Case No: QB-2016-005735

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand
London WC2A 2LL

[2021] EWHC 2913 (QB)

Monday, 1st November 2021

BEFORE:

MASTER THORNETT

BETWEEN:

(1) ROGER MANN (IN HIS OWN RIGHT AND AS EXECUTOR OF THE ESTATE OF MRS DENISE MANN)
(2) JAKE RONALD JAMES MANN
(3) JAMIE ROGER MANN

Claimants

- and -

(1) TOWARZYSTWO UBEZPIECZEN INTER POLSKA SA
(2) NOA CLINIC - USŁUGI MEDYCZNE SP Z.O.O.
(3) ADAM KALECIŃSKI

Defendants

MS S CROWTHER QC and **Miss Akram** (instructed by Irwin Mitchell) appeared on behalf of the Claimants
MR F KWIATKOWSKI (instructed by Ardens Solicitors) appeared on behalf of the First Defendant
MR RICHARDS (Solicitor, of Weightmans) appeared on behalf of the Second and Third Defendants

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Hearing dates : 11 November 2019, 29 July 2021 and 5 October 2021

JUDGMENT

1. This is the reserved judgment on the First Defendant's Application dated 14 April 2019 ["the April 2019 Application"] to set aside the default judgment against it entered on 31 August 2017. The Claim Form was issued on 20 September 2016. This decision follows hearings on 11 November 2019, 29 July 2021 and finally on 5 October 2021. As those dates alone illustrate, the April 2019 Application has seen an unusually and undesirably protracted period before resolution. For the reasons explored in this judgment, the principal reason for this has been a continuing blend of delay and

inappropriate procedure adopted by the First Defendant rather than unavoidable delays within the court system, with or without the overlay of the Covid Pandemic.

2. The First Defendant has produced much documentation and numerous authorities. It leads to essentially polarised positions from respectively the First Defendant and the Claimants[1]. The First Defendant maintains there had been fundamental failure in the service of process upon it in May 2017, all such that the judgment either should be treated as irregular and set aside automatically or alternatively that it be set aside as a matter of discretion. Its arguments in support are numerous but mainly focus upon the nature and sufficiency of documents it admits were physically served upon it (rather than, as in some Part 13 Applications, denial that there had been any awareness of the documentation until after default judgment). Conversely, the Claimants maintains that, taken overall, this is actually a very simple case where despite the detail of the First Defendant's submissions, there is nothing really in them and the judgment should be preserved.

3. The first hearing was on 11 November 2019. It had been listed direction for a half day hearing, this being in my experience ordinarily sufficient for this type of application. The hearing went part heard because the First Defendant had not completed its submissions. At the end of that hearing, however, I had already formulated the view that regardless of what other submissions the First Defendant relied upon, it was clear and I was so satisfied that the First Defendant had not acted promptly in issuing its April 2019 Application. This judgment amplifies the background and re-affirms that decision.

4. *Background to the claim and its progress before the First Defendant's appearance in the proceedings*

    a. Mrs Denise Mann received cosmetic surgery procedures in Poland in September 2013 which are alleged to have been negligent. The procedures were carried out by the Third Defendant at the premises of the Second Defendant, a private hospital providing cosmetic surgery services. The First Defendant is the Second Defendant's public liability insurer. Mrs Mann subsequently died on 8 February 2016. A claim continues on behalf of her estate for losses incurred during her lifetime owing to the surgery.

    b. It is clear that the Claimants' firm had corresponded about the claim with the First Defendant over a lengthy period before the default judgment. This is not denied by the First Defendant, although it seeks to place that correspondence in a mitigating context.

[1] Whilst the Second and Third Defendants have appeared at each of the hearings, as I find entirely proper given the developing stance of the First Defendant, they have not engaged in any direct submissions about the First Defendant's Applications.

c. In March 2017, the Claimants had sought to extend time for service of the Claim Form as by then issued. In a supporting Witness Statement dated 15 March 2017 the Claimants' solicitor, Ms Christina Wolfe, referred to correspondence to the Defendants from November 2014 onwards urging the Defendants to nominate solicitors (preferably within this jurisdiction) because no such indication or appointment had been made. Similar correspondence had been sent in December 2016. She confirmed that owing to anticipated delay in processing of the documents for formal service in Poland, she had sent to the Defendants by Airmail the detailed Letter of Claim, a copy of the Claim Form and its supporting documentation, all in both English and Polish.

d. Copy documentation annexed to this statement illustrated the materials the Claimants sought to be served formally. The material included a letter to the First Defendant dated 29 September 2016 referring to an intention to *"have the [annexed court documents] translated into Polish in order to formally effect service in accordance with the rules".* That letter noted that the *"significant costs associated with translating and serving the required documents in Poland*" would be avoided if solicitors within this jurisdiction were appointed. There is further a letter dated 20 February 2017 to the First Defendant that referred to the Claimants' solicitors letter dated 21 December 2016 and notified that, in the absence of a response about the nomination of solicitors in England and Wales, the Claimants was preparing to serve proceedings directly upon the First Defendant in Poland.

e. An extension was granted by Order sealed 24 April 2017 and the Claimants initiated the process of formal service in Poland.

f. The Claimants' case is that the same pack of documentation featured in the March 2017 Application was served by the Polish Court, via the ordinary request from the Foreign Service Department of the Queen's Bench Division ["QBFP"] and been certified by the Polish Court as served upon all three defendants.

g. In addition to initiating formal service, on 17 May 2017, by both Airmail and e-mail, the Claimants' solicitors sent to the First Defendant a copy of the 24 April 2017 sealed Order. The form of that Order was in both English and Polish, supported by a Certificate of translation. The covering letter requested (as had previous correspondence) the First Defendant to acknowledge receipt.

h. Ms Wolfe confirms that that First Defendant took no steps either to challenge the April 2017 Order or to enquire about it. This is despite, as I find, it plainly constituting clear notification to the First Defendant that proceedings had not only been issued in this jurisdiction but were now subject to directions from this court, not in Poland.

i. Despite this sequence of non-response, Ms Wolfe's confirms how a letter of "full" denial from the First Defendant dated 22 August 2016 had previously been received. I find this a very significant event in the context of a party that chose to ignore

subsequent correspondence and thereafter formal court documents, the latter substantially on the basis that they were incomplete and so, by implication, unintelligible. The First Defendant has never suggested that the antecedent correspondence and documentation from the Claimants' firm had proved in any way confusing or incomprehensible, in either its English or Polish translations.

The submission of a "full" denial pre-issue therefore implies the First Defendant had entirely understood what was going on and concluded it would be denying liability. If this is wrong or unfair, then the only logical counter-interpretation is that the First Defendant had simply not read the documentation sent by the Claimants' firm but improvised a response by itself.

