Neutral Citation Number: [2014] EWHC 1778 (QB)

Case No: HQ13X00142

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 6 June 2014

Before:

MR SIMON PICKEN QC
(sitting as a Deputy Judge of the High Court)

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Between:

JOHN PAGE

Claimant

- and -

(1) CHAMPION FINANCIAL MANAGEMENT LIMITED
(2) CHAMPION BUSINESS SOLUTIONS LIMITED
(3) CHAMPION CONSULTING LIMITED
(4) CHAMPION ACCOUNTANTS LLP
(5) PARK ROW ASSOCIATES LIMITED (IN LIQUIDATION)

Defendants

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Dermot Woolgar (instructed by **Fenchurch Law Ltd**) for the Claimant.
Nigel Burroughs (instructed by **Hewitsons LLP**) for the Fifth Defendant.

Hearing date: 14 May 2014

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APPROVED JUDGMENT

MR SIMON PICKEN QC:

Introduction

1. Does a default judgment obtained against one defendant (defendant A) preclude another defendant in the same proceedings (defendant B) from advancing, by way of defence to a claim against it (defendant B), a case which is inconsistent with the default judgment which has been obtained (against defendant A)?

2. This is the question of principle which arises in the present case. I say right away that it is not the question which was framed by Master Yoxall, on 17 January 2014, as the preliminary issue which was listed to be tried. That preliminary issue was described as being *"as to the operation and effect of section 39 of the Financial Services and Markets Act 2000"*.

3. Mr Woolgar, on behalf of the Claimant, described this formulation of the preliminary issue, accurately in my view, as having been only intended to 'signpost' the issue to be tried. The parties were agreed before me that, as the existing formulation did not really capture the essence of what is in dispute between them, the preliminary issue should be amended in the manner suggested by the Claimant's solicitors, Fenchurch Law Ltd ("Fenchurch"), in a letter to Hewitsons LLP ("Hewitsons"), the Fifth Defendant's solicitors, dated 14 April 2014. Fenchurch proposed a revised wording as follows:

    "the issue between the Claimant and the Fifth Defendant as to the effect of the default judgment against the First Defendant, and the operation and effect of section 39 of the Financial Services and Markets Act 2000, on the right of the Fifth Defendant to defend the claim against it on the grounds that the First Defendant was neither negligent nor guilty of any breach of contract".

4. Having listened to the parties' submissions, it seems to me that this reformulation is sensible and I propose to proceed in this judgment to determine the preliminary issue as so adapted rather than the preliminary issue which was directed by Master Yoxall. The revised preliminary issue entails what I have described as the question of principle above – a question on which, counsel told me, there is no authority, certainly no authority where the question has been the subject of full argument.

Relevant background

5. Before coming on to consider the parties' respective submissions in relation both to the question of principle which I have identified, and an application by the Fifth Defendant to set aside the default judgment obtained against the First Defendant, I should firstly set out some background and deal also with the procedural history of the proceedings. I do this by relying quite heavily on the contents of the two skeleton arguments, although I have also myself been through the underlying material. I start by briefly addressing Section 39 of the Financial Services and Markets Act 2000 ("FSMA") and the relevant regulatory regime under that Act.

6. Under Section 19 of FSMA, by virtue of what is known as the *"general prohibition"*, no person may carry on a regulated activity in the United Kingdom, or purport to do so, unless he or she is either an authorised person or an exempt person. Under Section 23(1), it is a criminal offence to act in breach of Section 19. The Financial Conduct Authority (the "FCA") is empowered under Part 4A of FSMA to permit persons to carry on regulated activities following receipt of an application for permission from that person. If permission is given, then, the applicant becomes an *"authorised person"* under FSMA. Section 22(1) stipulates that an activity is a regulated activity if it is an activity of a specified kind which is carried on by way of business and if it relates to an investment of a specified kind. Activities are of a specified kind if they are specified in the Financial Services and Markets Act (Regulated Activities) Order 2001 (the "RAO").

7. It is common ground that the specified activities relevant in the present case are: (i) arranging deals in investments (a specified activity under Article 25 of the RAO); and (ii) advising on investments (a specified activity under Article 53). It is also not in dispute that, in the present case, the Claimant's investments in a film partnership called The Scion Films Sale and Leaseback Sixth LLP ("Scion") and in a recording artist partnership called Stocksearch: The Mike Stock Recording Artist Development Fund 3 LLP ("Stocksearch") constitute collective investment schemes within the meaning of Section 235 of FSMA, and that *"units"* in a collective investment scheme are specified investments by Article 81 of the RAO. It follows, therefore, as Mr Woolgar explained, and which Mr Burroughs did not dispute, that: (i) making arrangements for another person to purchase an investment in a collective investment scheme, or advising on the purchase of such investments, are all specified activities; (ii) where such activities are carried out by way of business, they are regulated activities; and (iii) any person carrying on these activities must be either authorised or exempt.

8. It is well known that many investors purchase investments through intermediaries, which carry out regulated activities not because they are authorised but because they are exempt. As Mr Burroughs put it, the intermediary or appointed representative regime is a way by which individuals or small firms who or which would otherwise find it difficult to obtain authorisation under FSMA can nevertheless provide financial services; in essence, they take advantage of the authorisation granted to an authorised person, but are not themselves directly regulated. Specifically, intermediaries need not be authorised, provided the following requirements of Section 39(1) of FSMA are satisfied. Section 39(1) provides:

"(1) If a person (other than an authorised person) –

(a) is a party to a contract with an authorised person ("his principal") which –

(i) permits or requires him to carry on business of a prescribed description, and

(ii) complies with such requirements as may be prescribed, and

(b) is someone for whose activities in carrying on the whole or part of that business his principal has accepted responsibility in writing,

he is exempt from the general prohibition in relation to any regulated activity comprised in the carrying on of that business for which his principal has accepted responsibility."

9. By virtue of Section 39(2), an intermediary who is exempt as a result of Section 39(1) is known as an *"appointed representative"*. Since in the present case there was an agreement in place between the First and Fifth Defendants which meets the requirements of Section 39(1), an agreement dated 12 November 2003 which appears to have been duly notified to the FCA's predecessor, the Financial Services Authority (the "FSA"), it follows that at all material times the First Defendant was the Fifth Defendant's appointed representative. It follows, too, as Mr Burroughs readily accepts, that the Fifth Defendant (as the First Defendant's principal) has full responsibility in law for all the acts and omissions which the First Defendant (as the Fifth Defendant's appointed representative) committed or omitted in carrying out its business as the Fifth Defendant's authorised representative. This is because Section 39(3) provides as follows:

   "The principal of an appointed representative is responsible, to the same extent as if he had expressly permitted it, for anything done or omitted by the representative in carrying on the business for which he has accepted responsibility."

10. Responsibility under Section 39(3), which covers both civil and criminal liability, means that a claimant has the ability to pursue both the authorised representative and the principal – in this case, both the First Defendant and the Fifth Defendant. As Mr Burroughs neatly put it, Section 39(3) prevents an authorised representative from 'falling through the net', so that there is no regulation of his activities by the FCA, achieving this by making the principal responsible for the authorised representative's actions and enabling the principal to be sanctioned if its authorised representative fails to meet the requirements only indirectly imposed on the authorised representative.

11. Mr Burroughs cited, as an example, the FSA rules in force in August/September 2006 when the allegedly negligent advice was given by the First Defendant to the Claimant in the present case. Section 138 of FSMA provided that the FSA had power to make rules applying to authorised persons with respect to the performance of regulated activities. In pursuance of that power, the FSA issued the Conduct of Business Rules (the "COBR", replaced by the Conduct of Business Sourcebook, the "COBS", on 1 November 2007). As the COBR (and COBS) apparently only apply to authorised persons, and not also to appointed representatives, a customer could not complain to the authorised representative (the financial adviser with which the customer has had his or her dealings) if the authorised representative breached, for example, the 'know your client' rules or the 'suitable advice' rules. What Section 39(3), however, allows the customer to do is to hold the principal (in the present case, the Fifth Defendant) responsible for such breaches on the part of the authorised representative.

12. Although it might at one stage have appeared as though the Claimant was contending otherwise, not least because in the Amended Particulars of Claim served earlier this year (after, and in accordance with, Master Yoxall's January order) it was alleged that *"the Fifth Defendant is, by virtue of section 39(3), vicariously liable"* (see paragraph 26.3), at the hearing before me Mr Woolgar confirmed that he was not seeking to argue that Section 39(3) gives rise to vicarious liability in the strict (legal) sense. This was a sensible concession since it is clear that Section 39(3) does not entail the imposition of vicarious liability: see, by way of illustration, *Jackson & Powell on Professional Liability* (7th Ed) at paragraph 14-017.

13. Turning now to the procedural history of these proceedings, and (as part of this) the nature of the claims which the Claimant advances, the Claimant issued his Claim Form on 11 January 2013. In it, the Claimant's claim was described as being *"for professional negligence arising out of the Defendants' contractual and common law duties of care to Mr John Page"*. I was told by Mr Woolgar that the Claim Form was issued because of concerns about the imminent expiry of relevant periods of limitation, and that after its issue the Claim Form was not served immediately, the Claimant instead making an application for a 6-month time extension of time in respect of service of the Claim Form.

14. The extension was sought on the basis that it had not been possible, before issuing the Claim Form, to follow the relevant pre-action protocol, the witness statement in support of the application explaining that the claim was in respect of losses suffered by the Claimant when, on the advice of *"the Defendants"* (no distinction was made between the various Defendants), he made two investments in 2006 (one in Scion and the other in Stocksearch).

15. Having secured the time extension which the Claimant sought, on 22 April 2013, the order (made by Master Yoxall) was then sent to each of the Defendants. In response, the Second, Third and Fourth Defendants agreed that they would not seek to set aside the order, whereas the Fifth Defendant instructed Hewitsons and, on 2 May 2013, made an application to have Master Yoxall's order set aside. There was no response from the First Defendant. Mr Biggin, the partner at Hewitsons with conduct of the matter on behalf of the Fifth Defendant, made a number of points in his witness statement in support of the setting aside application. Mr Woolgar highlighted the following statements in particular: (i) that the Fifth Defendant *"was a provider of independent financial advice but closed to new business in November 2009"* (paragraph 3); (ii) that the Fifth Defendant's principal activity between 2010 and 2012 had been *"the conduct of a 'Past Business Review' under the direction of the Financial Services Authority and the preparation for the winding down of its business"* (paragraph 3); (iii) that the First Defendant *"was an appointed representative of the Fifth Defendant from 17 November 2003 to 7 February 2008"* (paragraph 3); and (iv) in respect of Scion and Stocksearch investments which form the basis of the Claimant's claim, the Claimant had given signed confirmation (in the form of so-called *"Client Response Forms"* dated 12 September 2006 and, in the case of the Scion investment, exhibited to the witness statement), that he wanted to *"proceed*

with this investment and do not wish to receive any advice with respect to the suitability of the recommendation to my personal circumstances" (paragraph 11). Mr Biggin concluded, in paragraph 12, as follows:

> *"In the light of these confirmations, the Fifth Defendant looks to the Claimant to either withdraw the claim on a voluntary basis. Alternatively, if the Claimant is unwilling to do so, then the Fifth Defendant's position is that the Claim Form should be served, without a stay of the proceedings being granted, to enable a strike out application to be made. …".*

16. The Claimant's response to the Fifth Defendant's application was to serve the Claim Form after all and without taking advantage of the time extension which he had obtained. He did so, together with the Particulars of Claim which had presumably in the meantime been drafted, on both the First Defendant and the Fifth Defendant, but not on the Second, Third and Fourth Defendants, against whom the Claimant decided, ultimately, not to proceed. Service in respect of the First and Fifth Defendants was deemed to have taken place on 10 May 2013.

