Neutral Citation Number: [2023] EWHC 2742 (Comm)

Case No: CL-2022-000579

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
COMMERCIAL COURT (KBD)

7 Rolls Building
Fetter Lane, London
EC4A 1NL
Date: 18/10/2023

Before:

THE HONOURABLE MRS. JUSTICE DIAS

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Between:

(1) RONNIE AMBIMBOLA DECKER **(2) GLOBUS INDUSTRIES INC.**	**Applicants/ Defendants**
- and -	
(1) INTERNATIONAL MEDICAL SUPPLIES LIMITED **(formerly known as Excalibur Healthcare Services Limited)**	**Respondent/ Claimant**

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JACK WATSON (C) (instructed by **Withers LLP**) for the **Applicants/1st Defendant**
ADAM BARADON, KC (instructed by **PCB Byrne LLP**) for the **Respondent/Claimant**

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JUDGMENT

MRS. JUSTICE DIAS :

1. *(Recording on)* — Mr. Decker to set aside judgment in default pursuant to CPR part 13.3. The underlying dispute arises out of a sale and purchase agreement dated 13th May 2020 for the supply of ventilators by a company, Globus Industries Inc. to the claimant, then known as Excalibur Healthcare Services Limited, now International Medical Supplies Limited. The ventilators were for use by the NHS during the global pandemic. Globus is a company incorporated in Delaware and controlled by Mr. Decker.

2. The sale and purchase agreement was negotiated by Excalibur with Mr. Decker on behalf of Globus. Mr. Decker claims that he and his wife were also beneficial owners of a Cypriot company, Princess Hotels Development Limited, which owned a hotel in Larnaca. His interest in Princess was said to be held through another company, Cytrex, of which Princess was a wholly-owned subsidiary. The shares in Cytrex and Princess, he says, were held by a Mr. Marios Polyviou as trustee or nominee for Mr. Decker. Mr. Polyviou was the sole director of Princess.

3. It is not in dispute that Globus failed to fulfil its obligations under the SPA and negotiations thereupon took place between Excalibur and Mr. Decker in the course of which it was agreed that Globus should repay the sum of $10 million. It is also not disputed that during the course of those negotiations, Mr. Decker represented that he had authority to execute agreements binding Princess. These negotiations led to the conclusion on 10th September 2020 of a repayment agreement between Excalibur, Globus and Princess which effectively compromised the original dispute and in which Globus promised to pay Excalibur $10 million by instalments, to be completed by not later than 31st March 2022.

4. In the repayment agreement, Princess agreed to secure repayment by way of fixed charge over the hotel. The repayment agreement was signed by Mr. Decker on behalf of both Globus and Princess. In the case of Princess, Mr. Decker signed over the name of Mr. Polyviou, appending the initials POA.

5. The repayment agreement was not honoured. Moreover, Mr. Polyviou had asserted in a letter dated 31st January 2022 that Mr. Decker in fact had no authority to represent Princess or to sign any documents on its behalf at the day (?) of the repayment agreement. In these circumstances, following service of a pre-action protocol letter of claim on 6th September 2022, to which there was no response despite a chaser on 22nd September 2022, Excalibur commenced proceedings against both Globus and Mr. Decker on 4th November 2022.

6. The primary claim against Globus was in debt for the amount due under the repayment agreement plus interest totalling something in excess of $10.6 million. The claim against Mr. Decker personally was for damages equivalent to the entire debt on two grounds: first, breach of warranty on authority and/or secondly on the basis of allegedly fraudulent representations that Mr. Decker had authority on behalf of Princess to execute the repayment agreement and that the security of the hotel would be sufficient to cover the debt.

7. Although this was initially denied, a point to which I will return, the proceedings were served by hand delivery by a process agent to the defendant's letter-box at his usual residence. It is now accepted that he was duly served. Nonetheless, it remains his case that for whatever reason the proceedings never came to his attention until he was served with the default judgment. For that reason he did not acknowledge service or serve any defence to the claim.

8. Excalibur thereupon entered judgment in default on 19th December 2022 for the full amount allegedly due from Globus under the repayment agreement. There is no dispute that this judgment was notified to Mr. Decker by email on 22nd December.

9. Excalibur followed this up with a statutory demand which was personally served on Mr. Decker on 9th January this year. Again, there is no dispute that he received this. On 11th January, Withers came on the record for the defendant. They had previously been instructed by him to consider the pre-action protocol letter of claim but not, apparently, to respond to it. Withers notified Excalibur that they were acting on behalf of Mr. Decker and reserved all his rights in respect of the default judgment, including a right to set it aside.

