the reasons set out in a judgment dated 24 July 2012 (the "Cooke J Judgment"). In effect, Cooke J made declarations that Piedmont's obligations under the transactions constituted legal, valid and binding obligations, enforceable in accordance with their terms.

44. Shortly before the hearing before Eder J, Piedmont sought to set aside Cooke J's judgment. The applications were issued 11 months after judgment. Eder J found that Piedmont had not acted promptly in seeking to set aside and that was 'a very strong factor' in dismissing the applications (at [34]). Even when it making the application, Piedmont still had not provided a draft defence and the evidence relied upon was 'sketchy in the extreme' (at [41]). (I should note that in PXC's case, Richmond did provide a draft defence: see Applicant Bundle pp174-81.) Eder J concluded at [61]:

> "*In my view, the delay in making the present applications to set aside the Cooke J Judgment is, of itself, sufficient to justify their dismissal. However, in any event, I am not persuaded that Piedmont has any real prospect of success; nor am I persuaded that there is any other good reason for setting aside the Cooke J Judgment*."

45. This is the context of the decision of the Court of Appeal. Sir Christopher Clarke, giving the judgment of the court, addressed the question of set aside and relief from sanctions at [38]-[42]:

> "*The effect of Mitchell*
>
> *38. A question arose at the hearing of the appeal as to the extent to which the principles laid down in Mitchell v News Group Newspapers Ltd [2014] 1 WLR 795 applied to applications to set aside a default judgment. Since the hearing this Court has given judgment in Denton v TH White Ltd [2014] EWCA Civ 906 and the parties have made written submissions on it. Neither case was concerned with applications to set aside a judgment.*
>
> *39. In essence Piedmont submits that the Mitchell/Denton principles do not apply to an application to set aside a default judgment. The majority in Denton considered that the Mitchell decision was correct to attribute a particular importance to the factors listed at CPR 3.9 (1) (a) (the need "for litigation to be conducted efficiently and at proportionate cost") and (b) (the need "to enforce compliance with rules, practice directions and orders") because the Civil Procedure Rule Committee had rejected a recommendation in the Review of Civil Litigation Costs Final Report that CPR 3.9.1 should be reworded so that 3.9.1 (b) read "the interests of justice in the particular case". But the Final Report did not propose any amendment to CPR 13.3 so that the reasoning of the majority in Denton does not apply to it. There is thus, it is submitted, no reason to conclude that the Mitchell/Denton principles apply to an application under CPR 13.3 or that promptness under CPR 13.3 should be regarded as anything more than a factor. I disagree.*
>
> *40. In my judgment the matter stands thus. CPR 13.3 requires an applicant to show that he has real prospects of a successful defence or some other good reason to set the judgement aside. If he does, the court's discretion is to be exercised in the light of all the circumstances and the overriding objective. The Court must have regard to all the factors it considers relevant of which promptness is both a mandatory and an important consideration. Since the overriding objective of the Rules is to enable the court to deal with cases justly and at proportionate cost, and since under the new CPR 1.1(2)(f) the latter includes enforcing compliance with rules, practice directions and orders, the considerations set out in CPR 3.9 are to be taken into account: see Hussein v Birmingham City Council [2005] EWCA Civ 1570 per Chadwick LJ at [30]; Mid-East Sales v United Engineering and Trading Co (PVT) Ltd [2014] EWHC 1457 at [85]. So also is the approach to CPR 3.9 in Mitchell/Denton. The fact that the Court's judgment in Denton was reinforced by the fact that CPR 3.9 was not reworded in the manner proposed by Jackson LJ does not detract*

from the relevance of CPR 3.9, and what was said about it in Denton, to applications under CPR 13.

41. Denton makes clear that any application for relief against sanctions involves considering (i) the seriousness and significance of the default (ii) the reason for it and (iii) all the circumstances of the case. At the third stage factors (a) and (b) in CPR 3.9 are of particular, but not paramount, importance.

