CIVIL PROCEDURE NEWS

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In Brief

Cases

■ **Edward v Okeke** [2023] EWHC 1192 (KB), 28 June 2023, unrep. (Master Dagnall)

Default judgment – no discretion to hold a hearing

CPR r.12.4. A claimant served proceedings outside the jurisdiction with the court's permission. No acknowledgement of service or defence was served in response to service of the claim form. The claimant requested the court enter default judgment. The Master initially considered holding a hearing in respect of the request, to be held remotely and directed accordingly. This was intended to ensure that the defendants were aware of the nature of the request. The claimant objected to this course of action on the basis that he was entitled to default judgment. He applied to set aside or vary the direction. The issue before the court was whether it had a discretion to direct a hearing where a request for default judgment was made further to CPR r.12.4. **Held**, the application was granted. The court had no jurisdiction or discretion to direct a hearing where a request for default judgment was made under r.12.4. When such a request was made the court had to apply, strictly, an administrative procedure. The request had to be put into effect, no more and no less: ***Lux Locations Ltd v Zhang*** (2023) applied (at [56]–[59]). That being the case, it was not, however, inappropriate for the court on such a request to carefully consider the claimant's statement of case to determine what exactly the claimant was seeking, e.g., whether they sought a specified sum or an amount to be determined. In considering this question, the court was not bound by what the claimant stated their claim to be. The court had, under r.12.4(1), to consider for itself what the claim sought. As the Master put it,

> *"[60] The second question, though, is in relation to two linked matters regarding the form of judgment which I should grant. The first question is whether or not I should actually be able to look at each of the statements of case to consider what they are actually asking for and whether they are asking for something which is not clearly extravagant; and the second is as to whether or not I should regard these cases as being claims for 'specified sums of money' or for 'amounts to be decided by the Court'.*
>
> *[61] It seems to me that for the Court to carry out this consideration is not inconsistent with the provisions of Part 12, and in particular CPR 12.4 and 12.5. The Court, it seems to me, ought to be asking itself, 'What is the claim actually for?' because until it is ascertained as to what the claim actually is for, and what in reality it is for, the Court cannot properly interpret the Rules and apply them to the case before it. It is true that there is a contrary construction, which is effectively that adopted by Master Matthews, to the effect that the claimant can effectively choose to characterise the claim as however the claimant wishes by the words which the claimant chooses to use. In considering the two constructions of the Rules, and in particular CPR12.4, I have to carry out the usual process of statutory construction; in terms of looking at the words used, considering the statutory purpose and intention, and coming to the conclusion as to what is the most likely construction of the words rather than going down a process of simply eliminating one or another and coming to a default position.*
>
> *[62] It seems to me that the most likely, and therefore the proper construction, of the Rules is that CPR12.4 and CPR12.5 are looking to the reality of what is being claimed, rather than just the words used by the claimant, in order to answer the question of whether the claim is 'for a specified sum of money' (CPR12.4(1)(a) and CPR12.5(1)) or 'for an amount of money to be decided by the court' (CPR12.4(1)(b) and CPR12.5(2)); and that, in consequence, the Court should look at the claims closely and ask itself as to what is the reality of what is being claimed. Further, it seems to me that the reality of what is being claimed is sums to be decided by the Court."*

In reaching this conclusion, the Master considered ***Merito Financial Services Ltd v Yelloly*** (2016). In that case, a claimant sought default judgment for damages for a specified sum. The damages would, ordinarily, have been unliquidated and thus subject to assessment. The Master declined to follow that decision, notwithstanding the fact it had stood for a number of years. He concluded that its approach was not correct, not least because, if correct, it would mark a significant change, in practice, to the assessment of damages in personal injury and defamation claims. Such claims ought to be dealt with, and CPR Pt 12 intended them to be dealt with, by way of assessment (at [66]–[70]). The Master granted permission to appeal from his decision on the basis that he had not followed ***Merito Financial Services Ltd v Yelloly*** (2016). ***Merito Financial Services Ltd v Yelloly*** [2016] EWHC 2067 (Ch), unrep., ChD, ***Lux Locations Ltd v Zhang*** [2023] UKPC 3, unrep., PC, ref'd to. (See ***Civil Procedure 2023*** Vol.1, para.12.4.3.)

