Neutral Citation Number: [2024] EWHC 2159 (Comm)

Claim No. LM-2023-000273

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
LONDON CIRCUIT COMMERCIAL COURT (KBD)
His Honour Judge Cadwallader sitting as a Judge of the High Court

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The Business and Property Courts of England & Wales
HMCTS
7 Rolls Building
Fetter Lane
London EC4A 1NL

(1) THISCOMPANY LIMITED
(2) THE BEAUTIFUL MIND SERIES LIMITED
(3) KINSKI LIMITED

Claimants

–and–

(1) DAVID JOHN WELSH
(2) GALES HOLDINGS LTD
(3) NICOLA DENNIS
(4) GARDEN COTTAGE FACILITIES LTD

Defendants

Craig Ulyatt and Tiffany Tang (instructed by **Reed Smith LLP**) for the **Claimants**

James Stuart (instructed by **Spencer West LLP**) for the **First, Second and Fourth Defendants**

Barnaby Lowe (instructed by **Forsters LLP**) for the **Third Defendant**

Hearing date: 5 July 2024

Approved Judgment

This judgment was handed down remotely at [10.30am] on 19 August 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

HHJ Cadwallader:

Introduction

1. This is my reserved judgment on the application of the First, Second and Fourth Defendants to set aside the judgment and for permission to file and serve their Defence and Part 20 claim within 7 days of the order. Had submissions not taken up the whole of the time allotted for the hearing, I should have delivered my judgment extempore.

The facts

2. The Claimants commenced these proceedings by Part 7 claim form in the London Circuit Commercial Court on 27 October 2023 against the first three Defendants. (I shall refer to the First, Second and Fourth Defendants together as the Welsh Defendants.) The claim against the First, alternatively the Second, Defendant is for breach of directors' duties or of the First Defendant's consultancy agreement with the First Claimant, or unjust enrichment, arising from allegedly improper payments from the Claimants to or for the benefit of the Defendants from the 2017/18 financial year onwards; and against the First Defendant for breach of such duties or negligence arising from alleged grey market sales of products of the First Claimant and the purchase on 1 June 2020 of a property known as Garden Cottage, Minster Road, Manston, Ramsgate CT12 4BA ("the Property"); and against the Third Defendant for

breaches of her employment contract or unjust enrichment in relation to the improper payments. The Claimants claimed damages and other relief.

3. There had been substantial pre-action correspondence. The Defendants themselves had threatened to issue a claim. Although the Claimants' proceedings had been issued on 27 October 2023, Reed Smith only told Spencer West of that for the first time on 15 December 2023. They did not issue a pre-action letter of claim until 22 December 2023. Spencer West provided a fully particularised pre-action letter of response on 15 February 2024. It reflected the defence on which the Welsh Defendants now seek to rely. Both documents were lengthy.

4. From 16 February 2024 to 11 March 2024 the claim was stayed pursuant to a consent order dated 16 February 2024 which provided that the 4-month period for service of the claim form did not run during that period.

5. On 11 March 2024 the claim form was amended to add the Fourth Defendant, which had just been restored to the register of companies following dissolution. The Fourth Defendant was alleged to be a special purpose vehicle holding title to the Property, and declaratory and other relief was sought against it.

6. On 15 March 2024 the Claimants' solicitors (Reed Smith) served the amended claim form on the Welsh Defendants by email to the email address provided by the solicitors, Spencer West LLP, who had confirmed they were willing to accept service by email, in accordance with CPR 6.3 (1)(d) and Practice Direction 6A paragraph 4. Pursuant to CPR 6.14, the deemed date of service was 19 March 2024.

7. CPR Part 59.5(2) applied, so that the period for filing an acknowledgement of service was 14 days after service of the claim form, that is 2 April 2024.

8. The Welsh Defendants did not successfully file acknowledgements of service dated 26 March 2024 until 11 April 2024. They indicated an intention to defend the claim.

From 3 to 11 April 2024 the Claimants might have sought judgment against them in default of acknowledgment of service by making an application, or by filing a request and abandoning against them everything except the money claims, but did not do so.