17. Notwithstanding that the Claimant chose not to serve the Claim Form (and Particulars of Claim) on the Second, Third and Fourth Defendants, in the Particulars of Claim all the Defendants (including the Second, Third and Fourth Defendants) were alleged to have owed the Claimant contractual and statutory duties (including *"specifically in relation to the Fifth Defendant, pursuant to section 39 of the Financial Services and Markets Act 2000"*), as well as common law duties of care (see paragraph 18). The Claimant's case was that *"the Defendants"* (therefore, all of the Defendants) should not have advised him to invest either in Stocksearch or in Scion (paragraph 19) and that the Defendants were each negligent for doing so (paragraph 20). More specifically, and in line with the case which was summarised in the witness statement served in support of the time extension application, it was pleaded in the Particulars of Claim that the Claimant was at all material times a director of a firm of financial advisers, and that his claim was for damages in respect of losses alleged to have been suffered as a result of inappropriate financial advice given to him in 2006 – advice which led him to make the investments which he did in Scion and Stocksearch.

18. In support of this case, the Claimant relied on two letters received by him and dated 6 September 2006, in which the First Defendant described itself as "*an appointed representative"* of the Fifth Defendant *"which is authorised and regulated by the Financial Services Authority*" (paragraph 5). He further relied, in paragraph 3, on the Client Response Form dated 12 September 2006 relating to Scion which he had returned to the First Defendant with a tick in the box which read as follows:

> *"I do not want a full review of my financial situation but would like advice with respect to my existing investments and the suitability of this recommendation".*

19. This was the third of four boxes, and the box immediately before the box with the tick in it in the version of the Client Response Form (also dated 12

September 2006 and also bearing the Claimant's signature) which was exhibited to Mr Biggin's witness statement dated 2 May 2013 in support of the application to set aside the order giving the Claimant a six-month time extension. As such, there is an oddity. It is not clear which of the two forms is the genuine document or, if both are genuine, why it should be the case that the Claimant completed two forms in relation to the same investment and, if that is what he did, why it is that he ticked different boxes in the two forms. Be that as it may, the Claimant went on to plead, in paragraph 4 of the Particulars of Claim, that:

"No box was ticked on the client response form in relation to Stocksearch, but as the forms were completed and returned together, the Claimant reasonably presumed that the request in relation to Scion would be reciprocated in relation to Stocksearch. None of the Defendants gave any indication otherwise."

20. Subsequently, service having been effected on the First Defendant, Fenchurch received a letter from Champion Insurance Brokers Ltd dated 18 May 2013, in which the following was stated:

"I refer to your letter of the 8th May 2013 addressed to Champion Financial Management Ltd [the First Defendant]. Whilst we do not act for them we do act as insurance brokers for other Champion companies. Our understanding of the position regarding Champion Financial Management Ltd is that:

The Company no longer trades. It has not traded since May 2008.

The Company was an appointed representative of Park Row Associates Ltd [the Fifth Defendant] (FSA Appointed representative ref: 216759. FSA Principal Ref: 194087). The financial advice provided by the Company was given by Park Row authorised advisors. All investment business undertaken by Champion Financial Management Ltd was done as an appointed representative of and written by Park Row Associates. The Company did not carry any Professional Indemnity cover of its own as being an appointed representative of Park Row Associates Ltd it was included in their cover.

I understand that in the event of a claim being made against Park Row Associates Ltd and any of its appointed representatives the claimant must contact KPMG, ...".

21. Having apparently decided, after all, not to make an application to strike out, the Fifth Defendant served its Defence on 6 June 2013. In this document, the Fifth Defendant repeated essentially what Mr Biggin had stated in his witness statement in support of the application to set aside Master Yoxall's order giving the Claimant a time extension in which to serve the Claim Form, denying liability to the Claimant on the basis that the Fifth Defendant's role in relation to Scion and Stocksearch had been "*executionary only and not advisory*" (paragraph 3). The Fifth Defendant denied, in particular, *"that the Claimant instructed either the First or the Fifth Defendants to provide him with financial advice"* (paragraph 4) and relied (as Mr Biggin had done previously) on the versions of the Client Response Forms in which the

Claimant stated that he wanted to *"proceed with this investment and do not wish to receive any advice with respect to the suitability of the recommendation to my personal circumstances"* (paragraph 6).

22. The Fifth Defendant additionally relied on: (i) two further forms each described as *"Life Pension & Investment Business Submission Sheet"* which, the Fifth Defendant alleged, it *"received from the First Defendant in respect of the said investments"* and which *"denote the role of the Fifth Defendant as 'Execution Only'"* (paragraph 7); and (ii) a form annexed to the Defence and headed *"'EXPERT' PRIVATE CUSTOMER DISCLAIMER"* signed by the Claimant on 12 September 2006, in which the Claimant is recorded as having asked the Fifth Defendant to treat him *"as an 'expert' private customer or intermediate customer"* and as such somebody to whom the Fifth Defendant was under no obligation under the FSA Rules *"to explain to you before recommending any transaction the risks involved in it, or to provide you with any written risk warnings about specific investments or transactions"*.

23. The First Defendant, in contrast to the Fifth Defendant, chose not to serve a Defence, nor indeed even to acknowledge service. Accordingly, as he was entitled to do, the Claimant filed a Request for Judgment under CPR 12, on 2 August 2013 (order sealed on 12 August 2013) obtaining judgment against the First Defendant, in default of acknowledgment of service, for an amount to be decided by the Court. Fenchurch subsequently, on 4 September 2013, sent a copy of the default judgment to Hewitsons. In Fenchurch's covering letter, they referred to the fact that the default judgment contained a direction (by Master Yoxall) that the Claimant should *"apply for a Case Management Conference following service of proceedings on 2nd, 3rd and 4th Defendants"*. Fenchurch stated that they would *"be making an application to the court to have the CMC referred to in the Judgment brought forward, as we see no reason why it cannot happen before the deadline for service of proceedings on the 2nd, 3rd and 4th Defendants"*. Fenchurch went on: *"The matter will then progress to a final hearing where it will be decided how much the 1st Defendant is required to pay our client in damages"*.

24. In a section headed *"Liability of your client"*, Fenchurch then referred to Section 39(3) of FSMA, before saying this:

> *"2.04 Therefore, under the Act, our client is permitted to enforce any Judgment or Order obtained in respect of the 1st Defendant against your client, as if your client were the 1st Defendant.*
>
> *2.05 The CMC will provide a timetable for expert evidence and document exchange (if necessary) in relation to the claim against the 1st Defendant. A date for a final hearing will also be scheduled. At that hearing the Master will order the 1st Defendant pay our client a specific amount.*
>
> *2.06 Once that order has been obtained, our client will enforce against your client, relying on section 39 of the Act. Your client will not be able to contest the order at that stage."*

25. I set out the terms of this letter in some detail given that both parties, for different reasons, rely on it in support of their positions: the Claimant because he says that the letter shows that the Fifth Defendant could have been in no doubt about his intention to rely on Section 39(3); and the Fifth Defendant because it says that the 4 September 2013 letter's reference to enforcement as against the Fifth Defendant demonstrates that what the Claimant had in mind at that stage was not what is now alleged by him in the Amended Particulars of Claim which came to be served in early 2014. The Fifth Defendant makes the point in particular, and entirely correctly, as Mr Woolgar accepted in argument, that the Claimant was mistaken to suppose that Section 39(3) of FSMA entitles him, without more, to proceed to enforce against the Fifth Defendant, as opposed to being entitled to claim in these proceedings that the Fifth Defendant is *"responsible"* for the acts and/or omissions of the First Defendant – a claim which would need to be established as against the Fifth Defendant (whether in reliance on the default judgment which the Claimant has obtained or not, depending on the decision which I reach on the question of principle which I have identified).

26. Returning to the chronology, five days later, on 9 September 2013, the Claimant issued an application in which he sought an order *"allowing the Claimant to apply for a CMC immediately, rather than after service of proceedings on 2nd, 3rd and 4th Defendants, as ordered in the Judgment for Claimant dated 02.08.2013"*. The application notice referred in this context to the *"claim against the 1st Defendant"* having to *"be concluded without delay, in order to allow time for a potential recovery against the 5th Defendant, under section 39(3) FSMA 2000"*. In the witness statement in support of this application, the Claimant's solicitor, Daniel Laycock, a senior associate at Fenchurch, stated as follows at paragraphs 20 and 22:

> *"20. It is therefore the Claimant's intention to obtain Judgment for a specified amount against the 1st Defendant and then enforce this against the 5th Defendant, relying on section 39(3) of the Act.*
>
> ...
>
> *22. Proceedings will not be served on the 2nd, 3rd and 4th Defendants until after the Pre-Action Protocol has been exhausted, and could be as late as 10.11.2013 (which is the final date that the court stated proceedings could be served on those parties). I have been informed by the 5th Defendant's solicitor that the 5th Defendant is presently looking to wind up the company. If the Claimant has to wait until proceedings are served on the 2nd, 3rd and 4th Defendant before proceeding with the claim against the 1st Defendant, there is a real risk that by that time the 5th Defendant will have disposed of its assets and been wound up. This will mean that the Claimant will not be able to enforce the Judgment for a specified amount that it has obtained against the 1st Defendant on the 5th Defendant, as the 5th Defendant may no longer exist."*

27. The Claimant's application was listed to be heard by Master Yoxall on 28 October 2013. It was preceded by exchanges between the parties' solicitors,

both in writing and on the telephone. Specifically, on 3 October 2013, Mr Biggin (the Fifth Defendant's solicitor) raised with Mr Laycock (the Claimant's solicitor) the point that, by entering judgment in default against the First Defendant, the Claimant should be taken as having made a fatal election which precluded him from pursuing his claim against the Fifth Defendant. This was not a point which ultimately the Fifth Defendant has pursued, Mr Burroughs accepting before me that it was not a point with any validity. Needless to say, it was a point which, however, Fenchurch felt they had to address. They did so in their letter to Hewitsons dated 21 October 2013, making the point (correctly) that *"section 39 confers liability on your client for the 1st Defendant's defaults, but not to the exclusion of the 1st Defendant"* and concluding (again correctly): *"Pursuing the 1st Defendant is, therefore, not incompatible with the pursuit of your client under section 39"* (paragraph 1.06).

28. In the same letter, Fenchurch went on, in a section headed *"Proposed Route Forward"*, to refer to the CMC scheduled to take place on 28 October 2013 and then to say this:

> *"2.02 On receipt of the Judgment for a specified amount, our client will make an application to amend the Particulars of Claim to plead that your client is liable to the 1st Defendant [sic] under section 39 in the amount of the Judgment against the 1st Defendant. Your client will then have the opportunity to amend its Defence.*
>
> *2.03 We cannot see that your client will be able to raise a triable Defence. If this is the case, we will recommend to our client that he seeks summary judgment against your client for the amount obtained against the 1st Defendant."*

29. Again, I have set this detail out because of the different emphasis placed on it by the parties, mainly in the context of the Fifth Defendant's application to set aside the default judgment obtained as against the First Defendant. The Claimant highlights the reference to the Particulars of Claim being amended in order *"to plead that your client is liable to the 1st Defendant"* (plainly intended, in fact, to be a reference to the Claimant, rather than the First Defendant) *"under section 39"*, whereas the Fifth Defendant highlights the fact that Fenchurch were not saying, certainly not in express terms, that they would, in due course, be contending that it was not open to the Fifth Defendant to put forward a case, in response to the claim under Section 39(3), which is inconsistent with the default judgment obtained by the Claimant as against the First Defendant. Although, with the benefit of hindsight, it can be seen that this may have been what Fenchurch had in mind with their reference to the Fifth Defendant not having a *"triable Defence"*, Mr Woolgar nevertheless, frankly and to his credit, acknowledged that the inconsistency of judgments point (the question of principle identified at the outset of this judgment) was not raised, full-square anyway, until March this year.