■ **R (London Fluid System Technologies Ltd) v His Majesty's Commissioners for Revenue and Customs** [2023] EWHC 2206 (Admin); [2023] B.T.C. 23, 1 September 2023, unrep. (Foster J)

Service by email – correcting defective service

CPR r.6.15. An issue arose whether a judicial review claim had been served validly. In pre-action correspondence, the respondent (HMRC) indicated that HMRC accepted service by email. It further indicated that guidance on how to serve it by email was available at a specific web address, and it provided details of that address. It further specified that any correspondence should be marked for the reference of a specified individual within its litigation team. The claimants' solicitor served sealed claim forms upon the specified individual by email. They did so using an email address given at the top of the correspondence letter sent to them by HMRC. They also served it via an electronic document transfer system. The claimants' solicitor was unaware of there being an issue concerning service until the Acknowledgement of Service was filed and served. Within the Acknowledgement of Service HMRC asserted that service had not been effected validly. It was asserted that the claimant ought to have served the claim form via its "newproceedings" email address. That was the case because the guidance to which HMRC had referred the claimants in its earlier correspondence specified that for new proceedings, which the present proceedings were, they were required to use that email address for service. Prior to this the claimant had, following correspondence with HMRC, agreed an extension of time for HMRC to serve its Acknowledgement of Service. Upon receipt of HMRC's assertion that service had not been validly effected, the claimants' solicitor took steps to serve the claim at the "newproceedings" email address, while maintaining that service had already been validly served. HMRC did not suggest that they had not actually received the claim form when it was sent initially by the claimants' solicitor. Its sole point was that service had not been effected on the correct email address. The claimants' solicitor applied, under CPR r.6.15, for an order authorising service on HMRC via service by email to the individual specified in HMRC's correspondence to the claimants. **Held**, the application was allowed. Foster J accepted that the claimants' solicitor ought to have used the "newproceedings" email address to serve the claim. They ought to have done so consistently with HMRC's guidance. However, Foster J also held that the present case was a clear one for granting authorisation further to CPR r.6.15 consistently with the principles set out in ***Barton v Wright Hassall LLP*** (2018) and ***R (Good Law Project) v Secretary of State Health and Social Care*** (2022). HMRC's guidance was, however, noted to be ambiguous. Any such guidance ought to be clear and unambiguous. Due to the ambiguity, the approach taken by the claimants' solicitor (as well as some HMRC solicitors) was understandable (at [65]–[67]). Just as it was the case that service had to be carried out with proper diligence, so did the preparation of guidance explaining how it was to be effected. As Foster J put it,

> *"[68] As Carr LJ also said in Good Law Project, service of the claim form requires the utmost diligence and care to ensure that the relevant procedural rules are properly complied with (at paragraph [63]). By the same token, in my judgement, where instructions are purported to be given, especially new instructions, regarding an important litigation step, they must be clear, logical, unequivocal and readily understood."*

In the circumstances, it was clear that there was a good reason to authorised service under CPR r.6.15: the claimants' solicitor had taken all reasonable steps to serve the claim and reasonably understood that he had done so validly; the aim of service had been achieved, as the claim had been brought to HMRC's attention through being provided to the individual it had specified would deal with the claim; and authorising the claim would not prejudice HMRC, particularly as it had known from an early stage in the pre-action process what the issues to be raised in the claim were to be (at [73]–[74]. While Foster J noted the unusual circumstances of this application, the statement of principle at [68] ought to be borne in mind when any similar guidance is prepared by any organisation to provide assistance to individuals who may seek to serve proceedings upon them. ***Barton v Wright Hassall LLP*** [2018] UKSC 12; [2018] 1 W.L.R. 1119, UKSC, ***R (Good Law Project) v Secretary of State Health and Social Care*** [2022] EWCA Civ 355; [2022] 1 W.L.R. 2339, CA, ref'd to. (See ***Civil Procedure 2023*** Vol.1, para.6.15.1.)

■ **Persons Unknown v Wright** [2023] EWHC 2292 (Ch), 18 September 2023, unrep. (Richard Smith J)

Party identification to the court

CPR rr.7.2, 39.2, Pt 47. In ***Wright v Persons Unknown*** [2022] EWHC 2982 (SCCO), Costs Judge Rowley held that it was necessary for a defendant to identify themselves to the court in order to participate in detailed assessment proceedings (***Civil Procedure News*** No. 1 of 2023). That decision was appealed. **Held**, the appeal was dismissed. In dismissing the appeal, Richard Smith J held that authorities concerning unknown but identifiable parties to defend claims did not establish that a defendant has a right to be heard either pseudonymously or to proceed anonymously (at [23]): ***Cameron v Liverpool Victoria Insurance Co Ltd*** (2019) distinguished as it was concerned with the ability to bring an individual before the court, i.e., the court's jurisdiction, not with the question of that individual's capacity to defend a claim and be heard (at [30]). Furthermore, the principle of open justice required the names of parties to litigation to be publicly known unless a derogation from that principle was justified (at [32]–[41]). If the defendant in this case had a positive case for anonymity, then it ought to have been made consistently with the principle of open justice and its exceptions. Where, however, the court was concerned, in no circumstance could a party maintain anonymity regarding it. Nor could they maintain anonymity from other parties to the litigation (at [42]–[44]). There were several powerful reasons justifying this principled approach. As Richard Smith J put it,

"[42] This leads to me a further and final point which, although it went largely unsaid at the appeal hearing, is also fundamental, namely that CPR, Part 39.2(4) assumes that the court and the other parties are already aware of the identity of the person who seeks to avoid its disclosure, with anonymity being sought against the outside world. In this case, however, the Defendant seeks not only anonymity against the public at large, but against the Claimant and the court as well.