42. *The judge concluded that the delay in making the applications to set aside the Cooke judgment was both significant and serious and, of itself, sufficient to justify their dismissal. In any event he was not persuaded that Piedmont had any real prospect of success or that there was any other good reason for setting aside the judgment of Cooke J.*"

46. The Court of Appeal concluded at [126] that:

"*Conclusion*

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

47. Thus, one must examine clearly what the Court of Appeal actually decided in *Piemonte*. Permission to appeal was refused. The court held that Eder J was entitled to conclude that Piedmont had no real prospect of successfully defending the claim. Although the court found that there were 'limited respects' in which there were real prospects, the court held that Eder J was entitled to take the view he did. In such circumstances, the observations of Sir Christopher Clarke about the relevance of the *Denton* principles, while persuasive and to be considered seriously, analytically were and must be *obiter*. They were not the *ratio* of the Court of Appeal's decision. The court did not need to decide the point to dispose of the permission to appeal

application. It failed on the basis that Eder J was entitled to find that there was no real prospect of successful defending the claim. As such, the *Denton/Mitchell* issue did not need resolution. It is true that as the Court of Appeal stated at [38] that 'a question arose' during the hearing about the applicability of the relief from sanctions jurisdiction. But the court did not need to decide that. Its comments were *obiter*. Therefore, I find that I am not bound by *Piemonte*.

48. Standing back, what is the effect of all this? Should a defence be permitted to be deployed following a set aside, it may of course succeed or fail at trial. But injustice is avoided by having the Article 6 right to have it advanced in front of the court, if (a) it is of sufficient merit (real prospects) and (b) if, overall, those merits outweigh countervailing considerations. As the White Book states, the discretion is "unconditional". I take that in-built latitude to exist so the court can be sensitive to the infinite variety of facts and factors and their ever-changing combinations.[2] That is why I find previous decisions unhelpful about this or that number of days or weeks or even years of delay. Put shortly, it all depends on the facts individually, cumulatively and in relationship to (context of) one another. That is how the court can properly assess weight.

(d) Promptitude

49. I turn to my approach to the question of promptitude. I do not find that this as a separate test. In other words, I do not find that there are two limbs to setting aside a default judgment: first, real prospects and, second, the application must be prompt. Instead, the rules require the court to have regard to the lack of promptness and to consider that as a very important factor. I do. It may be fatal to the application to set aside; it may not be. Take two distinct hypotheticals. First, a case where there are real prospects but there have been delays in excess of a decade. Here a court is unlikely to set aside the judgment. The second hypothetical: a case where there has been a lack of promptness, let us say in the order of months, but there is a cast-iron irrefutable defence. In those circumstances the court may be inclined to set aside the judgment – it will depend upon the facts, of infinite variety and colour.

50. That fact-sensitivity I take to be a genuine commitment to the principle that every case is different and the particular facts individually and in combination have varying weights that must be respected and meticulously assessed. Thus, I make it plain there is not a dual test with a promptitude condition precedent. If you fail to be prompt you are not necessarily deprived of a set aside, but you may be. The court's duty is to "have regard" is a duty to weigh and assess. It helps structure discretion; it is an inescapable part of the balance sheet. I approach a lack of promptitude in that way. It is not necessarily fatal to the application, but could be.

V. SUBMISSIONS

[2] I am conscious of the obvious echoes of what Lord Nicholls said in a different context, "The range of facts which may be properly taken into account is infinite." *(Re H and R (Child Sexual Abuse: Standard of Proof)* [1996] 1 FLR 80 HL at [101B]).

51. Having identified the legal framework by which I judge this case, I now set out the rival submissions of parties.

Applicant submissions

52. Those who instruct Mr Platt QC were themselves instructed on 29th April of this year – that is the last day before the Bank Holiday. What they undertook was a rapid search on what they call the "open web" using Google and no doubt other search tools. The search products were printed off and sent to the court as part of the applicant's bundle. There is a history of the Richmond Ice Rink which appears in various publications and documents scattered across the internet. Mr Platt QC submits it shows there is an "almost irrefutable body of evidence that the local authority was not the employer of the claimant." There is, he submits, no evidence that Richmond owned the rink, managed it or controlled it and there is a real prospect of a successful defence for CPR 13.3 purposes. Indeed, as indicated, a draft defence was attached to the bundle.