The provision of a "full denial" nine months or so before service also is central to the issue of the First Defendant's considerable delay : delay in the way it approached correctly to issue and present its Application, the form of the Application once issued (as was then sought to be amended) and after that the elaboration of its proposed defence. Put shortly, the First Defendant has had a long period of time commencing in August 2016 in which to realise that its "full-denial" was by no means closure of the proposed claim and so both to protect and to assert its position anew. The nature of service of proceedings in May 2017, as challenged by the First Defendant, is therefore but part of a larger picture.

j. Certified service on the First Defendant took place on 17 May 2017. A typical EU pro-forma certificate of service bears both the seal of the Polish Court and also, significantly, a signed receipt stamp by "SSR Malgorzata Klonowska", an employee of the First Defendant confirming receipt.

k. The Second and Third Defendants had also been served and neither of them have taken issue with service. However, they each had sought to dispute jurisdiction. Their Application was dismissed by Master Brown at a hearing on 14 July 2017, the Order following which recites satisfaction that the First Defendant also had had notice of the hearing but had not appeared and so was not represented.

l. The absence of formal appearance by the First Defendant at the July 2017 hearing, assuming there had been valid service of the Claim Form on the First Defendant, is open to interpretation. A strong inference is that any insured [the Second Defendant] would have informed its insurer [the First Defendant] of what was going on and that it was represented by Solicitors as instructed within this jurisdiction. Indeed, the ordinary practice of insurers at least in this jurisdiction would be to expect such notification and appointment, because a failure to do so might jeopardise their cover[2]. Accordingly, a further inference is that the First Defendant knew about the judgment and Application but had chosen not to become procedurally involved but instead await outcome of the Second and Third Defendants' Application. Even if this placed the First Defendant in a vulnerable position to a default judgment being entered in the interim (as transpired the case).

[2] This hardly seems an observation likely to be exclusive to insurance contracts only in this jurisdiction.

m. The basis for exploring inference as to the First Defendant's position at this early stage in the sequence is because, as I find, the First Defendant's general explanation as to what happened before its April 2019 Application is vague and undeveloped for this period. This is despite the background facts summarised above clearly inviting specific comment and explanation. In the absence of such comment, it is very difficult to accept that both procedural stance of the Second and Third Defendants should be wholly divorced from the stance taken by the First Defendant in this Application and so the First Defendant's account about being unaware of its own procedural position until a year or so later should be accepted without scrutiny.

n. Despite the outcome of the July 2017 hearing, the First Defendant did nothing in terms of responding to service. Unsurprisingly, therefore, the Claimants applied for judgment in default of Acknowledgment of Service or Defence on 23 August 2017. The absence of an Acknowledgement of Service from the First Defendant, assuming service of proceedings, precluded it from raising its own jurisdiction arguments under CPR 11.

o. In a Witness Statement dated 25 August 2017 in support of the default Application, Ms Wolfe annexed her 15 March 2017 letter as had listed enclosed documents as sent the First Defendant "both in English and Polish translation". The clear purpose, as expressed in that letter, being that such provision to the First Defendant was "*for your information and by way of informal service",* the same documents having at that date also having "*been sent for processing by the Polish Court*".

   Thus, this is not a case where the applicant defendant can assert that its only knowledge of issue of a Claim Form in this jurisdiction, along with its supporting documentation, derives from a single event of purported but defective formal service. To the contrary, the effect of the March 2017 correspondence had been sent to the First Defendant not only to notify it that proceedings had been commenced in this jurisdiction but to provide copies of the very documentation as would be formally served. Therefore, whilst informal service plainly cannot substitute the requirements of formal service, such notification and provision of copy materials to be served remains central to consideration of:

   (i) The First Defendant's overall knowledge and understanding of proceedings having been issued in this jurisdiction;
   (ii) The objective reasonableness and relevance of the First Defendant's assertion it had limited knowledge and understanding of the effect of such documents; and
   (iii) Issues of delay and discretion as underpin the April 2019 Application.

p. Despite the material around the service of documents by the Polish Court in May 2017, the First Defendant invites the court to look at that event in isolation and narrowly. It offers little if any comment as to the effect of the considerable steps by way of notification and invitation from the Claimants previously.

5. *The First Defendant's explanation for default and delay in responding to the claim and its late Application to set aside judgment*

    a. In summary, I find none of this persuasive.

    b. I do not regard it as entirely incidental that the First Defendant's Application itself was only issued upon direction of the court. A CCMC had been listed for 26 March 2019 in respect of the defended claim by Second and Third Defendants and in consequence to the default judgment against First. The Second and Third Defendants had prepared accordingly. Ms Wolfe adds she personally had also sent out a copy of the Notice of the 28 March 2019 hearing to all the Defendants but no acknowledgment had been received from the First Defendant until three days' earlier, on 25 March 2019, when the First Defendant indicated it would be sending representation to that hearing.

        Mr Kwiatkowski, Counsel instructed by the First Defendant, appeared at the hearing. He told me he had an oral application to set aside judgment that he openly accepted would somewhat upset the intended format for the hearing. The court declined to hear an impromptu oral application and instead provided a short period for a formal Part 23 application to be issued and served. Because of this, the CCMC as intended had to be vacated. Directions in the claim remain unsettled because of the First Defendant. Preparation for the ultimate resumed CCMC will be unlikely to derive much benefit, if any, from the hearing aborted in March 2019.

    c. It is hardly novel for a party applying very late to set aside a default to judgment to be expected to explain when they first knew that judgment had been entered against them. Despite this, nowhere in the First Defendant's April 2019 Application and documentation is a clear and unequivocal acceptance of a date by which it accepts it both knew about the default judgment *and* accepted it had to do something about it. I was obliged at the November 2019 hearing to ask Mr Kwiatkowski to take direct instructions from Mr Grochowalski of the First Defendant (who had personally attended that hearing) about the precise date.

        The reply was that it was "somewhere around October or November 2018".

    d. I find that delay of itself, some six months or so between admitted knowledge and Application, by a professional defendant whose insured is a co-defendant, sufficient alone to dismiss the First Defendant's Application in the absence of convincing explanation.

        The explanation for this particular period of delay is that the First Defendant felt constrained to instruct Polish speaking lawyers in this jurisdiction and this took time. I do not find this a convincing explanation. Whilst I readily follow in principle the desire of a non-English speaking party to converse with lawyers in the same language, that can hardly justify unreasonable delay given the reasonable and ready alternative of instructing English speaking lawyers in or around London

and using a Polish translator : even if only for the interim purposes of issuing the relevant Application and so avoiding any criticism of delay as to issue.

e. There is nothing in the period before "somewhere around October or November 2018" that assists the First Defendant either.

f. The detailed Witness Statement dated 15 April 2019 from Mr Pawel Grochowalski, a senior officer of the First Defendant, in support of the First Defendant's Application sets out to explain (i) why the First Defendant did not believe there were live or active proceedings in this jurisdiction until many months after the default judgment (ii) the inadequacy of the documentation apparently served (iii) the nature of the proposed Defence, if so permitted, and its merits.

g. Mr Grochowalski candidly accepts that all of his submissions are based upon his interpretation of a claims file that had been treated by the First Defendant back in 2016 as closed. He concedes that his commentary is without the assistance of any employees who were directly employed at any stage from the first correspondence from the Claimants, service of the Claim Form or subsequently. Apparently, none of them work for the First Defendant any longer. There is no discussion why they could not have been contacted to assist in the Application.