10. The defendant's case is that he was having difficulty at this time in raising cash to put Withers in funds and that a decision was therefore taken to prioritise the application to set aside the statutory demand, which seemed to be the more urgent of the matters in hand. An application to set aside the statutory demand was accordingly issued on 26th January and served on Excalibur on the 27th, although it was not apparently formally sealed under 2nd February. The accompanying evidence indicated that Mr. Decker was intending to apply to set aside the default judgment but without indicating any specific basis on which that application would be made.

11. Mr. Decker's case is that he was only able to put Withers in funds to start preparing the present application on 13th February and the application was eventually made on 13th March. This was two days before the hearing of the application to set aside the statutory demand. At that hearing it was argued on Mr. Decker's behalf that the application should be stayed pending the outcome of the present application to set aside the default judgment, and the District Judge apparently acceded to that

submission. The statutory demand proceedings have therefore been stayed, adjourned *sine die*.

12. The application to set aside the default judgment was based on Mr. Decker's first witness statement in a draft defence in which he denied that he had been properly served with the proceedings and was therefore entitled to have the judgment set aside as of right. He also asserted that he had in fact been authorised to sign the repayment agreement on behalf of Princess pursuant to a power of attorney. A hearing date was set for the application on 12th May with a time estimate of two hours. On 5th May, the day for service and reply evidence, Mr. Decker served a revised draft defence accompanied by a second witness statement which radically revised his case in both respects.

13. It was now accepted that he had been duly served and accordingly the application to set aside the default judgment as of right was abandoned. He also abandoned the assertion that he had ever had any valid power of attorney to represent Princess. On the contrary, it was accepted that he did not, but instead it was argued for the first time that he nonetheless had actual authority on the basis of an oral agreement and/or a board resolution of Princess.

14. Given this *volte-face*, counsel on both sides agreed that the time estimate for the hearing of the application was too short and the full day would be required. The hearing was therefore adjourned and in the event has come back before me.

15. As to the law, there is little disagreement as to the applicable principles. CPR part 13.3.1 gives the court a general discretion to set aside or vary a default judgment but only if one of two threshold conditions are satisfied. Either the defendant must show a real prospect of successfully defending the claim or there must be some other good

reason to set it aside or vary it. Mr. Decker did not rely on the second limb. His case was put solely on the basis that he had a real prospect of success.

16. It is common ground that in circumstances where judgment was regularly obtained, as is now conceded, the burden of proof is on the defendant. It was also common ground that the test to be applied in respect of the merits of the defence is the same as that for summary judgment, in other words, Mr. Decker must show a realistic prospect of a successful defence as opposed to something that is merely fanciful. Thirdly, it was common ground that the strength of the defence is an important factor but not decisive.

17. Part 13.3.2 of the CPR expressly provides that when considering the exercise of the court's general discretion, it must consider whether the application to set aside judgment was made promptly. Recent Court of Appeal authority in *FXF* has confirmed that the exercise of this general discretion under part 13.3 is also subject to the familiar three-stage *Denton* test. The interaction between part 13.3 and *Denton* was considered at paragraphs 50 to 51 of the judgment where it was made clear that the question of delay is relevant in two contexts. First, under part 13.3 specifically in respect of the delay in making the application, in other words, the time elapsed since the defendant became aware of the default judgment and the time when he applied to have it set aside, but secondly, delay is also relevant more broadly as part of limb 3 of the *Denton* test, when the court is considering all the circumstances of the case. This opens up the entire history of the dispute and delays other than that solely (?) in between the default judgment and the date of the application.

18. It is also clear that the court must have regard to the need for litigation to be conducted efficiently and at proportionate cost and the need to enforce compliance

with court rules and orders. (See CPR part 3.9) Thus, delay can result in the dismissal of an application even where a potentially meritorious or even strong defence is made out.

19. Reference was made by both sides to previous authorities on the length of delay which the courts have considered acceptable or unacceptable. I do not propose to discuss these, suffice it to say that each case is necessarily fact-specific and that my assessment falls to be made on the facts of this particular case. I therefore derive limited assistance from decisions in other cases on other facts. However, I do accept that there does need to be cogent evidence explaining the delay.