[43] Although it has been told that the Defendant is associated with a particular website and Twitter handle, and is supposedly a 'significant player' in its field, the court still has no idea who the Defendant actually is. Whatever the Defendant's (undisclosed) motive for wanting to keep its identity hidden, were the court to sanction such a state of affairs in proceedings before it, including on costs, the risks would be multiple and obvious, including:-

(i) The inability to verify that the person participating (pseudonymously) in the proceedings was, in fact, the person he purported to be;

(ii) The increased risk of the use of court proceedings for illicit purposes such as money laundering;

(iii) The reduced ability to secure compliance with court orders and/ or increased cost of necessary steps to that end;

(iv) The court's inability properly to apply its own rules where the identity of the party claiming anonymity is critical (for example, whether a company or an individual);

(v) The inability to ensure that the parties are treated on an equal footing consistent with the overriding objective; and

(vi) The inability to discern individual characteristics or vulnerabilities requiring, for example, the adoption of special measures.

[44] There are many other potential risks and shortcomings but, on any view, the court would have a much diminished ability to supervise and control its own proceedings and to conduct them fairly, raising the very prospect of the denial of justice, unfairness and abuse canvassed by the Defendant itself. The court cannot entertain that state of affairs."

R (C) v Secretary of State for Justice [2016] UKSC 2; [2016] 1 W.L.R. 444, UKSC, ***Cameron v Liverpool Victoria Insurance Co Ltd*** [2019] UKSC 6; [2019] 1 W.L.R. 1471, UKSC, ref'd to. (See ***Civil Procedure 2023*** Vol.1, para.7.2.1.2.)

■ **CA Indosuez (Switzerland) SA v Afriquia Gaz SA** [2023] EWCA Civ 1072, 28 September 2023, unrep. (Sir Geoffrey Vos MR, Phillips and Carr LJJ)

Lugano Convention – service of claim form outside jurisdiction

CPR r.6.33(3), Pt 20, Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1988 art.6(2). The Court of Appeal considered the question whether a Pt 20 claim could be served further to art.6(2) of the Lugano Convention. That article provides that "*that a person may be sued in third party proceedings in the court seized of the original proceedings unless these were instituted solely with the object of removing him from the jurisdiction of the court which would otherwise be competent in his case.*" In the present case, a CPR Pt 20 claim was issued during the transition period following the UK's withdrawal from the EU, but before the expiry of the EU Exit Implementation Period. The claim was served in Switzerland, where the main proceedings in the dispute had been commenced, without the court's permission to serve outside the jurisdiction having been sought. The validity of service was contested on the basis that reference to the Lugano Convention within CPR r.6.33 had been deleted following the expiry of the transition period and, as such, the court's permission was required for service to be effected outside the jurisdiction. As the main proceedings had also settled, it was further argued that there was insufficient connection to justify the application of the Lugano Convention to the CPR Pt 20 claim. **Held**, appeal dismissed. CPR r.6.33 was amended as from the expiry of the transition period. That amendment did not affect the application of the Lugano Convention during the transition period to the question of permission to serve outside the jurisdiction (at [32]–[36]). In so far as settlement of the main proceedings was concerned, as jurisdiction was established at the date on which the CPR Pt 20 claim was issued, that the main proceedings had subsequently settled did not mean that there was insufficient connection to maintain jurisdiction (at [79–[89]). (See ***Civil Procedure 2023*** Vol.1, para.6.33.9.)

■ **Crypto Open Patent Alliance v Wright** [2023] EWHC 2408 (Ch), 3 October 2023, unrep. (Mellor J)

Scope of requests for further information – expert evidence on witness vulnerability

CPR Pt 18. The court considered the scope of requests for further information under CPR Pt 18. It did so in proceedings concerning the question of who had created Bitcoin (at [1]–[3]). Mellor J summarised the scope of Pt 18 as follows,

"[56] . . . returning to the issue of principle . . . my conclusion is that CPR Pt 18 is a broad power which enables the Court to order the provision of further information which is strictly necessary to enable a party to know the case it is going to have to meet at trial. The power is not hidebound by the old approach to interrogatories. Although CPR Pt 18 is explicitly not restricted to the provision of further information relating to matters in dispute in statements of case and whilst its normal or usual application will be the provision of further information linked to the statements of case, the power can be exercised at any stage of an action for its stated purpose. Any perceived overlap with powers under PD 57AD is not a bar to an order for the provision of information under CPR Pt 18, although CPR Pt 18 cannot be used to circumvent the requirements for an order for specific disclosure. The Court can use any of these powers as appropriate to ensure the overriding objective is being complied with."