h. Either way, Mr Grochowalski's evidence is one of surmise and retrospective interpretation from the papers. At Para 6 he comments *"I can only present the matter as it arises from our files and our Internal procedures, which we have developed to date".* Hence, "*The information at points 7-9 below is only the Interpretation and not my personal account of events, that probably could have taken place and are based on my inspection of our (Inter Polska's) file and from investigation we have made recently".*

i. There is a further and very significant qualification about his evidence. I express serious concern as to the extent to which Mr Grochowalski's submissions are made truly from his own on his own knowledge and interpretation rather than with the assistance of legal advice. At end of Para 4, in the context of acknowledging receipt by the First Defendant of the April 2017 Order and supporting materials showing that that Claimants had extended time in which to serve the proceedings, appears the sentence:

"We've filed this letter to our "old" case of Mrs. Denise Mann. Could we say that this didn't make sense to TU lawyers ? -/-"

j. Mr Grochowalski explains that because a decision had been made in August 2016 to reject Mrs Mann's claim, following correspondence with the Claimants in 2015, this was seen as a closed case where there would be nothing further to do unless and until the Polish Court notified it what needed to be done. The First Defendant does not suggest it ever misunderstood the nature of the claim being intimated. The First Defendant instead suggests that it was entitled to ignore the correspondence from the Claimants' solicitors because it was not from the Polish Court.

k. He explains how Polish civil procedure is such that there can be no formal response to lawyers unless legal process has been served by the Polish Court. In respect of materials as sent directly by the Claimants' firm, he comments *"In Poland, this type of practice is simply not recognised, and it would be wrong for us to rely on them".*

   Whether this description is factually correct or not is largely irrelevant. The pertinent question not answered by Mr Grochowalski is why his company should have felt entirely entitled to assume that correspondence and proceedings emanating from another (as then) EU state could be similarly treated. Clearly, this was not correspondence from Polish lawyers in respect of Polish litigation, so discussion as to what would happen if it were does not provide a complete answer. It does not justify why, as a commercial enterprise, the First Defendant failed to make any reliable external enquiries whether its understanding about the English proceedings was correct.

l. Neither am I satisfied that Mr Grochowalski's version of how such documentation would have been treated in Polish is sufficient to persuade me that neither would any relevant employee(s) of the First Defendant who handled both the pre-service documentation and that formally served would similarly have believed it required no response. Mr Kwiatkowski's oral references to the "old country" and invitations that I take into account the conservative attitudes towards authority of a former communist state did not assist me. I am instead left uncertain whether the actual recipients of the May 2017 documentation would have understood its importance but instead failed to process it.

m. I therefore treat it as more speculation than objective observation how, at Para 7, Mr Grochowalski opines that in response to the March 2017 Order extending time for service the employee dealing with the case, Mrs Bielecka, "*could have assumed that by no later that September 2017 we should receive full case documentation from the above mentioned court including the notice regarding the hearing date, and other forms to submit by us before the hearing"*. The remark that Mrs Bielecka therefore "*correctly and according to standard of Polish law assessed the situation*" is irrelevant.

n. There is a further problem in the First Defendant's denial of the relevance of documentation because it had not received directions from the Polish Court. As stated, the 24 April 2017 Order featured provision for it to be set aside. Even if an element of uncertainty just might have been corporately shared by the First Defendant's employees, any reasonable and responsible professional organisation ought to have raised more specific enquiries as to the effect of an express provision that the First Defendant might apply *to this court* to set the Order aside.

o. This analysis remains pertinent and damaging to the First Defendant as at the date of service by the Polish Court of the Claim Form and supporting documentation in May 2017. I repeat, Mr Grochowalski offers very little about how, if at all, the First Defendant responded internally to the event. He refers to no internal process for checking and reviewing the documentation as served and any decision making in consequence, given this clearly appeared to be a revival of the claim as it had denied

in August 2016. Instead, we are told that in April 2018 [i.e. seven months after the default judgment] *"Inter Polska compensation department employee dealing with the case of Mrs Mann went on a prolonged sick leave in connection with her pregnancy".* The process of hiring a replacement took time and so ordinary internal review procedures as would have *"highlighted the matter as not finished and would further query documents"* was missed.

p. I do not find this explanation at all sufficient. It is effectively an unattractive admission that the First Defendant had no (or no effective) review procedures from the time of service of documents in May 2017 and such failure continued even when the relevant employee went on maternity leave in April 2018. Entirely without credit to the First Defendant, Mr Grochowalski admits at Para 10 that the first such review he believes took place might have been prompted more by the fact that, in June 2018, the First Defendant relocated to new offices in Warsaw *"and during the relocation work, documents of ongoing and suspended cases were reviewed as a matter of internal request. We noted we had still not received any court correspondence from the English Court".*

q. The shift of emphasis in Paras 10 and 11 away from expectation of direction from the Polish Court to an expectation of receipt of documentation *"from the Claimants"* or the "*English Court*" seems perverse and contradictory. Also contradictory is his comment [Para 13] the he was surprised to hear questions from Second Defendant's legal representatives asking the First Defendant about English litigation and the existence of a default judgment "*(B)y the end of 2018….because we have not received any formal notice from the English Court….We were not aware of the severity of the situation".*

r. The "somewhere around October or November 2018" date of first knowledge orally confirmed at the hearing is unreliable anyway.

s. At Para 17, Mr Grochowalski describes how, on date unhelpfully unspecified[3], the First Defendant had "mentioned" to one of the Polish law firms with whom they regularly deal that they had received documents from an English firm of solicitors. Because that lawyer, a Mr Stazecki, maintained a "*social relationship*" with "*a lawyer in the UK*" as a favour Mr Stazecki agreed to speak with his friend. The friend informed Mr Stazecki that "*our company will be subjected to court proceedings / trial in London".*

t. This somewhat opaque and generalised version of the response received as a result of the enquiry presumably is offered as a gentle concession that at least some information about the default judgment had percolated to the First Defendant in the months that followed. The First Defendant, however, invites the court to treat this very generalised reference as consistent with the general context of the First Defendant not really being aware of the significance of the default judgment until some time later.

[3] Only in a separate Witness Statement from Ms Supernat of the First Defendant's solicitors, dated 12 April 2019, is it confirmed that "on or around December 2017" a Polish lawyer contacted a Mark Stiebel of Charles Mia, Solicitors, in London who in turn contacted Irwin Mitchell.

A further emphasis by Mr Grochowalski is that none of this sequence establishes that the First Defendant ever formally instructed lawyers to act for it during this period, this only occurring when it instructed its current (English) firm to present an oral application at the hearing listed in March 2019. I do not find this distinction relevant to the chronology of what the First Defendant actually knew and what it might have done sooner. The distinction of not having formally instructed lawyers at that stage is not enough to displace the relevance of the information received.

u. The witness evidence from the Claimants' Ms Wolfe provides contrasting and very illuminating information.

