Neutral Citation Number: [2022] EWHC 2821 (KB)

Case No: QB-2021-002009

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/11/2022

Before :

MASTER STEVENS

- -

Between:

Mrs Caroline Bailey	**Claimant**
- and -	
Dr Monica Bijlani (1)	**Defendants**
MBNA (2)	

- -
- -

Hugh Rimmer (instructed by **Devonshires Solicitors LLP**) for the **Claimant**
Simon Butler (instructed by -**BSG Solicitors LLP**) for the **First Defendant**

Hearing dates: 21st June 2022

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Approved Judgment

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

.....

MASTER STEVENS

Master Stevens:

INTRODUCTION

1. This is my judgment on the first defendant's applications to set aside judgment entered on 21st February 2022 (sealed on 14th March 2022) in default of filing a defence pursuant to CPR 12**.** Judgment was entered of the courts own volition, although there was an outstanding application lodged by the claimant at the time, within unprocessed filings on the court CE system, which were not visible to me when ordering the default judgment .

2. The first defendant's first application first came before me at a hearing on 13th April 2022, but there was insufficient time to conclude matters on that occasion. The first defendant had arrived late for the hearing and been unrepresented, and a number of key documents were missing which I considered I needed to review before making a final determination. I therefore made an unless order on that occasion as follows:

(1) Unless the First Defendant complies with the remaining paragraphs of this order then the default judgement already entered against the First Defendant in favour of the Claimant with damages to be assessed shall not be set aside.

(2) The First Defendant shall, within two days of the service of this Order:
(i) File and serve a signed copy of her Defence on the Claimant and the Second Defendant, with a further signed copy to be filed with the Court:

(3) the First Defendant shall within 14 days of the service of this Order:
(i) File and serve an application to the Court supported by a sworn witness statement exhibiting copy documents to demonstrate:

(a) that the First Defendant instructed and paid lawyers to assist her in the defence of this claim, with dates of instruction and documents demonstrating the actions taken by those lawyers to assist her(redacted if necessary);

(b) the current status of the First Defendant's dispute with the General Dental Council with documents to evidence as to what was decided by the General Dental Council in respect of the dental treatment provided by the First Defendant to the Claimant (the subject of this claim), whether an appeal has been lodged against any such decision and the current status of that appeal with information as to any key dates currently known for the future progression of that appeal.

(ii) make an interim payment in respect of the Claimant's costs of today's application in the sum of £4000. The full costs payable by the First Defendant to the Claimant in respect of today's application shall be summarily assessed at the next hearing.

(4) the time periods set out in paragraphs 2 and 3 above shall commence from the date the Master approves this Order and notifies the parties of that approval by e-mail.

(5) This matters shall be re listed for a further hearing with a time estimate of 1.5 hours on the first available date after the First Defendant has submitted the evidence set out in paragraph 2 above

3. Following this order, which was sealed on 14th April 2022, in respect of paragraph 2 the first defendant served signed copies of her defence on 20th April 2022 (i.e. out of time) . In respect of paragraph 3 of the order she served a draft witness statement on the final day for compliance with that part of the unless order (but lacking the exhibits referred to) , and also the first defendant said that she was going to transfer funds in respect of interim costs that same day, which was the last day before the bank holiday weekend. In fact the claimant's solicitor was then served with the complete statement on Tuesday, 3rd May (i.e. out of time) , and that same day they received the interim costs into their account. The exhibits to the witness statement were said by the claimant not to include all of the documents which I had specified in my previous order in respect of her legal representative's retainer and the General Dental Council ("GDC") proceedings. However there were some documents pertaining to those matters in the exhibits, with the claimant supplying the balance in the hearing bundle.

4. On 3rd May 2022 the first defendant also served a fresh application notice " to set aside the default judgment and for relief from sanctions if necessary" and BSG solicitors commenced communicating on behalf of the first defendant with a Notice of Acting following shortly thereafter.

5. At the restored hearing of the first application on 21st June 2022, when the second application was also considered, counsel for the first defendant did not make any initial submissions seeking relief from sanctions in respect of non-compliance with my order as he said he had not been instructed to do so. Indeed his skeleton argument contained a submission at paragraph 36 that "D has complied with the Order made by Master Stevens on 13 April 2022". After I had suggested to counsel that he might wish to consider the matter in a short adjournment with his client, the application was duly made and granted. I emphasised in my determination that the court's patience was being sorely tested through persistent defaults by the first defendant, but in all of the circumstances on this occasion, I considered it would not be just to disallow the first defendant her opportunity to make final submissions about setting aside the default judgment. I am not setting out all the submissions on the relief point, nor my findings under the Denton principles, in this judgment as I do not consider it necessary to do so, but I do consider it important to include this brief record about the apparent lack of awareness of the need for relief to be properly dealt with, in case there are any further defaults in the future.

6. Following relief from sanctions, the first defendant's application proceeded with the benefit of a 483 page bundle and written skeleton arguments from both parties counsel.

7. I had been advised in advance that the second defendant would be taking no part in the hearing with a view to the saving of costs. That defendant was the credit card provider for the claimant , and their credit facility was the means by which the dental services, the subject of this dispute, were paid for. They accept that they will be jointly and severally liable to the claimant for losses proved against the first defendant but seek an indemnity and/or contribution from the first defendant in Part 20 proceedings which have also been issued.

