

Neutral Citation Number: [2026] EWHC 2256 (Comm)

Case No: CL-2020-000524

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 02/09/2026

Before :

MR CHRISTOPHER HANCOCK KC

Between :

**INNER MONGOLIA KING DEER CASHMERE
COMPANY LIMITED**

Claimant

- and -

**HAIAN MA (OTHERWISE KNOWN AS HARRY
MA)**

Defendant

Jeffrey Bacon (instructed by Saunders Law) for the Claimant
Philip Marshall KC and Gareth Tilley (instructed by McDermott Will & Schulte) for the
Defendant

Hearing dates: **10 February 2026**

JUDGMENT

MR CHRISTOPHER HANCOCK KC:

Introduction and background facts

1. This was the hearing of an application by the Defendant, Mr Ma, to set aside a default judgment entered against him on 12 May 2024 and various freezing orders made against him, together with various related applications made by the Claimant for orders for costs and further sanctions. In the exercise of my case management discretion, I decided to hear and determine the setting aside application first. Other matters have been adjourned pending my decision on this.
2. The nub of the claim is that it relates to an agency between IMKD (who manufacture cashmere products in China), and Mr Ma, who was IMKD's UK agent for selling such products to Marks & Spencer ("**M&S**"). It is common ground that Mr Ma became IMKD's UK agent in relation to the sale of cashmere products to M&S in 2004. On his case, this was pursuant to a written Exclusive Agency Agreement ("**EAA**"), with a term that ran until at least 2020. IMKD say the EAA never applied, but they accept, as I understand matters, that there was some form of agency.
3. The terms of the EAA were unusual in that they essentially allowed Mr Ma, by way of commission, to make whatever profit he could, as his entitlement was the difference between the price set by IMKD and whatever price Mr Ma could negotiate with M&S. Thus, cl.3.3 of the EAA provided that his remuneration was to be "*the difference in price between the price at which products are sold to Marks & Spencer UK by [Mr Ma] and the price of products supplied to [Mr Ma] by [IMKD]*".
4. Initially, according to Mr Ma, M&S paid either IMKD or its Hong Kong subsidiary King Deer (Hong Kong) Limited ("**KDHK**"), who paid Mr Ma's commission to his (then) company Zian Hi-Tech (UK) Limited ("**Zian**"). On his case, however, in 2005 KDHK was removed from IMKD's business, which meant a new Hong Kong subsidiary needed to be found to receive certain payments from M&S. Mr Ma says that he incorporated Kingdeer Cashmere Limited ("**KCL**") and used it for that purpose, with the full knowledge and consent of IMKD. As matters then stood, M&S were making some payments to IMKD direct and some to KCL. KCL was retaining sums that Mr Ma was entitled to earn as commission (as opposed to remitting it to IMKD only for IMKD to pay it on to Mr Ma or

Zian), and there were annual reconciliations in 2006, 2007 and 2008 and balancing payments made to IMKD on those occasions when KCL had been paid more than the amount to which Mr Ma was entitled.

5. Then in 2008, on Mr Ma's case, the payment arrangement changed again for reasons internal to M&S. The end result, he says, was that M&S would pay the whole amount to KCL; KCL would withhold the amount of Mr Ma's commission; KCL would then remit the balance to another company associated with Mr Ma called "Toplink" (who were responsible for paying the suppliers of trims and accessories applied to the garments); Toplink would retain a sum in respect of trims and accessories, and then remit the balance to IMKD ("**the Revised Payment Arrangements**").
6. In their Particulars of Claim, says Mr Ma, IMKD appear to accept that in 2008 they entered into a "Payment Agreement" under which they would be paid through Toplink and they accept that Mr Ma was entitled to profit from what they describe as an "*onward sale by Toplink to M&S*". The written Payment Agreement itself makes no reference to KCL's role in these arrangements. Mr Ma's case is that this is because there were originally two options discussed with M&S, one of which involved KCL and the other of which did not; the Payment Agreement reflected one of those options, but not the one that was actually implemented. Be that as it may, Mr Ma's case is that IMKD knew how things actually operated.
7. These arrangements worked perfectly well for several years.
8. Then on 4 September 2014 IMKD purported to terminate the EAA. Mr Ma says that this was a repudiatory breach, since it had 6 more years to run. Mr Ma's case is that during this time he would have earned some \$19 million in commission.
9. At or about the time of the termination notice, KCL had some \$9.4 million of money paid by M&S in respect of IMKD-manufactured garments. Mr Ma accepts that he caused KCL not to pay that money up the chain to Toplink and then to IMKD. This was because, he says, he had a claim for compensation for repudiatory breach of the EAA which would far exceed this sum.