53. This is, as Mr Platt QC points out, a *very* high value mesothelioma claim. It is in excess of £6m, as pleaded, but it could be more because that excludes ancillary medical treatment costs depending upon expert assessment. The Third Defendant is a public authority and legacy insurers reserve their position about indemnity. However, I am informed that it is likely that cover will be withheld. Indeed, the statement from the solicitor who instructs Mr Platt QC confirms that insurers presently are reserving their position. Those insurers, MMI, are insolvent. There was scheme established under s.425 of the Companies Act 1985 and the proportion is currently 25 per cent. Therefore, Mr Platt QC submits, the reality is that the preponderance of an award will come from public coffers, in other words from taxpayers' money and in particular from the residents of the borough. Given an irrefutable defence, as Mr Platt QC puts it, this amounts to a "windfall" for PXC. He has another defendant to pursue.

54. Mr Platt QC accepts that this application was not prompt. He submits, however, that if there was an adjournment because the court granted a set aside application, it would be possible for PXC to give evidence on commission. He could be questioned and cross-examined and his case evidentially could be laid before the court. In respect of reasons for delay, the person at the local authority who had the responsibility for this matter was the Insurance Manager, Mr Richard Mason. Mr Mason has now retired. It is unclear why he did not instruct solicitors or legacy insurers. Mr Platt QC accepted that there was a "complete lack of action" that is "inexplicable", but he submits there was compliance with the disease pre-action protocol, there was exposure to asbestos surveys of Balham Leisure Centre and indeed the relevant council, which was Wandsworth, was discontinued as a defendant. So something was done.

55. Before service of proceedings on 12th April 2021 there was an email at 20.20 hours from Mr Mason to Abbie Porter, who is a paralegal at the claimant's solicitors. It reads:

> "*Official. Evening. Not sure Richmond Ice Rink has ever been the responsibility of Richmond? Balham Leisure Centre is externally managed as are all LBW leisure centres. We will look into this, however, and revert.*"

56. It is signed by Mr Richard Mason, as "Insurance Manager, Resources Department" of Wandsworth and Richmond Councils. Nobody did revert. In the claimant's statement of truth, PXC speaks about having worked at the ice rink at Richmond. However, Mr Platt QC submits that they have never provided any sufficient evidence to satisfy the burden of proof that the Third Defendant owed a duty of care to PXC. They did not, he submits on the documentation, assess Richmond to see whether there was in fact any such connection. He submits that is a serious oversight and omission. In respect of the overriding objective factors, Mr Platt QC submits that to deal with the case justly, if judgment is not set aside and the case proceeds, PXC will receive a windfall from a defendant who should not have been sued and who was not to blame for his mesothelioma. PXC will benefit from a judgment that he should never have had. In terms of the amount of money involved, he submits that this is a very high mesothelioma claim and at the upper end in terms of such claims.

57. In terms of dealing with the case expeditiously and fairly, this claim only started in June 2021 and has reached this stage quickly because of the inaction of the Third Defendant. The claim can be quickly "put back on track", as Mr Platt QC puts it; suitable directions can be given by the court. Any costs issues can be dealt with by adverse costs orders against the local authority for which he concedes it is responsible. The conduct is the fault of the defendant; it not intentional, but a product of simple inaction.

Respondent submissions

58. Mr Kerr's submissions were significantly shorter, but no less powerful for that. It is, of course, not for Mr Kerr to prove anything in this application. He has a regular judgment in his back pocket regularly obtained. He has responded, if I may say so, energetically and forcefully to this very late application by the Third Defendant. In terms of real prospects, he submits that the evidence provided does not disclose a complete defence; in fact, it only offers "intimations", possible bases, for further investigation - nothing more than that. That falls far short of a real prospect of a defence for the CPR 13.3 test.

59. In terms of promptness, Mr Kerr submitted that there has been an absolute lack of promptness. He did not need to develop the point - frankly it was unanswerable. But what are the ramifications of it? In terms of the overriding objective discretionary factors, he submits that if at any time there was a case where delay trumped other factors, this is it. If there was a case where delay extinguishes competing considerations, this is it. As Mr Kerr puts it, otherwise "promptness becomes meaningless"; it becomes tokenistic. He submits that sending this case back to square one, as he put it, is the opposite of expedition. Setting aside this judgment would be "brutal" in its impact on PXC and his family. There has been no fault by PXC or indeed his solicitors. His solicitors in fact pressed the Third Defendant *repeatedly* to engage at each procedural step. Mr Kerr says this is evidenced by the correspondence bundle which I have had the opportunity to read. Once more, Mr Kerr is right.

VI. DISCUSSION

60. Having outlined the rival submissions of parties, I turn to the court's analysis. I sub-divide this critique into three parts: first, real prospects; second, promptitude; third, overriding objective and overall discretion.