BACKGROUND TO THE CLAIM

8. The claim concerns allegedly negligent dental treatment given by the first defendant to the claimant, a non-practising midwife who worked in hospitality at the time, on a private patient basis, over the course of several months in 2018. The first defendant has a lengthy practising history from 1991, apparently without similar incident until December 2016 when the first of 6 patients' allegations, as subsequently reported to the GDC, commenced. The GDC records do however reference a warning having been given by their Investigating Committee in August 2015 concerning clinical concerns of one patient. The claimant in these proceedings had had a dental bridge fitted to her front lower teeth for about 25 years during which time it had been trouble free. However in 2018 her NHS dentist said she should consider having the bridge replaced as it was old, with difficulties of cleaning and a risk of infection. The NHS dentist recommended an implant but explained these were not available on the NHS. The claimant approached the first defendant who advised that she could remove the bridge and thereafter put an implant into the site of missing tooth 41. On the same day as the initial consultation with the first defendant, treatment commenced and the bridge was removed over the course of several hours. It is alleged that no necessary preparatory steps were taken in advance. At the second appointment the implant was to be placed in situ but again, it is alleged, there were no appropriate or adequate x-rays or scans taken. The treatment was said to be painful and lasted for several hours. After this treatment the claimant experienced severe pain. The first defendant said that there was no infection or problem with the implant but that root canal treatment could help by removing nerves from tooth 31 and tooth 42. This advice was accepted and the root canal treatment commenced on the day of this consultation. Afterwards ongoing pain was experienced and infection was diagnosed. Subsequently a different dental practice diagnosed that the implant had been incorrectly angulated and would need to be removed. The claimant was referred to Addenbrooke's Hospital where she was prescribed oral morphine for the pain. Subsequently 10 or 11 days of inpatient treatment ensued for abdominal symptoms (ischaemic colitis) which the claimant was told was likely caused by the high level of anti-inflammatory drugs used to assist with her dental pain relief. Following her discharge, the claimant was examined by a maxillofacial consultant at Addenbrooke's who removed the implant and it was noted that tooth 31 had suffered damage said to be caused by incorrect placement of the implant which

could not be restored, such that it had to be extracted. The consultant also identified that tooth 42 had an inadequate root filling which could not be restored and had to be extracted on a later date. A partial denture was fitted whilst the claimant awaited her new implant which could only be successfully fitted after a bone graft due to the loss of part of the gum where it meets the teeth following the recent treatments.

9. Both breach of duty and causation are denied. The claim is pleaded at £88,792.90 plus general damages on a full liability and causation basis, although the claim form is currently limited to £80,000. Counsel for the claimant readily acknowledged that maintaining the default judgment would not obviate the need for his client to make successful arguments, with the benefit of expert evidence on a future occasion, regarding causation. Of particular significance in this regard is an allegation that the claimant's gastrointestinal problems, such as developing ischemic colitis, were caused by the alleged breaches of duty. Counsel for the claimant accepted that those particular losses associated with the gastrointestinal difficulty formed a very large part of the damages claimed.

10. The claim is slightly unusual in two regards. First, the claimant is not the only individual to have commenced court proceedings arising from alleged negligent dental treatment that was provided by the first defendant around the same time as the claimant. Secondly, six of the first defendant's former patients, and including this claimant, have had their complaints referred to the GDC for Fitness to Practise proceedings. The allegations considered, were summarised in the GDC hearing report as the first defendant having " failed to address underlying periodontal disease in some of the patients; failed to plan treatment adequately or at all in relation to some of the patients, including implant treatment; failed to obtain informed consent for treatment in some cases, including for bridgework and veneers, and on occasions placed implants and implant retained crowns without sufficient skill and care. There are also alleged failings in respect of your radiographic practice." The GDC heard evidence in June 2021 from both the claimant (and 5 other former patients) and the first defendant as well as expert evidence in a hearing lasting four days. The GDC then made findings of fact, on the balance of probability, and issued an immediate suspension from practice notice for 12 months. There is a large degree of overlap between those findings and the allegations of negligence made in this claim.

11. I had been advised at the previous hearing that there was an ongoing appeal against the GDC decision but it became apparent at this hearing that the appeal had been dropped some time in February 2022, and was now out of time for any fresh one to be commenced. Counsel for the claimant acknowledged that the evidential value of the GDC finding was not comparable to that of a conviction for a road traffic collision, such that it could be pleaded, but submitted that it was nonetheless persuasive.

CHRONOLOGY

12. The table below sets out a chronology of key events:

DATE	EVENT (references to "claimant" refer to her legal advisers and "GDC" refers to General Dental Council)
25-31st May 2018	Claimant treatment with first defendant that is complained about
24.7.18	Claimant complaint to GDC
21.2.19	GDC -independent clinical opinion on claimant's treatment by the first defendant concludes care between 28th and 31st May 2018 was "significantly below the level of professional practice reasonably expected "
25.2.19	GDC case examiner's summary of allegations sent to first defendant
21.3.19	Letter of notification
5.4.19	First defendant notifies brokers Gallaghers of claim intimated against her (it subsequently appears that they failed to engage with insurers leading to a lack of cover for late notification)
24.4.19	Letter of notification sent by claimant to notified medical malpractice insurers for first defendant
5.9.19	Keoghs instructed by first defendant's insurers confirm they are no longer instructed
10.11.20	Letter before action sent
26.11.20	First defendant speaks to claimant on telephone and email exchange about indemnity insurers and the letter of claim
15.12.20	Claimant chases first defendant by email about identity of her insurers
28.4.21	First defendant sends professional negligence pre-action protocol letter of claim to her insurance brokers claiming losses caused by late notification to insurers (letter sent by her legal representatives , Contract Law Chambers)
24.5.21	Claim Form issued
7.6.21-11.6.21	GDC Inquiry
June 2021	GDC Professional Conduct Committee Outcome (claimant is patient 5) published: Immediate suspension for 12 months
20.7.21	First defendant signs and files appellant notice against GDC with assistance from Contract law Chambers
28.9.21	Claim deemed served on each defendant with Particulars (sent 24.9.21)
19.10.21	First defendant calls the claimant and acknowledges service verbally
Oct 21	First defendant says she instructed Courthouselegal to draft a defence but they say it was at the start of December(paragraph 5 of her witness statement dated 29.4.22)
19.11.21	Acknowledgment of service Part 20 claim

