Neutral Citation Number: [2023] EWHC 2549 (KB)

CLAIM No. CC-2022-MAN-000048

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
CIRCUIT COMMERCIAL COURT (KBD)

Manchester Civil Justice Centre
1 Bridge Street West
Manchester
M60 9DJ

Date: 13 October 2023

Before:

His Honour Judge Pearce
- -

Between:

SEYED MOHAMMAD ATA SHOBEIRY **Claimant**

- and –

KALPESH PATEL **Defendant**

- -

Mr Stephen Topping, solicitor advocate (instructed by **JMW Solicitors LLP**) for the **Claimant**

Mr Mark Warwick KC (instructed by **Judge Sykes Frixou)** for the **Defendant**

Hearing date: 2 October 2023

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JUDGMENT

The application

1. The Defendant applies to vary the judgment in default of defence entered against him on 23 September 2022. That judgment is in the sum of £1,449,514.34 comprising a principal sum of AED[1] 5,000,000, converted to sterling, together with interest and court fees. In short, it is the Defendant's case that:

    a. The judgment should have been expressed in AED rather than sterling and/or

    b. An error has been made such that the judgment sum contains double interest; and/or

    c. The judgment sum applies the wrong exchange rate between sterling and AED.

2. The underlying claim is a debt claim, arising from two loans from the Claimant to the Defendant: the first of AED 1,800,000 made on 9 March 2014 and repayable on 9 September 2014; and the second of AED 3,200,000 made on 31 March 2014 and repayable on 30 April 2014. It is common ground that no repayment of these loans was made prior to the issue of proceedings. It should be noted that, since the Defendant did not file a Defence in these proceedings, he has not raised the issue that was relied on in the Dubai proceedings referred to below to the effect that the parties agreed that repayment of the loan would take place by the transfer of the Defendant's interest in a property.

3. The application was listed before me for 2 hours on 2 October 2023. As will be seen, the hearing did not follow the course that either party had anticipated and both advocates had to make submissions beyond that which had been covered in their skeleton arguments. I reserved judgment to enable me to consider more fully the issues that arose.

[1] Arab Emirates Dirham

The Procedural History

4. I am obliged to Mr Topping for the procedural chronology at paragraph 6 of his skeleton argument. Adopting that with slight changes:

   a. On 18 June 2019, the Claimant issued proceedings numbered 983 of 2019 against the Defendant in the Dubai Courts of First Instance.

   b. On 30 September 2019, the Dubai Courts of First Instance ordered the Defendant to pay to the Claimant the sum of AED 5,000,000 plus interest at 9% per annum.

   c. The Defendant appealed to the Court of Appeal in Dubai, which allowed the appeal to the extent of reducing the interest rate to 5% but upheld the order to pay AED 5,000,000.

   d. The Defendant further appealed to Dubai's superior court, the Court of Cassation in Dubai. On 20 May 2020, the Court of Cassation allowed the appeal, revoked the judgment as a nullity, and referred the case back to the Dubai Courts of First Instance.

   e. The Claimant issued a second set of proceedings on 9 June 2020 ("the Second Proceedings").

   f. The Defendant defended and counterclaimed in the Second Proceedings, alleging that the Loan Agreements had been repaid, that they were to be set off against the purported transfer of ownership of a property in London and that insofar as the value of the property exceeded the amount due under the Loan Agreements, this surplus is repayable to the Defendant.

   g. On 11 April 2021, the Dubai Courts of First Instance gave judgment for the Claimant and dismissed the counterclaim ("the Second Proceedings Judgment"). The Defendant was ordered to pay to the Claimant the sum of AED 5,000,000, interest of 5% per annum from 9 June 2020 until payment, AED 500 as attorney's fees, and the expenses of the Second Proceedings and the counterclaim.

   h. The Defendant appealed to the Court of Appeal in Dubai, which dismissed the appeal and ordered the Defendant to pay to the Claimant AED 1,000 by way of

attorney's fees and also expenses ("the Second Proceedings Court of Appeal Judgment").

i. The Defendant further appealed to the Court of Cassation in Dubai. On 12 January 2022, the Court of Cassation dismissed the appeal and ordered the Defendant to pay to the Claimant the sum of AED 2,000 by way of attorney's fees and also the expenses ("the Second Proceedings Court of Cassation Judgment")

j. The Claimant issued proceedings in England on 13 June 2022, under claim number CC-2022-MAN-000048 in the Business and Property Courts in Manchester ("the CCC proceedings"). The claim sought to enforce the Second Proceedings Judgment, the Second Proceedings Court of Appeal Judgment and the Second Proceedings Court of Cassation Judgment at common law and/or as a debt, in the sum of AED 5,506,239.73 and/or damages in the same sum. The Claimant specifically pleaded his claim in the alternative to recover the sterling equivalent of the AED sum, providing a currency exchange 'spot rate' from Barclays Bank Plc as of 10 June 2022. The overall sum claimed was calculated as the judgment sum of AED 5,000,000, interest of AED 502,739.73 and attorney's fees of AED 3,500. The Claimant claimed in the alternative the sterling equivalent, being £1,278,024.26 (inclusive of interest) at the date of the pleading.