(a) Real prospects

61. In the authority bundle at Tab 5 is a case called *Riley v Reddish*. I have only been provided with a transcript of this judgment and it was not referred to in argument explicitly. This was a decision of Nugee J (as he then was) on 7 June 2019 in the Chancery Division. Here was an application to set aside a judgment for £1.6m in damages. It proceeded, without argument on the point, on the basis that the *Denton* jurisdiction applied to CPR 13.3. Nugee J stated at [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.*"

In paragraph 53 the judge said:

> "*I go on then to the question of how the discretion should be exercised. It is accepted that it requires looking not only at the terms of CPR 13.3(2), which requires the court to have regard to the question of promptness, but also to the principles applicable to an application for relief from sanctions under CPR 3.9 and the guidance given in Mitchell and Denton v White.*"

62. I make it plain, as I have previously, that I am not persuaded that the *Denton* jurisdiction applies. The judge cites Sir John Chadwick in the Court of Appeal case of *De Ferranti & Another v Execuzen Ltd [2013] EWCA Civ 592* at [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 & Another v Execuzen Ltd [2013] EWCA Civ 592, where the reasoned judgment was given by Sir John Chadwick where, at paragraphs 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 right 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 19th January 2012. But, in failing to do so, he fell into error.*"

63. What Nugee J states at [26] strikes me as being of significance to this case:

> "*It does seem to me in those circumstances that it was incumbent upon the Deputy Master: (i) to accept that there was a reasonable defence on the merits, so a real prospect of successfully defending the claim, because that was conceded before him; but (ii)* ***to evaluate so far as it was possible to do so the apparent strength of that defence***."
>
> (emphasis provided)

64. I therefore express my approach based on authority. It is not to decide whether this defence is proved, but to examine whether the real prospects of success exist, which involves assessing its strength. Having said that, to assess the prospects I must decidedly not conduct a "mini-trial" - *Swain v Hillman* makes that plain. Equally, I do not take the evidence or the material put in front of me at face value unreservedly. As is made clear in the White Book at 24.2.3 in respect of Part 24 summary judgment, "contemporaneous documents are important: see *ED v Patel* at paragraph 10." I would also add what Lord Pearce famously said in *Onassis*, "Contemporary documents are always of the utmost importance" (*Onassis v Vergottis* [1968] 2 Lloyd's Rep. 403 at 431).

65. I therefore turn to the material filed by the Third Defendant. There is a document exhibited to the statement of Richmond's solicitor Mr Brankin which is dated 4th May 2022. It refers to an article by an individual called Richard Meacock. Mr Meacock, a local resident, battled for years to have a new ice rink built in Richmond. It appears that this article, or the extract from it, is taken from his website. Therefore, it must be viewed in that restricted way (see B164-65). Mr Meacock details the long history of ice skating at Richmond. It goes back hundreds of years. There is evidence of ice skating near Richmond Bridge as far back as 1749 and undoubtedly it goes back much farther than that, too.

66. What Mr Meacock writes is that after the rink had been in various private hands up to the 1930, including being used as a munitions factory and storage facility during the First World War, the rink changed hands in 1934 when purchased by the Rule family through their company The Sports Drome Limited. Then in about 1978, because of various problems, control of the rink fell into the hands of a property developer called Tony Carratu. At that point, Mr Carratu, it appears, sought assistance from others to help him raise the profile of the rink – I will come to the details of that in a moment. In 1987 the Beckwith brothers, the Managing Directors of LET, which is London & Edinburgh Trust, bought out Mr Carratu. He sold the site without written agreement that the rink would be replaced as part of the arrangement, and the possible loss of the rink naturally raised anxieties within the community about whether this historic association between ice skating and the Richmond area would continue.

67. There was, as Mr Meacock states, a lengthy letter that was written by Peter Beckwith to a person, Mr Richard Harble, who was at that point the Chief Executive of Richmond Council. What is clear from that letter is that LET had stated that they did not want to spend £22.5m to replace the rink's roof and they were writing to the council to say that if the council did not insist on that condition, that they would pay the council £2.5m instead. I am going to put that into context with other documentation and break off from the account of Mr Meacock's website article – and again I emphasise this is a website on the internet. It is hearsay evidence, and almost certainly second-hand hearsay evidence, but is it substantively accurate? It is certainly detailed. On the face of it, it has a comprehensive and coherent structure, but is there other material, especially contemporaneous material, that casts light on whether those factual details are accurate or in fact inaccurate? There is.