Specifically, it was permissible to make a request for further information concerning documents that had been disclosed. It was thus permissible to ask for such information concerning "*the attributes of such documents: their existence, their identity, whether they are authentic or have been altered and in what respects, or does the only power to order such information to be provided arise in the context of the rules on disclosure (in this case CPR PD57AD)?*" (at [14]). Care had to be taken in approaching this issue by reference to Matthews & Malek, *Disclosure*, 5th edn (2017). Its analysis placed too great a weight on pre-CPR authorities, particularly those on interrogatories (at [12]–[28]). An issue also arose concerning whether expert evidence should be permitted to assist the court in determining what, if any, reasonable adjustments might need to be implemented to the trial process to enable the defendant to receive a fair trial. Evidence on this point was submitted as being necessary in the light of the defendant being a vulnerable person with a disability (at [131]–[133]). Mellor J noted that the principles applicable to such an application were well-established, albeit not in the sphere of civil proceedings (at [136]–[148]): see ***R v Mulindwa*** (2017). It was noted that such an application was unprecedented in commercial proceedings, such as the present. Permission to adduce an expert report was granted. It was not to be taken as a precedent for granting such permission in all cases where there is a vulnerable witness. Such permission was granted to enable the court to determine what, if any, reasonable adjustments may be necessary. Such permission was to be granted only in reasonably exceptional circumstances. As Mellor J put it,

"[148] . . . The fact that I have admitted and given directions for expert evidence in this case does not mean that such evidence will be necessary in every case involving vulnerable witnesses, but only in reasonably exceptional cases where it is proportionate and fair for the parties to incur the cost of expert evidence. In the vast majority of cases, one would expect suitable adjustments to be agreed."

R v Mulindwa [2017] EWCA Crim 416; [2017] 4 W.L.R. 157, CACD, ref'd to. (See ***Civil Procedure 2023*** Vol.1, paras.1.6.1, 18.1.3, 35.1.2.)

■ **Diag Human SE v Volterra Fietta** [2023] EWCA Civ 1107, 4 October 2023, unrep. (Newey, Stuart-Smith and Andrews LJJ)

Unenforceable conditional fee agreement – severability

Courts and Legal Services Act 1990 ss.58 and 58A. The appellant, solicitors, were instructed by the respondent, to provide legal advice concerning an arbitration claim that arose from an investment treaty. They acted under a conditional fee agreement (CFA). The CFA was, however, found to be unenforceable. It had, for instance, made provision for a success fee that could exceed 100%. It also failed to specify the success fee percentage (at [1]–[2]). It was argued by the solicitors that the success fee provisions could be severed from the agreement and, thus, that they could recover fees at the rate otherwise agreed in the CFA for work done. In the alternative the solicitors argued that they could recover the cost of work done on a quantum meruit basis. They further argued that they should be entitled to retain sums paid to them on account of costs. **Held**, appeal dismissed. The Court of Appeal noted common law public policy that rendered CFAs, as a form of contingency fee agreement, as being unenforceable: ***Awwad v Geraghty & Co*** (2001) (at [16]–[19]). It then noted the basis on which CFAs were enforceable,

"[20] The following points may be noted:

i) There are three conditions with which a CFA such as the present must comply. They are neither complicated nor onerous: (i) the agreement must be in writing; (ii) it must state the percentage amount of the success fee uplift; and (iii) that percentage must not exceed 100%;

ii) Section 58's intrusion on the common law position is limited to saying that a compliant CFA 'shall not be unenforceable by reason only of its being a conditional fee agreement'. It is right to describe section 58 as creating an exception to the normal consequences of the common law's public policy; but the overall effect is that a compliant CFA is no longer regarded as being contrary to public policy and will therefore be enforceable. The statute says nothing that expressly or by necessary implication affects or alters the common law as it applies to non-compliant CFAs;

> *iii) It is clear from the terms of section 58(2)(a) that if an agreement with a person to provide advocacy or litigation services provides for any part of that person's fees to be payable only in specified circumstances, the agreement as a whole is a conditional fee agreement which must satisfy the statutory requirements if it (i.e. the agreement as a whole) is not to be unenforceable. It follows that, in a case such as the present, the provision for the payment of the discounted fees in paragraph 2 of the agreement cannot be separated and somehow excluded from being part of the conditional fee agreement as defined. It was ultimately common ground that the September 2017 Agreement as a whole is a CFA."*

The solicitors argued that public policy had changed since ***Awwad v Geraghty & Co*** (1999). The Court of Appeal rejected that argument. There was nothing to suggest that public policy had changed since that decision. Furthermore, authority was to the contrary (at [22]–[26]). Any change in public policy was a matter for Parliament. That that was the case was an important factor to be borne in mind when the question of severance was considered. In so far as severance was concerned, the three-stage test set out by Maurice Kay LJ in ***Beckett Investment Management Group Ltd v Hall*** (2017) as approved by ***Egon Zehnder Ltd v Tillman*** (2019) specified that,

> *"[28] . . .*
>
> > *'... a contract which contains an unenforceable provision nevertheless remains effective after the removal or severance of that provision if the following conditions are satisfied: 1 The unenforceable provision is capable of being removed without the necessity of adding to or modifying the wording of what remains. 2 The remaining terms continue to be supported by adequate consideration. 3 The removal of the unenforceable provision does not so change the character of the contract that it becomes 'not the sort of contract that the parties entered into at all'."*