Dec 21 /Jan 22	First defendant says she meets CAB twice around the time of seeking legal representation from other firms- but she also has produced documents showing payments to Courthouselegal at the end of December and in January (paragraphs 3,4 and 6 of her witness statement dated 29.4.22)
17.1.22	Claimant emails first defendant to advise in light of no formal acknowledgment of service (AOS) they will apply for default judgment
18.1.22	Exchange of emails between the parties-claimant will hold off any application to court until Friday 21.1.22
18.1.22	First defendant files AOS for Part 20 claim (endorsed with handwritten date 19.11.20)
25.1.22	Claimant emails first defendant to advise judgment in default will be applied for on 2.2.22
28.1.22	Courthouselegal offers first defendant "mates rates" to prepare defences for all claims against her with fixed fee offer to expire on 1.2.2.
28.1.22	First defendant asks Courthouselegal to complete Defence in this action by 2.2.22 as default judgment is threatened and offers a fee purely for that claim
31.1.22	Courthouselegal email first defendant over their non-negotiable fee to complete the defence and refer to having started the job on the previous Thursday (? 27.1.22)) .. "I had hoped that the first experience of us sitting down on Thursday and looking at this, was a one off, warm up experience, and that by the second sitting, you would have got the shouty, abusive aggressive distinction character that ran start to finish Thursday out of your system… and that on Sunday we could just get on with the task in hand and make serious progress into the draft without the damaging and draining (not to mention time consuming) tug of war that and battle that achieved nothing..".....
31.1.22	First defendant replies to claimant's earlier email she had got muddled between documents filed at court in second defendant's claim and needed more time to reply
Undated but February 2022	GDC appeal discontinued by first defendant acting through contract law Chambers , it appears due to costs risks
1.2.22	Courthouselegal email first defendant setting out a plan requesting confirmation of instructions by making a bank transfer of £600 before 1pm, they will then seek an extension and arrange collection of files that evening for review on Friday and the weekend with a telecon on 7.2.22 and conference on 8.2.22 by which time the bulk of the draft should be ready
1.2.22	Courthouselegal email claimant to advise they will be settling Defence-noting their patience and advise "Dr Bijlani has had

	to meet head- on a full lorry-load of litigation against her". The situation was said to have "been exasperated by the professional difficulties that Dr Bijlani has endured over the past two years or so involving a regulatory tribunal."…" our client is at breaking point"… "the impact… has almost been life ending"…" [It is appropriate and also necessary for me to record the capacity issues that initially held back this Firm from assisting with the defence):-Dr Bijlani came to see this Firm some weeks ago at the beginning of December) seeking our assistance with the drafting of her defence…… we doubted if at that time whether Dr Bijlani had the requisite capacity to instruct any legal representative, let alone, participate in live litigation without a guardian. Consequently we sent Dr Bijlani away advising her to rest and seek treatment….Since the December conference….. the author of this e-mail has been in regular telephone contact with Dr Bijlani(at least weekly, often several times a week), and well as e-mail communication. Further, the author of this e-mail met with Dr Bijlani on four separate occasions in the month of January; in part those meetings were for this Firm to be able to take a more informed and detailed view on Dr Bijlani's capacity or otherwise. I am pleased to say that the concerns which saw us send Dr Bijlani away in December, have not arisen since, and do not exist today". A final extension of time was sought to 4:00 PM on 15th of February 2022 failing which an application would be issued for an extension.
2.2.22	First defendant called claimant to chase up request for an extension- claimant taking instructions and advised first defendant to file paperwork with the court without further delay. She also route to Courthouse legal stating " I was forced to speak with Justin as you abandoned me and I was aware of the 4:00 PM deadline today " and " you are totally unreliable and not accountable…. you don't answer calls, texts WhatsApp or your emails. It's very stressful and unacceptable especially as you have been instructed and I'm a payment at your request yesterday",
3.2.22	Extension granted but first defendant warned any subsequent one would require an application to court (noting White Book commentary to CPR 15.5.2)
8.2.22	First defendant emails Courthouselegal stating" you have gone MIA once again. We have less than a week to send in our Defences to both claims. You keep letting me down…. When are we getting the draft defence done? I need to work on it asap and not last minute with more stress and errors which will need editing before sending it to Justin."