10. The reason given by IMKD for the termination was, according to IMKD, because M&S did not want to deal with companies that used “middlemen” anymore. Mr Ma denies this, stating that he has seen no evidence of such. But even if this was correct, he argues that that was no reason to terminate the EAA. The terms of the EAA permitted Mr Ma to act as agent to negotiate purchase contracts with M&S and conclude them on IMKD’s behalf: see e.g. cl.4.1, “[IMKD] appoints [Mr Ma] to act as exclusive agent with general powers in relation to the sale to Marks & Spencer UK of products processed by [IMKD]”. Transactions involving Mr Ma would not therefore have involved a “middleman” but would have resulted in contractual relations between IMKD and M&S directly. Accordingly, Mr Ma’s case is that the termination of the EAA was a repudiatory breach giving rise to a counterclaim for his lost profits for the remainder of the term of the EAA.
11. Alternatively, Mr Ma argues that he has a claim for compensation under the Commercial Agents (Council Directive) Regulations 1993. The amount of damages and compensation is substantial, amounting to some \$19 million plus interest since it ought to reflect the loss of remuneration to be expected over the life of the agency under the EAA.
12. In 2015 IMKD issued proceedings in China against both Mr Ma and Toplink in which it placed reliance on the EAA and the Payment Agreement and claimed under Chinese law for the payment of the sum of \$9.4 million alleged to have been wrongfully withheld. Mr Ma says that IMKD failed to serve those proceedings on Mr Ma but nevertheless went on to seek and obtain a default judgment in 2019.
13. On 14 August 2020 IMKD then issued these proceedings against Mr Ma alone. As originally formulated this was a claim for payment of funds wrongfully retained, disavowing reliance on the EAA and applying English rather than Chinese law. But, in the four months that passed before service, claims for breach of fiduciary duty and fraud were added.
14. When the claim was served in December 2020 it was accompanied by the Chinese judgment.
15. Initially Mr Ma applied to stay the proceedings on the basis that the EAA contained an arbitration agreement (“**the s.9 Application**”). Thereafter, the following events took place:

- (1) Directions were given on 10 March 2023;
 - (2) The trial of the s.9 Application was fixed in July 2023 for a 4-day hearing to take place commencing on 15 April 2024. Mr Ma consented to attend for cross-examination;
 - (3) In December 2023, IMKD sought further directions in relation to the s.9 Application (which were given on 19 February 2024). Those directions were not complied with by Mr Ma, leading to a hearing on 27 March 2024;
 - (4) Shortly before that hearing, Mr Ma's then solicitors Zhong Lun had applied to come off the record, which the Court dealt with on 27 March 2024, 3 weeks before the hearing of the s.9 Application was due to commence on 15 April 2024;
 - (5) At the hearing on 27 March 2024, the s.9 Application was dismissed and struck out; and
 - (6) Directions were given for the filing and service of a defence by 4.00pm on 13 May 2024;
 - (7) IMKD sought and obtained a freezing injunction without notice on 24 May 2024, which was continued by Knowles J on 14 June 2024; and
 - (8) The various orders were served on Mr Ma at Mulberry Cottage, a house in the UK which he had connections with. In addition, they were emailed to Mr Ma in China.
16. It is Mr Ma's case that, whilst he was in China he was experiencing difficulties accessing his emails. It is also his evidence that he had been suffering from medical problems from 2023. He says that he only learned of the order to serve a defence on 6 June 2024, at which point he was still very ill; that very day he experienced "*dizziness, unstable walking and excessive sweating*" and was admitted to hospital and diagnosed with a cerebral infarction on 19 July 2024.

17. It was argued by Mr Ma that the most pressing thing to deal with thereafter was complying with the disclosure requirements of the freezing order. MWS were instructed on 27 June 2024 and received funds on account on 1 July 2024 and were then able to start work.
18. MWS then communicated with Saunders Law and came on to the record on 2 July 2024. They sought, and were given, an extension of time within which to file evidence in response to the freezing order.
19. On 8 July 2024, without notice, IMKD made an application for a default judgment and a continuation of the freezing order in aid of judgment. That application was heard by Foxton J (as he then was), and both applications were granted. Mr Purcell's affidavit disclosed the fact that Mr Ma now had solicitors on the record, but this fact was not, it would appear, discussed at the hearing.
20. This set aside application was issued on 30 July 2024, and a draft defence and counterclaim was served at the same time.
21. Following this:
 - (1) IMKD issued an application (for an immediate debarring or unless order in relation to various unpaid costs orders) and there was a dispute as to whose application would be heard first.
 - (2) That dispute had to be decided at a hearing, which took place before HHJ Pelling KC on 4 April 2025. HHJ Pelling KC ordered the Applications to be heard together, except that the discrete question of the costs of the s.9 Application ("**the s.9 Costs**"), and Mr Ma's application for permission to rely on expert medical evidence would be heard first.
 - (3) That hearing was listed before Andrew Baker J on 23 September 2025, by which time Mr Ma had paid the s.9 Costs with interest.
 - (4) Andrew Baker J gave directions providing a period of time for IMKD to serve its responsive evidence in relation to Mr Ma's application and for Mr Ma to serve his reply evidence.