She states that on 12 December 2017 a Mr Mark Stiebel of Charles Mia Solicitors telephoned and

> *"who stated that he was calling on behalf of the First Defendant as it had received some documentation from the English Court and he was seeking to find out the current position with the claim. I updated him on the present position with the proceedings and, in particular, that the Claimants' had obtained an Order for Default Judgment against the first Defendant and the matter would shortly be listed for hearing. Mr Stiebel asked if I would agree to have this Order set aside to which I did not agree and stated that, in accordance with the proper procedure, the First Defendant would need to make an application to Court if it wished for the court to set the Order aside. Mr Stiebel then asked if I would e-mail him a copy of the Order for Default Judgment which I duly did later the same day, again stating the need for the First Defendant to make an application if it wished to challenge the Order".*

Ms Wolfe annexes a copy of the e-mail of 12 December 2017 @ 11:13 attaching the 6 September 2017 Order and as provided a schedule of costs as at 6 October 2017, commenting further "*Should you wish to challenge the attached Order, you are free to apply to the Court accordingly".*

v. I cannot accept that this more specific version did not find way back to the First Defendant [i.e. who instead only received the more generalised and anodyne message Mr Grochowalski describes]. After all, why would each respective lawyer have gone to such initial trouble to assist and yet fail sufficiently to report back? This has nothing to do with whether they were formally instructed.

w. I find that the start of the First Defendant's knowledge of the default judgment commences a few days after 12 December 2017 and certainly not "somewhere around October or November 2018". The April 2019 Application is therefore even later than it first seems, notwithstanding the point made by Mr Kwiatkowski that provision of the default judgment by this method did not constitute formal service of the default judgment by way of CPR 23.9.

x. In conclusion, I am satisfied that the April 2019 Application should fail on the basis of significant and inexcusable delay. I do not find Mr Grochowalski's emphasis upon the First Defendant being a small niche company in the Polish insurance market and as had no previous experience of a claim against it brought in another

jurisdiction relevant. I am satisfied that such a company could and should taken reliable advice to understand about the English proceedings from service in May 2017 if not previously upon their notification by the Claimants' solicitors. This could have been done by a variety of means. If I am wrong on this, then the date should at least have been from around mid-December 2017 onwards. Even if the First Defendant first had to find a Polish speaking firm of solicitors in London to obtain legal such advice, that could never account for the extraordinary delay that elapsed.

6. I will nonetheless go on to conclude the First Defendant's other submissions.

7. *What documents were served by the Polish Court?*

   a. A fundamental question of fact arises whether the documents certified by the Polish Court as served were those submitted by the Claimants' firm and accepted by QBFP or a materially less complete set, as the First Defendant alleges.

   b. I am entitled to take judicial note that the procedure operated by QBFP is to exercise its own process of scrutiny before accepting documents for onward transmission for service out of the jurisdiction. Scrutiny, that is, as far as whether the requisite documents have been provided and in correct number and duplicate form rather than their actual content. QBFP requires and only accepts the specified number of duplicates (here two, per PD 6B 4.1) from a submitting Claimants. The list of documentation is checked to ensure both completeness of each, and consistency between, the enclosures. Any discrepancy will result in a request for re-submission.

   c. In a Witness Statement dated 5 November 2019, Ms Wolfe seeks to amplify and clarify matters of service. Ms Wolfe is a solicitor and so an Officer of the Court and so her evidence to the court, as it has to be supported by a Statement of Truth, has to be given considerable weight.

   d. Ms Wolfe confirms how a full set of documentation, including translations and certificates of translation, were sent to QBFP on 20 March 2017 in duplicate. In addition, all Defendants were individually sent by both e-mail and Airmail copies of the same documentation, with a covering letter making clear that the same documents were to be formally served by the Polish Court. She describes how on 10 June 2017 QBFP returned to her firm the duplicate set as she had originally submitted but as had been confirmed by the Polish Court as served upon the First Defendant on 17 May 2017. Ms Wolfe expressly confirms that the duplicate set as returned by QBFP retained a full copy of both originals and Polish translations of all of the documents originally submitted to QBFP.

   e. Ms Wolfe adds that the translation agency used by the Claimants, Language Link (UK) Limited, informs her that they had been directly contacted twice by the First Defendant's representatives to obtain copies of the translation certificates (as annexed to Ms Wolfe's statement). Ms Wolfe describes as "puzzling" why the First

Defendant or its representatives had never approached her firm directly for assistance but seemed to conduct its own investigations.

f. Ms Supernat, in her first Witness Statement dated 12 April 2019 on behalf of the First Defendant, refers to having attempted to "*establish the full extent of the High Court's records of foreign service processes connected with this case"* but had not been provided with "*facilities for access*" as at that date. I regret I do not really understand this commentary, not least because it mistakenly assumes that QBFP retain copies of every case it receives for foreign service and there exists a facility for their public inspection. QBFP do not retain copies but instead return to a Claimants the duplicate set as originally provided by the Claimants and will have been sent to and returned by the foreign serving agency.

   At Para 5, Ms Supernat refers to an advocate in Warsaw attending "the Court in Warsaw" to obtain "full copy of the records held" and annexes the set apparently held there. Although not entirely clear, the concluding observation appears to be that no Annex II document was included in that documentation.

g. Although the precise distinction is difficult to follow as to what is meant by "the Court in Warsaw", what system of copying or retention they operate and why, despite this going further than the QBFP as the country of origin of that documentation, such a system applies, the central proposition appears to be that (i) there was no Annex II document in that retained by "the Polish Court in Warsaw" and so (ii) the set as received from Poland by QBFP and certified as that served was different.

h. The imprecision of both the introduction of and explanation from the Warsaw advocate leads me entirely to prefer the evidence of Ms Wolfe. On balance, I accept that the documents submitted by the Claimants were those dispatched by QBFP to the Polish Court, served by the Polish Court in May 2017 and that the duplicate set (still intact) as returned to the Claimants by QBFP is clear evidence this is an identical set to that served on the First Defendant.

i. In any event, the absence of an Annex II document from the papers is agreed, the Claimants' case being that none was required anyway.

8. *EU Regulation 1393/2007: The Service Regulation*

a. The First Defendant challenges both the absence of Annex II, a document contemplates in the Regulation, in the documentation served in May 2017

b. It is useful to look at the intended procedure for the service of a Claim Form issued in this jurisdiction upon a defendant in Poland.

c. Pursuant to CPR 6.40(3)(a)(i) a Claim Form can be served in Poland by any method provided for in the Service Regulation.

d. CPR 6.41 sets out the procedure for a party wishing to serve a claim form in accordance with the Service Regulation. The party must file (a) the Claim Form or other document to be served (b) any translation and (c) any other documents required by the Service Regulation. The Claimants' firm maintains it provided all forms to the QBFP as were relevant for compliance with the Regulation.

e. CPR 6.45(3) states that every translation filed under CPR 6.45 must be accompanied by a statement by the person making it that it is a correct translation and must include the person's name, address and qualifications for making the translation. I note the First Defendant does not directly challenge that the translations were appropriately certified and carried out by a suitably qualified person. It instead takes issue with the translation of certain words.

f. Under Article 4 of the Service Regulation, service is permissible by transmission between transmitting and receiving agencies established by each Member State under Article 2. The relevant agency for England and Wales is the Senior Master (Foreign Process Section).

   QBFP then make a request in the form of Annex I of the Service Regulation. Annex I is a request form.

g. From the viewpoint of an applicant Claimants in this jurisdiction requesting service in Poland, therefore, there are only ever two sets of the Claim Form and accompanying documentation, one or both of which are returned following service (or attempted service).