20. I should refer to two further matters which were common ground. The first is that the default judgment only relates to the claim against Mr. Decker for breach of warranty of authority. It is therefore unnecessary for me to deal with the case of deceit. Secondly, it is conceded on behalf of Mr. Decker that his failure to acknowledge service or to serve a defence in response to the claim form was a serious and significant failure for the purposes of *Denton* limb 1.

21. Against this background the following issues fall for determination. First, does the defendant have a realistic prospect of a successful defence? This falls into two parts. The first is whether he did indeed have the requisite authority to sign the repayment agreement on behalf of Princess. As it is now conceded that he did not hold any valid power of attorney, the question is whether he nonetheless had authority in some other way. The second limb of this issue is whether he can show a real prospect of successful defence on quantum. The second issue is whether there was a good reason for his failure to acknowledge service or file a defence for the purpose of *Denton* limb 2. This essentially turns on my assessment of his case that the proceedings never

came to his attention. The third issue is the general exercise of my discretion in all the circumstances of the case.

22. Starting then with real prospects of success and the question specifically on authority. As I have said, it is common ground that Mr. Decker did not have a power of attorney as previously asserted. Reliance was placed on an undated board resolution which had been produced in relation to a loan transaction with Alpha Bank in 2003 whereby apparently Alpha were to take security over the hotel. It was accepted on both sides that the document in question could not constitute a valid power of attorney under either Cypriot or English law. On any view it was not in the form of a deed. However, I can understand how a lay person might have described a document of this nature as a power of attorney.

23. The question is, therefore, whether the document constituted a written authority to Mr. Decker which was still effective nearly 20 years later. The defendant's case was argued with great skill and persuasiveness by Mr. Jack Watson, whose efforts have all the more to be applauded in circumstances where he was apparently not instructed until mid-afternoon last Friday. He submitted essentially as follows. Although the first of the two board resolutions in the papers before the court was limited only to the operation of bank accounts, the other was not so circumscribed and on its face purported to confer unlimited authority on Mr. Decker to act on behalf of Princess. This, he said, was sufficient under Cypriot law, which it was agreed was the relevant system of law for this purpose, to confer actual authority on Mr. Decker. It also supported Mr. Decker's evidence that there had been discussions with Mr. Polyviou and an oral grant of authority. Either would suffice under Cypriot law.

24. In any event, he said, Cypriot law was to the effect that Princess is estopped from denying the grant of authority either on grounds of ostensible authority or because of a rule equivalent to the English law indoor management rule. The letter from Mr. Polyviou dated 31st January 2022 claiming that any authority had been revoked and that Mr. Decker had had no interest in Princess since 2012, should be treated with caution. It was not apparent what questions he had been asked or what email he was responding to, nor was there any explanation of the transactions underlying his assertions in paragraphs 3 to 6 of the letter regarding Mr. Decker's interests in Princess or any evidence or documents to support what he said. Mr. Watson submitted that in all the circumstances this was an entirely self-serving letter.

25. In any event, he said that even if authority had been revoked, that was irrelevant because such revocation was ineffective under Cypriot law until the revocation was communicated to the agent, which it never was. In this context he relied on section 168. Therefore, he submitted that Princess was bound by the repayment agreement either because the defendant had actual authority or because Princess was estopped from denying that he did. Mr. Decker's previously-pleaded case on ratification is not pursued as it is not supported by the Cypriot law evidence.

26. Excalibur was represented before me by Mr. Baradon, KC. His submissions can be summarised as follows. There was no evidence at all from Mr. Decker about the board meeting at which these resolutions were signed, despite the fact that it was apparently attended both by him and by Princess's lawyer, Mr. Dimitriou. Mr. Decker himself said that the board resolution had been signed in context with a transaction with Alpha Bank in 2003 but he had provided no evidence at all about this transaction: what it was, what happened or whether indeed it ever took place.

27. The board resolutions had been admittedly signed by Mr. Polyviou in that context and the natural inference was therefore that they were limited to that transaction. Moreover, the defendant's expert on Cypriot law had apparently not been told about the Alpha Bank transaction at all.

28. Even if the authority conferred by the board resolution was unlimited, there is no evidence that it continued after 2003 for nearly 20 years. On the contrary, the evidence of Mr. Polyviou is that it was revoked. Section 168 only applies as against Mr. Decker himself and is therefore no defence as against Excalibur. That would be the equivalent position in English law as well.