10.2.22	First defendant wrote to Courthouselegal stating" I would really appreciate a draft by tomorrow latest. We started on this 3 weeks ago. You have had the files for almost 2 weeks."
14.2.22	Courthouselegal email claimant saying "please call me at 11.55.Please ensure that the remainder of today is free."
14.2.22	First defendant emails Courthouselegal to say they have kept up with none of the plan regarding completion of the defence-says she is available all day 16.2.22 to get the pleading completed
17.2.22	Claimant emails Courthouselegal to check if they are on the court record, setting out requirements for service of the pleading and noting if not attended to by 4pm on 18.2.22 default judgment would be sought
17.2.22 (a Thursday)	Courthouselegal email claimant to advise draft pleadings will be sent across that day, the lawyer responsible having been off sick all week
18.2.22	First defendant calls claimant to say she has difficulty contacting her lawyer and he is not allowed to do direct access work – told to apply to court for more time if needed and on 21st February court will have the claimant's application for judgment too and court can decide
18.2.22	First defendant emails Courthouselegal stating " your draft yesterday shows almost no work has been done. You have told the lawyers you were going to give them the pleading yesterday which you did not even have in draft form. You agreed to meet me today from 11:00 AM when we spoke yesterday and I am here waiting for you. I think you are not taking this matter or its extended deadlines serious at all. I refuse to get default judgement against me for your total lack of effort and continually letting me down. I tried calling you but you don't answer. What are you playing at Henry???? Call me back please
21.2.22	Court of own volition orders default judgment
23.2.22	Claimant submits request for default judgment to RCJ
23.2.22	Claimant advised by email from first defendant that Courthouselegal have been sending her daily messages that the draft defence is ready but have let her down-she is instructing another firm and filing an application for an extension
25.2.22	First defendant lodges application (wrongly at the county court and signed 24.2.22) for an extension of time (second defendant consented although this was subject to payment of their costs and obtaining court approval). Reasons for lateness cited as: -she has been let down by a barrister she instructed over 2 months ago -she has had to report him to the Bar Standards Board for poor conduct and negligence in letting her down

18.3.22	First defendant emails RCJ about her application which she says was hand-delivered to court by her as her barrister " had a meltdown and went to France due to personal reasons , abandoning my case"
6.4.22	First defendant's defence filed (dated 21.3.22 and signed 25.3.22) NB claimant believes this was filed 30th March but it is not visible on CE file which shows a submission date of 6.4.22 for a signed defence -the copy which the claimant appears to have received was an unsigned version on 8.4.22
13.4.22	First hearing on first defendant's application
14.4.22	Order sealed
20.4.22	Signed defence received
29.4.22	Final date for compliance with Unless Order re: application to the court plus witness evidence and interim payment of costs -16.01 witness statement arrives without exhibits - payment initiated -appears to arrive after 4pm (claimant's solicitor letter of 3/5/22 acknowledges receipt of monies at some time on 29/4)
3.5.22 (filed on CE 9.6.22)	BSG applies to set aside judgment and relief from sanction "if necessary" (application notice dated 29.4.22 but signed 3.5.22). References previous application for an extension of time in February
6.5.22	Notice of Acting filed by BSG on behalf of first defendant
21.6.22	Hearing of application

THE BREACHES OF DUTY TO WHICH THE DEFAULT JUDGMENT ATTACHES

13. At paragraph 28 of the Particulars of Claim, the negligence of the first defendant is summarised as set out below; the overlap with allegations made at the GDC Inquiry is indicated by the use of bold lettering:

(a) Failed to make and keep full and comprehensive clinical records of treatment;

(b) ***Failed to fully assess and plan the proposed implant treatment****;*

(c) ***Failed to obtain the necessary and appropriate pre-operative radiographs*** *or scans;*

(d) ***Failed to adequately advise the Claimant about the risks, benefits and alternatives to treatment with an implant or give her appropriate time to consider and choose her treatment plan. as such, failed to properly obtain the Claimant's consent for treatment****;*

(e) ***Placed the implant in such a way that it caused iatrogenic damage to the adjacent tooth 31****;*

(f) Root treated tooth 31 to an inadequate standard;

(g) Root treated tooth 41 to an inadequate standard;

(h) ***Caused*** *such* ***damage to tooth 31 and to tooth 42*** *that they had to be removed.*

THE LEGAL TEST ON AN APPLICATION TO SET ASIDE A DEFAULT JUDGMENT UNDER CPR 12.3 (2)

14. Pursuant to CPR 13.3, the court may set aside a default judgment 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 judgement should be set aside or varied; or
    (ii) the defendant should be allowed to defend the claim.

The rules go on to provide the court must have regard to the promptness with which an application to set aside is made.

15. In the notes in the White Book at CPR 13.3.1 it is made clear that the court's discretion should be exercised in accordance with the overriding objectives. Those objectives are well known but I will set them out again for clarity, namely that the court is to deal with the case justly and at proportionate cost which includes, so far as is practicable,-

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

(b) saving expense

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

(i) to the amount of money involved;
(ii) to the importance of the case;
(iii) to the complexity of the issues; and
(iv) to the financial position of each party;

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

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

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

Burden of proof

16. Broadly the same test is applied on setting aside a default judgment as that on summary judgment applications under CPR Part 24. The only significant difference between the tests was set out by Potter LJ in *E D & F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472. He said, "the only significant difference between the provisions of CPR 24.2 and 13.31 is that under the former the overall burden of proof rests upon the claimant to establish that there are grounds for his belief that the respondent has no real prospect of success whereas, under the latter the burden rests upon the defendant to satisfy the court that there is a good reason why a judgment regularly obtained should be set aside. That being so although generally the burden of proof is in practice of only marginal importance in relation to the assessment of evidence, it seems almost inevitable that, in particular cases a defendant applying under CPR 13.3 (1)may encounter a court less receptive to applying the test in his favour than if they were a defendant advancing a timely round of resistance to summary judgment under CPR 24.2."

17. As to the applicable test on summary judgment, in essence the court is considering whether the claim/defence is "bound to fail" as set out in *Altimo Holdings v Kyrgyz Mobil Tel Ltd* [2012] 1 WLR 1804 at [80] and [82]. It is clear that the court must not conduct a mini-trial ; *Three Rivers District Council v Governor and of the Bank of England* (No3) [2003] 2 AC 1. The court should allow for the possibility that further facts may emerge on disclosure or at trial ; *Royal Brompton NHS Trust v Hammond (No 5)* [2001]EWCA Civ 550. However a case should not be allowed to go to trial on the basis that something may turn up which would have a bearing on the outcome; *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725.