30. In the event, the hearing before Master Yoxall on 28 October 2013 was one which Mr Biggin was unable to attend owing to the bad storms that day. The Fifth Defendant was, therefore, represented by counsel instead, not Mr

Burroughs but counsel who was instructed at short notice and without much familiarity with the case. The First Defendant was not represented. Master Yoxall gave directions for disclosure and inspection and in respect of expert evidence, with a view to a disposal hearing taking place, by which I mean a hearing concerned with the assessment of damages as against the First Defendant. He directed also that there by a further CMC to be attended by the Claimant, the First Defendant and the Fifth Defendant on 17 January 2014.

31. I was told by Mr Woolgar, who appeared before Master Yoxall at the hearing on 28 October 2013, that it was suggested, albeit only tentatively, by the Fifth Defendant's counsel (not, I repeat, Mr Burroughs) that the Fifth Defendant might be in an analogous position to that of an insurer in respect of the First Defendant's liability to the Claimant, and that accordingly the Fifth Defendant might have the right to appear in, or perhaps even have conduct of, the First Defendant's defence at the disposal hearing. Mr Woolgar told me that he pressed for clarification as to the Fifth Defendant's intentions in this connection, and specifically as to the legal basis for what counsel was suggesting. Master Yoxall directed, as a result, that the Fifth Defendant should, by 18 November 2013, give the Claimant notice *"as to whether or not it intends to take part in the action against the First Defendant and, if it does, it shall specify in respect of what issues it wishes to be heard"* (paragraph 3 of the order).

32. Hewitsons duly wrote to Fenchurch on 14 November 2013, making a number of points. The first was concerned with the argument that had been raised on 3 October 2013, during Mr Biggin's conversation with Mr Laycock: the election point. In the circumstances, I say no more about that. Secondly and more pertinently in the light of subsequent events, Hewitsons made the point that, in the absence of an amendment to the Particulars of Claim, the default judgment obtained by the Claimant against the First Defendant *"cannot be relied upon by Mr Page to establish liability against PRA [the Fifth Defendant]"*. Thirdly, and equally pertinently (albeit controversially, as it turns out), Hewitsons stated that the *"default judgment entered against CFML [the First Defendant] does not have the effect of making PRA [the Fifth Defendant] liable to your client – he still has to prove on the balance of probabilities at trial that PRA [the Fifth Defendant] breached its statutory obligations"*. Fourthly, following on from the third point, Hewitsons asked Fenchurch to confirm that "*our client's defence has not been prejudiced in any way by the default judgment entered against CFML [the First Defendant]*". Hewitsons went on to address the question of directions, making the point that, although Master Yoxall had purported to give the Fifth Defendant permission to take part in the claim against the First Defendant, it was apparent that the Fifth Defendant was not going to be permitted, on the basis of the existing directions, to do more than address the Court on the question of assessment of damages. Hewitsons made the point in this context that, as *"judgment has not been entered against our client"*, it was *"premature and inappropriate for our client to participate in the assessment of damages"* against the First Defendant. On this basis, Hewitsons proposed that the assessment of damages against the First Defendant "*should be postponed until you have either a judgment against [the Fifth Defendant] or the claim against it has been dismissed"*.

33. Again, this is relevant to the setting aside application – as is Fenchurch's letter in response dated 25 November 2013. In that letter, Fenchurch stated that the Claimant did not intend to amend the Particulars of Claim until after the quantification of his damages as against the First Defendant, but that he would then amend to particularise *"the plea which has already been raised against your client under s.39 FSMA identifying the specified amount for which your client is liable"*. Fenchurch added that they were neither obliged nor, indeed, willing to give the confirmation sought concerning whether the Fifth Defendant's defence had been prejudiced by the default judgment obtained against the First Defendant. Nor was the Claimant willing, Fenchurch explained, to agree to the assessment of damages (as against the First Defendant) being deferred.

34. In the immediate lead-up to the hearing before Master Yoxall, on 17 January 2014, witness statements were served by Mr Laycock (for the Claimant) and Mr Biggin (for the Fifth Defendant), both on 13 January 2014. Mr Laycock's witness statement was made in support of the Claimant's application, dated 13 January 2014, for a stay of the claim against the Fifth Defendant *"until the claim against the first Defendant has been concluded"*. Mr Laycock explained in paragraph 20, that it was *"the Claimant's intention to obtain Judgment for a specified amount against the 1st Defendant before amending his particulars of claim to plead further that the 5th Defendant is liable to the Claimant for that Judgment amount by virtue of its liability under section 39 of the Act".* In his witness statement, Mr Biggin stated (in paragraph 10) that the Claimant had taken the position that *"under section 39 ... the Fifth Defendant is strictly liable for the acts and defaults of the First Defendant"*. He explained that the Fifth Defendant did not accept that that was the case and that its position was *"that it can rely on any defence which would have been available to the First Defendant"*.

35. This, then, is the context in which the matter came before Master Yoxall: the parties having identified that there was an issue between them concerning the impact of Section 39(3). In these circumstances, it made obvious sense that Master Yoxall should adopt the stance which he did. Indeed, I am told by both counsel that, during the course of the hearing, Master Yoxall having apparently canvassed whether the Fifth Defendant should be applying to set aside the default judgment, it was explained (presumably by Mr Burroughs) that its position was that the default judgment was not binding on it because it did not, as far as the Fifth Defendant was concerned, constitute *res judicata*. Master Yoxall was told by Mr Burroughs that that it was incumbent on the Claimant, in bringing his Section 39(3) claim, to prove that the First Defendant had been negligent and it was not sufficient merely to point to the default judgment and say that that of itself proved the Claimant's case.

36. Faced with this position, Master Yoxall very sensibly ordered a trial of the preliminary issue to which I have referred, namely *"the issue as to the operation and effect of section 39".* In doing so, he directed that the Claimant should plead his case under Section 39 by way of Amended Particulars of Claim, giving the Fifth Defendant permission to amend its Defence in order to deal with the amendments which the Claimant would make. He set aside the

directions which he had given concerning disclosure, inspection and expert evidence and gave fresh directions leading to the trial of the preliminary issue.

37. The Claimant filed and served his Amended Particulars of Claim on 7 February 2014. Paragraphs 18, 19 and 20 were amended so that they now alleged that only the First Defendant owed contractual and common law duties to the Claimant which were breached. As for the claim against the Fifth Defendant, this was made in a new paragraph 26 which alleged various things: first, that the Fifth Defendant was responsible for the negligence and/or breach of contract of the First Defendant by virtue of Section 39(3) of FSMA; secondly, that the Fifth Defendant is, by virtue of Section 39(3), the privy of the First Defendant and so bound by the default judgment obtained as against the First Defendant; thirdly, that the Fifth Defendant is, by virtue of Section 39(3), vicariously liable in respect of the First Defendant's negligence and/or breach of contract, and as such is bound by the default judgment; fourthly, that being liable to the Claimant by reason of the above and having elected not to apply to set aside the default judgment, the Fifth Defendant is bound by the default judgment and is estopped from advancing any defence on liability which would have been available to the First Defendant but for the default judgment. Accordingly, the Claimant contended, the Fifth Defendant is strictly liable to pay the Claimant a sum equivalent to the amount of any judgment for damages which the Claimant may obtain against the First Defendant.

38. In its Amended Defence, served on 28 February 2014, the Fifth Defendant admitted that it is responsible for anything done or omitted to be done by the First Defendant in carrying on the business for which the Fifth Defendant accepted responsibility pursuant to Section 39(3). The Fifth Defendant denied, however, that the First Defendant had been negligent or that the First Defendant had acted in breach of contract. The Fifth Defendant also denied, consistent with what was argued before me, that it is bound by the default judgment obtained against the First Defendant on any of the grounds alleged in the Amended Particulars of Claim.

39. Subsequently, on 19 March 2014, Fenchurch wrote to Hewitsons, suggesting that the real issue for the Court was *"whether the default judgment does or does not prevent [the Fifth Defendant] from defending the claim against it under section 39(3) on the grounds that D1 is not guilty of any negligence or breach of contract"*. They indicated that the Claimant would argue at the trial of the preliminary issue that the default judgment is binding "*in the sense that your client cannot be permitted to run any defence which is inconsistent with the default judgment"*. They explained that *"We will say that that the Court cannot allow mutually inconsistent judgments to be given in the same action"*. Mr Woolgar accepted that this was the first occasion that the Claimant had made it clear that he would be advancing the inconsistency of judgments point which lies at the heart of the question of principle which I am addressing in this judgment.

40. Further correspondence between the parties' solicitors ensued, including a letter from Fenchurch on 29 April 2014 in which they stated that they considered that *"it would be difficult for your client to persuade the court that an application to set aside the default should be allowed, based on the delay in*

making such an application and the fact that your client chose not to make an application immediately upon receiving notice of the judgment". Shortly afterwards, on 7 May 2014, the Fifth Defendant issued an application to set aside the default judgment obtained against the First Defendant. The Fifth Defendant's position was (and is) that if the Court is concerned about the risk of inconsistent judgments, then, the default judgment should be set aside, either on the Court's own motion or on the Fifth Defendant's application. This remained the Fifth Defendant's position before me.

The effect of the default judgment against the First Defendant (the question of principle)

41. Against this somewhat lengthy backdrop, I turn now to consider the parties' submissions on the question of principle to which I have referred concerning the effect of the default judgment obtained against the First Defendant in the context of the claim which the Claimant makes as against the Fifth Defendant under Section 39(3) of FSMA.

The Claimant's submissions

42. Mr Woolgar, on behalf of the Claimant, made it clear during his oral submissions that the Claimant no longer contended (notwithstanding how the case had been pleaded in the Amended Particulars of Claim) that the Fifth Defendant was a privy of the First Defendant, nor that the Fifth Defendant is vicariously liable for the acts and omissions of the First Defendant, nor that, having elected not to apply to set aside the default judgment, the Fifth Defendant is bound by the default judgment and is estopped from advancing any defence on liability which would have been available to the First Defendant but for the default judgment. Mr Woolgar made it clear that his only point was that it is not open to the Fifth Defendant to defend the claim against it on the grounds that the First Defendant was neither negligent nor guilty of any breach of contract because to allow this to happen would be to risk the Court arriving at a judgment which is inconsistent with the existing default judgment obtained against the First Defendant, and the Court should not allow that to happen.

43. At the forefront of his submissions was the proposition that default judgments are no less binding than ordinary judgments delivered after a trial 'on the merits'. Mr Woolgar relied, in this context, on what Viscount Radcliffe stated in ***Kok Hoong v Leong Cheong Kweng Mines Ltd*** [1964] AC 993 at page 1010:

"Their Lordships turn to the first ground. In their view there is no doubt that by the law of England, which is the law applicable for this purpose, a default judgment is capable of giving rise to an estoppel per rem judicatam. The question is not whether there can be such an estoppel, but rather what the judgment prayed in aid should be treated as concluding and for what conclusion it is to stand."