29. Further, Mr. Baradon submitted that the board resolution relied on was not provided to Excalibur until after the repayment agreement had been signed. Accordingly, there can have been no representation to Excalibur which was capable of founding either an estoppel or any ostensible authority. Likewise, the indoor management rule could not apply where Mr. Decker did not have authority in the first place and no representation that he did had been made to Excalibur. In any event, he said the expert opinion relied upon by Mr. Decker was heavily caveated by reference to the Articles of Association which had not been provided to the expert.

30. These, it seems to me, are powerful points. It is surprising that the expert was not given the Articles of Association. I was told by Mr. Watson that his client does not have them and that even though they are supposedly publicly available, he was unable to find them himself. However, he pointed out that they were therefore equally accessible to Excalibur, who could have relied on any relevant — *(fault in recording)* — for themselves. That no doubt is true. However, I discount that point because I

bear in mind that the burden of proof is firmly on the defendant in this case, not on Excalibur.

31. Furthermore, it seems to me unsatisfactory that the expert appears not to have been told that the board resolution was drafted in the specific context of the Alpha Bank transaction. Her opinion, therefore, proceeds on the basis that the authority which Mr. Decker claims to have been given was in fact given. There is an obvious circularity. Therefore, there is a limit to which I can place weight on her opinion.

32. I also note that despite having a copy in his possession from at least 9th March, there is no evidence from Mr. Decker which specifically rebuts what is said by Mr. Polyviou in his letter about Mr. Decker ceasing to have any interest in the hotel after 2012 or at least after 2018. I accept that the thrust of his evidence in his witness statements contradicts what Mr. Polyviou says, but I would have thought that he should be in a position to support his case at least on his continuing interest in the hotel and Princess. Indeed, no particulars or explanation have been provided even of his own pleaded case that he disposed of some interests in Princess and Cytrex to Mr. Polyviou in February 2022.

33. I also accept that in the absence of any evidence that Excalibur was shown the board resolution prior to signing the repayment agreement, there is simply no basis on which any estoppel can be said to have arisen because there was simply no representation by Princess to Excalibur. I also accept that the indoor management rule cannot rescue Mr. Decker here. That only protects a third party against an admitted agent exceeding his powers. It cannot apply where Mr. Decker did not have authority in the first place. Since Excalibur were not apparently shown the board resolution until after

signature of the agreement, it cannot even be said that Mr. Decker was clothed with ostensible authority.

34. Mr. Decker's expert on Cypriot law does not deal with revocation but I agree with Mr. Baradon that the provision of Cypriot law relied upon has no application as between Princess and Excalibur, only as between Princess and Mr. Decker. I note that the original draft defence relied upon a further part of section 168 which specifically addressed the position of third parties. That was deleted in the revised draft and the inference must be that the expert was unable to support it.

35. Mr. Decker has had a very long time indeed to bolster his case in all those respects where there are glaring evidential gaps. He has not taken advantage of that opportunity and I can only infer that that is because he is unable to do so. For all these reasons I am satisfied that he has no real prospect of succeeding on liability so far as the claim for breach of warranty of authority is concerned.

36. That leaves the question of quantum. Mr. Watson submitted that even if Mr. Decker was liable for breach of warranty of authority, that did not necessarily mean that he was liable for the full amount of the debt owed by Globus. He submitted that the correct comparison was between Excalibur's actual position and the position they would have been in had the repayment agreement bound Princess. Since the repayment agreement did not itself create any security, he submitted that Excalibur would have to prove that they could and would have obtained security and the amount which they could have recovered on enforcement. That, he submitted, would depend on what other incumbrances were in place and what the value of the hotel was at the date of enforcement.

37. It seems to me that this basic premise is correct. There is clearly, to my mind, a realistic argument that the repayment agreement did not create any security itself and that further formalities would have had to be complied with under Cypriot law. There is no evidence before me as to what these would be or whether Princess would have co-operated. It should be noted that this hypothesis only arises on the premise that the defendant in fact had no authority and I cannot assume that even if Princess was bound by the repayment agreement that Mr. Polyviou would necessarily have been co-operative in this regard.

38. I therefore accept that what Excalibur lost was the opportunity to agree security and have it registered in Cyprus. That is a matter yet to be addressed in the evidence and it does seem to me that there is a real prospect of successfully attacking quantum on this ground.

39. I turn next to the question of whether there was good reason for Mr. Decker not to respond to the claim form. Mr. Decker's consistent case has been that he never saw the claim form or the particulars of claim. His initial case was that he could not, therefore, have been properly served, although it is fair to say that he did not say so in so many words until this application was in fact issued on 13th March. Prior to that date, Withers had simply reserved his rights without saying categorically that he had never received the documents.