9. *Annex II*

a. The First Defendant asserts that because an Annex II document was not included as part of the materials served, a material flaw arises in service. The consequence of which being that flaw has to be made good but such step would now be academic owing to the expiry of limitation. All of which means the judgment is not regular and should be set aside.

b. Article 8 of the Service Regulation provides:

> "1. The receiving agency shall inform the addressee, using the standard form set out in Annex II, that he may refuse to accept the document served at the time of service or by returning the document to the receiving agency within one week **if it is not written in, or accompanied by a translation into, either of the following languages** [my emphasis added],
>
> (a) A language which the addressee understands;
> (b) The official language of the Member State addressed…"

h. It is clear from the decision of the CJEU in *Henderson* [2019] I L Pr. 21, a case where documents served on the Irish domiciled defendant were only in Portuguese, that the right to refuse to accept service of a document stems from the need to protect the rights of the defence of the addressee in accordance with the requirements of a fair hearing enshrined in Article 6(1) ECHR and Art 47 second paragraph of the Charter of Fundamental Rights of the EU : see Para 51, page 497 of the judgment.

   This obviously reflects the importance of the addressee being able to know and understand effectively the meaning and the scope of the action against the recipient so they can prepare a defence.

i. The First Defendant denies that full translated documents were provided. However, this assertion appears in real terms to concern a few individual words of translation.

j. I agree with the Claimants' submission that the natural and ordinary meaning of Article 8 of the Service Regulation is that the receiving agency need only provide an Annex II form if the documents being transmitted do *not* include a translation. This is, I find, entirely clear from the words highlighted in the extract from Article 8 above. There seems no logical basis for suggesting that a right to object still arises notwithstanding provision of such translation. I agree that there simply is no point in offering the recipient a right to refuse when it does not exist on a correct reading of Article 8.

k. I dismiss the First Defendant's submission that Annex II ought to have been provided and, in its absence, service is ineffective.

10. *Missing documents*

Separate to his central point about the absence of an Annex II certificate, Mr Grochowalski refers to other missing documents in the materials. Even if, contrary to my primary finding that the correct documentation had been served and so these observations are after the event in response to an incomplete file, they seem of little consequence in terms of the First Defendant's attempt to argue that service should be treated as so defective that there was no recognisable service of proceedings. ineffective.

Dealing with each as listed at Para 1 in his 15 April 2019 Witness Statement:

(i) The provision of two rather than one Order (as evidenced the extension of time for service) is hardly prejudicial to the First Defendant preparing a response had it wanted to. The central point being, however, that it chose not to respond anyway;

(ii) The translation of the report of Dr Frati is not missing in terms of central narrative but the annexed photographs. Mr Grochowalski fails to explain why photographs plainly annexed to a report in one language cannot be deemed

equally to apply to a translation of that report. One does not have to read only either Polish or English to realise that the same photographs are intended to be annexed, and are referred to in the narrative body of, the same report;

(iii) Notification of Foreign Service : This point is not otherwise developed or explained. If it refers to service in May 2017, the First Defendant nonetheless acknowledged service of documents by way of the signature of Malgorzata Klonowska. There seems no question since of the First Defendant did not understand it had been served with documents emanating from a non-Polish court system;

(iv) Note of the Costs : Another point not otherwise developed or explained. Given no costs order would have been made at the point of service of a Claim Form, I do not follow this remark;

(v) Response Pack : Curiously, whilst Mr Grochowalski alleges there was no translation this runs entirely contrary to the statement of Ms Sobolewska dated 1 October 2019. This annexes both English and Polish translations of the Response Pack, commenting these constitute "*as sent*" [Para 2]. I treat this conflict in the First Defendant's evidence as not simply unfortunate but endorses why the First Defendant's allegations of incomplete documentation are unreliable and why the Claimants' evidence should be preferred.

11. *Inadequate translation?*

a. The First Defendant challenges the sufficiency of the translation of certain parts of documentation as served and submits that this negates there having been adequate service. These submissions seem somewhat academic, given Mr Grachowalski in his first statement, at Para 2, denies *any* Polish translation of the Response Pack was received. I will deal with them, however.

b. A Witness Statement from Ms Sobolewska of the First Defendant's solicitors, dated 1 October 2019, asserts that the following errors appear:

(i) The required hand amendment of the extended response periods on the N9 form featured in the English version but not Polish translation. Thus, whereas the English version correctly referred to increased time periods of respectively 35 and 21 days for the preparation of a defence, the Polish translation retained the respective pro-forma periods in the N9 of 28 and 14 days as applicable to this jurisdiction;

(ii) The Polish translation within Acknowledgement of Service tick box response suggests that the recipient might "intend to contest the *judgment* of the court" rather than "*jurisdiction*";

(iii) Within the Defence / Counterclaim section, the signature box certification of having been signed "by you or by your solicitor or litigation friend" instead read, in the Polish translation, "*of the Defendant, of his lawyer or his litigation plenipotentiary"*. The latter are the Polish equivalents to Solicitor and Barrister. However, there is no exact equivalent in Polish of "litigation friend".

c. Plainly, there is always a range of meaning attaching to any translation. For the purposes of this Application, I have to consider whether the meanings asserted by the First Defendant undermine there having been intelligible service of proceedings, despite (according to the Certification provided by the Claimants' translator) the translations having been carried out by a qualified person.

d. I find that nothing arises from these translation points.

e. Mr Grochowalski of the First Defendant does not in any way suggest that such translations were even considered upon service, still less that they caused any difficulty or misunderstanding. Had this been a case where an Acknowledgement of Service and/or Defence was late because of such a misunderstanding, this might have been a very different type of Application. As already explored, however, the actual reasons for the First Defendant's non-appearance are actually entirely different.

f. Taking them in isolation, if they could be sufficient reason alone to refute service, they are not convincing.

g. First, any party genuinely moved to ascertain the periods for a response (which the First Defendant was not) would surely have noted the discrepancy between the English and Polish translation versions because handwritten amendments to a pro-forma (in English) had not been carried over into what was plainly intended to be a translation of the same pro-forma but Polish. Therefore, whilst this specific part of the documentation is unfortunately contradictory between the two versions, few would seriously contend that the form accordingly became entirely without intended meaning or effect.

   Further, that the First Defendant took no action in response to the documents as served in 2017 until its April 2019 Application. The distinction between the Polish N9 providing the shorter time periods as afforded in this jurisdiction is entirely academic. Nothing consequential in fact hinges on this error.

h. I apply similar comment to the distinction between "jurisdiction" and "judgment". If this point is realistically to be considered, the First Defendant has to explain what confusion or consequence it had. And confirm that it had attempted to read the translation as a whole.

On Ms Sobolewska's account, the alleged mistranslation of "judgment" leads to the sentence in the accompanying explanatory notes reading "*If you do not file an application to dispute the judgment of the court within 14 days of the date of filing this acknowledgment of service, it will be assumed that you accept the court's judgment and judgment may well be entered against you".*

Any recipient acting reasonably and wanting to respond to the process, even if to challenge it, would surely spot the contradiction that there cannot possibly be both an existing judgment and also the possibility of the court entering judgment in default of their response. However, any reasonable recipient would surely still realise that *something* needed to be done within a time limit. No reasonable recipient would conclude that the contradiction was so remote and confusing that nothing need be done at all.

By way of illustration, no point is made by the First Defendant or its lawyers that there is anything misleading about the form as a whole. In particular, the preceding tick boxes 1 and 2 [whether the claim is admitted or intended to be defended]. The First Defendant's implied acceptance that tick boxes 1 and 2 were correctly translated is telling and so, I find, its reliance upon the alleged mistranslation of "jurisdiction" a distraction to the First Defendant's failure to acknowledge service at all.