68. In the bundle are various newspaper reports, contemporaneous reports that various journalists had filed. At B21 there is a report from the *Guardian*. This is a report from (what looks like) March 1979. This then is after Mr Anthony Carratu had purchased a controlling stake in the rink. The Guardian report states that Mr Carratu (this is 1979) had purchased a birthday present for himself which was a controlling stake in Richmond ice rink. Of course, the immediate point about that is it does not state that he exclusively purchased or controlled the ice rink. That leaves open the possibility that it was some kind of joint ownership with the council or anyone else. But nowhere is there any evidentiary suggestion that Mr Carratu purchased the ice rink from the council or had anything to do with the local authority.

69. The next document is an article from the Evening Standard in December 1980 and that is about the famous British ice skater Robin Cousins who was enlisted by Mr Carratu as "artistic consultant" at the rink. Critically, in this further newspaper report a year on, Mr Carratu is again quoted to be the "owner" – and no one else. There is

then a report from the *Guardian* in 1984, where yet again Mr Carratu is quoted as being the "owner" – again no one else mentioned, and no mention of the council. It will be recollected that reference was made to LET, London & Edinburgh Trust. In the applicant's bundle is the annual report of this Trust dated 1987. On page 14 of that report (B105), it states in terms:

> "*The group owns the Richmond ice rink which is planned to be relocated to release its current site for residential redevelopment and will build a new ice rink to international competition standard.*"

70. I should point out that two pages later, at page 16 in the directors' report section, it does state "a significant proportion of the group's activities is made up from joint companies and partnerships." However, again there is no mention of any involvement of Richmond, the local authority. This contemporaneous document from 1987 materially supports the details from Mr Meacock's website about the ownership of the site. I emphasise none of this is definitive. But it is no part of my job to decide these questions as a matter of fact definitively.

71. The next document relates to October 1989. That is a document in respect of planning permission that was granted to "Richmond Properties Ltd" to demolish the site – no suggestion that this was a guise of the council. There is an *Evening Standard* report of 19 December 1991 that states that Mr Meacock felt so strongly about the loss of the ice rink as an amenity for the Richmond community that he went on hunger strike. It states that the rink was owned by LET and they wished to demolish the site as developers had obtained planning permission, presumably Richmond Properties Ltd, for 240 apartments and 34 houses. So there is documentation of the local authority being consulted about an operation in relation to the ice rink.

72. It is puzzling, if Richmond were the owner of this site, why it had been consulted. Of course, the council has a statutory function in planning applications, but I find that overall this is further supportive evidence that the ice rink was not owned, occupied or operated by the council. It seems from the *Evening Standard* report (B138-39), that in fact the council was *opposing* the development plans to demolish the site. It states:

> "*The council 'bid' to put the development on hold received a setback yesterday and the case was adjourned in the High Court*."

73. Thus Richmond appeared to oppose LET's demolition plans. This is curious if the council owned this site, but again I emphasise none of this is definitive. I do not make final findings about it.

74. In evaluating the strength of the defence to assess real prospects, a judge must consider what may be deployed against it. Looking through all the evidence, I could only find a brief reference by PXC himself about the operation of the rink. PXC's witness statement is dated 18 July 2021. He states at [13]:

> "*When I was 14 or 15 years old, in around 1987 or 1988, I started work at the ice rink in Richmond. I worked most Saturdays throughout the year and most days during the summer holidays. I did this for at least two years. I worked on a rota, generally working in the cloakroom, doing the skate hire, or as a steward on the rink itself. However, I spent a lot of my time 'backstage' of the rink, constantly getting things like brooms and squeegee mops to sweep up mess, clean up spillages or soak up the melted ice brought from the rink. The Zamboni machine was kept back there and surplus equipment was stored there. Behind the scenes the ice rink was literally falling apart. It was in a real state, and required constant maintenance just to keep it going.* ***It was frequently dusty and I believe that included asbestos dust because I believe asbestos lagging was used for insulation because of the refrigeration and freezing machinery***. *Like in [AB College], there was no segregation from the work at all, so I would often be walking past them or working nearby as they did the maintenance and repair work. Within a few years – by the early 1990s – the ice rink was closed down.*"
>
> (emphasis provided)