9. On 18 April 2024 Reed Smith emailed Spencer West seeking agreement that service of Particulars of Claim by email would be accepted. Receiving no reply, they chased by email on 22 April 2024, and by telephone on 23 April 2024, but received no reply until an email of 23 April 2024 from Spencer West saying they were unable to respond to the question because they believed that the Claimants were out of time for service of particulars of claim. The Claimants therefore filed and served particulars of claim on the Welsh Defendants by delivery to Spencer West by conventional means on the same day, 23 April 2024. By virtue of CPR 6.26, the deemed date of service was the same day. Reed Smith emailed to say they disagreed that the particulars of claim were out of time, and asked why Spencer West said so. They received no response. On 7 May 2024 they emailed again to say that since they had not heard, they proceeded on the basis that the Welsh Defendants accepted that the Particulars of Claim were validly served, and that they looked forward to receiving their Defence by the due date of 21 May 2024.

10. On 8 May 2024, Spencer West responded, saying that the claim form had been served on 15 March 2024, that the 14-day period for serving the particulars of claim under CPR 7.4 was 29 March 2024 at the latest, so that the particulars of claim purportedly served on 23 April 2024 were out of time. The writer trusted that the position was now clear to Reed Smith.

11. On 13 May 2024 Spencer West wrote again, saying

> "Could you please let me have a response to my email of 08/05/24 explaining our understanding of the position on service of your particulars of claim.? This needs to be resolved as a matter of urgency."

12. Reed Smith responded on 17 May 2024, after office hours, to say

> "We do not understand what response you are seeking, not least since your email of 8 May 2024 did not ask any questions or otherwise call for a response. Indeed, your email of 8 May 2024 ended with the statement that "[w]e trust that the position is now clear to you". If that is the response that you are seeking, we confirm that your position is indeed now clear to us."

Spencer West replied on 20 May 2024 in the following terms.

> "Thank you for your email of 17 May timed at 18:15. Your comments are clearly not intended to be helpful and certainly not commensurate with the purposes of conducting litigation in the expected manner. However, we set out the position as follows. We informed you that in our opinion you were out of time for service of the Particulars of Claim. You asked us to clarify that point. We have done so.
> If you are now stating that you do not believe that your service of the Particulars of Claim was out of time you must explain this to us in detail as we have done our best to explain our position to you. in view of all the circumstances we would be obliged for an immediate response to this."

Reed Smith had in fact already stated that they did not believe that the particulars of claim were served out of time, but they had not explained why not and (as they said in their email of 17 May 2024) until this email, they had not been asked to do so.

13. No defence was served. On 22 May 2024 the Claimants made an application, without notice, for judgment in default of defence to be entered without a hearing against the Welsh Defendants pursuant to CPR 12.3(2) only. The application was supported by a witness statement of Katherine Goatly of the same date. It referred to the correspondence about the service of the particulars of claim, although not to the pre-action correspondence. Default judgment was entered by HHJ Pelling KC on the same day. The order recited that time for the Defence had expired on 21 May 2024,

and judgment was entered against the Welsh Defendants for amounts to be determined by the court, together with costs. Since the order had been made without notice and without hearing the parties or giving them an opportunity to make representations, the order stated that any party affected might apply to vary or set aside the order, providing any such application was issued by no later than 4 pm 7 days after service of the order on the party making the application.

14. On 31 May 2024 the Welsh Defendants applied to set aside the judgment and for permission to file and serve their Defence and Part 20 claim within 7 days of the order. It stated that they had a real prospect of successfully defending the claim on the basis of the Defence and Part 20 claim dated 31 May 2024 which was attached, that they had made the application promptly and within the 7-day period, and that in any event default judgment was improperly obtained without notice to the Welsh Defendants, for reasons which they set out. The application was supported by a witness statement of Mr Edwards of Spencer West of the same date. That is the application with which I am concerned. I have the benefit of further evidence.

The law

15. This application is not made under CPR 13.2. So far as relevant, that provision applies where judgment was entered under Part 12 wrongly because, in the case of the judgment in default of a defence, any of the conditions in Rule 12.3 (2) and 12.3 (3) was not satisfied. In particular, Rule 12.3 (2) does not apply because the Welsh Defendants now accept that the time for filing a Defence had expired. Their solicitors had thought that it had not, because they thought the particulars of claim were served out of time. They thought that the particulars of claim were served out of time because the very latest time they should have been served under CPR 7.4 was, they thought, 29 March 2024, and they had not been served until 23 April 2024. They were mistaken, because different limits apply in the Circuit Commercial Court, as noted in the White Book at 7.4.2. Under CPR 59.4(1)(c) and (d), in the Circuit Commercial Court the Claimants must serve particulars of claim within 28 days of the filing of an acknowledgement of service which indicates an intention to defend. The Welsh Defendants now accept that the particulars of claim were served in time.