- (5) He also ordered that IMKD should pay the costs of the application for permission to adduce expert medical evidence, and ordered an interim payment on account of those costs (with a stay of execution).

The application to set aside: the relevant legal principles

22. It was Mr Ma's case that under CPR13.3(1) the court may set aside a default judgment if the defendant has a real prospect of successfully defending the claim. This is essentially the same test as applied to summary judgment applications (see White Book 2025, para 13.3.1). CPR13.3 reads as follows:

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

13.3

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

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

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

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

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

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

(Rule 3.1(3) provides that the court may attach conditions when it makes an order)

23. Mr Ma therefore argued that 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 (CPR13.3(2)). When considering promptness “*there is no arbitrary time limit and...each case must ultimately depend on its own facts*” *Regione Piemonte v Dexia Creditop SpA* [2014] EWCA Civ 1298 at [35] (Christopher Clarke LJ). Rather, it is question of weighing the time taken to issue the application against the prospects of defence and the justification given for any delay: see *Lombard North Central plc v European Skyjets Limited (in liquidation)* [2020] EWHC 679 (QB) (Freedman J) at [106]-[111], applying *Standard Bank*

plc v Agrinvest International Inc [2010] 2 CLC 886 (CA) at [21]-[22] (Moore-Bick LJ) and *Regione Piemonte* at [36] (Christopher Clarke LJ).

24. Further, said Mr Ma, following *FXF v English Karate Federation* [2023] 1 WLR 1097 (CA) at [7], [63], the criteria in *Denton v TH White* [2014] 1 WLR 3926 (CA) apply to an application to set aside a default judgment, namely (1) identify and assess the seriousness and significance of the failure; (2) consider why the default occurred; and (3) evaluate all the circumstances of the case so as to enable the court to deal justly with the application (including factors (1) and (2)). The focus is on the instant breach – the failure to file a defence – which was sought to be corrected in a matter of weeks in this case. It is also apparent, said Mr Ma, from the judgment of Vos LJ at [71] that the merits are of particular importance in applications concerning default judgment.

25. The Court of Appeal, in that case, said the following.

“63. In my judgment, the [Denton](#) tests do, as I have said, apply to applications to set aside default judgments under [CPR r 13.3](#). There are a number of reasons for this.

64. First, just as Moore-Bick LJ held analogously in [Hysaj](#), it is now far too late to depart from the position enunciated clearly by the Court of Appeal in [Hussain](#), [Piemonte](#), [Gentry](#), and [Family Channel](#). [Piemonte](#) was a default judgment case and decided expressly that the [Denton](#) tests applied. The words at para 40 in [Piemonte](#) that I have just mentioned did not detract from that decision. “All the circumstances” and the overriding objective are directly relevant at the third stage of the [Denton](#) analysis.

65. Secondly, [Matthews](#) was not a case about setting aside a default judgment. [Rule 26.7](#) of the Trinidad and Tobago [CPR](#) is in a different form from our [CPR r 3.9](#), in that it provides that the court may “grant relief only if it is satisfied” of three prescriptive matters: (a) the failure to comply was not intentional, (b) there is a good explanation for the breach, and (c) the party in default has generally complied with all other relevant rules, practice directions, orders and directions. Lord Dyson’s reasoning that I have summarised at para 32(ix) above drew attention to the difference between these conditions and the requirements of [rule 13.3](#). It may be, as Lord Dyson said in [Matthews](#), and Moore-Bick LJ accepted in [Hysaj](#), that the reasoning on [rules 26.6\(2\) and 26.7](#) of Trinidad and Tobago’s [CPR](#) applied “with equal cogency to [CPR rr 3.8 and 3.9](#)”. To spell it out, [rule 26.7\(2\)](#) and [CPR r 3.9](#) provide expressly that “where a party has failed to comply with” rules or court orders, “any sanction for non-compliance imposed by the rule or the court order has effect” unless relief from the sanction is obtained. This formulation contemplates the sanction in question being imposed by the same rule or court order with which the party has failed to comply. In the case of a default judgment, the “sanction” is imposed by a subsequent court order made when the default judgment is obtained. Like Moore-Bick LJ, however, I do not think that

this logic is conclusive. [CPR r 3.9](#) was amended for the reasons and in the manner explained in [Denton](#) and [Mitchell](#) . It was intended to send a general signal to the legal community that there would be a “tougher more robust approach to rule-compliance and relief from sanctions” in support of the revised overriding objective. This was the origin of the [Denton](#) tests deriving, as they do, from the express words of [CPR r 3.9](#) . Accordingly, I do not think that this court would now be justified in preferring the reasoning in [Matthews](#) to that, taken together, in the six forceful decisions of this court in [Hussain](#) , [Mitchell](#) , [Denton](#) , [Piemonte](#) , [Gentry](#) , and [Family Channel](#) .