75. What is striking from PXC's statement, and it is a testament to his balance and fairness, is that he did not himself assert that the ice rink was owned by the Third Defendant local authority. However, in the amended Particulars of Claim dated 3 June 2021, this is converted into an unequivocal assertion of responsibility attaching to the local authority, that it was responsible for Richmond Ice Rink, although it was not clarified on what basis this duty of care is founded. So in the first bundle at page 5 it is stated at paragraph 8:

> "***In either 1987 or 1988, the claimant started a part-time job working at the Third Defendant's ice rink in Richmond***. *Over the course of two years he worked there most Saturdays throughout the year and most days during the summer holidays. His work required him frequently to go into the areas where there was pipework and other plant required to keep the ice rink working, for instance to get and to put back mops, dustpans, brushes and spare ice skates. These areas, which were not open to the public, were in dreadful condition and as a result maintenance crews were regularly patching up the plant, much of which was lagged with old and degraded asbestos. The work created dust, including asbestos dust, which hung in the air. There was no segregation from this work and the claimant was exposed to it repeatedly as he went about his employment. He was never warned of the dangers of asbestos and was not provided with any protection from inhaling it.*"
>
> (emphasis provided)

76. The Particulars of Negligence, at [24] allege:

> "*The Third Defendant was negligent in that it (a) failed to keep the premises free of asbestos and the ice rink in a proper state of repair and/or required its employees, including the claimant, to work in close proximity to those undertaking maintenance of the plant; (b) failed to ensure health and safety to employees, including the claimant, was reasonably assured*."

77. And so forth. I do not mean that disparagingly. Therefore, the conclusions of the court on the question of real prospect of successfully defending this claim are as follows. There is no evidence independently to support the assertion that the Third Defendant at the material time (or indeed ever) owned, occupied or controlled Richmond Ice Rink. Indeed, the claimant did not make the claim in his witness statement. I specifically asked Mr Kerr if he could assist in identifying any other evidential basis for the claim aside from the assertion in the pleadings. He could not.

78. Not one of the contemporaneous reports or records suggests the local authority had ownership, occupation or control. There is detailed, consistent, mutually supporting documentation which has been produced independently over many different years by completely differing sources which strongly points to the fact that ownership, occupation and control rested not in the hands of the local authority, but in a variety of private hands. Accordingly, I am satisfied that the CPR 13.3(1)(a) test is met. I find that the Third Defendant as a real as opposed to fanciful prospect of defending this claim on liability. But that is only the threshold criterion. It is not the end of the matter.

(b) Promptitude

79. I consider next promptness. I can deal with that very shortly. There has been a fundamental lack of promptness. The Third Defendant has not sought to argue otherwise. Indeed, Richmond could not plausibly or sensibly have done so. Therefore, I proceed on the basis that there was a substantial lack of promptness. Further, I find that it was inexcusable. It amounts to a delay of nine to ten months. The effect of the delay is a very important factor to the CPR 13 discretion. It is also relevant to the overriding objective factors in respect to expedition, fairness and just disposal. I take delay into account in this case as relevant to all those matters.

80. I next set out what the consequences of delay are. It will, in my judgment, have a serious and adverse impact on PXC. It may be, and this is decidedly not exaggeration or hyperbole, that PXC will have died by the time that this matter comes to trial if judgment is set aside. I say that with great respect and profound regret. Those are the stakes, and this court cannot and will not duck them. I accept that it is possible to take evidence from PXC on commission and that he can be cross-examined in advance of trial, but that is not the same as his attendance at the trial in two key respects. First, trials evolve, as does the evidence. He will not be present to give his instructions

dynamically. Second, he will not know the outcome of his case in his lifetime. I take these matters very, very seriously.

(c) Overriding objective and overall discretion

81. I turn to the third part of the court's analysis, the overriding objective factors. First, the amount of money actually involved. This is a high value, multi-million-pound claim. I do not need to investigate Mr Platt QC's assertion, which I have no reason to doubt, that this is one of the largest recent claims for mesothelioma.

82. Second, the importance. This is an important case. It is critically important to PXC and his family and it is also important to the local authority and its taxpayer residents. This is a very significant sum. However, I accept Mr Kerr's submission that there is no greater privilege afforded to taxpayers than, for example, to small businesses.