k. On 23 September 2022, the Claimant filed a request for judgment in default of defence in the CCC proceedings for a specified amount pursuant to CPR12.4(1)(a), using form N225. The sum claimed was expressed in sterling as follows:

Amount of claim admitted	£1,291,692.48
(including interest at date of issue))	£129,786.18
Interest since date of claim (if any)	£18,035.68
Court fees shown on claim	£10,000
Amount payable by Defendant	£1,449,514.34

l. On 23 September 2022, judgment in default was entered in the CCC proceedings for this sum.

m. The Claimant then made an application for a Charging Order over the Defendant's solely owned and unencumbered property at 4 Wavel Mews, London. An Interim Charging Order was made on 10 November 2022.

n. The Final Charging Order hearing was listed to take place on 17 January 2023. The Claimant's application and the Interim Order were served on the Defendant on 19 December 2022. The Defendant sent correspondence to the Court opposing the making of a Final Charging Order.

o. The Final Charging Order hearing took place on 17 January 2023. The Defendant did not attend. Following representations made on behalf of the Claimant at the hearing, a Final Charging Order was made in respect of 4 Wavel Mews, based on the judgment that the Claimant had obtained herein together with further interest, the total secured sum being £1,482,414.15.

p. On 28 February 2023, the Claimant issued Part 8 proceedings under Claim No PT-2023-MAN-000020 seeking an order for sale of 4 Wavel Mews pursuant to the Trusts of Land and Appointment of Trustees Act 1996 ("the TOLATA claim").

q. In May 2023, the Dubai Court made an order for repayment of the judgment sum by five equal instalments to be paid on the first every month from June 2023 until October 2023. The Defendant paid AED 500,000 into the Dubai Court on 2 May 2023, which sum has defrayed certain costs, leaving a sterling sum of £86,398.24 to be credited against the judgment sum herein. However, the instalments order was not otherwise complied with and has been discharged by the Dubai Court[2]. The Defendant has not otherwise sought to repay the monies due either pursuant to the Dubai judgments or the judgment herein.

r. On 28 July 2023, the Defendant, (who until this point had been a litigant in person but now instructed Judges Sykes Frixou Limited to act on his behalf[3]), issued an application stated to be in cases PT-2023-MAN-000020 and CC-2022-MAN-000048, seeking:

[2] See paragraph 20 of the statement of Ms Stanaway dated 26 September 2023.
[3] The notice of change was dated 31 July 2023.

"*An Order under CPR40.2.18 to vary the default judgment obtained by the Claimant dated 22 September 2022 in proceedings number CC-2022-MAN-000048 which is expressed in the sum of sterling £1,449,514.34 to AED the sum of AED5,506,239.73 which is the sum claimed in the Claimant's Particulars of Claim in the Action CC-2022-MAN-000048 interest at 5% pa until payment and fixed costs and/or a stay of execution of the said Judgment including on the application to enforce the charging order obtained or other relief under CPR40.8A."*

Though the Circuit Commercial Court case number was included in the heading, the claim was in fact only issued in the TOLATA claim.

s. On 7 August 2023, District Judge Banks considered this application together with the order sought by the Claimant in the TOLATA claim and vacated a hearing that had been listed in the TOLATA claim on 22 August 2023, listing both applications for hearing on 12 October 2023.

t. The Claimant's solicitors wrote to the court on 11 August 2023 pointing out that the application to vary related not to an order in the TOLATA claim but an order in the Circuit Commercial Court claim. Unless and until the Circuit Commercial Court judgment was varied or set aside, the Claimant was entitled to proceed to enforcement under the 1996 Act.

u. By order dated 14 August 2023, Judge Banks recorded the contents of the Claimant's letter and a finding that the court did not have jurisdiction to vary the order in the Circuit Commercial Court proceedings. He therefore vacated the hearing on 12 October 2023 and relisted the TOLATA claim on 4 September 2023.

v. By application notice dated 23 August 2023, the Defendant applied to set aside that order.

w. On 4 September 2023, Judge Banks dismissed the application to set aside his order of 14 August 2023 and made an Order for Sale of the property at a sum of not less than £950,000.

x. On 7 September 2023, the Defendant issued an application in the Circuit Commercial Court claim, seeking:

"(1) An Order under CPR 13.3(1) to vary the default judgment obtained by the Claimant dated 23 September 2022 in proceedings number CC-2022-MAN-000048, which judgment was expressed in the sum of sterling £1,449,514.34, but should have been expressed in AED 5,506,239.73 plus interest at 5% pa until payment.
(2) A stay of execution upon the judgment, pursuant to CPR 40.8A."