Avoidance of injustice, default judgment is not a punishment & considerations of abuse of process

18. The purpose of the court's discretionary power is to avoid injustice and the court will not deprive the claimant of a regular judgment lightly. The discretionary power is both unconditional and a broad one. In particular where there are serious allegations, or very serious conflicts of evidence, it would be desirable to give those as full and fair a hearing as the circumstances permitted. The case of *Strachan v Gleaner* [2005] UKPC 33, makes it clear that it cannot be safely assumed that any prejudice to the claimant could be met by making the defendant pay their costs thrown away.

19. Further assistance with the interpretation of the tests is provided by the case of *Hussain v Birmingham City Council* [2005] EWCA Civ 1570 where it was held that the judge's discretionary powers should not be exercised to punish a party but simply to further the overriding objective. It may however be considered an abuse of process for a defendant to have done nothing whatsoever to comply with court rules until the judgment is obtained and only then to seek to set it aside.

Lack of finality and promptness

20. In *Khan v Edgbaston Holdings* [2007] EWHC 2444 (QB) HHJ Coulson QC, (as he then was and sitting as a Deputy High Court Judge), noted that the judgment of Chadwick LJ in the *Hussain* case referred to above, had identified that where the application for default judgment was only one of a number of procedural aspects of the case, which would not bring finality to the proceedings as a whole (it being against one defendant only), any delay carried less weight in a determination than in a case where leaving the judgment undisturbed would bring finality.

21. Failure to act promptly enough was defined by Simon Browne LJ in *Regency Rolls Ltd v Carnall* (Security for Costs) 22 June 2000 unrep. as a failure to act "with all reasonable celerity in the circumstances", but later Court of Appeal authorities have stressed the question of promptness will be very fact sensitive to the context of each case.

Comparison of the legal test with that applied on an application for relief from sanctions

22. In *Hussain* the Court of Appeal stressed that CPR 3.9 is also relevant on any application to set aside a default judgment. They summarised a useful checklist:

    (a) the interests of the administration of justice;

    (b) whether the failure to comply was intentional;

    (c) whether there is a good explanation for the failure;

    (d) the extent to which the party in default has complied with other rules, practice directions, court orders and any relevant pre-action protocol;

    (e) whether the failure to comply was caused by the party or his legal representative;

    (f) whether the trial date or the likely date can still be met if relief is granted;

    (g) the effect which the failure to comply had on each party; and

    (h) the effect which the granting of relief would have on each party."

Liability of the party, not their representative

23. Finally the case of *Mullock v Price* [2009] EWCA Civ 1222 is authority for the correct interpretation of the language of CPR 13.3, namely that the duty to act promptly is imposed upon the defendant personally such that any errors or omissions by their legal representative cannot be viewed as an acceptable excuse, or reason, for not filing the defence on time.

SUBMISSIONS

24. Submissions on behalf of the first defendant:

(a) Lack of prejudice to the claimant

It was submitted that the few weeks' delay resulting from the failure to file and serve a defence within the consensual extension of time granted, has not caused the claimant any prejudice. Counsel highlighted the fact that parties have a transcript of all the evidence provided to the GDC and that the claimant already has all medical records and their own expert dental opinion, such that they can respond to the defence. It was further submitted that any costs incurred by the claimant making the application for default judgement can be dealt with by making an appropriate order for costs.

(b) Real prospect of success

i. A number of the first defendant submissions related to causation of damage rather than breach of duty, especially in respect of the more valuable claim for gastrointestinal difficulties, but ultimately these do not affect a determination on breach of duty which was acknowledged.
ii. It was submitted that a transcript of the GDC Inquiry contained evidence that the claimant had accepted that she was warned of options, risks and benefits of procedures. It was however acknowledged that the court is not bound by decisions of the GDC.
iii. Finally, it was submitted for the first defendant that the draft defence clearly shows facts pertaining to the claimant's consent to treatment such that she has a real prospect defending the claim.

(c) Delay

i. The first defendant relied on case authority pointing to merits of the defence trumping delays of even up to five years, for example, (*Lombard North Central plc v European Skyjets Limited*[2020] EWHC 679 (QB).
ii. The first defendant also submitted that the need to act promptly should be weighed against the other circumstances of the case, as set out in *Tideland Ltd v Westminster City Council* [2015] EWHC 2710 (TCC). It was further submitted that the first defendant had complied with the order made on 13th April 2022 and that this should be reflected in the court's decision. I dealt with this submission at the outset when I made it plain that the order

had in fact not been fully complied with and that relief was necessary (and was subsequently granted).

25. Submissions on behalf of the claimant

a) Seriousness of the breach

The claimant submitted that the defence is such an important document, and key to litigation, that it cannot readily be viewed as anything other than a serious and significant breach to fail to submit it on time.

b) Reasons for the breach

i. The claimant set out the chronology, from despatch of a letter of notification in March 2019 through to January 2022, when legal representatives contacted the first defendant as no defence had been filed and indicated an intention to obtain judgment. It was submitted that the allegations have not changed in any significant way since the first defendant was first put on notice of the claim, and whilst there may have been some difficulties in gaining timely assistance from Courthouse legal there was no evidence or reason given for the delay prior to that.

ii. The claimant also sought to rely on notes in the White Book at CPR 3.9.16 as follows, " the fact the court was dealing with a litigant in person could only be relevant at the margins, where, for example, there was some extremely complex factor or complicated order which the lay person might find difficult to understand".