44. Mr Woolgar pointed out that in the ***Kok Hoong*** case the Privy Council followed the earlier House of Lords decision in ***New Brunswick Railway Co v***

British and French Trust Corporation Ltd [1939] AC 1, in holding that a default judgment is binding, but only in respect of the bare issue which the judgment must necessarily have determined and only if that issue is capable of being ascertained precisely (in the present case, that the First Defendant was negligent and in breach of contract in relation to the investments in Scion and Stocksearch which the Claimant made). Mr Woolgar referred me, in particular, to what Viscount Radcliffe had to say at page 1012:

"In their Lordships' opinion the New Brunswick Railway Co case can be taken as containing an authoritative reinterpretation of the principle of Howlett v Tarte in simpler and less specialised terms. This reinterpretation amounts to saying that default judgments, though capable of giving rise to estoppels, must always be scrutinised with extreme particularity for the purpose of ascertaining the bare essence of what they must necessarily have decided and, to use the words of Lord Maugham LC [in New Brunswick Railway Co v British and French Trust Corporation Ltd at [1939] AC 1, 21] they can estop only for what must "necessarily and with complete precision" have been thereby determined."

45. Mr Woolgar went on to point out that judgments are either *in personam* or *in rem*, and that in the case of the former (the default judgment in the present case falling into that category) a judgment binds only the parties to the proceedings in which the judgment is pronounced and their privies, but not strangers. By way of an example of a case in which a judgment was held not to be binding on a stranger, Mr Woolgar cited ***Ex parte Young In re Kitchen*** (1881) 17 Ch D 668. This was a case in which, prior to his entry into bankruptcy, a bankrupt had guaranteed to certain wine merchants that a firm in which his son was a partner would pay for all wines supplied by the merchants to the firm. The firm failed to pay, the wine merchants obtaining an arbitration award in their favour against the firm in the sum of £1250. Subsequently, the guarantor having gone into bankruptcy, the wine merchants tried to prove under the letter of guarantee for the amount of the award. The registrar admitted the proof for the whole amount. The trustee in bankruptcy then appealed, the court deciding that the arbitral award and subsequent judgment recognising that award were not binding on the trustee. James LJ explained as follows at page 671:

"*It is contended that [the surety] is liable to pay any sum which an arbitrator shall say is the amount of the damages. The guarantee must be expressed in very clear words indeed before I could assent to a construction which might lead to the grossest injustice. It is perfectly clear that in an action against a surety the amount of the damage cannot be proved by any admissions of the principal. No act of the principal can enlarge the guarantee, and no admission or acknowledgment by him can fix the surety with an amount other than that which was really due and which alone the surety was liable to pay. If a surety chooses to make himself liable to pay what any person may say is the loss which the creditor has sustained, of course he can do so, and if he has entered into such a contract he must abide by it. But it would be a strong thing to say that he has done so, unless you find that he has said so in so many words. The arbitration is a proceeding to which he is no party; it is a proceeding between*

the creditor and the person who is alleged to have broken his contract, and if the surety is bound by it, any letter which the principal debtor had written, any expression he had used, or any step he had taken in the arbitration would be binding upon the surety. The principal debtor might entirely neglect to defend the surety properly in the arbitration; he might make admissions of various things which would be binding as against him, but which would not, in the absence of agreement, be binding as against the surety. It would be monstrous that a man who is not bound by any admission of the principal debtor, should be bound by an agreement between the creditor and the principal debtor as to the mode in which the liability should be ascertained. That is enough to dispose of the case."

46. It is because of this, Mr Woolgar went on to observe, that in *The Law of Guarantees*, Andrews & Millett (5th Ed.), it is recommended, at paragraph 7-023, that creditors do whatever they can *"to ensure that the claims against the principal and surety are heard by the same court or arbitral tribunal"* and suggest that the simplest way of doing this *"is to sue the principal and the surety in the same proceedings"*. Mr Woolgar highlighted this recommendation in support of his overarching submission that if more than one defendant is sued in one set of proceedings, then, the risk of inconsistent judgments is removed. I pointed out to Mr Woolgar in argument, however, that the recommendation presupposes that there will be a single judgment dealing with the claims brought against both the principal and the surety, and indeed that that judgment will be one which follows a trial. What is not envisaged is that there will be a default judgment against the debtor followed by a trial of the claim against the surety – in other words, the situation which has occurred in the present case.

47. Mr Woolgar submitted that, although the default judgment obtained against the First Defendant is not a judgment against the Fifth Defendant as such, nevertheless, *"as a matter of public policy"*, as Mr Woolgar put it, the default judgment must be treated as binding against the Fifth Defendant because, were that not the case, then, the Court would be at risk of giving conflicting and contradictory judgments in the same action. Mr Woolgar emphasised that, in the present case, the Fifth Defendant seeks to defend the claim against itself under section 39(3) by showing that the First Defendant was neither negligent nor in breach of contract, and that if the Court were to be persuaded of this defence, it would be making a judgment which Mr Woolgar described as being *"diametrically opposed to the default judgment that has been entered against"* the First Defendant. Mr Woolgar submitted that that *"would be incongruous, even an absurdity"* since the First Defendant *"cannot be both liable to [the Claimant] in negligence and for breach of contract and, at the same time, not so liable"*.

48. Mr Woolgar submitted that there is a public policy interest in the consistency of judgments. He suggested that if there were regularly judgments on the same issues but going in different directions, then, as Mr Woolgar put it, the law would be brought into disrepute. He gave three examples which he suggested demonstrated that the Court will strive to avoid such inconsistency. First, Mr Woolgar highlighted that Court's traditional reluctance to entertain an

application for interim declarations concerning the rights of the parties, on the basis that such a declaration might, after trial and on a fuller examination of the relevant facts and law, be shown to have been mistaken: see ***International General Electric Company of New York Ltd v Customs and Excise Commissioners*** [1962] Ch 784 and ***R v Inland Revenue Commissioners & Anr ex p Rossminster Ltd & Ors*** [1980] AC 952. Mr Woolgar pointed out, in this respect, that, since the introduction of the Civil Procedure Rules, the Court has been given express power to grant interim declarations under CPR 25.1(1)(b), but that that power has been exercised in practice very rarely and never, it would appear, in order to make an interim declaration of rights: see *Zamir & Woolf: The Declaratory Judgment* at paragraphs 3-112 to 3-115.

49. Secondly, Mr Woolgar pointed out that the courts have long been aware of the need for consistency between any judgment in the main action and any judgment in a third party action. He relied, in particular and by way of illustration, on ***Benecke v Frost*** (1876) 1 QBD 419, in which the third parties, against whom the defendant claimed an indemnity, were given liberty to appear in, and defend, the main action. Mr Woolgar flagged the fact that Blackburn J, noting what had happened where such orders had not been made in the past, stated that the *"object of the Act"* (probably the Judicature Act 1873, Section 24 of which introduced a form of third party procedure into English law for the first time) "*was not only to prevent the same question being litigated twice, but to obviate the scandal which sometimes arose by the same question being differently decided by different juries"*.

50. Bringing matters somewhat more up-to-date, Mr Woolgar observed that the need to avoid the *"scandal"* to which Blackburn J referred is now reflected in the CPR in two places: in CPR 20.10(1), which stipulates that *"A person on whom an additional claim is served becomes a party to the proceedings if he is not a party already"*; and CPR 20.11(2)(a), which stipulates that, where a third party action is brought not for a contribution or an indemnity, and the third party fails to file an acknowledgment of service or a defence, the third party *"is deemed to admit the additional claim and is bound by any judgment or decision in the main proceedings in so far as it is relevant to any matter arising in the additional claim"*. Mr Woolgar also highlighted the fact that if the additional claim is a claim for contribution under the Civil Liability (Contribution) Act 1978 between co-defendants, then, Section 1(5) of that Act operates, again so as to ensure consistency:

"A judgment given in any action brought in any part of the United Kingdom by or on behalf of the person who suffered the damage in question against any person from whom contribution is sought under this section shall be conclusive in the proceedings for contribution as to any issue determined by that judgment in favour of the person from whom contribution is sought".

51. Thirdly, Mr Woolgar referred to the principle of *res judicata*, and one of the rationales behind that principle, namely the risk that successive litigation on the same facts may produce inconsistent judgments to the detriment of the authority of the law. Again, Mr Woolgar prayed in aid certain dicta of (by this stage) Lord Blackburn, who in ***Lockyer v Ferryman*** (1877) 2 App Cas 519 said this at page 530:

"The object of the rule of res judicata is always put upon two grounds – the one public policy, that it is the interest of the State that there should be an end of litigation, and the other, the hardship on the individual, that he should be vexed twice for the same cause."

52. Although Mr Woolgar accepted that the present case is not one in which the principle of *res judicata* applies, since the Fifth Defendant is not in a relationship of privity with the First Defendant, Mr Woolgar nevertheless relied on what was stated by Lord Blackburn as a demonstration of the Court's antipathy to inconsistency. Mr Woolgar also cited Lord Wilberforce in the ***Ampthill Peerage Case*** [1977] AC 547 at page 569, as follows:

"English law, and it is safe to say, all comparable legal systems, place high in the category of essential principles that which requires that limits be placed upon the right of citizens to open or to reopen disputes. The principle which we find in the Act of 1858 is the same principle as that which requires judgments in the courts to be binding, and that which prohibits litigation after the expiry of limitation periods. Any determination of disputable fact may, the law recognises, be imperfect: the law aims at providing the best and safest solution compatible with human fallibility and having reached that solution it closes the book. The law knows, and we all know, that sometimes fresh material may be found, which perhaps might lead to a different result, but, in the interest of peace, certainty and security it prevents further inquiry. It is said that in doing this, the law is preferring justice to truth. That may be so: these values cannot always coincide. The law does its best to reduce the gap. But there are cases where the certainty of justice prevails over the possibility of truth (I do not say that this is such a case), and these are cases where the law insists on finality. For a policy of closure to be compatible with justice, it must be attended with safeguards: so the law allows appeals: so the law, exceptionally, allows appeals out of time: so the law still more exceptionally allows judgments to be attacked on the ground of fraud: so limitation periods may, exceptionally, be extended. But these are exceptions to a general rule of high public importance, and as all the cases show, they are reserved for rare and limited cases, where the facts justifying them can be strictly proved."

53. Mr Woolgar observed that it had not been possible to find a reported case which decides, in clear terms and after full argument, that a default judgment against one co-defendant is to be treated as binding on another, so as to prevent that other co-defendant from advancing a defence which is inconsistent with the default judgment. Mr Woolgar nevertheless submitted that English law's antipathy to inconsistent judgments ought to mean that the question of principle to which I have referred is answered by saying that it is not open to the co-defendant (here, the Fifth Defendant) to advance a defence which is inconsistent with the default judgment obtained (here, against the First Defendant).

54. It appears that the only authority in which the issue has previously been considered is ***Otkritie International Investment Management Ltd v Urumov & Others*** [2012] EWHC 890 (Comm), an unreported decision of Flaux J which appears to have been given *ex tempore*. It is apparent from reading the transcript of the judgment in that case that the issue was regarded by Flaux J

as the last of several bad reasons put forward by the First, Second and Fourth Defendants in support of a submission that judgment in default should not be entered against another defendant (the Third Defendant, Dunant International SA). These reasons included an argument founded on CPR 12.8(2)(b) to which I shall return in the context of the Fifth Defendants' invitation to me to set aside the default judgment against the First Defendant of my (namely, the Court's) own motion; indeed, it was on this point that the ***Otkritie*** case was cited to me. However, dealing with a submission that default judgment should not be entered because entering default judgment would, in effect, *"decide the issue of fraud in favour of Dunant in circumstances where the whole claim against Dunant is contingent upon establishing fraud, which Mr Uromov [the First Defendant] hotly disputes"* (paragraph [22]), Flaux J said this:

> *"23. With all respect to Mr Weekes, as I think he appreciated during the course of argument, that particular submission really fails to appreciate the nature of a default judgment.*
>
> *24. The default judgment that the court enters, whatever its precise form, is not one which is a judgment on the merits. It is a procedural judgment which the claimant is entitled to ask for if the claimant has served regularly on the relevant defendant because the relevant defendant has failed to comply with the rules, here with the rules requiring acknowledgment of service within a set period.*
>
> *25. Since it is not a judgment on the merits, and since there are provisions in the rules that in certain circumstances a defendant against whom a default judgment has been entered may apply to set aside the default judgment - I have in mind Rule 13.3 - it seems to me that the effect of the default judgment is simply against Dunant. It has no effect whatsoever against any of the other defendants, either current defendants or defendants soon to be joined to the proceedings."*

55. Mr Woolgar submitted that I should not treat this case as being determinative of the position. He suggested, in particular, that Flaux J had clearly not had the benefit of full argument on the issue which I am now being asked to decide. Indeed, Mr Woolgar pointed out, it was apparent that Flaux J had not even had cited to him the ***Kok Hoong*** case bearing in mind what is stated in paragraph [25] about the default judgment not being a judgment on the merits. With all respect to Flaux J, Mr Woolgar, therefore, invited me to view with caution any suggestion that what Flaux J had to say in the last sentence of the same paragraph constitutes an authoritative statement of the law.