66. Thirdly, the [Denton](#) tests are actually peculiarly appropriate to the exercise of the discretion required once the two specific matters mentioned in [CPR r 13.3](#) (merits and delay in making the application to set aside) have been considered. The first two tests focus attention on the delay in complying with the requirements of [CPR r 15.2](#) , which provides that “a defendant who wishes to defend all or part of a claim **must** file a defence”, and the third test brings into consideration all the circumstances of the case including the two critically important stated factors. What we said at para 34 in [Denton](#) bears repetition:

“Factor (a) makes it clear that the court must consider the effect of the breach in every case. If the breach has prevented the court or the parties from conducting the litigation (or other litigation) efficiently and at proportionate cost, that will be a factor weighing in favour of refusing relief. Factor (b) emphasises the importance of complying with rules, practice directions and orders. This aspect received insufficient attention in the past. The court must always bear in mind the need for compliance with rules, practice directions and orders, because the old lax culture of non-compliance is no longer tolerated.”

67. Fourthly, as I indicated at para 51 above, [Gentry](#) actually provides an example of how the exercise under [CPR r 13.3](#) and the application of the [Denton](#) tests ought to be undertaken. The merits are dealt with first at para 28. Next, the delay in making the application to set aside is dealt with at para 29–35. I turned then to consider the [Denton](#) tests, dealing with the pre-judgment delay and the excuses for it at para 36, and “all the circumstances of the case, so as to enable [the court] to deal justly with the application, including [factors (a) and (b)]” at para 37. In some—perhaps many—cases, additional factors included in the overriding objective (or even other relevant factors) will need to be considered at this stage when the court is exercising its discretion. The relevant factors are not closed. What is critical, however, I can repeat once again for yet further emphasis, is the need to focus on whether the breach has prevented the court or the parties from conducting the litigation (or other litigation) efficiently and at proportionate cost, and the need to enforce compliance with rules and orders.

68. My fifth reason must be stated without it being meant to be unduly critical. The judges in [Cunico](#) and [PXC](#) seem to me to have adopted an unduly academic approach to the problem with which they were faced. The default judgment entered under [CPR rr 15.3](#) and [12.3](#) is obviously a sanction “imposed for any failure to comply with any rule”, in the sense that it would not have been granted if the defendant had filed its defence in compliance with the mandatory provisions of [CPR r 15.2](#) . These decisions took an unduly nit-picking approach to what has been deliberately intended to change the culture

of civil litigation. Parties to civil proceedings and their solicitors need fully to understand that flouting rules and court orders will simply not be tolerated...

71. I am fortified in this conclusion by the fact that, in my judgment, approaching the matter as I did in [Gentry](#) , I would have reached the same conclusion. Dealing with the matter briefly: (i) there is and was no doubt in this case that the IKA has a real prospect of successfully defending this claim, (ii) the IKA did not make its application to set aside promptly, but that factor did not inconvenience other court users, and I agree with the Master that the unexplained delay did not, in this particular case, eclipse the merits of the proposed defence, (iii) the delay in filing the defence was obviously serious and significant, (iv) despite counsel for the IKA's best efforts, the insurance issues and investigation of liability did not provide an adequate explanation for the delay, (v) the stage 3 [Denton](#) test allows the court to consider the justice of the case and the effect of the case on other court users, including the need to enforce compliance with the rules; whilst these factors, alongside the unexplained delay militate against setting aside the Judgment, the unusual situation of the IKA itself and its somewhat tenuous connection to the tortfeasor reinforce the fact that the IKA seems to have a real case on the merits that deserves to be tried. This is a very serious claim as I pointed out at the start, and it merits the court's proper attention."

26. Where the reason for the default is illness, it was argued that the correct approach is explained in *Mohun-Smith v TBO Investments Ltd* [2016] 1 WLR 2919 (CA) (a CPR part 39.3 case). This concerned an application to set aside judgment given following non-attendance at a trial for medical reasons. Lord Dyson MR stated that where there was a reasonable prospect of success, the court should “*not in general adopt too rigorous an approach to the question whether a good reason had been shown*” (at [24]) because the touchstone was the overriding objective and the need to give effect to the applicant’s Art. 6 rights (at [28]).

27. Lord Dyson said:

“24. I recognise that an appellate court should be slow to interfere with a decision of a lower court on the question of whether a litigant had a good reason for not attending a trial. Such a decision is a fact-sensitive evaluation made in the light of all the circumstances. It is the kind of decision that an appellate court will only strike down for reasons analogous to those which justify interfering with an exercise of discretion. But in making that assessment, the judge must have regard to the guidance given in the [Pereira case](#) [2011] 1 WLR 2391 and the [Estate Acquisition case](#) [2006] CP Rep 32 and the need, when applying [rule 39.3\(5\)\(b\)](#) , to seek to give effect to the overriding objective of dealing with cases “justly” and to comply with [article 6 of the Convention on Human Rights](#) . This is particularly important where, as in the present case, the party has a reasonable prospect of success at the trial. In such a case, the court should usually not

adopt a very rigorous approach to the question whether the litigant has shown a good reason for not attending.