c) An arguable defence is not one demonstrating a real prospect of success

i. The claimant referred to the GDC findings, and the evidence put before the Council from Dr Jefferies which concluded that the first defendant's practice fell significantly below that required. In particular that expert had concluded informed consent was not obtained, the pre-treatment assessment was inadequate, the implant was too big and damaged the adjacent teeth and a specialist referral should have occurred after the treatment. There were separate opinions expressed about the development of ischaemic colitis through the over prescription of anti-inflammatory medication. The severity of the sanction issued by the GDC of immediate suspension was another factor relied upon.

ii. Counsel for the claimant noted that the first defendant's own expert report from a Dr Draper was notable in that no evidence appears to have been produced to deal with actual charges and breaches of duty".

iii. The lack of an ongoing appeal, which the first defendant had started but discontinued, was said to add weight to the contention there was no real prospect of success in this claim for the first defendant.

iv. The claimant relied on the fact that the charges were said to have been admitted, as well as found proven and following expert evidence from a dental expert, Mr Kramer and two other experts.

v. The fact that the first defendant was legally represented at the hearing was also brought to my attention. At its highest, it was submitted the defence was "arguable", rather than one having real prospects of success.

d) Matters of causation do not impact a default judgment

I have already alluded to this point when dealing with the first defendant's submissions, and indeed the acknowledgement of the same by her counsel.

e) Delay

These submissions surrounding delay echoed those which had been made in respect of there being no good reason for the breach earlier in the hearing.

THE GENERAL DENTAL COUNCIL HEARING, THE DENTAL RECORDS & THE DRAFT DEFENCE

26. I consider it important to set out some headline details taken from the GDC hearing document exhibited to the witness statement filed on behalf of the claimant for this application, and to compare those with assertions made by the first defendant in her draft Defence.

27. The GDC hearing began on Teams video links in respect of all 6 patients who had registered complaints and on day 3 it was recorded that the first defendant wished to make some admissions in respect of this claimant concerning a lack of informed consent . The following day it was recorded that all other allegations brought by her were also admitted.

28. When seeking to make findings of fact the GDC took into account 2 witness statements from the claimant which I have not seen and her dental records. They also had the written expert dental evidence of Mr Kramer contained in a main report and an addendum and 3 witness statements from the first defendant which I have not seen. The first defendant elected not to give oral evidence, it being submitted on her behalf that "due to the passage of time you (i.e. she) could not confidently say what happened " and thus it was submitted oral evidence would not assist beyond what was contained in the dental records. In closing submissions it was stated that " all she has and all you have are the

records to jog her memory of what she understands has happened. It is accepted that those are insufficient." (paragraph A on page 200 of this hearing bundle). The claimant and Mr Kramer gave oral evidence but I do not have a transcript of that part of the hearing although some of it is summarised in the closing submissions before the GDC which I do have a copy of.

Findings regarding examination pre-treatment

29. As the dental records of the claimant revealed minimal pre-treatment checks for the appointment on 25th May 2018, the GDC accepted the independent expert's view (from Mr Kramer) that there had been an inadequate examination. This had also been the opinion of S M Jefferies, an independent dental practitioner commissioned by the GDC early on in the investigation to provide a screening report to direct the future conduct of the investigation. Whilst the first defendant had undertaken some imaging of the claimant, the type of scanning undertaken was said by S M Jefferies to cause magnification distortion such that it could not be relied upon alone when examining the claimant's mouth in order to choose the correct size of implant. Both in that early clinical advice report, and in the evidence of Mr Kramer, it was stated that an OPG radiograph alone was also unlikely to be adequate to ascertain the amount of available bone into which the implant would be secured. Mr Kramer said a 3D scan was required pre-operatively. I note that the draft Defence at paragraph 7 asserts that the claimant had received relevant advice at a prior appointment in 2016 for veneers and upon her return in 2018 declined certain pre-treatment checks on the grounds of wishing to avoid radiation and to keep cost to a minimum. At paragraph 8 it is also asserted that the claimant had "acute dental phobia" which influenced her choices/willingness to subject herself to various checks. The contemporaneous dental records do not descend into that level of detail. The transcript of the GDC hearing at page 199 of the bundle recorded elements of cross-examination of the claimant. She conceded "it's hard to recall everything".

Findings regarding discussion of the treatment plan prior to treatment and assessment of risks

30. Again the clinical records of 25 May 2018 were relied upon by the GDC in making a finding against the first defendant but her draft Defence at paragraphs 8 and 9 once again refers back to the 2016 records and the fact that the claimant was a returning patient with strong views as to what procedures she wished to undergo. The dental notes record that the claimant had not been happy with her previous dentist, but clearly she was sufficiently happy with the first defendant in 2016 to return for more treatment in 2018.The GDC did not make any detailed comment on the 2016 notes, beyond saying they were inadequate. Whilst in respect of risks it was noted that there was some discussion in 2018 , that was considered inadequate on its own by the GDC. I refer again to the cross-examination of the claimant at the GDC hearing and the transcript extract where she did not recall much of the consultations on account of them having occurred so long ago, but accepted the possibility there had been discussions about her

treatment in advance. She did not recall signing a consent form but accepted it was her signature upon it.