56. Lastly, Mr Woolgar submitted that, as he put it, *"a necessary corollary"* of the approach which he was urging upon me is that it will normally be open to the co-defendant to apply to set aside the default judgment. He acknowledged that CPR 13.3(1)(b) is widely enough framed as to permit such an application (by a co-defendant) to make such an application: see, in an *in rem* context and by reference to CPR 61.9(5) which permits a default judgment obtained in an *in rem* case to be set aside, ***Humber Work Boats Ltd v The Owners of the Selby Paradigm*** [2004] EWHC 1804. As I understood Mr Woolgar's submission,

the fact that there is the ability to apply to set aside is, indeed, itself a recognition on the part of the Court that inconsistent judgments should be avoided and that, in the absence of such an application and unless the default judgment is set aside, the Court will not allow itself to be placed in a position where there is a risk that it will produce a judgment after a trial which is at odds with the default judgment. In short, there is a mechanism available to the (non-defaulting) co-defendant which means that there is no injustice in that co-defendant being bound by the default judgment, assuming that the co-defendant chooses to make the appropriate application and that that application is successful.

The Fifth Defendant's submissions

57. In his skeleton argument, Mr Burroughs understandably addressed the various ways in which the Claimant had put his case in the Amended Particulars of Claim, specifically in paragraph 26 (as summarised above). I need not, in the circumstances, given that Mr Woolgar made it clear that his only point was the point concerning the need for consistency of judgments, set out Mr Burroughs' submissions on these other matters. Instead, I focus on Mr Burroughs' oral submissions in relation to a point (the inconsistency of judgments point) which Mr Burroughs emphasised (and Mr Woolgar accepted) had not reared its head until March this year, when it was relied on in Fenchurch's letter dated 19 March 2014.

58. Mr Burroughs' submission was simple. It was (and is) that, whilst, of course, inconsistent judgments are undesirable, there is nevertheless no rule of law or practice which prevents a co-defendant (defendant B in my earlier example) in a case from arguing that it is not liable even if the consequence of that argument succeeding is that there will be a judgment from the Court which is inconsistent with an earlier judgment in default against another defendant (defendant A). Mr Burroughs submitted, in essence, that, unless the case comes within *res judicata* territory, the position is that defendant B is not bound by the default judgment against defendant A. Since it was (now) accepted by the Claimant that the present case is not one in which he can say that the Fifth Defendant is bound as a matter of *res judicata*, since the Fifth Defendant is not the First Defendant's privy, Mr Burroughs' position was that that is an end to the matter, and the default judgment has no impact on the case which the Fifth Defendant can advance at trial.

59. Mr Burroughs submitted that this must all the more be the case where, as in the present case, defendant B has had no involvement in the process by which the default judgment has been obtained from the Court – whether in relation to the default of defendant A which has resulted in the default judgment, or in relation to the claimant's application for the default judgment. Mr Burroughs highlighted the fact that, in the present case, the first that the Fifth Defendant knew about the default judgment, or the fact that the Claimant had submitted a request for a default judgment, was when Fenchurch sent Hewitsons a copy of the default judgment the Claimant had obtained under cover of a letter dated 4 September 2013.

60. In support of his submissions in this regard, Mr Burroughs observed that the reason why there is no authority which Mr Woolgar has been able to identify in support of his argument that a default judgment is binding as against a co-defendant, even where the doctrine of *res judicata* is inapplicable, is precisely because there is no rule of law of the type suggested by Mr Woolgar. Indeed, Mr Burroughs pointed out, such authority as there is, in the form of the ***Otkritie*** case, provides clear (if, admittedly, not fully reasoned) support for the Fifth Defendant's case. Mr Burroughs submitted that I should be slow to depart from what Flaux J had to say in that case.

61. Mr Burroughs further submitted that his position was also supported by James LJ's observations in the ***Ex parte Young*** case, specifically the point that the *"principal debtor might entirely neglect to defend the surety properly in the arbitration"* and the statement that it *"would be monstrous that a man who is not bound by any admission of the principal debtor, should be bound by an agreement between the creditor and the principal debtor as to the mode in which the liability should be ascertained"*. Mr Burroughs drew an analogy between the arbitration in that case, namely proceedings in which the guarantor had (and could have) no involvement, and the default judgment obtained in the present proceedings, which was obtained without the Fifth Defendant's involvement and for reasons which had nothing whatever to do with the Fifth Defendant. Mr Burroughs went on, in this context, to make the point which I have myself previously made in relation to Mr Woolgar's reliance on the passage in *The Law of Guarantees*, Andrews & Millett (5th Ed.) at paragraph 7-023.

Decision

62. Having considered the parties' rival submissions with care, I have reached the clear conclusion that Mr Burroughs' submissions are to be preferred over those of Mr Woolgar, despite the attractiveness with which Mr Woolgar's submissions were advanced. It seems to me that Mr Burroughs was quite right when he submitted that, although the Court would understandably prefer it if there were not inconsistent judgments, nevertheless the circumstances in which the Court will take action to prevent inconsistency arising are limited, and there is no general rule of the kind which Mr Woolgar would need there to be if he is to succeed on the facts of the present case, a case in which the doctrine of *res judicata* is inapplicable.

63. I can state my reasons briefly. First and most fundamentally, although I entirely accept that it is desirable that there is, as far as possible, consistency between judgments, especially when those are judgments which are within the same proceedings, nevertheless the need, if possible, to avoid such inconsistency has to be balanced against what I consider to be the overriding need to ensure that a co-defendant (defendant B in my example) is able to put forward the case which it wants to advance. In short, in my view, in a case such as the present, any public policy interest in the consistency of judgments is outweighed by the public policy interest in ensuring that a co-defendant is able properly to defend itself.

64. Secondly, precisely because the public policy interest in ensuring that a co-defendant is able properly to defend itself generally outweighs the public policy interest in the consistency of judgments, I am satisfied that the circumstances in which a co-defendant will be precluded from advancing the case of its choosing should, as a matter of public policy, be kept within limited bounds. Such circumstances will typically (but perhaps not exclusively) involve cases in which the *res judicata* doctrine is applicable. In such cases, the balance between the two public policy interests to which I have referred is struck differently because the co-defendant is regarded as bound by the default judgment obtained against its privy. To extend the circumstances in which a co-defendant is precluded from advancing a defence which is inconsistent with the default judgment obtained against another defendant beyond the range of the *res judicata* doctrine would not, in my view, represent the striking of an appropriate balance, and would not, as such, be warranted. Indeed, if Mr Woolgar were right in his submissions before me, it would be open to some question why there would be any continued need for a freestanding *res judicata* doctrine to exist.

65. Thirdly, although I acknowledge that there are various examples of the Court striving to avoid inconsistent judgments, as Mr Woolgar helpfully demonstrated, none of the authorities to which I was referred in this context supports the existence of some overarching principle that, in a case such as the present, a co-defendant should be stuck, essentially, with a default judgment obtained against another defendant. On the contrary, I agree with Mr Burroughs that James LJ's observations in the ***Ex parte Young*** case point strongly in the other direction.

66. Fourthly, I agree also with Mr Burroughs that the analogy which he sought to draw between the present case and the arbitration in the ***Ex parte Young*** case is fair. I am in little doubt that, were James LJ to have been considering a case such as the present, he would have taken the view that it would be equally *"monstrous"* that the Fifth Defendant, *"who is not bound by any admission of the principal debtor"*, should be bound by the First Defendant's decision not to acknowledge service of the proceedings, and thereby enable the Claimant to obtain a default judgment against it. The Fifth Defendant was in no better position, in the present case, than was the surety in the ***Ex parte Young*** case, to have stopped the First Defendant doing what it did. True, the Fifth Defendant could presumably have asked the First Defendant to ensure that it acknowledged service of the proceedings and then went on to serve a Defence. True also, as Mr Woolgar submitted, given the relationship between the First and Fifth Defendants (the former being the latter's appointed representative) and given the fact that, under Section 39(3) of FSMA, the Fifth Defendant is responsible for the First Defendant's acts and omissions, it might reasonably have been expected that the Fifth Defendant would have looked to protect its own interests by taking steps to ensure that the First Defendant did not allow judgment to be entered in default. However, it seems to me that similar considerations would have applied to the surety in the ***Ex parte Young*** case: Mr Kitchin could presumably have sought to influence how the debtor conducted the arbitration. In both cases, what matters is that the claimant obtained judgment or an award, as against the First Defendant and the debtor

respectively, without the involvement of the Fifth Defendant or Mr Kitchin and, indeed, without the Fifth Defendant or Mr Kitchin even needing to be involved. As Mr Burroughs pointed out, the first that the Fifth Defendant knew about the default judgment, or the fact that the Claimant had submitted a request for a default judgment, was when Hewitsons received a copy of the default judgment on 4 September 2013.

67. Fifthly, although I accept that in the ***Otkritie*** case there clearly was only limited argument on the question of principle which I am now addressing, nevertheless the case does still represent authority which is resolutely in the Fifth Defendant's favour, and equally resolutely against the argument which Mr Woolgar advanced before me on behalf of the Claimant. Flaux J was very clear that *"the effect of the default judgment is simply against"* the defendant which is in default and that it *"has no effect whatsoever against any of the other defendants"* (paragraph 25). These were views which were expressed very firmly, and I am clear that they should be afforded weight – the more so, since it will be apparent that I agree with them. I might add, in this context, that, although Mr Woolgar pointed out that the ***Kok Hoong*** case cannot have been cited to Flaux J (and although that may well be right since, after all, Flaux J makes no reference to that authority in his judgment), I do not myself read what Flaux J is saying in paragraph [25] about the default judgment not being a judgment on the merits as indicating that he was proceeding on the basis that (contrary to what was held in the ***Kok Hoong*** case) a default judgment is less binding than an ordinary judgment delivered after a trial 'on the merits'. All I read Flaux J as saying is that a default judgment is not binding on another defendant. He is obviously not suggesting that had a default judgment been obtained against that other defendant (or defendants), it would be inferior to a judgment after a trial 'on the merits'. He had no reason to go that far, and rightly did not do so.