25. *At first sight, it might appear that there is a conflict between the Pereira guidance (which is similar to that given in the Estate Acquisition case) on the one hand and the guidance given in the Levy case on the other hand. Nothing that I say in this judgment should be interpreted as casting doubt on the guidance given in the Levy case. Generally, the court should adopt a rigorous approach to scrutinising the evidence adduced in support of an application for an adjournment on the grounds that a party or witness is unfit on medical grounds to attend the trial. In [Denton v TH White Ltd \(De Laval Ltd, Part 20 defendant\) \(Practice Note\) \[2014\] 1 WLR 3926](#) , para 89 Jackson LJ emphasised the general undesirability of adjourning trials in the context of applications under [CPR r 3.9](#). I entirely agree with what he said.*

26. *But I accept the submission of Mr Burgess that there is a material distinction between an application under [rule 39.3\(3\)](#) and an application for an adjournment of a trial. If the court refuses an adjournment, there will usually be a trial and a decision on the merits, although the unsuccessful applicant will be at a disadvantage, possibly a huge disadvantage, by reason of the absence of the witness or the party himself. Despite their absence and depending on the circumstances, it may still be possible for the disadvantaged claimant to prove the claim or the disadvantaged defendant to resist it. I accept that, in some cases, the refusal of an adjournment will almost inevitably lead to the unsuccessful applicant losing at trial. That is a factor that must be borne in mind when the court exercises its discretion in deciding whether or not to grant an adjournment. But if the application to set aside a judgment under [rule 39.3\(3\)](#) fails, the applicant will have had no opportunity whatsoever to have an adjudication by the court on the merits. This difference between an application under [rule 39.3\(3\)](#) and an application for an adjournment of the trial is important. Although it has not been articulated as the justification for generally adopting a more draconian approach to an application for an adjournment than to an application under [rule 39.3\(5\)](#) , in my view it does justify such a distinction. It follows that the judge should have applied the Pereira guidance rather than the Levy guidance in so far as there is a difference between the two.*

27. *Although the judge correctly referred to the Pereira guidance, it seems to me that he lost sight of it when he came to consider whether there was a good reason for Mr Robinson not attending on 30 June. He made no mention of it when he came [2014] EWHC 3241 at [21] to make his overall assessment of whether a good reason had been established. At para 18, he said that the fact that the GP's initial diagnosis was made over the telephone and in advance of any physical examination “does not encourage confidence in the accuracy of the diagnosis”. But he rightly went on to consider the rest of the medical evidence, including the opinion expressed by the doctor after she had seen Mr Robinson. The unequivocal effect of all the evidence was that, in the opinion of the doctor, Mr Robinson was suffering from stress and on that account he was not fit to attend court during the week commencing 30 June. The judge did not say in terms that he rejected this opinion. He expressed misgivings about it. I accept that it would have been better if the evidence had been more comprehensive in the respects suggested by the judge. The evidence might not have sufficed to persuade the judge on the basis of the*

Levy guidance to accede to an application to adjourn the trial on 30 June. But that was not the application that the judge had to deal with on 31 July. He had already refused the application for an adjournment on 30 June and there was no appeal from that decision.

28. Having identified shortcomings in the defendant's evidence, the judge should have reminded himself of the general need not to adopt a very rigorous approach and to have regard to the overriding objective of dealing with cases "justly" and in accordance with [article 6](#) of the Convention. This was particularly important in a case where (i) the claim was for approximately £2m; (ii) the defendant had a defence which had reasonable prospects of success; and (iii) it must have been apparent that a refusal to set aside the earlier decision would be likely to have very serious consequences for the defendant. The judge knew that this was a small company. In my view, he adopted too rigorous an approach to his assessment of the medical evidence. If he had kept the Pereira guidance in mind, he could not reasonably have rejected the doctor's opinion. If the sick note had stood alone, I do not consider that, even in the context of an application under [rule 39.3\(3\)](#), the judge could have been criticised for dismissing it. But there was evidence that the doctor's opinion was based on an examination of Mr Robinson. The opinion expressed in the sick note was confirmed by the doctor in her letters dated 25 and 30 July. I do not consider that there is much force in the point made by Mr Lazarus about the different causes to which the defendant attributed Mr Robinson's stress. The differences do not cast doubt on the medical opinion that Mr Robinson was suffering from stress and unfit to attend the trial. More importantly, the judge did not take these inconsistencies into account in reaching his decision."

28. Mr Bacon, who appeared for the Claimant, very helpfully made clear that there was no dispute of principle between the parties. Instead, the issue was as to the application of the principles to the dispute. I take each point in turn.

Arguable defence

29. I do not need to go into this limb of the test in any detail, since Mr Bacon accepted that Mr Ma had an arguable defence to the claims. In very brief outline, Mr Ma's defences fell into both positive and negative categories.

(1) First, on the negative side, Mr Ma argued that there were flaws in the Claimant's case, as a matter of law, for a number of detailed reasons. It would not be appropriate for me to express any views on these contentions at this point, and I do not do so. Suffice it to say that the issues raised were many and various.