16. Instead, the application is made under Part 13.3 which provides that in any other case the court may set aside or vary a judgment entered under Part 12 if the defendant has a real prospect of successfully defending the claim or it appears to the court that there is some other good reason why either the judgment should be set aside or varied or the defendant should be allowed to defend the claim. In considering whether to do so 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.

17. The parties do not disagree about the law applicable to applications of this kind. It is now settled that an application to set aside default judgment is an application for relief from sanctions: *FXF v English Karate Federation Ltd* [2023] EWCA Civ 891 at [63] per Sir Geoffrey Vos MR. The Court should first consider the matters set out in CPR 13.3 (the merits of the case and the delay in making the application). Whether the defendant has a real prospect of successfully defending the claim is a threshold condition: see *Gama Aviation (UK) Ltd v MWWMMWM Ltd* [2021] EWHC 2229 (Comm). If that threshold is crossed, whether to grant the application is a discretionary question, and the *Denton* test is engaged. That involves (a) identifying and assessing the seriousness and significance of the breach, (b) considering why the default occurred, and (c) evaluating all the circumstances of the case, including the factors set out in CPR 3.9.

> "What is critical, however, I can repeat once again for yet further emphasis, is the need to focus on whether the breach has prevented the court or the parties from conducting the litigation (or other litigation) efficiently and at proportionate cost, and the need to enforce compliance with rules and orders.": *FXF* at [67].

I remind myself, too, of the notes in the White Book for 2024.

> "The Court of Appeal in *Denton* went on to state that litigation cannot be conducted efficiently and at proportionate cost without fostering a culture of compliance with rules, practice directions and court orders, and cooperation between the parties and their lawyers. Rule 1.3 provides that "the parties are required to help the court to further the overriding objective". Parties who opportunistically and unreasonably oppose applications for relief from sanctions take up court time and act in breach of this obligation. The court made it plain that it is wholly inappropriate for litigants or their lawyers to take advantage of mistakes made by opposing parties in the hope that relief from sanctions will be denied and that they will obtain a windfall strike out or other litigation advantage. In a case where (a) the failure can be seen to be neither serious nor significant, (b) where a good reason is demonstrated, or (c) where it is otherwise obvious that relief from sanctions is appropriate, parties should agree that relief from sanctions be granted without the need for further costs to be expended in satellite litigation. The parties should in any event be ready to agree limited but reasonable extensions of time up to 28 days as

> envisaged by the new r.3.8(4). The court will be more ready in the future to penalise opportunism. It is as unacceptable for a party to try to take advantage of a minor inadvertent error, as it is for rules, orders and practice directions to be breached in the first place. Heavy costs sanctions should, therefore, be imposed on parties who behave unreasonably in refusing to agree extensions of time or unreasonably oppose applications for relief from sanctions."

Discussion

18. The Claimants explicitly accept that the Defence discloses a real prospect of successfully defending the claim, although they say it is unsatisfactory in various ways. Accordingly, that threshold is passed. I accept, too, that the application was made promptly on 31 May 2024 after the order dated 22 May 2024 (and sealed on 24 May 2024). That is not a threshold requirement, but it is a matter of considerable significance: see *Workman v Deansgate 123 LLP* [2019] EWHC 360 (QB) at [26].

19. I turn, therefore, to consider the *Denton* criteria. Failing to file a defence is by definition serious or significant: *Gama Aviation (UK) Ltd v MWWMMWM Ltd* [2021] EWHC 2229 per HHJ Pelling KC at para [13], citing *Gentry v Miller* [2016] EWCA Civ 141 per Vos LJ at para [36]. The delay in issuing and serving the claim is not relevant, nor that in serving the particulars of claim: one party's slowness does not relieve the other of its obligation to comply with Rules of Court. The fact that the matters complained of happened some time ago, or that the correspondence identified the issue some time ago, or that the Particulars of Claim were 40 pages long, does not make it any the less serious or significant. The harm done is the delay in the Court's process, and costs and Court time used as a result of the application to set aside judgment and its being opposed. This is not a case like *Workman v Deansgate 123 LLP* [2019] EWHC 360 (QB), in which the defence was only late by matter of days. By Part 15.4(1) the defence was to be served 28 days after service of the particulars of claim, that is by 21 May 2024. It has not been served at all, save in draft with the

application, which was provided to the Claimants on 4 June 2024, nearly 2 weeks later. I therefore reject the submission that the breach was not serious or significant.