68. Sixthly, I am not persuaded by Mr Woolgar's submission that the fact that there is the ability to apply to set aside a default judgment demonstrates that, in the absence of such an application and unless the default judgment is set aside, the Court will not allow itself to be placed in a position where there is a risk that it will produce a judgment after a trial which is at odds with the default judgment. It seems to me that just because a mechanism exists which would enable a (non-defaulting) co-defendant to apply to set aside a default judgment obtained against a (defaulting) defendant cannot justify a conclusion that the co-defendant is bound by the default judgment unless and until it is set aside. Were that the case, then, it seems to me that the co-defendant could find itself in a position where it is bound because the Court declines to set aside the default judgment for reasons which are not the co-defendant's responsibility or for which, although the co-defendant is responsible, nevertheless the co-defendant could do nothing about. I have in mind, in particular, the requirement in CPR 13.3(2) that the Court must have regard to the promptness with which a setting aside application has been made. I can see that it may be, for example, that an application will be regarded as having been made insufficiently promptly in circumstances where the co-defendant has, through no fault of its own but nevertheless in the particular circumstances of the case still fatally, been unaware of the existence of the default judgment. It does not

seem right to me that, were the Court to decide that the setting aside application must fail on the basis of a lack of promptness, the co-defendant should then find itself bound by the default judgment. In short, I consider that, whilst the ability to apply to set aside obviously provides a co-defendant with a means by which it can avoid having to advance a case which is inconsistent with the default judgment obtained against its fellow defendant, the existence of that ability to make such an application ought not to have any bearing on the question of principle which I have to determine.

69. For all these reasons, I conclude that the answer to the question of principle posed at the beginning of this judgment is that a default judgment obtained against one defendant (defendant A) does not preclude another defendant in the same proceedings (defendant B) from advancing, by way of defence to a claim against it (defendant B), a case which is inconsistent with the default judgment which has been obtained (against defendant A). Expressed in terms which are specific to the present case, and taking the formulation of the revised preliminary issue wording contained in Fenchurch's letter to Hewitsons dated 14 April 2014 (as set out above), I conclude that it is open to the Fifth Defendant to defend the claim against it on the grounds that the First Defendant was neither negligent nor guilty of any breach of contract notwithstanding the default judgment against the First Defendant which the Claimant has obtained.

The Fifth Defendant's application to set aside the default judgment obtained against the First Defendant

70. I turn now to consider the Fifth Defendant's application to set aside the default judgment obtained by the Claimant against the First Defendant. In the light of my conclusion on the question of principle as set out above, it is not strictly necessary for me to deal with this application, an application which was made only in the alternative and on the basis that the default judgment is (contrary to the Fifth Defendant's position and contrary to what I have, in the event, held) binding on the Fifth Defendant. However, in case there is an appeal on the question of principle, it seems sensible that the setting aside application has been addressed, in order that the Court of Appeal is in a position to deal with all issues at the same time.

71. Mr Burroughs explained that there were two routes by which the default judgment obtained on 2 August 2013 should be set aside.

CPR 12.8 and CPR 3.3 – the Court's own initiative

72. First, as he explained in his skeleton argument (paragraphs 35 and 36), Mr Burroughs' position was that the default judgment should be set aside on the basis that, under CPR 12.8, judgment in default can only be granted by the Court against one of two or more defendants if the claim can be dealt with separately from the claim against the other defendants. Specifically, CPR 12.8 (entitled *"Claim against more than one defendant"*) provides, where relevant, as follows:

"(1) A claimant may obtain a default judgment on request under this Part on a claim for money or a claim for delivery of goods against one of two or more defendants, and proceed with his claim against the other defendants.

(2) Where a claimant applies for a default judgment against one of two or more defendants –

(a) if the claim can be dealt with separately from the claim against the other defendants –

(i) the court may enter a default judgment against that defendant; and

(ii) the claimant may continue the proceedings against the other defendants;

(b) if the claim cannot be dealt with separately from the claim against the other defendants –

(i) the court will not enter default judgment against that defendant; and

(ii) the court must deal with the application at the same time as it disposes of the claim against the other defendants."

73. Mr Burroughs submitted that if the Claimant is right on the question of principle (something which I have, of course, held he is not), and the Fifth Defendant is bound by the default judgment obtained by the Claimant against the First Defendant, so that the Fifth Defendant cannot defend the claim brought against it by the Claimant, then, the claim against the First Defendant could not have been dealt with separately from the claim against the Fifth Defendant. Accordingly, Mr Burroughs submitted, default judgment ought not to have been granted under CPR 12.8(2)(a), and instead the Court should have done as envisaged by CPR 12.8(2)(b) and refused to enter default judgment, instead dealing *"with the application at the same time as it disposes of the claim against the other defendants"*.

74. Mr Burroughs went on, in paragraph 36 of his skeleton argument, to point out that at the time that the default judgment was obtained, last August, the Claimant had not amended its Particulars of Claim. He suggested that, in view of this, it might have been arguable that, at that (pre-amendment) stage, the claim was against all Defendants severally, so that a judgment against one of them would not bind the others and, accordingly, CPR 12.8(2)(a) applied. However, Mr Woolgar fairly, and in my view rightly, observed that the more natural reading of the (unamended) Particulars of Claim is that the Claimant was advancing his claims on the basis that the Defendants were jointly and severally liable to him. On this basis, Mr Burroughs invited the Court to set aside the default judgment on its own initiative in line with CPR 3.3.

75. Mr Woolgar's response to Mr Burroughs' invitation to the Court to act on its own initiative was forthright: Mr Woolgar described it as *"an inherently improper invitation"*, observing that it was something of a contradiction in terms to invite the Court to act on its own motion. Mr Woolgar furthermore disputed that Mr Burroughs was right to suggest that this is a case in which *"the claim cannot be dealt with separately from the claim against the other defendants*" (see CPR 12.8(2)(b)); on the contrary, Mr Woolgar submitted that it was plainly a *"claim"* which *"can be dealt with separately from the claim against the other defendants"* (see CPR 12.8(2)(a)).

76. In support of the latter point, Mr Woolgar submitted that CPR 12.8(2)(b) has as its focus *"the claim"* as advanced by the claimant, and not any defence which a defendant might wish to advance. Mr Woolgar prayed in aid two decisions which he suggested supported this approach to CPR 12.8(2)(b). The first of these authorities was ***E Yates v H Elaby & Another***, unrep., 17 November 2003. In that case the claim brought against the second defendant was contingent on the claim brought against the first defendant failing: the claimant's primary case was that the first defendant was her landlord, and the second defendant was only sued in the alternative in the event that the court were to hold that the second defendant (as opposed to the first defendant) was the claimant's landlord. In those circumstances, Mitting J held that CPR 12.8(2)(b) applied. Specifically, he said this at paragraph [33]:

"It is obvious that in the case of alternative liabilities in respect of the same matter, that the alternative claims cannot be dealt with separately from each other, at least where, as here, the claim against one is said to be contingent upon it being held that the claim against the other is wrong. ...".

On that basis, as Mitting J went on to say at paragraph [34], consistent with CPR 12.8(2)(b):

"the duty of the court was not to enter default judgment, but to deal with the application at the same time as the claim against the first defendant was disposed of".

77. The second case on which Mr Woolgar relied was the ***Otkritie*** case, to which I have previously referred. In that case, in which the ***Yates*** case was cited, Flaux J said this at paragraph [16]:

"As the notes to that rule in the White Book make clear, Rule 12.8(2)(b) — that is to say the case where the claim cannot be dealt with separately — is essentially directing itself classically at the case where a claim is brought in the alternative against two defendants."

He then went on in paragraph [19] as follows:

"What it seems to me 12.8(b) [sic] is not dealing with is a case where the claimant has a claim against a number of defendants, not in the alternative, but on a several basis, and this, it seems to me, is a classic such case because, as I indicated earlier, the claimant's total claim is in the region of US$160 million plus interest, and so far as any judgment entered against Dunant is

concerned, the effect of the judgment will be to impact upon in the region of US$30 million-odd, therefore a relatively small amount of that claim."

78. Mr Woolgar submitted, on the basis of these authorities, that the present case was not one in which the Claimant's claims can be described as alternative claims, and so CPR 12.8(2)(b) is inapplicable. Instead, under CPR 12.8(2)(a), the Court was entitled to do what it did, and allow default judgment to be entered against the First Defendant.

79. It seems to me that, in view of the conclusion which I have reached in relation to the question of principle, namely that the Fifth Defendant can defend the claim brought against it by the Claimant by contending that, despite the default judgment, the First Defendant was not negligent and was not in breach of contract, this is a case in which CPR 12.8(2)(a) is applicable rather than CPR 12.8(2)(b). This is because the claim against the First Defendant (the claim in relation to which default judgment was sought and obtained) *"can be dealt with separately from the claim against"* the Fifth Defendant. I consider this to be the position whether the focus ought to be on the *"claim"* as advanced by the claimant (as Mr Woolgar submitted) or on how that claim and any other claims brought against other defendants are to be disposed of (as Mr Burroughs submitted with his focus on the fact that CPR 12.8(2)(b)(ii) refers to the disposal of the claim). As I see it, based on my conclusion in relation to the question of principle, this is a case in which the claims against the First Defendant and against the Fifth Defendant could be dealt with separately – including consideration of the defences to those claims. They are not alternative claims because the claim against the First Defendant (unlike the claim against the second defendant in the ***Yates*** case) did not depend on the Claimant being unsuccessful in relation to his claim against the Fifth Defendant (or, in the ***Yates*** case, the first defendant). The claim against the First Defendant was (and is) not a claim which can, in the language of Mitting J in the ***Yates*** case, be *"said to be contingent upon it being held that the claim against the other"* (i.e. the claim against the Fifth Defendant) *"is wrong"*. On the contrary, it is the claim against the Fifth Defendant which is contingent on the claim against the First Defendant – and on that claim being made out, not on that claim failing.

80. However, I have to consider this issue on the hypothesis that I had determined the question of principle differently and held that the Fifth Defendant is not able to defend the claim brought against it by the Claimant by contending that, despite the default judgment, the First Defendant was not negligent and was not in breach of contract. It is, of course, only if I had reached this conclusion that the CPR 12.8 issue arises at all. In that event, the dispute between Mr Woolgar and Mr Burroughs, as to whether the proper focus ought to be on the *"claim"* as advanced by the claimant or on how that claim and any other claims brought against other defendants are to be disposed of, is more significant. If Mr Woolgar is right and the focus is only on the claim advanced against the First Defendant, then, since that claim could be dealt with separately from the claim against the Fifth Defendant, CPR 12.8(2)(a) would be applicable rather than CPR 12.8(2)(b). If, however, the focus is not confined to the claim against the defendant which is in default, but extends to

the other claims brought against other defendants, and how those claims and the claim against the defaulting defendant are to be disposed of, then, it seems to me that CPR 12.8(2)(b) would apply, given the effect of the default judgment obtained against the First Defendant in relation to the Fifth Defendant's ability to defend the claim brought against it.

81. I have found this a difficult question. On balance, however, I consider that Mr Woolgar is right and the proper focus ought to be on the claim advanced against the First Defendant, and only on that claim. It seems to me that this can only be what the word *"claim"* in both CPR 12.8(2)(a) and (b) is referring to. I have in mind, in particular, that in both these sub-sub-paragraphs a distinction is drawn between that *"claim"* and *"the claim against the other defendants"* (see CPR 12.8(2)(a), CPR 12.8(2)(b) and CPR 12.8(2)(b)(ii)). This seems to me to confirm that all that needs to be considered is whether that claim (i.e. the claim against the defaulting defendant) *"can"* or *"cannot be dealt with separately from the claim against the other defendants"*. If it had been intended that there should be a broader focus, looking at whether claims against other defendants can or cannot be dealt with separately from the claim against the defaulting defendant, I would have expected this to have been stated. I do not consider it appropriate, in such circumstances, to read the provisions as though the requirement were broader than has been expressly stated.

82. It seems to me that any harshness involved in this construction of CPR 12.8(2) is lessened by the fact that CPR 12.8(2)(a) enables the Court, in the exercise of its discretion (the word *"may"* is used, as opposed to *"will"* in CPR 12.8(2)(b)), not to grant the default judgment sought, but to require that all claims are dealt with at the same time. It seems to me that this covers a situation where, although the claim against the defaulting defendant (here, the First Defendant) *"can"* be dealt with separately from the claims brought against other defendants (here, the Fifth Defendant), it nevertheless makes better sense for all claims to be dealt with at the same time.