In the present case, severance would result in the contract undergoing a fundamental change. It would not satisfy the three-stage test. Consequently, severance was not permissible (at [40]–[53]). Severance was also impermissible as, if allowed, it would permit partial enforcement of the CFA, where the CFA was itself unenforceable. Permitting such an approach was contrary to public policy (at [62]). Finally, the solicitors could not recover based on quantum meruit. Such a claim was contrary to public policy and authority: ***Awwad v Geraghty & Co*** (1999) and ***Garrett v Halton BC*** (2006) (at [67]–[69]). Given these conclusions, it was impermissible for the solicitors to retain sums paid on account. Such sums had to be repaid to their client (at [76]–[79]). ***Awwad v Geraghty & Co*** [1999] EWCA Civ 3036; [2001] Q.B. 570, CA, ***Garrett v Halton BC*** [2006] EWCA Civ 1017; [2007] 1 W.L.R. 554, CA, ***Beckett Investment Management Group Ltd v Hall*** [2007] EWCA Civ 613; [2007] I.C.R. 1539, CA, ***Egon Zehnder Ltd v Tillman*** [2019] UKSC 32; [2020] A.C. 154, UKSC, ref'd to. (See ***Civil Procedure 2023*** Vol.2, para. 7A-4.)

Practice Updates

STATUTORY INSTRUMENTS

The Courts and Tribunals (Fee Remissions and Miscellaneous (Amendments) Order 2023 (SI 1094/2023). In force from **27 November 2023**, except for art.3(2), which comes into force on **6 November 2023**. Article 3(2) applies fees applicable to multi-track cases, under Fee 2.1(1) in the Civil Procedure Fees Order 2008, to both intermediate and multi-track cases. The Order also amends the 2008 Order to alter the eligibility criteria for remission or partial remission of fees, as determined by reference to the disposable capital test and the gross monthly income test. The former is amended through the simplification of the banding structure, which is reduced from ten to three bands, and through increasing the lower disposal capital threshold from £3,000 to £4,250. The latter is revised so that gross monthly income means (i) the total sum of either the gross amount earned in the month preceding the remission application or the average of the gross amount earned in the three months prior to the application, whichever is lower, and (ii) the gross amount received by the party seeking remission from any other source in the month immediately prior to the application being made. In calculating the latter amount, receipt of specified benefits is excluded.

PRACTICE GUIDANCE

Practice Note – Encouraging Greater Participation of Junior Counsel in Courts and Tribunals Hearings. On 8 November 2023, the Heads of Division and the Senior President of Tribunals issued a joint statement concerning participation of junior counsel in proceedings. The statement provides guidance to both the judiciary and practitioners. It is intended to promote the development of advocacy experience amongst junior counsel and requires members of the Bar to

consider whether and how junior counsel may make submissions during hearings, particularly where they have been involved in the preparation of written argument. The guidance is further intended to help promote diversity within the legal profession. The statement is set out below.

"**Encouraging Greater Participation of Junior Counsel in Courts and Tribunals Hearings**

Allowing junior counsel to participate in oral argument supports their continuing development as advocates. There is also anecdotal evidence, supported by empirical data from a Supreme Court study, that women are under-represented as leading advocates, especially in major civil and Business and Property Courts litigation.

It is desirable therefore to give junior counsel in general, and female junior counsel in particular, better opportunities to advance oral argument in courts and tribunals.

It is acknowledged that this will not always be possible, and will depend upon the nature of the argument and the length of the hearing. However in all suitable cases involving leading and junior counsel, particularly where junior counsel has been heavily involved in the drafting of the written argument, judges will be expected to ask whether a speaking part for junior counsel has been considered, and will generally be amenable to both junior and leading counsel addressing the court or tribunal (junior counsel may for example, deal with intermediate points in the principal argument). In cases where this issue is likely to arise therefore, the parties should consider it in advance of the commencement of the oral argument.

Baroness Carr of Walton-on-the-Hill
Lady Chief Justice of England & Wales

Sir Geoffrey Vos
Master of the Rolls

Dame Victoria Sharp
President of the King's Bench Division

Sir Andrew McFarlane
President of the Family Division

Sir Julian Flaux
Chancellor of the High Court

Sir Keith Lindblom
Senior President of Tribunals

8 November 2023"

DEFAULT JUDGMENT – STERLING OR A FOREIGN CURRENCY – BUNDLES GUIDANCE

In ***Shobeiry v Patel*** [2023] EWHC 2549 (KB), the Circuit Commercial Court (HHJ Pearce) considered the approach to be taken to an application to vary default judgment on the basis that it had been entered in sterling when it was submitted it ought to have been entered in a foreign currency. HHJ Pearce also provided guidance on the correct approach to producing electronic bundles.