Placed the implant in a way that caused damage

31. The record of GDC findings does not contain any specific finding that the placement caused damage, merely that the first defendant did not exercise sufficient skill and care in the placement of the implant, that there had been inadequate assessment of bone volume prior to placing the implant and a record that the allegation had been admitted by the first defendant. The Clinical Advice Report prepared for the GDC at an earlier stage in the investigation had referred to the implant being too large for the claimant's mouth, such that it damaged adjacent teeth, but the GDC did not make an express finding about this. The detailed findings of the GDC (such that they relate to allegations within this claim i.e. excluding findings about pain control and an unnecessary radiograph after treatment) all relate to a failure to plan and prepare for treatment nor actively inform the claimant of risks and options. At paragraph 23.2 of the draft Defence it is averred that following the implant treatment the first defendant was "transparent and honest having diagnosed the angulation of the Implant" and at paragraph 55(e) she says the implant ended up touching another tooth due to the claimant moving about in the course of treatment. Further at paragraph 53 the first defendant states that she "erroneously conceded the allegations" and was "under duress and undue pressure from D1's former legal representatives". That comment relates to all allegations made against her in respect of this claimant. The contemporaneous dental records do not contain detail about the claimant moving around in the course of treatment.

Root treatments

32. The GDC did not make specific findings regarding the root treatment to tooth 31 and 42 but the Clinical Advice Report referred to above had said root treatment was inappropriate and the recommended course would have been immediate removal of the over-large implant and the incisor damaged by its placement. It is not known from the papers before me if damage to the second tooth could have been avoided by this course of action. The draft Defence states that both were performed to an adequate standard at paragraph 55.

EXERCISE OF DISCRETION-striking the balance and conclusions

A real prospect of success or some other good reason to set aside the default judgment

33. It is important to reflect that even if I consider that there is a real prospect of success or other good reason why the defence should proceed I am not bound to set aside the default judgment. On the question of prospects of success I consider the case is very borderline on the basis of the evidence before me, but falls just above the threshold. Whilst it had been submitted that the claimant had

accepted she was warned of options, risks and benefits of procedures at the GDC hearing, the transcript I was furnished with merely recorded that she had said it was “possible” she had been in discussion with the first defendant about her treatment (at paragraphs B-C on page 199 of the bundle). That leaves open a live issue and the case law is clear that I am not to conduct a mini-trial now. The instructions given by a patient are an important part of the factual matrix for any determination, just as the explanation of risks is too by the treating practitioner.

34. In a clinical negligence case the court will need to hear the range of expert professional opinion on both the standard of care that is acceptable, and, if there has been a breach of duty, whether any causation whatsoever flows from that which is actionable in damages. Whilst it will not be enough for the first defendant, who bears the burden of proof, to simply state that even if there has been any breach then there is a realistic prospect of successfully defending as there will be no causative loss flowing from that breach, the court timetable has not yet reached the stage of exchange of expert liability and causation evidence. So far no independent dental evidence has been supplied from an expert regarding the contentions made by the first defendant, (such as those at paragraph 18 of the draft Defence) based on her own professional knowledge, but I am told that it will be provided and I have been supplied with the names of the experts she will seek to rely upon, if granted permission. I cannot second guess what the full clinical evidence will be on breach, let alone causation, but, as set out above, I am told that it will be supportive. I need to take account of evidence that can be reasonably expected to be available at trial. The first defendant did not call evidence of her own at the GDC Inquiry (save as to the development of the claimant’s ischaemic colitis which requires different expertise to that needed on dental breach of duty). It is not for me to speculate on the reasons why there was no such evidence, but that decision leaves a gap which so far is only partially filled by evidence relied upon by the GDC.

35. The factual evidence of the parties, as explored by the GDC, and which I reviewed at paragraphs 28 and 29 above, is inconclusive due to poor memory retention, and complicated by about-turns as to what is recollected and what is not, and therefore does not, on the face of it, assist at this stage in meeting the threshold criteria for maintaining that there is “a real prospect of success”. However, I am mindful that I cannot conduct a mini-trial at this stage. The expert evidence position is rather different. Expert evidence is critically important in clinical negligence disputes and I have been supplied with the names of experts whom the first defendant states will support her defence if allowed to do so. Overall I am satisfied, by a somewhat narrow margin, that there is a realistic prospect of success. That finding does not compel me to exercise my discretion to set aside the default judgment.

36. For the avoidance of doubt, I wish to make clear that the absence of an ongoing appeal against the GDC findings, as contended by the claimant, is not persuasive to my reasoning about whether there is a real prospect of success for the first defendant in this litigation . The GDC findings are not admissible in subsequent proceedings. It is for a trial judge to make findings based on the evidence before them. The leading Court of Appeal authority is *Hollington v Hewthorn* [1943] 1KB 587. The discontinuance of the appeal appears, from the documents submitted, to relate to matters of pragmatism, cost and process, rather than principle about the fairness of the GDC findings, in any event.

Avoidance of injustice

37. Turning to the second limb of the test, as to whether there is other good reason to set aside the default judgment there is considerable overlap with the factors that I need to take into account in the exercise of my overall discretion, particularly under the overriding objective. Turning first to the need to ensure "*parties can participate fully in the proceedings*" and "*parties and witnesses can give their best evidence"*, I am troubled by the fact that the GDC was advised (as recorded at paragraph 4 on page 24 of the GDC determination) that the first defendant had suffered " a bereavement and challenging family circumstances" which played a part in her conduct of the case before them and in the incidents complained of. The first defendant now says she was under duress when making concessions through her legal representatives at the hearing. She gave no oral evidence and no other witnesses were called on her behalf (save as to causation of ischaemic colitis). The hearing was in June 2021. Lawyers instructed by her later that year in respect of this litigation, refer to the first defendant's mental health being too poor for them to be satisfied she had the requisite capacity to provide instructions. It is said that the first defendant now has capacity and she has produced a detailed draft Defence which raises significant matters which should be tried, and the subject of cross-examination in the normal course of events. I have reviewed some of these at paragraphs 28-31.For example, there is an issue over whether the claimant's own requests, which were said to be forcefully made, caused the first defendant to adopt a practice that she otherwise would not have done, and that this raised the risk profile for the occurrence of the damage which subsequently materialised. Whilst the claimant may raise issues of credibility about the first defendant's change in position since the time of the GDC hearing, that does not mandate that I should shut the door of the court, now that she is said to have capacity, so that she cannot even attempt to deal with those points. I am told there will be other witnesses called by the first defendant who have certainly not been able to present their evidence previously. There are very serious conflicts of evidence revealed by the draft Defence and it would be unfair for those not to be tested in court, absent any sufficient, other, counter-balancing factors.