- (2) Secondly, on the positive side, issues of limitation and set off were raised by way of defence. Again, I do not consider these in detail, given the common ground that these defences were arguable.

Application made promptly

30. I turn next to the question of the promptness with which the application to set aside was made. Mr Ma's case was that default judgment was entered on 12 July 2024. The application was issued on 30 July 2024, 18 days later. In this regard, it was argued that MWS learned of the entry of default judgment on 16 July 2024; that same day Mr Ma was travelling to China for medical treatment, and was hospitalised for 4 days on 19 July 2024 and diagnosed with a cerebral infarction and depression (amongst other things); the application was prepared as quickly as possible, bearing in mind it involved the assimilation of a large volume of material, drafting a defence to a complex claim, and obtaining the necessary medical evidence.

31. In response to this, IMKD submitted that it took Mr Ma nearly 10 weeks after the date ordered for his Defence (13 May 2024) to make the Application. It argued that this, in all the circumstances, was a lengthy delay.

- (1) First, it urged me to take the background into account, both in relation to delay and in relation to the question of the circumstances of the case (the third Denton criterion). Mr Ma had chosen to disengage from the litigation. He had gone to China in March 2024, with a return booked for June 2024, in the knowledge that a hearing on the s.9 Application was due to take place during the period of his proposed absence; and he had chosen not to give instructions to his then solicitors, Zhong Lun, who had come off the record as a result. That in turn led to abortive hearings in front of Sean O'Sullivan KC and Picken J, the latter of whom dismissed the s.9 Application and gave directions for the litigation to continue in Court. As a result of this conduct, the Claimant had been put to increased cost, and the litigation had been substantially delayed. IMKD urged me to find that the medical evidence, in particular that of Dr Wang, as to the state of Mr Ma's cardiovascular health during this period was not reliable, and that, in particular, that evidence did not go so far as to establish that he could not engage with

the litigation at all during this earlier period. Moreover, Mr Ma's evidence that he assumed that Zhong Lun would deal with the matter was simply not credible.

(2) Secondly, following the entry of the default judgment, IMKD argued that Mr Ma had not applied with promptitude.

(a) Mr Ma had been sent (by email and by post) copies of Picken J's judgment requiring a defence to be served by 13 May 2024. His evidence that he did not open his emails because he was travelling and because of difficulties of opening emails in China was not satisfactory.

(b) Even on Mr Ma's case, he received a copy of that judgment when he received the bundle of documents including the judgment and order of Knowles J in June 2024. He then instructed solicitors in late June but no attempt was made at that stage (in early July) to obtain an extension of time for the service of a defence. Had such an attempt been made, then there is no reason to suppose that a default judgment would have been entered.

Discussion and conclusions on promptness

32. The first issue is what the relevant start point is in this regard. IMKD suggested it was the date on which the defence was due, i.e. May 13 2024, rather than the date on which the default judgment was entered, i.e. July 12 2024. In my judgment, the latter is the relevant date, for the following reasons:

(1) The principles of Mitchell and Denton are engaged because this is an application for relief from sanctions. Here, the relevant sanction was the entry of the default judgment. Before that, there was no sanction to seek relief from.

(2) I am reinforced in this conclusion by the provisions of CPR 13.3. The application that is required under this head is an application to set aside a default judgment. No such application could be made unless and until that default judgment was entered – here 12 July 2024.

33. Accordingly, the relevant period of delay here was 18 days.

34. I turn to the reasons for *this* 18 day delay. Earlier periods of delay are, in my judgment, not relevant at this stage of the inquiry, although they may be in relation to later stages of that inquiry.

35. The relevant chronology has been set out above. I would emphasise the following:

- (1) As at the moment of entry of the default judgment, Mr Ma was engaging in the litigation. He had instructed solicitors and they had been put in funds, and they were corresponding with IMKD's solicitors.
- (2) Unfortunately, for whatever reason, no request for an extension of time for the service of a defence was made by Mr Ma or his solicitors at that stage. I do not intend any criticism by this. I accept the submission that the recently instructed solicitors had a great deal to get to grips with in a very short time.
- (3) It does not seem to me that there is any sufficient proof that a substantial part of *this particular delay* was due to medical problems on the part of Mr Ma. As I have noted, there was a particular brief episode in mid-July, just after MWS learnt of the default judgment, during which health problems may have been relevant; but this was a brief period only. The majority of the time was due to the need for the newly instructed solicitors to collate the necessary information and prepare the defence and application.
- (4) Finally, although I return to the subject of the overall medical evidence below, I am satisfied on the basis of the written evidence that Mr Ma was suffering from health problems.

36. Overall, I have concluded that the application was clearly made promptly.

The Denton criteria

37. I turn, in the light of my conclusions as set out above, to the broader Denton criteria relied on by IMKD. All of these matters, as I understood it, were said to be relevant to the third

stage of the inquiry, namely the consideration of all the circumstances of the case so as to deal with the application fairly.