5. I would note certain points that are relevant to or arise from the chronology:

a. An application for judgment in default pursuant to CPR Part 12 which is made on form N225 will not normally be referred to a judge. Accordingly, 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. I therefore take it that 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.

b. Judge Banks was undoubtedly correct to find that it was not open to him to vary the judgment in the CCC Proceedings. During the course of submissions before me, it appeared to be suggested that he had declined to consider the application to vary as if it were made in the CCC proceedings on the technical ground that the application had been issued in one set of proceedings but not the other. As Mr Warwick KC pointed out, a party issuing an application and heading it with two claim numbers might assume that it would be issued in both claims. However (i) for the same application to be issued in each claim would require two filings and two fees to be paid that is the applicant's responsibility; but, more significantly, (ii) District Judges are not automatically Judges of the Circuit Commercial Court[4] and therefore do not have the jurisdiction to deal with matters in that court other than in a case of urgency where no Circuit Commercial Court judge is available to hear it; where a Circuit Commercial Judge directs that the issue be heard by that judge; or where the issue relates to enforcement[5].

[4] The authority to sit in the Circuit Commercial Court is given to certain High Courts and certain person authorised to sit as Judges of the High Court pursuant to section 9 of the Senior Courts Act 1981 - I fall into the latter category.
[5] See para 1.3 of PD59 and the definition of a Circuit Commercial Court Judge at CPR59.1(3)(c).

c. The history of this case shows clear and repeated attempts by Mr Patel to avoid his liability to the Claimant. As will be noted when I comment on the statement from Mr Zebida below, these attempts appear to continue.

The hearing before me

6. At the hearing before me, I was provided with an electronic bundle that contains a series of witness statements:

a. For the Claimant, statements from his solicitors, Mr Ewan Cooper dated 26 September 2023 and Ms Jesscia Stanaway dated 26 September 2023 and from the Claimant himself dated 29 September 2023.

b. For the Defendant, statements from his solicitor, Mr Franklin Price, dated 7 September 2023 and 29 September 2023.

7. I had skeleton arguments from each side and I heard oral submissions from Mr Warwick KC for the Defendant and from Mr Topping for the Claimant.

8. During the hearing, I had several concerns about issues of procedure and practice. Given the limited available time, it was not possible to explore these in any detail. Indeed, I indicated during the hearing that time was better not wasted with me complaining about these matters, given the developing arguments on the merits of the application and the short time estimate

9. However, since this is a reserved judgment and I have had some time to address all issues, it would be remiss not to mention matters that had a significant affect on the efficient use of court time.

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[6], 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.

b. The witness statements filed on behalf of the Defendant did not comply with PD 32. Paragraph 17.2[7] provides:

> "*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*."

In order to ensure that the documents could properly be understood, I spent time annotating them with the appropriate details.

c. At the beginning of the hearing, my attention was drawn to the bundle that had been filed by the Defendant, one skeleton argument each from the parties and a bundle of authorities from the Claimant. The Defendant also provided a number of hard copy documents. However, during the course of the hearing I was referred to witness statements that were not in the hearing bundle, including:

    i. A statement from the Claimant dated 29 September 2023 (the working day before the hearing). This was CE filed on 2 October 2023. As chance would have it, I discovered that the statement had been filed in the morning of 2 October 2023 and had read it in advance of the hearing. It has not assisted in my decision.

[6] Though it is available at The Circuit Commercial Court Guide (judiciary.uk).
[7] Issued I believe in April 2012, some 11½ years ago

ii. A statement from Ahmed Ali Mohamad Zebida served on behalf of the Defendant. That is referred to in a supplemental skeleton argument on behalf of the Claimant (which itself was apparently uploaded to CE filing at 9.18 am on 2 October 2023 and is annexed to the supplemental skeleton argument). However, the statement of Mr Zebida has still not been CE-filed at the time of handing down this judgment. I was not referred to the supplemental skeleton argument during the hearing and I was wholly unaware of it until revisiting the court file for the purpose of this judgment.

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 referred to above 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.

11. I have now had the opportunity to read the supplemental skeleton argument of the Claimant and the attached document, including the statement of Mr Zebida. The witness statement does not assist on determining the issues in this case. However, I should note that the Defendant, though Mr Zebida, appears to dispute the Claimant's entitlement to any relief in the English courts.

The Issues

12. At the hearing before me, the Defendant did not pursue the application for a stay of execution. Accordingly, I was concerned only with the application to vary the judgment of 23 September 2022.