Background

The claimant brought proceedings arising from a debt that was said to arise from two loans made by the claimant to the defendant. The first loan was for AED (Arab Emirates Dirham) 1,800,000. The second was for AED 3,200,000. Neither loan was repaid prior to proceedings commencing. While there were proceedings in Dubai concerning the debt, defences that were raised in those proceedings were not before the Circuit Commercial Court. They were not because no defence had been filed. As no defence was filed, the claimant sought judgment in default. This was processed as an administrative matter, as is normally the case where it is sought under CPR Pt 12 via Form N225 (at [5]). One consequence of that was

"[5] . . . the amount of the judgment is likely to be in the amount and the currency stated on that form. There is no evidence in the court file of any judicial consideration of the N225 here . . . the judgment was entered entirely administratively, with no consideration of the currency or the amount of the judgment by the court, in accordance with the usual procedure."

Judgment in default was for £1,449,51.34, which comprised a sum of AED 5,000,000 that had been converted into sterling, interest and court fees (at [1]).

Electronic Bundles and Witness Statements

HHJ Pearce noted that during the hearing he expressed concerns about the parties' approach to procedure and practice. Specifically, those concerns were focused on preparation of electronic bundles and witness statements. In so far as the former was concerned,

> *"[9] . . . a. The electronic bundle was not properly prepared: parts of the hearing bundle were not capable of being marked using a PDF reader; the bundle did not have proper book marks; but far more importantly, the pagination meant that the printed page number did not match the electronic page numbers. Some 3½ years after COVID-19 and its consequences taught us of the need for the efficient preparation of electronic bundles, the failure to comply with these principles is unacceptable. If any party in a case in the Circuit Commercial Court in Manchester wishes to understand what proper preparation of a bundle involves, they may wish to look at the Circuit Commercial Court Guide 2022 which sets it out. If they do not have access to that, they might read the notice of hearing that goes out in the Business and Property Courts in Manchester, which draws attention to the relevant guides. The failure to comply with either, in a case in which the preparation of the bundle is claimed by the Defendant at £900, is frankly incredible. In the event, I was able to manage the failure by spending time ensuring that the bundle that I was dealing with was so far as possible accessible and usable."*

The same point no doubt applies to guidance set out in Appendix 7 of the Commercial Court Guide.

Where witness statements were concerned, HHJ Pearce noted that they failed to comply with CPR PD 32 para. 17.2, which requires that

> *"At the top right hand corner of the first page there should be clearly written: (1) the party on whose behalf it is made, (2) the initials and surname of the witness, (3) the number of the statement in relation to that witness, (4) the identifying initials and number of each exhibit referred to, and (5) the date the statement was made."*

The consequence of this failure was that valuable judicial time was wasted by the judge having to annotate the witness statements with the necessary detail (at [9(b)]).

Finally, HHJ Pearce noted that during the course of the hearing he was referred to witness statements that had not been included in the electronic bundle, one of which he went on to note had not even been filed via CE-File by the time his judgment was handed down (at [9(c)]). As HHJ Pearce put it,

> *"[9] . . . This is a completely unacceptable way of preparing for an important hearing. The Circuit Commercial Court Guide clearly indicates how additional material for a bundle should be dealt with, reflecting the flexibility which is a central feature of the Circuit Commercial Court. In the event, two of the three documents . . . were not even available to me during the hearing and the third I found almost accidentally. Fortunately, my review of this material (in so far as it has been possible to do it) suggests that this material is of no assistance to me in deciding the issues in the case. That is a surprisingly common feature of material that is provided at the door of court.*
>
> *[10] I would not expect a paying party to meet the cost of material that was not even put in front of me during the hearing. I would also not expect them to have to meet the cost of the inadequate preparation of material that has led to available judicial time being wasted on putting right those failures of preparation."*

The three practice points noted by HHJ Pearce mark a salutary reminder to practitioners to ensure that they prepare materials for hearings properly. Starkly, HHJ Pearce's warning that paying parties should not be expected to meet the costs that arise from inadequate preparation should be well-borne in mind. It might equally be thought that parties might well find themselves penalised in costs for inadequate preparation of the kind identified here, not least as it undermines the achievement of the overriding objective.

The substantive issues

Two substantive issues were before the court. First, whether the default judgment was wrong as it was expressed in sterling rather than AED, and/or because it contained double interest and/or applied the wrong exchange rate. Second, the effect of delay on making the application to vary.

The currency issue

Where default judgment is wrongly entered it must be set aside: CPR r.13.2. Where it has not been wrongly entered the court retains discretion to set aside or vary such a judgment: CPR r.13.3. Default judgment in this case was not entered wrongly. It thus fell under CPR r.13.3 (at [14]–[16]). It was thus necessary to consider both whether the application was

made promptly and whether relief from sanction should be granted. Before turning to those issues, the court considered whether the judgment sum entered was erroneous and, as a consequence, ought not to have been the subject of a request for default judgment that would hence have been dealt with administratively (at [18]). It was initially argued that the judgment sum should have been given in AED. However, it was accepted that the court had a residual discretion to determine whether to express judgment in sterling or a foreign currency, but that in this case due to currency volatility at the time judgment was given it was unjust to give judgment in sterling.