20. There was no good reason for the breach. According to the Welsh Defendants, the default occurred because Mr Edwards thought the particulars of claim had not been served in time and he wished to establish that before asking for a specific extension of time if any was required. His evidence was that if he had been given notice that the Claimants intended to assert that time for the defence had expired and was about to expire he would have sought an extension and if necessary would have applied; but he did not, because he had no inkling that the Claimants were going to play what he described as such procedural games.

21. However, Mr Edwards was wrong in thinking the particulars of claim had not been served in time. His error appears to have been a failure to appreciate that different time limits applied in the London Circuit Commercial Court. That information was available to him in a number of forms, however, including the Civil Procedure Rules themselves, and the notes in the White Book. His correspondence does not initially evince a wish to establish that the particulars of claim had not been served in time, but a desire to assert it. He was told that Reed Smith disagreed, and he had been told the date they said the defence was due. He did not seek an extension.

22. They were under no duty to explain their reasoning. *Barton v Wright Hassall LLP* [2018] UKSC 12 established that a party (and their legal representatives) are "under no duty to give [the other party] advice" about service of a claim form. "Nor could they properly have done so without taking their client's instructions and advising them that the result might be to deprive them of a limitation defence. It is hardly conceivable that in those circumstances the client would have authorised it" per Lord Sumption. So too here. The parties are required "to help the court" further the

overriding objective: CPR Part 1.3. They are not required to help each other. See *Woodward v Phoenix Healthcare Distribution Ltd* [2019] EWCA Civ 985 at [42]. It is submitted on behalf of the Welsh Defendants that this is not the point; what occurred was that Reed Smith unreasonably did not respond to a legitimate request for an explanation. That is to re-introduce a duty by the back door. Certainly, the request was legitimate. But it was not unreasonable not to respond to it. Nor did they encourage him in his error, or do anything to mislead him into thinking that they agreed, whether expressly or by silence. That being the case, it is just as wrong to describe them as having played procedural games as it was in *Woodward*, where it was also confirmed that the duty not to engage in technical game-playing, as set out at para.41 of *Denton v T H White Ltd* [2014] EWCA Civ 906, was focused on the elimination of meretricious resistance to relief from sanctions applications that were bound to succeed. No doubt each case depends on its facts, but in the context of the correspondence which I have summarised above, it seems to me that Reed Smith did not act unreasonably.

23. The Defendants place reliance on *Roundstone Nurseries Ltd v Stephensons Holdings Ltd* [2009] EWHC 1431 (TCC). In that case it was held by Coulson J (as he then was) that the Claimants ought not to have entered judgment in default of defence when both parties were in breach of their duty to inform the court of a possible settlement, and the claimants knew that the defendants were operating on the basis that a further stay was required but the claimants had never once suggested the contrary, not challenging the correctness or commonsense of the approach, so that the court took their silence as acquiescence: paras [34-35]. In the present case, the circumstances are different; and in particular Reed Smith had made it clear they did not agree with Spencer West's approach.

24. The Defendants in the present case took comfort, however, from the following passage at paragraph [36] of that judgment.

> "During the course of his helpful submissions on this point, Mr. Crangle went so far as to say that, if a Claimants was technically entitled to enter judgment in default then he was entitled to do so, even if he knew that the defendant had a real prospect of defending the claim and therefore setting aside such judgment. I am afraid I do not accept that submission: it seems to me that it is contrary to the entire basis of the Civil Procedure Rules. If a Claimants knows that, because of some technical glitch, he could enter judgment in default against the defendant, but that the defendant had a real prospect of successfully defending the claim (and therefore getting judgment set aside) then that Claimants should not, at least as a general rule, enter judgment in default."

25. In my view, however, that passage (and paragraph [42]) should be read in the context of the preceding paragraphs to which I have referred, rather than in isolation. Also, it is to be remembered that the learned Judge was rejecting a broadly stated proposition, rather than setting one up: so that the breadth of the terms of his rejection is to be understood in that context too. Moreover, the decision long pre-dates *FXF* and the current culture which it reflects and promotes. *APP v Wholesale plc Adlink UK Ltd* [2012] EWHC 1806 (QB), in which it was cited, takes the matter no further. Accordingly, I do not accept that the default judgment was obtained improperly on this ground, or that the reason why the defence was not served in time was a good one.

26. In all the circumstances, should relief be granted in order to deal justly with the matter, when taking into account the interests of the court in efficiency and proportionate cost, and enforcing compliance with the rules? The application was prompt. Although the acknowledgement of service had been late, no harm was done. The Defendants had generally been cooperative and had engaged in a practical way over preserving the Property. If relief is refused, the Defendants have lost their opportunity to defend a claim which is otherwise defensible (and, if and to the extent

that it is relevant at this point, one which the Claimants accepts is defensible and, on the basis of the pre-service correspondence to which I have referred knew or ought to have known was defensible). I accept these points, and they carry some weight.