I note such point did not seem to have troubled the Second or Third Defendants, who had received the same translations. They each had presented Applications to dispute jurisdiction, presumably reflecting their prompt instruction of solicitors upon service. It would perhaps be unnecessarily gratuitous of me to ask whether the First Defendant seeks to suggest that, as respectively a Polish hospital and medical practitioner, the Second and Third Defendants were somehow in a better position to understand that a primary challenge was open to them following service of legal proceedings than the First Defendant as an insurance company.

Hence, I see no reason why the court now should treat service as simply ineffective owing to such mistake as alleged.

i. The third objection, that the phrase "litigation plenipotentiary" appears rather than "litigation friend", simply has no relevance to the First Defendant. As a company, could never had been represented by a third party, whether a "plenipotentiary" or litigation-friend. I find this too a merely academic and irrelevant observation that has never been argued by the First Defendant directly as having, in fact, proved confusing or led to misunderstanding.

j. In summary, it is unconvincing for a defendant who admits to having paid no attention at all to this documentation at the time to now rely on such points as raised by its lawyers.

12. *The First Defendant's proposed Defence*

a. There is no dispute that such an Application must set out, if not produce in draft, a proposed defence that establishes a real prospect of success. Real meaning something more substantial than merely arguable.

b. The First Defendant sought to further develop its case on proposed defence without permission some six months after issuing its Application by way of a second Witness Statement from Mr Grochowalski, dated 24 October 2019. That is, only a few weeks' before the first listed hearing. A draft Defence was annexed.

c. Mr Grochowalski suggest that because "*documents relating to service of the Claim via the Hight (sic) Court's Foreign Service Process Section to the Court in Warsaw were only released to my solicitors well after the time limited for lodging this application"* he accordingly "*sincerely regret(s) that it did not prove feasible to properly identify and assess….within the period set for the presentation of the Application"* the points he now seeks to make by way of proposed defence.

d. This suggestion is, with respect, factually incorrect and misleading. It seeks to conflate submissions previously made about service with a late introduction of a proposed defence. This stance is all the less acceptable given Mrs Mann's claim had been notified to the Second Defendant as far back as March 2015, denied in September 2015 by way of a medical report commissioned by the First Defendant and then subject to the "full-denial" letter in August 2016. It is extraordinary to suggest that anything has prevented the First Defendant from producing a very finely pleaded Defence from the time it first knew about the default judgment.

e. The First Defendant seeks to disconnect any association between the Third Defendant and its insured. Mr Grochowalski suggests that the Deceased must personally have contracted with the Third Defendant because her bank statements show a money transfer directly to him. So, he contends, the Third Defendant must only in person be directly liable to her. The First Defendant's seeks to amplify this point by way of its own internet investigation to illustrate that the Third Defendant professionally practises in his own right.

f. This is a surprising argument given both Second and Third Defendant are represented in this claim by the same firm of well-known and experienced clinical negligence solicitors who do not seem to have identified any conflict of interest in this long running matter. Their Defence affirms that, by way of a single contract, they were contracted to provide service to the late Mrs Mann.

g. I note that the Deceased's consultation sheet signed by the Third Defendant was on the headed paper of the Second and bears its stamp. Plainly, therefore, they offered their services in conjunction with each other and without distinction. The Third Defendant concedes that both he and the Second Defendant provided the services.

Conversely, nothing has been produced by the First Defendant in explicitly contractual terms to show any independent contact solely with the Third Defendant.

h. The First Defendant seeks to argue that its policy of insurance "does not cover Adam Kelecinski in his own person". I am not sure that this is a separate or independent point once, as I am satisfied would be the overwhelmingly probable finding at trial, one accepts that the Third Defendant worked for the Second Defendant at least for the purposes of the services to Mrs Mann.

i. A further point is that the Second Defendant was only insured by the First for limited events such as outpatient procedures. This too is unconvincing. The Second Defendant clearly advertised its services in cosmetic surgery and the claim includes care provided to the Deceased following her surgery. As distinct from the financial extent of the First Defendant's indemnity to the Second, the proposition that the scope of the First Defendant's liability to the claim is at least limited seems a very fine one at this late stage, having regard to the sequence of events discussed above.

j. I am similarly unpersuaded that the maximum liability to indemnify [100,000 EUR for one incident and 500,000 EUR for all incidents] because the policy affords only the statutory minimum of cover, constitutes an actual defence. I remind myself that Miss Crowther QC at the first hearing offered an approximate valuation of the claim in the region of £50-100,000 and Mr Kwiatkowski, in closing the Application at the second hearing, sought to emphasise the low value of the claim as a factor to the exercise of the discretion.

13. *Conclusion*

None of the first Defendant's ancillary arguments and nothing by way of proposed defence sufficiently changes the gross and damaging picture of serious default and failure to act promptly by the First Defendant in bringing its Application.

14. *A late further Application to amend the April 2019 Application*

a. By CPR 23.6, an Application notice must state both (a) what Order is being sought and (b) why the Applicant is seeking it. Whilst Applications can differ as to the extent of the supporting narrative under (b), the fundamental requirement of clearly identifying the procedural relief or direction sought under sub-para (a) is usually well understood by legally qualified practitioners.

Further, the White Book commentary at 23.0.9 notes that:

"Every application should be made as soon as it becomes apparent that it is necessary or desirable to make it."

b. The First Defendant's 15 April 2019 Application sought an order both to set aside the default judgment and to dismiss the claim. The basis for setting aside the

judgment was first "as of right" and, in the alternative, by way of the court's discretion. There is no challenge to jurisdiction raised in the April 2019 Application.

c. By a separate Application dated 12 August 2021, the First Defendant now seeks to amend its primary Application "*by specifying that the first limb of the application which seeks to set aside the judgment as of right, shall be treated as having been brought under Part 11 of the Civil Procedure Rules".*

d. A one-hour hearing took place before me on 5 October 2021 for the purposes of deciding whether permission in principle should be granted to the First Defendant to amend the earlier Application. I made clear that, if so permitted, there would not be time and so I would not hear any substantive arguments on jurisdiction and Part 11. However, Mr Kwiatkowski clarified and confirmed at the commencement of the hearing that but for treating the April 2019 Application as encompassing a Part 11 jurisdiction challenge, no new arguments or evidence was needed. The material going to the question of permission in principle were the same as the application of Part 11, if so permitted.

e. Therefore, whilst this decision primarily is whether there should be permission to amend, by way of the First Defendant's concession it also disposes of any arguments that might be pursued if permission were granted.

f. It follows from the extensive interval between an Application in April 2019 and then an Application in August 2021 significantly to amend the former that the First Defendant bears a very heavy burden to explain why the first Application had not been put in the form now sought.

g. Before considering that explanation, I note the following.

h. First, the direction to the First Defendant at the aborted March 2019 CCMC, was that "*Any application to set aside default judgment or in respect of the validity of service of the proceedings shall be issued by the First Defendant by no later than 4pm on 15 April 2019".* Thus, the precise procedural format of the Application remained for the First Defendant to consider. Even if this direction had not been express, it clearly was for the First Defendant to consider what sort of Application was required.

i. Secondly, because it had become clear to me from what were at times less than hushed direct exchanges between Miss Crowther and Mr Kwiatkowksi during the November 2019 hearing that they disagreed as to the permissible scope of Mr Kwiatkowski's proposed submissions, I directed by e-mail following the hearing that "*The 1st Defendant shall serve and file its final skeleton argument not later than 10 clear working days before the hearing as next listed. Such skeleton argument shall clearly but succinctly identify any further submissions as will be relied upon in concluding the 1st Defendant's application but as do not appear in the skeleton argument already provided for the hearing on 11 November 2019. No*

further submissions shall be heard as do not appear in either that skeleton argument or the previous skeleton argument from the 1st Defendant unless with the permission of the court".