In considering the approach to be taken, HHJ Pearce accepted that entry of default judgment was, ordinarily, an entirely administrative act. There was, consistently with that, no evidence of a judge considering the amount of currency of the judgment sought in this case. The court could not have been said to have exercised any power, such as that referred to in ***Civil Procedure 2023***, Vol. 1, para.40.2.18, to enter judgment in a particular currency. On the contrary, the court – administratively – simply entered judgment in the sum and currency set out in the claimant's request for judgment (at [33]).

It was apparent that there was no prior authority on the question whether a party requesting default judgment can use a different currency than that in which the claim is expressed in either its claim form or particulars of claim and/or whether it can be requested for a different figure set out in either of those documents (at [34]). While HHJ Pearce hesitated in doing so, he dealt with one specific issue that was necessary to deal with the matter before him,

> *"[35] . . . given that one of the threshold considerations for varying a judgment is whether there is good reason to do so, then, subject to the issue of whether this application was brought promptly and/or whether the Defendant should be given relief from sanction, it is necessary for me to rule upon whether it was open to the Claimant in the circumstances of this claim to enter judgment in the sum claimed in sterling."*

Having set that out, HHJ Pearce concluded as follows,

> *"[36] I am satisfied that this is not a case in which it was open to the Claimant to request as of right a judgment in sterling at a different exchange rate than that relied on in calculating the figures in the Claim Form. I say so for the following reasons:*
>
> *a. This was a loan made in AED and it follows that the parties must have anticipated reimbursement in AED or at the very least in the sterling equivalent at the time that payment was made.*
>
> *b. In fact, the Claimant had, through the Particulars of Claim, expressed a sterling equivalent to the AED figure, thereby giving the Defendant notice of what he was seeking to recover. The Defendant was entitled to work on the assumption that any judgment entered against would be in the figure claimed in the Statement of Case. There is no indication that he in fact did so since the Defendant has not explained why he did not file a Defence. Given that he had entered an Acknowledgement of Service indicating both an intention to defend the claim and an intention to dispute jurisdictions, that he continues to raise arguments as to why he should not repay this loan[8] and that he has not in fact repaid the loan, I doubt that he is the hypothetical Defendant referred to by Mr Warwick who has simply failed to file a defence because he accepted that he had no defence to the claim. But if, as seems more likely, he is a debtor who is doing everything he can to avoid meeting a liability, nevertheless he is entitled to act on the basis that any liability is limited to the monies expressly claimed from him. Here that was either a sum in AED or a stated sterling equivalent.*
>
> *c. However the sum in which judgment was in fact entered represented a different sterling equivalent that was substituted without any process for judicial consideration or even any notice to the Defendant, which would have enabled him to object to the figure claimed.*
>
> *[37] I do not exclude the possibility that the court might in an appropriate case conclude that judgment in a debt claim should be entered in sterling (or some other foreign currency), even though the currency of the debt is some other foreign currency. This might be so in two circumstances:*
>
> *a. Where (as here) the Statement of Case claims the sum in a currency other than that of the debt, the Defendant would have notice of the intended claim. If no defence is filed, the Defendant may be taken to have accepted that the debt will be entered in the sum claimed, even if that is a foreign currency. In this case, that might have justified judgment being entered in the sterling equivalent stated on the Claim Form.*
>
> *b. Where the currency in which judgment is sought best reflects the loss that the Claimant has suffered through non-payment, a judgment in a different currency than that of the debt might be justified – see for example The Folias [1979] AC 685, albeit in the context of a damages rather than a debt claim. Had the Claimant taken steps to invite the court's approval of the judgment in sterling at an exchange rate different to that used in the Particulars of Claim, perhaps by making application for judgment to be entered in this amount[9], it would have been open to the Claimant to argue that such an order was justified.*

[38] It is self-evident that the issue of whether a judgment should be entered in a particular currency is one that a Judge can only address if the issue is brought to her attention. As Mr Warwick KC rightly says, that will not normally be the case where a default judgment is sought. Is it then open to the Claimant simply to pick the currency of choice and require the Defendant to apply to vary the judgment (with the procedural consequences noted below)? On the fact of this case, I do not see that that the Claimant could justify seeking the default judgment at a different exchange rate on the first basis set out above. The alternative circumstance in which the court might consider entering judgment in a different currency than that of the debt is not met here. In any event, there is no evidence to persuade me that, at the time of entering judgment, a judgment in sterling more properly expressed the Claimant's loss through non payment of the debt than did a judgment in AED. It follows that the Claimant should not have sought judgment in a different sterling figure than that referred to in the Particulars of Claim, where the difference in the figure arose solely from the use of an exchange rate calculated on a different date. That does not render the judgment unenforceable but, subject to the question of whether the Defendant has applied promptly and whether he is entitled to relief from sanction, I would vary the judgment to express the judgment sum in AED, since that currency appears to me most properly to express the Claimant's loss.