- (1) First, IMKD relied on the fact that, at the outset, Mr Ma applied to set aside all orders except that relating to the dismissal and striking out of the s.9 Application, including therefore the order that Mr Ma pay the costs of the s.9 Application. It is only more recently that Mr Ma accepted that he had to pay the costs of the s.9 Application and has done so.
- (2) Secondly, IMKD relied on the fact that four years have been wasted because of the unsuccessful s.9 Application.
- (3) Thirdly, IMKD relied on the Court time that was wasted by reason of the s.9 Application.
- (4) Fourthly, IMKD relied on the fact that Mr Ma had changed his case on various occasions, in relation to what had happened in relation to emails, what had happened in respect of the retention of monies, and in relation to correspondence sent in his name. All of this was unsatisfactory.
- (5) Fifthly, IMKD relied on Mr Ma's decision to go to China knowing that a Court hearing had been fixed, which showed that he treated this Court with contempt.
- (6) Sixthly, IMKD said that some of the evidence which Mr Ma had caused his solicitors to put forward was false, in particular in relation to the moving around of his assets.
- (7) Lastly, IMKD said that Mr Ma had not given full and frank disclosure in relation to his alleged impecuniosity.

38. I turn to Mr Ma's responses. It was said, on his behalf, that:

- (1) Mr Ma has suffered from numerous chronic diseases prior to 2024. By 2023 he was suffering from a depressive episode that was moderate to severe, and his depression persisted for the next 6 months. On 6 January 2024 he suffered a transient cerebral ischaemic attack, or "*mini-stroke*". These can be unpredictable. This led to further

treatment including a CT scan on 1 February 2024 and on 13 March 2024 he was diagnosed with coronary arteriosclerosis. He had persistent chest tightness and fatigue over this period. He was hospitalised again on 5 June 2024 when in China – another mini-stroke – and again on 19 July 2024. Whilst there is clearly a difference of opinion between Dr Wang and Dr Pilgrim on the one hand, and Dr Gupta (for IMKD) on the other as to the degree to which Mr Ma was disabled from participating in proceedings. Dr Wang says Mr Ma was “*greatly restricted*” and “*seriously impaired*”; (Dr Pilgrim says he was “*prevented from participating meaningfully*”.) Dr Gupta on the other hand considers Mr Ma’s behaviour consistent with “*volitional withdrawal*”. What Dr Gupta does not challenge, however, is what Mr Ma was suffering from. He did have a mini-stroke. He did have depression. He was advised by Dr Wang to stop all work and rest. He did have multiple hospital admissions and treatments over a period of months. The cumulative effect of these things over a long period of time is, it is submitted, a good explanation for the default.

- (2) The authorities do not say that only total incapacity will amount to a good reason. It is submitted that the combination of mental and physical illness to the degree described by Dr Wang and Dr Pilgrim (who unlike Dr Gupta actually observed Mr Ma) is enough to amount to a good reason, even if Mr Ma could have picked up a telephone to speak to a lawyer. Dr Gupta’s opinion itself accepts that “*full participation in complex litigation...may not have been feasible*”. What Mr Ma failed to do, relevantly, is file his defence. Drafting a party’s main statement of case would have to be one of the litigation steps most demanding client involvement. It cannot be dismissed by saying that Mr Ma was well enough to pick up the phone to tell his solicitors to do it.
- (3) On top of this, because he was in China, Mr Ma had difficulties accessing his emails and opening and reading attachments.
- (4) As to all the circumstances of the case, Mr Ma principally relies on the strength of his defence, the promptness with which he brought his application, and the explanation for his default on grounds of ill health. The other matters that the court is invited to bear in mind are as follows.
 - (a) First, overall delay. IMKD make the point that the claim was commenced over 4 years ago, and attribute the delay to the conduct of Mr Ma, particularly in relation

to the abandoned jurisdiction application, and where Mr Ma's disengagement began in 2023, before the period where it is contended his health impacted his ability to participate in proceedings. However, this needs to be seen in context:

- (i) IMKD waited 6 years from the conduct complained of before starting proceedings.
- (ii) IMKD have been wholly made good in relation to the delay attributable to the s.9 Application, Mr Ma now having paid the indemnity costs order plus interest. Indemnity costs were the sanction for the conduct of the jurisdiction application, including the period of disengagement before Mr Ma fell ill. Mr Ma has paid the price for that. He should not be punished twice by having that held against him on the question of default judgment being set aside.
- (iii) Mr Ma's Application was issued on 30 July 2024 – over 18 months ago. It could have been dealt with soon after if IMKD had served evidence in opposition in the normal way. Instead it mounted an aggressive campaign seeking to have its own application heard first, and seeking to block Mr Ma from adducing the medical evidence on which he relies. That resulted in having to have two hearings before this one, those before HHJ Pelling KC (who denied IMKD's request to have the whole of its application heard before Mr Ma's) and Mr Justice Andrew Baker (who rejected IMKD's opposition to permission for the medical evidence of Dr Pilgrim and Dr Wang) and ordered IMKD to pay an interim sum on account of the costs of that application. It is fair to observe that this position did result in the s.9 Costs being paid, but apart from that, IMKD were unsuccessful and were ordered to pay the costs of the application concerning expert evidence. IMKD were therefore the authors of the last year or so of delay. Delay is not something that should be held against Mr Ma.