40. His case changed when he was confronted with unequivocal video evidence showing that the documents had indeed been inserted into the letter-box of his usual residence. Mr. Baradon suggested that this was simply an indication of Mr. Decker's tactical ducking and weaving. Certainly that is one interpretation. On the other hand, it is also entirely consistent with Mr. Decker's case. If he had genuinely never seen the

documents, the natural assumption would be that they had not been sent to him and when it was proved that they had been, the next natural assumption to be made is that they must have been mislaid. However, of course, if he had not seen them he would be completely unable to say how that came about. Ultimately, therefore, this all turns on whether I accept his case that he never saw them.

41. At first blush it seems somewhat improbable, given the evidence in his first witness statement that no-one else had access to his letter-box apart from him and his wife, and that he checked it regularly. On the other hand, the video shows that the documents were contained in a slim white envelope which although marked "Private and confidential" did not have any other marking to indicate that they contained important documents. I also take account of the fact that all other communications from Excalibur and their solicitors have been made or accompanied by email. However, there was no email on this occasion to say that service had been effected or was on its way, and so there was no particular reason for Mr. Decker to be looking out for service of the claim form at that time.

42. Mr. Baradon sought to rely on the circumstances surrounding the subsequent service of the statutory demand as an indication that Mr. Decker had some sort of propensity to evade service. I am not prepared to draw such an inference, not least because it was subsequent to service of the claim form. I also bear in mind that Mr. Decker had previously signed courier deliveries of the pre-action protocol letter of claim and chaser. I am not prepared, therefore, to assume that he was given to deliberately trying to avoid service.

43. Moreover, if Mr. Decker had seen the documents, it seems inherently unlikely to me that he would not have sought legal advice at that stage. He had, after all, asked

Withers to look at the pre-action protocol letter of claim and he must have appreciated that the formal issue of the long-threatened proceedings was a radical upping of the ante.

44. In these circumstances I cannot exclude altogether the possibility that Mr. Decker genuinely did not see the claim form and particulars of claim for whatever reason, and I am not persuaded that there was any deliberate failure on his part to engage with the service of the proceedings or that he is lying. I am therefore prepared to assume in his favour that he did not see the documents, in which case that would obviously be a good reason for not lodging an acknowledgement of service.

45. Turning next to delay, this as I have said has a dual relevance — *(fault)* — Under this head, I deal with the specific delay in making the application under 13.3. Mr. Baradon submits that the delay in question was far beyond acceptable. He submits that Withers had already been instructed to look at the pre-action protocol letter of claim and so would not have needed long to get up to speed as regards the default judgment, notwithstanding the intervention of the Christmas holidays. He points out that there was no cogent evidence from Mr. Decker to explain why he was: "Unavoidably away" and so unable to provide instructions or funding until early January. He also submitted that the purported justification that it was necessary to prioritise the statutory demand application carries no weight because the response to the statutory demand depended itself on the application to set aside the default judgment.

46. I see force in all these points. On the other hand, if Mr. Decker was genuinely having difficulty in raising funds, then this does provide some explanation as to why Withers

were initially not in a position to do more than hold the ring pending funds to allow proper consideration and investigation of the matter to be carried out.

47. Even so, however, that is not necessarily a good excuse. Lack of funds to instruct lawyers would not have prevented Mr. Decker from taking steps himself. He is obviously a businessman of some experience, so it is not as if he is completely helpless. Moreover, there are many sources of assistance through *pro bono* schemes or Direct Access to assist litigants who cannot afford to instruct City solicitors. The key questions, therefore, seem to me to be first, whether Mr. Decker genuinely was experiencing lack of access to funds. Secondly, whether this is a good enough excuse.

48. The total delay between Mr. Decker becoming aware of the default judgment and the service of the application was about 2½ months, with of course the intervention of the Christmas and the New Year period. As to the funding position, the evidence of Ms. Bischof suggested that Mr. Decker owned a number of assets. In response, he accepted that he owned some but denied others. However, he has not seen fit to adduce any evidence of his actual asset position. The saga of the stolen Bentley I also find to be slightly odd. The police investigation has apparently been closed but the DVLC still have the car on its books, so that presumably it can be traced. There is no evidence of the outcome of his insurance claim.