[39] My determination that the Claimant was wrong to seek the judgment that he did does not alone suffice for the Defendant to persuade the court that the judgment figure should be varied. One would obviously expect those seeking judgment in default to ensure that the judgment sum sought properly reflected the claim that had been brought. One might argue from first principles that where the judgment is entered in a figure or currency other than that of the claim that there should be an absolute right to have the judgment set aside or that, at the very least, the criteria for the applicant should be less stringent than those of relief from sanction. However the Civil Procedure Rules and binding authority makes clear that neither of these are in fact the case:

a. CPR13.2 expressly limits the category of case where judgment must be set aside. Those circumstances do not include the situation where the judgment has been entered in the wrong amount.

b. CPR 13.13 and CPR3.9 sets out the principles to be applied where an application is to be made to set aside a judgment which does not fall within CPR 13.12."

In the light of that conclusion, HHJ Pearce turned to the question of delay and relief from sanction.

The issue of delay and relief from sanction

It is evident that defendants are required to act promptly in seeking to set aside or vary a default judgment. That requirement is consistent with the overriding objective (at [45]). What is prompt may vary on a case-by-case basis. However, in considering what is prompt, that such applications should not be used to frustrate or hinder legitimate steps to recover what is owed by a defendant must be borne in mind.

In the present case, it was clear that the defendant had not acted promptly. Default judgment was entered in September 2022. The application to vary was not made until September 2023. Such a period of delay could not amount to the defendant acting in a prompt manner in making the application as required by CPR r.13.3(2). Moreover, the defendant was unable to demonstrate that any injustice to him created by the default judgment was sufficient to enable the court to disregard their lack of promptness in making the application to vary (at [50]). The question of whether the defendant acted promptly is one of great importance as to the defendant's application.

Finally, the court considered whether to grant relief from sanction. It did so out of completeness. It accepted that the test for relief set out in ***Denton v TH White Ltd*** [2014] EWCA Civ 906; [2014] 1 W.L.R. 3926 applied. In doing so it rejected an argument that ***FXF v English Karate Federation Ltd*** [2023] EWCA Civ 891 was decided *per incuriam* (at [17] and [56]). Moreover, ***FXF*** was authority for not refining the application of the ***Denton*** test to applications for relief where setting aside a default judgment was concerned. As HHJ Pearce explained

"[58] I see no justification for somehow refining that test in the particular circumstances of the case. It is true that there are some features of applications to set aside default judgements that are different than many other applications for relief from sanction. As noted in the judgment of Dexter Dias KC sitting as a Judge of the High Court in PXC v AB [2022] EWHC 3571, the power to set aside judgment stems from the legitimate policy that judgment given without full determination of the underlying merits of a claim may determine liability in way that causes injustice. This line of thinking can be seen in Lord Millet's comments in Strachan v The Gleaner [[2005] 1 W.L.R. 3204]. But there is equally a risk of injustice if those who are aware of a default judgment do not act promptly to set them aside. At the level of first principle, it is not obvious that the one factor so outweighs the other as to justify a departure from the general principles to be applied in application relief from sanctions. At the level of authority, it is clear that I am bound by FXF and that judgment contains no basis for thinking that any such refinement to the Denton could or should exist."

Applying the ***Denton*** test it was clear: that the defendant's default was serious and significant; the absence of an explanation why the application was made late pointed to there not being an explanation; and, not least given the lack of promptness in making the application, it would not be unjust to refuse relief. In the premises, relief from sanction was refused. Accordingly, HHJ Pearce held that:

"[67] . . .

a. The most appropriate currency for this judgment was AED;

b. If an application to vary the judgment had been made promptly and the Defendant had shown ground for relief from sanctions, I would have varied the judgment to the sum of AED 5,000,000 plus appropriate fees and interest;

c. However the application was not made promptly and in all of the circumstances does not meet the test for variation or setting aside under CPR 13.3;

d. In any event, the application would have failed because I would have refused relief from sanction."

Comment

The judgment provides a salutary lesson in ensuring that any application to vary or set aside a default judgment must be done promptly. Moreover, it emphasises that such applications need to be considered by reference to the aims that underpin CPR r.13.3, and particularly the need to ensure that such applications are not made meretriciously to "*frustrate or hinder legitimate steps*" taken by claimants to pursue judgment and enforcement. It equally emphasises the need for practitioners to ensure that they are familiar with relevant guidance concerning the preparation of bundles and witness statements and the adverse consequences both to the administration of justice generally and to parties that fail to adhere to such guidance. Finally, and substantively, it provides guidance for the first time on the approach to take where default judgment is sought in a foreign currency, one that differs from that set out in the claim form.

EDITOR: **Dr J. Sorabji,** Barrister, 9 St John Street
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