27. The Defendants, argue, moreover, that the default judgment was in any event improperly obtained because the application for default judgment ought not to have been made without notice to them. The argument was succinctly set out in the Defendants' skeleton argument as follows.

28. By CPR 59.7(1) Part 12 applies to Circuit Commercial Claims except rules 12.10 and 12.11 (which do not apply here) are modified by CPR 59.7(2) and (3). Thus CPR 12.4 applies here unmodified. By CPR 12.4(3)(a), in cases where the claim contains a claim for a remedy other than for a specified sum of money or an amount to be decided by the Court or delivery of goods with the alternative of paying their value, or a combination of those remedies, the Claimants must make an application "in accordance with Part 23." The Claimants seek many remedies: equitable compensation, damages, an account of profits, a constructive trust, restitution, a declaration as to a beneficial interest in a property and an order for the transfer of that property. By CPR 23.4 a copy of the application notice must be served on each respondent unless a rule, practice direction or court order permits otherwise.

29. The Defendants argue that no rule, practice direction or court order permitted this application for default judgment to be made without notice. The Claimants rely upon CPR 59.7(3), which states that "the application may be made without notice, but the court may direct it to be served on the defendant". But, the Defendants argue, that rule applies only in respect of the application referred to in CPR 59.7(2), that is, an application for a default judgment where the defendant has failed to file an acknowledgment of service. In the present case, the Welsh Defendants had filed

acknowledgments of service so that neither of CPR 59.7 (2) and (3) applies; so the application for default judgment should have been made on notice.

30. The Claimants argue that this is a misreading. CPR 59.7 (3) applies to any application for default judgment, not just where no acknowledgement of service has been filed because it is in general terms; and both CPR 59.7 (2) and (3) are introduced by 59.7(1) as modifications to CPR 12.10 and 12.11. Although those provisions, as presently numbered, do not apply, they are outdated references to what are now CPR 12.11 and 12.12, following the substitution of CPR Part 12 from 6 April 2022 onwards, pursuant to The Civil Procedure (Amendment) Rules 2022/101, rules 1(2) and 7. CPR 12.12 (previously CPR 12.11) sets out "*supplementary provisions*" for default judgment applications, including further circumstances in which such applications can be made without notice.

31. The Claimants' submissions as to the renumbering are wholly persuasive, as counsel for the Defendants accepted. At first glance, and even at second glance, it looks as if the reference to 'the application' in CPR 59.7(3) is only to the application mentioned immediately above it in CPR 59.7(2). As the rule is laid out, that is the most natural reading. I am not persuaded that the reference is intended to be to any application referred to in CPR Part 12.11 and 12.12. Those rules refer at many points to the making of applications in many different circumstances. I reach this conclusion with hesitation, because it appears to follow that the highly experienced judge who made the order may have acted, in this respect, in error. But it seems to me that CPR 59.7(3) applies only where there has been no acknowledgment of service, and not in the present case. Notice ought to have been given, unless the court dispensed with it, which it did not explicitly do. Nonetheless, the court was evidently content to make the order knowing that notice of the application had not been given. I cannot accept,

therefore, the contention that it ought not to have been entered without notice having been given. The case is different therefore from that in *Intense Investments Ltd -v- Development Ventures Ltd* [2005] EWHC 1726. I recognise, nonetheless, of course, that had notice been given judgment would probably not have been entered.

32. The Claimants rely on what they say is a lack of honesty and poor conduct of the Welsh Defendants in making this application. However, while of course I accept that such matters are in principle capable of being relevant to the grant of refusal of relief, I do not consider they carry substantial weight in the present case. The same applies to complaints about the use of documentation belonging to the Claimants, and about their criticisms of Reed Smith, and their attempts to get this application listed urgently. I have considered them, and the other points made before me, but they do not seem to me to carry any substantial weight in considering the exercise of my judgment, as compared with the ones to which I have specifically alluded. Nor do I consider that a conditional order would be appropriate in all the circumstances.

33. It is clear to me, having regard to all the above factors, that judgment ought to be set aside, and I will do so. Nothing else would serve the interests of justice and the overriding objective. I will expect an agreed order to be submitted following receipt of this judgment, or competing drafts.

End.