49. All in all, Mr. Decker has been very cagey about his assets. However, I find it difficult to think that he would have delayed in raising funds when he was facing potential bankruptcy. It is also fair to say that the assets which he accepts were owned by him were not liquid and therefore not readily available for the purpose of

putting — *(fault)* — in funds. I accept, or I was told by Mr. Watson on instructions that Withers would not have been permitted to accept a charge over property.

50. I note that Mr. Decker is apparently able to fund the present application and it would seem to a reasonably generous extent. However, the fact that funding issues prevented the instruction of Mr. Watson until Friday suggests that there may indeed be genuine problems in this regard. Again, I am prepared to assume in Mr. Decker's favour that he did need to raise funds and that this took him some time.

51. The question then is whether this is a sufficient excuse for the delay in issuing the application. As I have said, there was nothing to stop Mr. Decker going to a smaller firm of solicitors, seeking *pro bono* assistance or even acting in person. The rules of procedure apply to litigants in person as much as they do to other litigants and they are to be observed by and make use of the courts.

52. However, a factor of some importance, in my judgment, is the need to carry out some investigations in Cypriot law. This too would have taken some time and is not something which could readily be dealt with without legal assistance. Even if Mr. Decker had made his own application to set aside judgment at an earlier stage, therefore, it would probably have required considerable subsequent amplification and would not of itself have assisted Excalibur greatly.

53. It is accepted on Mr. Decker's behalf that it cannot be said he did everything as quickly as he possibly could have done. However, although borderline, I do not feel that the delay in bringing the application was excessive, given the intervention of the Christmas and New Year holidays, difficulties in raising funds, which I am prepared to assume in his favour, and the need to investigate Cypriot law.

54. This then brings me on to the general exercise of my discretion, at which stage I can take account of all the circumstances including both Mr. Decker's alleged lack of engagement prior to the service of the default judgment and also the delay post-application on which Mr. Baradon relied. At the outset I should say that I discount the fact that Mr. Decker is an individual being held liable for the company debt. That is a fact of life and indeed it was recognised by him contemporaneously, that if anything went wrong he would be personally liable. I also ignore the size of the judgment. If Mr. Decker is liable he is liable, and there is no basis for depriving Excalibur of judgment simply because Mr. Decker might be bankrupted as a consequence.

55. However, in my judgment, it is important that I am considering this matter now in the light of the fact that Mr. Decker only has realistic prospects of success in relation to quantum and that if I acceded to the application, I would simply be varying the judgment to make this clear. The question is, therefore, whether in all the circumstances he should be precluded from re-opening the judgment to this limited extent. The factors relied on by Mr. Baradon regarding the deficiencies in his evidence, therefore, largely drop out of the picture because they all go to the question of liability rather than to quantum.

56. I discount the delay due to the adjournment of the original hearing fixed for this application. I accept that it was necessitated by Mr. Decker's change of case. However, the adjournment was the result of a joint application by counsel and it seems to me that this is a matter which goes to costs rather than being a reason to shut Mr. Decker out completely. I do not regard it as a delaying tactic; to my own mind it simply reflects the fact that Mr. Decker had carried out further investigations which

obviously required his case to be amended if it was to be properly presented before the court.

57. Taking a step back and looking at everything in the round, I find that this is very much a borderline case. The evidence as to non-receipt of the claim form I have held was improbable but I am unable to rule it out altogether. Evidence as to Mr. Decker's asset position is exiguous, although his claim that he has a lack of ready funds is consistent with the course of events to date. It is also accepted that he did not do everything as quickly as he possibly could have done and it is true that he has not exactly hurried to engage in the proceedings.

58. However, in circumstances where I have held that the delay in bringing the application is not egregiously excessive in all the circumstances, I do not, on balance, regard this as a case where I shall refuse to set aside the judgment to the limited extent indicated. Excalibur is now in litigation. It seems to me that it will suffer no real prejudice by the setting aside of the judgment, which cannot be compensated in costs or accommodated by the imposition of conditions. As I say, I find this case to be very much on the borderline, but I am just persuaded that I should give the defendant the benefit of the doubt on quantum but subject to conditions.

59. I will hear counsel as to what conditions it would be appropriate to impose, but I should indicate that I am minded at the moment to impose the condition that Mr. Decker pay the costs of the abortive 12th May hearing and at least part of the costs of this application, and that he should also provide such security as the court orders for the next phase of the proceedings, pursuant to any application that Excalibur wishes to issue in that regard.