83. Next, the complexity of issues. There are potentially complex issues of causation here, but they do not apply for the purpose of this application. There is a significant dispute about the assumptions in the forensic accounting projections. That is by way of background. I look at the financial position of each party. PXC will die in the near future; there is no way to dress it up. He has been the financial provider for his wife and his son. His loss will be devastating on every level. The local authority, like all public authorities, is under financial pressure due to the economic downturn and Covid and, of course, the war in Ukraine. We see here how macro international factors affect the lives of real people. Further, the council's legacy insurers are insolvent, therefore the bulk of any damages must come from council coffers - taxpayers.

84. Expedition. There has been significant delay. I have previously explained its significance and weigh it again.

85. Fairness. I have to consider fairness, and what weight I attach to shutting out a viable defence. I have to consider how fair it will appear to be to the public to have a decent family who, for ten months since the default judgment was obtained perfectly legitimately, until this week believed they would receive compensation in the sum of several millions for the untimely death of PXC. What does that look like? As Mr Kerr put it, if they are to go back to square one with all the uncertainty and anxiety that that will entail, it will be "brutal".

86. Resources. I have to consider the use of the court's resources. Setting aside judgment will inevitably result in a trial, not just on quantum but also on liability, and thus greater cost.

87. Compliance. I have to consider rule-compliance or here non-compliance and the importance of this factor. Setting aside the judgment would relieve this defendant of its fundamental disregard of the rules of proper procedure. Mr Platt QC, however, makes the point that there can be a cost consequence as a result.

VII. CONCLUSION

88. I carefully weigh the factors against one another, and all together.

89. I begin by recognising that the ethos and culture of civil courts is significantly different to 20 years ago with respect to procedural compliance. Promptness matters. It is a very important factor; nothing less. Therefore, in this application we proceed in a different forensic landscape to that which prevailed in some of the earlier judgments that were put in front of me. The other point is that there is an extant regular judgment. The burden is on the Third Defendant to justify setting it aside. I begin my conclusion by reminding myself of what Nugee J said in *Riley v Reddish* at:

> "*66. The usual way to decide claims in the civil litigation system is to have them tried. The whole purpose of the Civil Procedure Rules 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.*
>
> *…*
>
> *68: I do regard it as unjust to visit on him liability under a judgment for £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.*
>
> *…*
>
> *71: 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.*"

90. Here there has been a serious and inexcusable lack of promptness. Against that are very clear and consistent indications that the Third Defendant has a viable and realistic defence. It is often difficult to prove a negative – that Richmond did not own, control or operate the ice rink. But the evidence before me strongly suggests that other entities, corporate and private individuals, did. If so, put simply, Richmond is just the wrong defendant. How can the court weigh these against one other, especially when an entirely decent man is dying and will leave behind a devoted wife and a nine–year-old son? The court must not become desensitised to human suffering, but must not be led astray by it, harsh though that sounds. Frankly, I derive little assistance from the facts of cases like *Hussain*. That is because factors weigh differently in different cases. Here, PXC's time is very limited. It is correspondingly very precious. Equally the court must be fair to all parties coming before it. It must avoid injustice; that is the purpose of CPR 13.2.

91. What is significant in this case is my conclusion that the observations on relief from sanctions in *Regione Piemonte* were *obiter*. Thus they are not binding on me. I concur with Andrew Baker J on this. But in any event, when one carefully examines the third limb of *Denton*, there is no doubt that if the court considers all the

circumstances of the case to deal with it justly, it is impossible to ignore a defence with a real prospect of success. To use the *Denton* terminology, would it be "just" to prohibit its deployment? This is what unites CPR 13 and the *Denton* jurisdiction: just disposal – or its corollary, the avoidance of injustice. Thus, I find that the decision would be the same whether via *Denton* or CPR 13. That flows from my conclusion that it would be unjust for a defendant who has no liability to have substantial damages running into many millions of pounds entered against it. Equally, I cannot see how shutting out a defence with real prospects of success in these circumstances where there is a live, evident and non-fanciful chance that the London Borough of Richmond is simply the wrong defendant, would inspire public confidence in the legal system in a case of this scale and public consequence with many millions of pounds of public money at stake.