83. In the circumstances, I need not take up time considering whether it would have been appropriate for the Court on its own initiative to set aside the default judgment under CPR 3.3. Had it been necessary for me to give consideration to this matter, I should say that I would have been reluctant to have done as Mr Burroughs invited me to do. It seems to me that the appropriate course in a case where a default judgment has been obtained which should not have been obtained is for a party (here, the Fifth Defendant as co-defendant) to make an application to set aside the default judgment under CPR 13. However, I acknowledge that it is odd that CPR 13.2 (where the Court must set aside default judgment) does not appear to permit an application to be made where a default judgment has been wrongly obtained under CPR 12.8, and so, on the face of it, the application would need to be made under CPR 13.3 (where the Court has a discretion to set aside). I need not, in the circumstances, however, express any concluded view on this point, and decline to do so.

CPR 13.3 – the Fifth Defendant's own application

84. I now consider the Fifth Defendants' alternative application under CPR 13.3. This is an application which had only been issued on 7 May 2014 (the Court stamp is dated the next day), the week before the hearing before me.

85. CPR 13.3 is in the following terms:

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

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

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

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

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

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

86. Mr Burroughs submitted that the Fifth Defendant has a real prospect of successfully defending the claim (sub-paragraph (a)), and anyway that there is *"some other good reason"* why the default judgment should be set aside (sub-paragraph (b)). Specifically, Mr Burroughs' position was that the Fifth Defendant has a real prospect of successfully defending the claim because neither the First Defendant nor the Fifth Defendant was instructed by the Claimant to provide him with financial advice, the Claimant having, in September 2006, signed Client Response Forms in which he confirmed that he wanted to go ahead with the investments and did not wish to receive any advice as to their suitability. Further, Mr Burroughs submitted that there is another good reason why the default judgment should be set aside, namely that, if it is not set aside and assuming that the default judgment is binding on the Fifth Defendant (contrary, actually, to the conclusion which I have reached), then, the Fifth Defendant would find itself liable to the Claimant despite not having had any opportunity to defend the claim against it at trial.

87. As to CPR 13.3(2) and the promptness with which the application to set aside has been made, Mr Burroughs pointed out (and Mr Woolgar agreed) that the earliest that the Fifth Defendant could have applied was 4 September 2013, when Fenchurch sent Hewitsons a copy of the default judgment which had been obtained the month before. Mr Burroughs' primary position, however, was that time should not begin to run until 19 March 2014, when Fenchurch first raised the inconsistency of judgments issue. Mr Burroughs submitted that, before then, the Claimant's position in relation to the default judgment had not been clear. Indeed, Mr Burroughs submitted, even the Claimant's amendments to the Particulars of Claim in order to advance his claim under Section 39(3) of FSMA, on 7 February 2014, had not made the position clear. Alternatively, Mr Burroughs submitted that time should not count until the amendments had

been made, the Claimant not previously having asserted a claim against the Fifth Defendant under Section 39(3) of FSMA (despite a passing reference to the provision in the original Particulars of Claim) and, indeed, having apparently been under the (wrong) impression (as demonstrated, for example, by Fenchurch's letter dated 4 September 2013) that Section 39(3) entitled him simply to enforce the default judgment directly against the Fifth Defendant.

88. Mr Burroughs went on to submit that, whilst the application to set aside was only issued on 7 May 2014, nothing had happened in the proceedings since 19 March 2014 or, indeed, since 7 February 2014. There had been correspondence between Hewitsons and Fenchurch Law, but Mr Burroughs submitted that the proceedings were effectively put on hold pending the resolution of the preliminary issue which had been ordered to be tried by Master Yoxall in January this year. Accordingly, Mr Burroughs submitted, the Claimant can have suffered no conceivable prejudice (indeed, none was even alleged), and so any lack of promptness (if that is what there has been) ought not to mean that the application to set aside should be rejected. Mr Burroughs further observed that it was only because the Fifth Defendant had taken the trouble to probe the Claimant's assertion that he could, by virtue of Section 39(3), enforce the default judgment directly against the Fifth Defendant that the Claimant was obliged to rethink and amend his case, Master Yoxall having clearly recognised (through his ordering of the preliminary issue) that the Claimant's approach could not be right or, at least, possibly was not right. Mr Burroughs submitted that, in these circumstances, whilst, of course, the Fifth Defendant could have made the setting aside application at an earlier stage, nevertheless the Fifth Defendant had acted reasonably, and so the application should not fail for lack of promptness.

89. In response, Mr Woolgar highlighted the fact that the Fifth Defendant had not adduced any witness statement evidence in support of the contention that the Claimant instructed the First Defendant not to provide him with any advice concerning either Scion or Stocksearch. He added that the Client Response Forms and the other forms relied on by the Fifth Defendant need to be explained, the former in particular not being consistent with the different version in the Claimant's own possession which, as I have pointed out, contained a tick in a different box. Mr Woolgar submitted that without any witness statement evidence as to the provenance of the copy Client Response Forms relied on by the Fifth Defendant nor as to how and where those documents came into the Fifth Defendant's possession, there are real doubts over whether the Fifth Defendant will ultimately be able to succeed with the defence which it has put forward. Nevertheless, Mr Woolgar accepted, reluctantly as he put it, that the Fifth Defendant *"can just show a defence with real prospects of success"* and, therefore, that there is *"some other good reason"* why the default judgment obtained against the First Defendant should be set aside (under CPR 13.3(1)(b)).

90. In the light of Mr Woolgar's acceptance that the Fifth Defendant *"can just show a defence with real prospects of success"* and, therefore, that there is *"some other good reason"* why the default judgment obtained against the First Defendant should be set aside (under CPR 13.3(1)(b)), the only issue for me is

whether the application should nevertheless fail on the ground that it was not made sufficiently promptly (under CPR 13.3(2)) – I repeat, on the assumption that (contrary to the actual position) I have determined the question of principle against the Fifth Defendant.

91. Mr Woolgar submitted that the Fifth Defendant's application should be refused on the basis that it had not been made sufficiently promptly. Mr Woolgar relied on CPR 13.3(2) and explained that the requirement to make the application *"promptly"* means *"with alacrity"* and *"with all reasonable celerity in the circumstances"*: see ***Regency Rolls Ltd v Carnall*** [2000] EWCA Civ 397 per Arden LJ; ***Khan v Edgbaston Holdings*** [2007] EWHC 2444 (QB) per HHJ Coulson QC (as he then was); and, more recently, ***Intesa Sanpaolo SpA v Regione Piemonte*** [2013] EWHC 1994 (Comm) per Eder J at [31]. Mr Woolgar furthermore submitted that an application to set aside a default judgment must be considered in the light of the Overriding Objective, which requires the Court to ensure that every case is dealt with so far as practicable both expeditiously and fairly: see CPR 1.1(2)(d). The Overriding Objective also requires, Mr Woolgar pointed out, that the Court should seek to enforce compliance with rules, practice directions and orders: see CPR 1.1(2)(f).

92. Mr Woolgar's position was that the relevant period of delay should be regarded as having started on 4 September 2013, and not any later. Accordingly, Mr Woolgar invited me to treat the Fifth Defendant's application as having been made more than 8 months after the time when it should have been made. Mr Woolgar submitted that such a delay is, as he described it, *"simply too great"*, as the Fifth Defendant ought to have appreciated much sooner than it apparently did that it should apply to set aside the default judgment. The reason for the delay, Mr Woolgar submitted, is that the Fifth Defendant made a tactical decision not to apply to set aside the default judgment, but instead to seek to avoid its consequences by advancing the contention that the default judgment obtained against the First Defendant is not binding on it. Mr Woolgar submitted that the Fifth Defendant should have appreciated the good sense of making the application and should have made it immediately when given notice of the default judgment. Even if the Fifth Defendant was entitled to have some time to consider its position, Mr Woolgar submitted that the Claimant had made it perfectly plain what his intentions were and how he intended to deploy the default judgment in his claim against the Fifth Defendant by the time that the CMC took place before Master Yoxall on 28 October 2013. Mr Woolgar suggested that the Fifth Defendant had, as he put it, *"ample cause to reflect again"* about how to proceed given that, at the hearing on 28 October 2013, Master Yoxall directed that the Fifth Defendant should, within 3 weeks, give notice *"as to whether or not it intends to take part in the action against the First Defendant and, if it does, it shall specify in respect of what issues it wishes to be heard"*.

93. Mr Woolgar submitted that the Fifth Defendant is to be regarded as having essentially made a tactical decision that it need not be concerned with the default judgment. This was despite the fact that Hewitsons asked Fenchurch, on 14 November 2013, to confirm, on behalf of the Claimant, that the Fifth

Defendant's defence had not *"been prejudiced in any way by the default judgment entered against"* the First Defendant, only to be told by Fenchurch, on 25 November 2013, that the Claimant was neither obliged nor willing to give that confirmation. Mr Woolgar's position was that the Fifth Defendant, acting reasonably, should have made a setting aside application at that juncture, and not waited for another 6 months or so as, in fact, the Fifth Defendant chose to do. Mr Woolgar went on to submit that the fact that the Fifth Defendant had made a tactical decision not to apply is further borne out by the Fifth Defendant's failure to make an application even after Master Yoxall had queried whether that was what it should be doing at the hearing which took place on 17 January 2014. Mr Woolgar then made the point that, even after service of the Amended Particulars of Claim and after Fenchurch's letter dated 19 March 2014, still the Fifth Defendant chose to wait until 7 May 2014, between 3 and roughly 2 months later, before making an application to set aside. This, Mr Woolgar submitted, was all just too late: it had long been apparent, Mr Woolgar observed, that the Claimant regarded the default judgment obtained against the First Defendant as, as he put it in his oral submissions, *"something the Claimant could use against the Fifth Defendant"*: Mr Woolgar made the point that the *"tune has not changed"*, although he was prepared to agree with me that the lyrics had done (a point which Mr Burroughs emphasised when addressing this issue in reply). There was, in these circumstances, Mr Woolgar submitted, no justification for delaying since parties are expected, in what Mr Woolgar described as the *"climate of the times"*, to proceed with all due speed.

94. Mr Woolgar's reference to the *"climate of the times"* was a reference to the Jackson reforms and the approach adopted in ***Mitchell v News Group Newspapers Limited*** [2013] EWCA Civ 1537. After the hearing, it came to my attention that just the week before, on 9 May 2014, Burton J had handed down judgment in ***Mid-East Sales Limited v United Engineering and Trading Company (PVT) & another*** [2014] EWHC 1457 (Comm). In this judgment, Burton J considered the impact of the ***Mitchell*** case on applications under CPR 13.3. In the circumstances, I thought it appropriate to draw the attention of the parties to the ***Mid-East Sales*** case (as well as to a judgment which I myself handed down on 16 May 2014 and in which I referred, with approval, to the ***Mid-East Sales*** case: ***Pamela June Dalton v Gough Cooper & Company Limited*** [2014] EWHC 1556 (QB)), and invite further submissions.

95. In the ***Mid-East Sales*** case, Burton J considered a number of authorities on the issue of delay, both in the setting aside of default judgment context and in a wider context (including, most notably, the ***Mitchell*** case): see paragraphs [45] to [61]. These authorities included a recent decision, ***Samara v MBI Partners UK Ltd*** [2014] EWHC 563 (QB), a case in which Silber J decided that a 20 month delay meant that the setting aside application failed, the judge, after considering the ***Mitchell*** case, concluding that "*the new regime has universal application to all rules in the CPR . . . it is based on and underpinned by the changes to the overriding objectives which apply to all parts of the CPR*"(see paragraph [36]). He went on, in paragraph [38], to say this:

"It is very clear that in the new regime, the need for promptness has even greater significance than it had previously and that relief will be granted much more sparingly than hitherto."