This direction obviously obliged the First Defendant and its representatives very carefully to review all arguments and procedural points upon which it relied in concluding its Application. I am very clear that, as a matter of good and ordinary litigation practice, that task ought immediately to follow the hearing, rather than commence shortly before the restored hearing date. The 10-day requirement sought to avoid last minute surprises. It did not mean the First Defendant need only start reviewing its part-heard Application shortly before that deadline.

j. I regret the impression is to the contrary.

k. The First Defendant did not pursue either appropriately or with any rigour the ensure a restored listing of its April 2019 Application, following the hearing in November 2019. The court had provided a restored date as 13 March 2020 but the Second and Third Defendants notified the court in January 2020 that this date did not reflect their dates. The March 2020 listing was vacated and I requested "an agreed/fully completed unambiguous PRA[4] form submitted by this Friday 13 March 2020". The First Defendant, as Applicant, bore the responsibility of complying with this simple and entirely usual requirement. However, its solicitors only submitted their own details on a PRA form (and as submitted a week later on 20 March 2020).

The failure by the First Defendant to provide a completed PRA form meant that it did not generate any referral to me for listing and so nothing happened : at least not until a year later on 5 May 2021 when the Claimants' solicitors asked for an update.

In response, the court overrode its PRA direction and the impasse the PRA default had caused and promptly listed the restored hearing for 29 July 2021.

l. Mr Kwiatkowski was late in serving his Second Skeleton argument on 23 July 2021 rather than 15 July 2021.

m. Seeded throughout the Second Skeleton Argument from Mr Kwiatkowski submitted for the July 2021 hearing were references to the First Defendant challenging jurisdiction. Miss Akram, junior counsel to Miss Crowther QC and as briefed to represent the Claimants at the resumed hearing, objected to this approach. Quite appropriately, she relied upon the express provisions for challenging jurisdiction under CPR 11, in particular rules 11(3) and (4), and how these had to have been followed, without which such arguments simply could not be pursued.

[4] A "Private Room Appointment" form [now termed a "Masters Appointment Form"] is needed for a hearing before a Master that is longer than 30 minutes and requires time estimates and dates of availability. It must be completed by the Applicant but including contribution from all parties, the failure to do so only being justified if another a party simply fails to co-operate.

Mr Kwiatkowski had to concede in the hearing that if the First Defendant was to seek to argue jurisdiction at all, it had to issue an Application on terms the court could procedurally recognise. These, according to Part 11, are quite specific.

As had happened at the March 2019 hearing, the First Defendant was therefore again given a short period of time in which pursue its proposed procedural path correctly.

n. The Third Witness Statement of Ms Supernat dated 12 August 2021 on behalf of the First Defendant concedes that jurisdiction was not raised in the April 2019 Application and that it was only when Mr Kwiatowski came to prepare his skeleton argument for the November 2019 hearing that he "discovered" the case of *Hoddinott and Others v Persimmon Homes (Wessex) Ltd* [2007] EWCA Civ 1203. However, did not "invoke" that case and "its associated procedures" because the centrality of the First Defendant's "opening argument" was to challenge whether there had been valid service in May 2017. Thus, to "trigg(er) a "jurisdiction challenge" to bad service". She submits that it therefore "was not open to [Counsel] to mount any argument explicitly relying on Part 11".

She explains that because "counsel's instructions ceased shortly after the hearing on 11 November 2019" and how, when he was "re-instructed shortly before the hearing on 29 July 2021", "it was established that the jurisprudence which has developed around *Hoddinott* is to the effect that any attempt to challenge the jurisdiction of the court to try a claim *must* be brought under Part 11 of the CPR".

Ms Supernat acknowledges the limited time for raising a challenge utilising CP Part 11 but relies upon the provisions of CPR 3.10 for the court to remedy an error of procedure.

o. The 28 September 2019 Witness Statement of Ms Palmer-Hughes, on behalf of the Claimants in response to the August 2021 Application, reminds the court of the extensive delay and protraction in the presentation of the First Defendant's April 2019 Application. She confirms that not until receipt of Mr Kwiatkowski's second skeleton argument had the First Defendant formally introduced the concept of a challenge under Part 11. She confirms that there is no such mention in any of the inter-partes file notes and correspondence on her file prior to receipt of the skeleton argument. As by then was "*one month short of 4 years since judgment in default had been obtained and a little over 2 years since the original application to set that judgment aside had been made".*

As I find pertinent, Ms Palmer Hughes comments that despite seeking to rely on Part 11 and 3.10, the First Defendant has still not filed an Acknowledgment of Service pursuant to the requirement of r.11(2), whereas the Second and Third Defendants had as far back as 5 May 2017. Their Acknowledgments had expressly confirmed that jurisdiction was challenged.

p. I have no hesitation in dismissing the First Defendant's Application for failing sufficiently, if at all, to provide good reasons both for not drafting the April 2019 Application as is now sought and for not issuing the subsequent Application to amend sooner.

q. As far back as November 2013 when the Court of Appeal handed down the judgment in *Mitchell v news Group Newspapers Limited*, it has been clear and understood that mere oversight is never likely to constitute a good reason for default. If the underlying explanation is that counsel, by way of oversight, failed properly to advise as to (on the First Defendant's case) the significance of CPR Part 11 until much later into the part-heard case, then this is hopelessly insufficient as an explanation. If, whether additionally or alternatively, the explanation is somehow that the First Defendant believed that it had the right to first challenge service as part of its "opening argument" then this manifestly misconceives the requirements of CPR 23.6 and ordinary practice. Quite simply, an Applicant does not have the right to adopt only certain arguments in an Application and reserve further significant procedural points if and when they seem more apposite.

r. In these circumstances, the propriety of proceeding to issue a further Application following the conclusion otherwise of submissions on the April 2019 Application ought to have been very carefully considered.

s. Despite, as I have with the April 2019 Application, finding that delay and lack of compelling explanation sufficient to dismiss this Application, because the Mr Kwiatkowski asserts with conviction that adding reliance upon CPR 11 is both necessary and central to the April 2019 Application, and so justifies the August 2021 Application despite its obvious lateness, I will deal with that assertion.

t. This is a case where the Applicant Defendant does not challenge the method of service but that the contents of the material served were sufficiently defective such that that did not amount to service. In other words, there was no process procedurally to acknowledge.

u. The Claimants relies upon *Shiblaq v Sadikoglu* [2003] EWHC 2128 (Comm), as being precisely on this point.