Injustice & Finality

38. I am mindful that I should also endeavour to avoid injustice to the claimant who should not lightly have the benefit of a valid judgment removed from them, with the additional delay and expense she may be put to if the fight on liability is allowed to proceed further. No costs order can fully restore the value of the existing judgment if that is taken away from her. But the fact of the matter is the judgment was obtained through court process, rather than in response to the claimant's submissions. Whilst retaining the judgment would resolve the issue of breach of duty, the causation of any loss following those breaches would still need to be explored by dental expert opinion and lay evidence. The lack of finality afforded by the present judgment is therefore another factor tending to offset other reasons for refusing to set aside judgment, as referred to in the *Hussain* judgment which I discussed at paragraphs 18 and 19.

Saving expense & saving a trial date

39. The overriding objective also requires me to take account of the potential for *saving expense*. As I have set out in the preceding paragraph, the evidence required and the cost of it, in proving causation is so interlinked with that of breach of duty, I consider any saving to be pretty negligible, both to the parties and to the court. Furthermore, there is no trial date that might be lost by setting aside judgment, that being another potentially costly step and one considered to be relevant to the exercise of discretion in the *Hussain* case.

Compliance with rules & delay

40. The claimant has been at pains to point out that the filing of a defence is a key step in any piece of litigation and therefore it cannot be said that the first defendant's failure in that regard is not both serious and significant. I cannot disagree with those submissions. The claimant further contends that there is no good reason for the failure both in February 2022, and in conduct over the many preceding months both from service of the claim in September 2021 and during the pre-action period. I have already dealt with the point about a perceived lack of mental capacity for the first defendant to adequately address matters for a period of time prior to December 2021. I can only take the instructed lawyer's opinions on this at face value from the contemporaneous documents. But, in any event, I have seen copy correspondence passing between the first defendant and the claimant, which until 4pm on 18th February was a period when inter partes extensions of time for filing the Defence had been granted voluntarily. The claimant need not have granted those extensions if they considered there had been a lot of "mucking around" in the preceding periods. At the time the final extension was exceeded, from the documents before me, the first defendant had been actively chasing the lawyer she had paid to prepare the Defence and she was let down by him. In less than a week after the final consensual extension expired, the first defendant had lodged her own application at court as a litigant

in person for an extension. I am aware that the standard of compliance expected from a litigant in person should not usually be lower than for a represented party, and the duty to act promptly is imposed on a defendant personally, irrespective of legal representation (see the case of *Mullock* discussed at paragraph 22 above). However, the final and most crucial period of delay following expiry of the voluntary extension was less than one week and followed increasing efforts by the first defendant to get her Defence finalised. In these circumstances, and noting that the first defendant has taken steps to engage new lawyers to take matters pro-actively forwards, I cannot find that it would be just on account of the previous default and delay to deprive her the opportunity to proceed with her Defence.

41. Furthermore, case law has also developed since it was first held that there should be a good reason for any default as part of the test for the exercise of the court's discretion when considering relief after there has been a failure to comply with the CPR. In *Redbourn Group Ltd v Fairgate Development Limited* [2017] EWHC 1223 (TCC) Coulson J, as he then was, held that *an explanation* for the default may be sufficient *even if that does not amount to a good reason*. The fact that a reason may not be a "good" one is far from decisive and only one factor.

Conclusions

42. Having examined the material placed before me, and applied the various legal tests which are relevant on any application to set aside a default judgment, I have concluded by a narrow margin that there is a realistic prospect of successfully defending this claim. My determination under CPR 13.3 (b) and the overriding objective, is that there are other very good reasons why the first defendant should be allowed to defend the claim and that overall it would be just to allow that defence to proceed. Much of the evidence relied upon by the claimant in support of this application arises from the GDC investigations, which are non-binding upon this court. Furthermore, the parties do not appear to have been on an equal footing in respect of each having crucial independent expert evidence to support their case during those investigations. Evidence from those experts will be required by this court in any event on issues of causation such that the benefit of the default judgment to the claimant will be very limited, whilst the prejudice to the defendant of having judgment imposed by default is significant. The mental health status of the first defendant during a significant period of time when the Defence should have been prepared, has been called into doubt by the lawyer assisting her at the time. Happily those concerns are now said to have resolved, such that it is only just to allow that party the opportunity to give her best evidence, in accordance with the overriding objective. The draft Defence which has been filed is detailed, not a bare denial, and raises issues of substance which should be explored. The first defendant has shown resolve to engage with the matters in dispute since the time when her previous lawyer indicated her mental health had improved, such that she had capacity to give instructions, and she now has a new legal team appointed to progress matters. There was very little delay from the expiry of the final

voluntary extension of time for the Defence to be served (less than one week) and the first defendant approaching the court for an extension. I have clearly set out that laxity in progression of the Defence will not be tolerated under the court's case management powers, but the exercise of the court's discretion when considering setting aside a default judgment is not to be directed towards punishment of a party for anything that has gone before.

43. Accordingly, I direct that the default judgment be set aside.