(b) Second, other instances of breaches of court orders. As to this:

- (i) IMKD rely on Mr Ma's non-payment of the s.9 Costs until just before the hearing before Andrew Baker J. However, this favours Mr Ma. In so doing he has made IMKD good in relation to the s.9 Application. Mr Purcell states that

IMKD is concerned about the fate of future costs orders. However this is an irrelevant consideration. IMKD chose to sue Mr Ma. He has been upfront about the fact that he is beholden to third parties not only to fund the proceedings but also fund the payment of any costs orders made against him. In relation to the s.9 Costs Orders, in the event, contrary to expectations, Mr Ma was able to secure funding from third parties to cover the costs. Mr Ma has, through his solicitors, apologised for his past breaches and stated that he fully intends to comply with all rules, orders and practice directions in the future. If future costs orders are made and not complied with then, if IMKD believe that Mr Ma has the means to pay them, it can seek to enforce them. If Mr Ma does not have the means to pay them, then it is no reason to deprive him of the right to defend these proceedings.

(ii) Mr Ma has applied for the discharge of the remaining costs order made on the freezing injunction application. He also applied for them to be stayed in the meantime. Those applications have still to be dealt with.

(iii) Costs orders aside, it appears that Mr Ma is in breach only of case management orders relating to the jurisdiction application (namely the consent order of 2 March 2023, and the directions order of Sean O’Sullivan KC dated 19 February 2024, which was made during Mr Ma’s period of ill health). These breaches have already been addressed by the payment of costs.

(c) Third, IMKD’s conduct has itself been highly unattractive:

(i) It brought its default judgment application without giving notice to Mr Ma, even though MWS were by then on the record.

(ii) IMKD previously sued Mr Ma relying on the existence of the EAA in China. Then it alleged in these proceedings – supported by a Statement of Truth – that the EAA never operated.

(iii) Nor did IMKD bring this to the court's attention when it sought a freezing injunction on a without notice basis, in breach of its duty of full and frank disclosure.

(d) Fourth, Mr Ma is a private individual, and if the default judgment were to remain in place it would result in his financial ruin.

39. In summary, said Mr Ma, the balance of the *Denton* factors weighs in favour of granting relief from sanctions and setting the default judgment aside.

Discussion and conclusions on the circumstances of the case

40. I turn therefore to this last question, in the light of my conclusions on the strength of the defence and the promptness of the application. I have concluded as follows:

(1) Starting with the s.9 Application, the making of that application had the following consequences.

(a) First, it led to the incurring of costs by IMKD. However, I accept that these costs (leaving aside the costs of the application for default sanctions) have been paid, with interest, making IMKD whole in this regard.

(b) Secondly, it has led to delay in these proceedings. However, who will suffer as a result of this delay will depend on whose claim prevails at the end of the day. I do not regard this as a matter which I can conclude tells against the setting aside of the default judgment.

(c) Thirdly, it has inconvenienced other Court users, who would otherwise have had greater access to the Court. I accept that this is a relevant factor, which must be weighed in the balance.

(2) I turn next to the conduct of Mr Ma, both in relation to the s.9 Application and the remainder of the proceedings.

(a) Mr Ma seeks to explain his conduct in relation to the s.9 Application by reference to his health. Whilst IMKD challenge the medical evidence in this regard, I do not feel that I can take a view on this point adverse to Mr Ma given that I have not heard from the experts, and given that Mr Ma's experts have seen him whereas Mr Gupta (for IMKD) has not. I am certainly not prepared to accept the allegations of want of credibility on the part of Mr Ma's experts. This evidence was, of course, not available to earlier judges. At the very least, I take the view that any criticism of Mr Ma must be tempered by reason of the evidence as to his mental and physical state.

(b) In my judgment, these allegations that Mr Ma has not told the truth or has changed his case cannot fairly be judged on a summary application of this sort.

41. Overall, even in the absence of the other factors relied on by Mr Ma, I take the view that, given the fact that he has an arguable defence and that this application was brought promptly, the judgment in default should be set aside. I do not regard the other circumstances relied on by IMKD as sufficient to outweigh the fact that Mr Ma has a defence which it is accepted is arguable, the fact that the delay in this case is very short and the wholly understandable reasons for that delay insofar as they involved the need for newly instructed lawyers to get to grips with what is on any view a complex case.

42. Accordingly, I propose to set aside the default judgment. I will however hear Counsel in relation to the question of whether conditions should be imposed, pursuant to my jurisdiction as set out in CPR 13.1, and in relation to the various other applications made by IMKD and Mr Ma.