In *Shiblaq*, the defendant applied to set aside a judgment in default of acknowledgment of service, primarily under CPR 13.2 and alternatively under CPR 13.3. The foreign defendant submitted that because default judgment was obtained in circumstances where there had not been effective service and where therefore there could not be an acknowledgment of service, consequently the time for such acknowledgment never began to run. The Claimants had argued that a defendant cannot rely on defective service to bring himself within CPR 13.2. Issues as to the validity of service, or whether service has been effected at all, can do so only by making an application under CPR 11.

Mr Justice Colman at Para 24 clearly preferred the defendant's submission:

> "CPR 13.2 does not, therefore expressly provide for mandatory setting aside of the default judgment, which has been obtained in the absence, not only of Acknowledgement of Service, but of valid Service itself. However, such a judgment would clearly be irregular for the reason that it would have been obtained where there had been no relevant "default". CPR 12.3(1) obviously means that the defendant has failed to file an Acknowledgment of Service that he was under a procedural duty to file. If he was under no such duty the omission cannot be sensibly described as a default, which would entitle the Claimants to judgment. Accordingly, where the Acknowledgement of Service is not filed because there has been no valid Service, the condition in CPR 12.3 (1) (a) and (b) has not been satisfied and the Court must set aside judgment".

v. In the recent case of *YA II PN Ltd v Frontera Resources Corporation* [2021] EWHC 1380 (Comm), 2021 WL 02118218, the foreign defendant similarly made an Application to set aside a default judgment on the basis that the Claim Form had not been validly served, submitting that the conditions in CPR 12.3(1) were not satisfied prior to the default judgment being obtained.

   Neither the parties nor court was concerned about the propriety of the defendant challenging service (and hence jurisdiction) utilising CPR 13.2 rather than CPR 11.

   See Butcher J at Para 14:

   > "…Frontera submitted, YA II did not dispute, and I accept, that, as was decided in *Shiblaq v Sadikoglu* [2004] EWHC 1890 (Comm), [2005] 2 CLC 380, first judgment paragraphs 20-24, if there was no valid service, there will have been no obligation on the defendant to serve an Acknowledgment of Service, and no default in failing to do so, and a judgment in default entered in such circumstances must be set aside, subject only to the possible effect of an order retrospectively validating such service…"

w. At the hearing, Mr Kwiatowski did not appear directly to have considered the reference to *Shiblaq* in Miss Akram's skeleton argument but submitted that because *Hoddinott and Others v Persimmon Homes (Wessex) Ltd* [2007] EWCA Civ 1203 was a later authority in time, and from the Court of Appeal, his proposition as to the essential requirement of an amendment to rely upon CPR 11 remained. He did not further seek to distinguish the express reasoning in *Shiblaq* displacing reliance upon CPR 11.

x. The more recent case of *YA II* was not mentioned at the October 2021 hearing. Mindful that *Shiblaq* remains an authority cited by the editors of the notes to the 2021 White Book, following the hearing I researched whether *Shiblaq* had been judicially considered since. I notified Counsel and Solicitor for the Second and Third Defendants of *YA II PN*. I invited the First Defendant to provide any final argument why that decision did not establish that the August 2021 Application was pointless.

y. Mr Kwiatoski maintains in response that CPR 11 applies "whenever" the court is being asked to hold either that it does not have jurisdiction to try a claim or that it should not exercise such jurisdiction. Therefore, if service has failed, this clearly engages CPR Part 11. *Hoddinott* lays down a principle of general application even if the situations to which that principle applies will vary from case to case. Because *Hoddinott* is a Court of Appeal authority and subsequent to *Shiblaq*, its dicta has the effective of displacing *Shiblaq*, which authority was not in any event put before the court in *Hoddinott* in argument.

z. In passing, though, Mr Kwiatoski concedes that it would be very convenient if the court in this decision could distinguish *Hoddinott* in way that pre-empts what he portrays as the First Defendant's undesirable but highly necessary recent Application.

aa. I do not share Mr Kwiatoski's sense of inevitability or obligation as to CPR 11. I am not surprised that *Shiblaq* was not considered in *Hoddinott*, or that neither the parties nor the court in *YA II* (as decided after both of the former) felt they need to revisit *Shiblaq* in the light of *Hoddinott*.

bb. In *Hoddinott*, the Claimants had obtained an extension of time to serve the Claim Form. Before service, the defendant had applied to set the extending Order aside. In response to service, the defendant acknowledged service but did not indicate an intention to contest jurisdiction. At the hearing of the defendant's Application to set aside the extension, the District Judge had set aside that order and additionally held that a CPR 11 application challenging the court's jurisdiction was not necessary. The issue on appeal was whether CPR 11 had been engaged. The defendant argued that it was and need not because of the feature of its pre-service Application, as drew upon procedural rules on the discretion to extend time for service. The Court of Appeal considered the application of Part 11 specifically in that factual and procedural context [see paras 22 and 24] and accordingly rejected at Para 26 C the submission that:

> "..if an application is made before the filing of an acknowledgment of service to set aside an order extending the time for service, this has the effect of disapplying the requirement for an application under CPR r.11(1). There is no such express disapplication, nor does one arise by necessary implication" [my emphasis].

cc. *Hoddinott* is accordingly not an authority for the proposition that the incidence of *any* Application [whether or not before Acknowledgment of Service] can have no effect if jurisdiction is sought to be challenged. The reasoning in *Shiblaq* is entirely compatible with *Hoddinott* if, as distinct from *Hodinott* as concerned a challenge to an extension of time[5], the substance of the post-service Application innately draws upon jurisdiction because it directly challenges whether there has been service at

[5] Or *Caine v Advertiser and Times Ltd* [2019] EWHC 39 (QB), a further case relied upon by the First Defendant in support of its proposition, as concerned a strike out application

all. This analysis precedes the emphasis in *Hoddinott* of the importance of a party disputing jurisdiction in the Acknowledgment of Service if jurisdiction is to be challenged and so justifies separate consideration.

This is not to say that a party must instead always follow CPR 13.2 rather than CPR 11 in these circumstances, the interplay of which I note was discussed (but not ruled upon) at Para 18 *Newland Shipping v Toba Trading* [2017] EWHC 1416 (Comm).

For the present purposes, I need only say that I reject the First Defendant's proposition that, having elected to pursue a challenge as to service utilising CPR 13, a step entirely supported by the authority of *Shiblaq*, it is nonetheless now obliged – and at a very late stage and at the additional expense of time and cost – to seek to graft further material under Part 11.

dd. I am quite satisfied that the August 2021 Application should be dismissed for this reason too.

15. *Next Steps*

I noted that Statements of Costs had been served in anticipation of the July 2021 hearing. It became clear at the conclusion of the hearing, not least because of the necessity for a yet third hearing arising from the August 2021 Application, that a summary assessment on the papers would not be appropriate.

If a party has not yet served their Statement of Costs, they should do so immediately upon the handing down of this judgment. If, as I assume will be the case, there is no agreement on costs, I ask the Claimants to e-mail both me and my clerk no later than 14 days following the handing down to list a costs hearing. That request should provide mutual dates to avoid and suggested time estimate(s). I make clear, however, that I do not wish to see the costs hearing unreasonably postponed. The CCMC in this case ought to be restored sometime in early 2022. Three years after the aborted March 2019 CCMC is quite unacceptable as it is.