96. In the ***Mid-East Sales*** case Burton J did not agree with Silber J. He said this at paragraph [88]:

"It seems to me clear that, although applications under CPR 13.3 do fall to be considered by reference to the new approach, there needs to be, and here I differ from Silber J, a somewhat different approach from that in relation to a case, as in ***Mitchell****, falling within CPR 3.8. A sanction set out by the Rule itself for breach may be said to be pre-estimated as the appropriate course, absent good reason. But a sanction imposed pursuant to CPR 3.9, or an application by reference to CPR 3.9 and 13.3, may allow different or wider considerations to be taken into account, or more than trivial delays to be addressed ... ."*

Burton J then went on to set aside the default judgment which had been obtained in the case before him, explaining that the delay concerned was 5½ months, that the applicant had *"arguable defences, such as to more than satisfy the first condition in CPR 13.3(1)"*, and that there was *"in this case the important issue of allowing the claim of immunity to be resolved"* (the applicant being the Islamic Republic of Pakistan).

97. I agree with Burton J about this. The view I take (consistent with the approach which I myself adopted in the ***Dalton*** case: see paragraph [62]) is that the ***Mitchell*** approach to procedural requirements should be taken into account, but that the Court should (as expressly contemplated by CPR 13.3(2)) *"have regard"* to the promptness of the application to set aside and not regard itself as obliged to treat the lack of promptness as being necessarily fatal to the application. That said, I agree with Mr Woolgar (in his supplemental skeleton argument addressing the ***Mid-East Sales*** case) that there is, in the context of an application under CPR 13.3, particular emphasis given to the need for promptness. This is confirmed by what was stated by Moore-Bick LJ in ***Standard Bank Plc v Agrinvest International Inc*** [2010] 2 CLC 886 at paragraph [22] (a passage set out in the ***Mid-East Sales*** case at paragraph [45(viii)]):

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

a factor of considerable significance ... if there has been a marked failure to make the application promptly, the court may well be justified in refusing relief, notwithstanding the possibility that the defendant might succeed at trial.”

98. I might add that, in his oral submissions (confirmed by his supplemental skeleton), Mr Woolgar conceded that there was an additional reason why, in the present case, the Fifth Defendant’s setting aside application does not require the court to consider the provisions of CPR 3.9. He submitted that it might be said, on a broad reading of CPR 3.9, that the rule is engaged in the present case since the default judgment obtained against the First Defendant is a *“sanction imposed for a failure to comply with [a] rule”* and, although that sanction was imposed against the First Defendant for its failure to file an acknowledgment of service, that sanction has had the further consequence of prohibiting the Fifth Defendant from running the defence which it wishes to advance, and the Fifth Defendant wishes to obtain *“relief”* from that prohibition by applying to have the default judgment set aside, realistically CPR 3.9 has no application where the Fifth Defendant is not the party which was in default. As Mr Woolgar acknowledged, and as Mr Burroughs emphasised in his own supplemental skeleton argument, it was the First Defendant which failed to acknowledge service in time, so allowing the Claimant to obtain the default judgement which it did. The Fifth Defendant knew nothing about the First Defendant’s failure, and no sanction has been imposed on the Fifth Defendant. It would, therefore, be wrong, in these circumstances to apply CPR 3.9 in the present case (even if the approach adopted by Silber J in the ***Samara*** case were to be preferred to that of Burton J in the ***Mid-East Sales*** case), whether directly or by analogy (on the basis that, were the First Defendant making the application to set aside the default judgment, CPR 3.9 were to apply). I agree with this analysis. Accordingly, even had I been minded, as a matter of principle, to prefer Silber J’s approach over that of Burton J in the present case, I am clear that it would not have been appropriate, in any event, to follow the former approach in the present case.

99. I see considerable force in the suggestion that the Fifth Defendant’s application has not been made with sufficient promptness, depending on whether the relevant delay is taken as having started on 4 September 2013 (when Fenchurch sent Hewitsons a copy of the default judgment) or on 28 October 2013 (the hearing which took place before Master Yoxall) or on 25 November 2013 (when Fenchurch declined to confirm that the Fifth Defendant’s defence had not *“been prejudiced in any way by the default judgment entered against”* the First Defendant) or on 17 January 2014 (the further hearing which took place before Master Yoxall) or on 7 February 2014 (when the Claimant served his Amended Particulars of Claim) or on 19 March 2014 (when Fenchurch first raised the inconsistency of judgments issue) – a range from approximately 8 months to approximately 7 weeks. I consider, however, that the most appropriate starting point to take is 7 February 2014, when the Claimant served his Amended Particulars of Claim and thereby formally committed himself to a case in which he sought to establish liability on the Fifth Defendant’s part based on the default judgment which had been obtained against the First Defendant. I approach the current application on the

basis, therefore, that the relevant delay is 3 months because it was 3 months after 7 February 2024 that the Fifth Defendant issued the application notice.

100. This may well be generous to the Fifth Defendant because the Claimant had indicated to the Fifth Defendant, in Fenchurch's letter dated 28 October 2013, that his intention was, in due course, to amend. Indeed, in his witness statement in the lead-up to the hearing on 17 January 2014, Mr Biggin stated that the Claimant had taken the position that *"under section 39 ... the Fifth Defendant is strictly liable for the acts and defaults of the First Defendant"*, but that Fifth Defendant's position was *"that it can rely on any defence which would have been available to the First Defendant"*. The Fifth Defendant, therefore, knew, at that stage, that the Claimant was taking the position that the default judgment entitled him to obtain judgment against the Fifth Defendant. Indeed, at the hearing on 17 January 2014 Master Yoxall expressly queried why the Fifth Defendant was not making such an application. As a result, it seems to me that it would not have been unfair to have taken 17 January 2014 (admittedly only three weeks before my preferred date) as the starting point.

101. I also bear in mind that, although it was only on 19 March 2014 that the Claimant made it clear that he was advancing the argument that the Fifth Defendant could not run a case which was inconsistent with the default judgment, nevertheless from the outset, even when Fenchurch were (wrongly) contending that the default judgment could be enforced directly against the Fifth Defendant, the Claimant was saying that he could rely on the default judgment as against the Fifth Defendant. The tune was, therefore, much the same throughout, even though the lyrics underwent change. In my view, however, it was when the Claimant served his Amended Particulars of Claim formally setting out his case that the default judgment obtained against the First Defendant is binding on the Fifth Defendant, and that the Fifth Defendant is, accordingly, liable under Section 39(3) of FSMA, that the Fifth Defendant ought to have made the application. Until that stage the Claimant's position had merely been stated in correspondence and not entirely clearly.

102. I should explain that I do not consider it matters that, in paragraph 26 of the Amended Particulars of Claim, the Claimant advanced various arguments which, ultimately, were not pursued before me, and that the lyrics underwent further change the following month when, in Fenchurch's 19 March 2014 letter, the inconsistency of judgments point was raised. What matters, as I see it, is that, in the Amended Particulars of Claim, the Claimant clearly and formally stated that the default judgment was binding on the Fifth Defendant for the purposes of his claim under Section 39(3) of FSMA. That remained the Claimant's position right up until 7 May 2014, when the Fifth Defendant issued its application. In the circumstances, I consider that, as at 7 February 2014 or soon afterwards, the Fifth Defendant ought to have taken steps to have the default judgment set aside and ought not to have waited for another three months before making its application.

103. Mr Burroughs submitted, in his supplemental skeleton argument addressing the ***Mid-East Sales*** case, that a three month period of delay compared favourably with the 5½ month period in the ***Mid-East Sales*** case, a case in

which Burton J was prepared to set aside the default judgment. He submitted that, weighing what he described as the strength of the grounds to set aside the default judgment against the delay, and the reasons for that delay, the present case is one in which the default judgment should be set aside. However, as Eder J observed in the ***Intesa Sanpaolo*** case, at paragraph [32], *"each case must ultimately turn on its own facts"*. Indeed, in the ***Khan*** case, to which Eder J referred in the immediately preceding paragraph and which Mr Woolgar cited to me), HHJ Coulson QC suggested that a delay of 59 days was *"very much at the outer limit of what could possibly be acceptable"*. I am not, therefore, particularly impressed by the comparison with the length of delay in the ***Mid-East Sales*** case which Mr Burroughs sought to draw.

104. In the present case, it seems to me that Mr Woolgar is right when he says that the Fifth Defendant made what was essentially a tactical decision not to apply sooner than it did – given my 7 February 2014 starting point, soon after that date. There was, after all, no reason why the application could not have been made without prejudice to the Fifth Defendant's primary position that the default judgment had no effect on its ability to defend the claim brought against it by the Claimant. Having initially taken a point that the Claimant had made a fatal election which precluded him from pursuing his claim against the Fifth Defendant, the Fifth Defendant thereafter (including after 7 February 2014) essentially decided, until late in the day, to put all its eggs in the basket of the question of principle (which, in the event, I have determined in its favour) and its case that the default judgment obtained by the Claimant against the First Defendant did not relieve the Claimant from the obligation to make good his case against the Fifth Defendant. As I see it, in adopting this stance, the Fifth Defendant, in effect, took the risk that the Court might later conclude that a setting aside application had not been made sufficiently promptly. That is a risk which the Fifth Defendant freely took.

105. Nevertheless, even taking this into account and having particular regard to the need for promptness in the context of setting aside applications (as made clear by CPR 13.3(2) itself and as made clear by Moore-Bick LJ in the ***Standard Bank*** case), I have concluded that, had I reached a different conclusion in relation to the question of principle and decided that the default judgment obtained against the First Defendant did preclude the Fifth Defendant from contending that the First Defendant did not act in breach of contract or negligently, I would have exercised my discretion to set aside the default judgment obtained against the First Defendant notwithstanding the three month delay which I consider there has been. I say this for a simple reason: I consider that the injustice which the Fifth Defendant would suffer were it to find itself bound by the default judgment would substantially outweigh the Fifth Defendant's lack of promptness and the essentially tactical reason why an application to set aside was not made earlier than it was. In my judgment, it would be wholly unfair if the Fifth Defendant were unable to advance a case that the First Defendant was not negligent or in breach of contract because of a default judgment which, it must be remembered, was obtained through no fault of the Fifth Defendant. The Fifth Defendant was, on the present hypothesis, mistaken as to the effect of the default judgment and so as to the need to make an application. However, as demonstrated by the conclusion

which I have, in fact, reached on the question of principle, the approach adopted by the Fifth Defendant in relation to that issue can hardly be described as untenable. Weighing these considerations in the balance, and bearing in mind the lack of prejudice suffered by the Claimant (in particular, Mr Burroughs' point that nothing has happened in the proceedings since 7 February 2014, other than service of the Amended Defence and issue of the setting aside application itself) and the Claimant's express acceptance that there is *"some other good reason"* why the default judgment should be set aside, had I decided the question of principle differently, I am clear that I would nevertheless have acceded to the Fifth Defendant's application and set aside the default judgment.

Conclusions

106. In conclusion:

(1) I determine that it is open to the Fifth Defendant to defend the claim against it on the grounds that the First Defendant was neither negligent nor guilty of any breach of contract notwithstanding that the Claimant has obtained the default judgment against the First Defendant which it has obtained.

(2) Had I determined the question of principle differently, I would have set aside the default judgment in the exercise of my discretion under CPR 13.3. However, I would not have set aside the default judgment under CPR 3.3.

107. I will hear submissions as to costs in the event that the parties are unable to reach agreement in this regard.