92. Another way to test this conclusion is to ask whether the "sanction", to use the Denton/CPR 3.9 rubric, is proportionate. That sanction in the circumstances of this case is the wholesale exclusion of a plausibly viable defence. Although there will – and must – be cases where that must follow, I am not persuaded that this should happen here. I do not for a moment consider that PXC or his solicitors have been opportunistic. I also have regard to what the Court of Appeal said in *Denton* itself at [41]:

> "*It is wholly inappropriate for litigants or their lawyers to take advantage of mistakes made by opposing parties in the hope that relief from sanctions will be denied and they will obtain a windfall strike out or other litigation advantage.*"

93. This is of significance because it indicates that the obtaining of windfalls or litigation advantages are matters of significance that the court should have in mind and seek to avoid. It is difficult to envisage greater litigation advantage than complete victory on liability. If the claimant is not objectively entitled to recompense, that is a windfall.

94. Promptitude or its lack requires mandatory and important consideration. The court is obliged to consider it and give it significant weight. I do. But failure to act promptly is not in itself necessarily depositive. The court must weigh all the circumstances of the case – *Denton* itself makes that clear. I do here. I consider carefully the need to enforce compliance with rules, practice directions and orders (CPR 1.1(2)(f)). I consider the high need for litigation to be conducted efficiently and at proportionate cost. But I remind myself what Davis LJ said in *Chartwell Estate Agents Ltd v. Fergies Properties SA* [2014] EWCA Civ 506 at [62]:

> "*It is also to be emphasised that the courts in considering applications under CPR 3.9 do not have and should not have as their sole objective a display of judicial musculature. The objective under CPR 3.9 is to achieve a just result, having regard not simply to the interests of the parties but also to the wider interests of justice. As has been said by the Master of the Rolls (in his 18th lecture), enforcing compliance is not an end in itself. In the well-known words of Lord Justice Bowen: "The courts do not exist for the sake of discipline".*"

95. I conclude that the applicant has satisfied the court that the judgment should be set aside and that the factors in favour of that disposal clearly outweigh those on the other side. In looking at the balance, I am conscious that claimant assertion aside, there is no independent or other evidence to indicate that the Third Defendant owned, operated or controlled Richmond Ice Rink at the material time. All the evidence put in front of me points in the opposite direction. It is not in this application for the claimant to prove his case or anything like it. But projecting forward to a possible trial, as I am obliged to do, I consider the lack of evidence pointing to Richmond's ownership, occupation or control as significant in assessing the local authority's prospects of success. This is naturally in combination with the material the applicant has put in front of the court which uniformly points to other individuals and entities as the relevant owner-occupiers.

96. It is telling that in respect of the Part 24 test, authorities specifically mention whether the "realistic prospect" can be advanced with "some degree of conviction" and that contemporaneous documents are potentially significant (see *ED & F Man Liquid Products v Patel* [2003] EWCA Civ, 472 at [8] and [10]). I find the contemporaneous documents of significance here as *Onassis* emphasises. Viewed globally, this material permits the defence to be advanced with some degree of conviction. What is required, of course, is that the defence has real prospects of success. I judge that it has. The character and scale of this case is such that wider interests of justice are engaged beyond the specific interests of parties.

97. I do not take the setting aside of judgment lightly. I make plain that my decision does not extinguish the chance of recovery from the local authority. It merely grants the local authority the chance to defend the action, as Nugee J said, "in the usual way to decide claims". Further, not to set aside would, to my mind, equate to "punishing" the defendant for their procedural failures. That would be wrong in principle. However, the local authority does richly deserve rebuke in this case.

VIII. DISPOSAL

98. Therefore, the disposal of the court is as follows:

(1) The default judgment of Master Thornett dated 9th July 2021 is set aside;

(2) I do not decide Richmond's application to adjourn the quantum trial. It is rendered redundant by (1) - an adjournment is inescapable;

(3) I grant an anonymity order to protect the claimant and his family.

99. I would add that if the analysis of this court in *Cunico*, the Privy Council in *Attorney-General of Trinidad and Tobago v Matthews* and as is set out in this judgment is correct, it may be of benefit to revisit the commentary in the White Book at paragraph 13.3.5 (2022 edition, p.561).

100. May I end by saying this: if it is ever permissible for a judge in this court to say so, I reach the overall conclusion in this case with a heavy heart.

101. That is my judgment.

This judgment has been approved by the Judge.

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