13. As regards the application to vary the judgment, the submissions fell in to two categories.

    a. Whether the judgment was wrong for being expressed in sterling rather than AED and/or containing double interest and/or applying the wrong exchange rate;

    b. The effect of delay on the application.

The Relevant Law

14. The Defendant's application to set aside is made pursuant to CPR Part 13. The relevant rules provide:

> *"**Cases where the court must set aside judgment entered under Part 12***
> *13.2 The court must set aside a judgment entered under Part 12 if judgment was wrongly entered because–*
> *(a) in the case of a judgment in default of an acknowledgment of service, any of the conditions in rule 12.3(1) and 12.3(3) was not satisfied;*
> *(b) in the case of a judgment in default of a defence, any of the conditions in rule 12.3(2) and 12.3(3) was not satisfied; or*
> *(c) the whole of the claim was satisfied before judgment was entered.*
>
> ***Cases where the court may set aside or vary judgment entered under Part 12***
> *13.3*
> *(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*."

15. Cases which fall within CPR 13.2 are often described as cases of an "irregular judgment" although that is not the term used in Part 13. In any event, the Defendant accepts that this is not the case which falls within CPR 13.2 although, as identified below, he argues that the judgment is in fact "irregular" in the broader sense that it should not have been entered.

16. It is common ground that the CPR 13.3 criteria apply to this application, albeit that the Defendant contends that they must be applied in the context of a judgment which can properly be described as "irregular" or perhaps "plain wrong." Accordingly, the court is required to consider whether the application was made "promptly" under CPR13.3. Of necessity, that is concerned with the period between the entering of judgment and the making of the application to set aside, in this case from 23 September 2022 (when the default judgment was entered) until 7 September 2023 when this application was made.

17. Until recently, there has been debate whether the principles of CPR 3.9 are to be applied in an application to set aside default judgment. Despite the decision of the Court of Appeal in Gentry v Miller [2016] EWCA Civ 141, there have been different decisions on this issue at first instance. However the matter has now seemingly been put beyond dispute by the decision of the Court of Appeal in FXF v English Karate [2023] EWCA Civ 891. In his judgment with which the rest of the court agreed, the Master of the Rolls stated unambiguously that the relief from sanction test set out in Denton v White applies to an application under CPR 13.3. Whilst neither party had referred either to the decision in FXF or the principles of applications for relief from sanction, within their skeleton arguments, both accepted during oral submissions that those principles in fact applied and addressed them in oral argument. As I indicate below, the Defendant's application for permission to appeal addresses an argument that FXF was in fact wrongly decided.

The alleged error(s)

(1) The Defendant's case

18. The Defendant contends that the judgment sum is erroneous and should not have been the subject of the request for judgment.. The case was originally put on the sole basis that the judgment sum should be in AED not sterling - see paragraphs 18 and 19 of Mr Price's statement of 28 July 2023 (served for the purpose of the application in the TOLATA claim). In his statement of 7 September 2023 in support of this application, Mr Price concedes that the court had a residual discretion to determine whether the judgment should be expressed in sterling or in the foreign currency but goes on to contend that it would be unjust to give the judgment in sterling when the exchange markets have been particularly volatile. At paragraph 20 of that statement, he says:

"*The time when the Default Judgment was entered in September 2022, the UK Government was in somewhat of a turmoil* (sic), *with Liz Truss as Prime Minister and Kwasi Kwarteng as Chancellor of the exchequer where the sterling rate to the Dollar fell to 1.07. Subsequently, sterling has sharply recovered in value and there clearly would be a less value in sterling to pay a judgment expressed in UAE AED today than there would have been in September 2022."*

He sets out certain spot rates that are said to support this analysis.

19. In the Defendant's skeleton argument for the purpose of the hearing on 2 October 2023, it is asserted that, using the sterling figure claimed in the Claim Form of £1,278,024.26, the interest is wrongly calculated. The skeleton argument goes on to argue that in any event the judgment should have been expressed in AED.

20. In oral submissions, Mr Warwick KC sought to show how the error in the request for judgment had come about. Relying on the sterling figure claimed in the Claim Form, he submitted that what appeared to have happened was that the figure of £1,278,024.26 (being the sterling equivalent of AED 5,506,239.73) claimed in the Claim Form had been mistakenly transposed into the request for judgment as £1,291,692.48, but that the request for judgment had then wrongly claimed interest of £129,786.18 for interest up to the issue of the claim in addition to that sum. In fact, Mr Warwick KC contended that it was clear from paragraph 14 of the Particulars of Claim that the figure claimed, whether expressed in AED or the sterling equivalent included interest to the issue of the claim.

21. If this were the correct analysis, this would be a simple case of miscalculation by double counting of the interest and, putting aside issues relating to the relief from sanctions, the error in the judgment would be obvious. However, it was not my understanding of the Claimant's case that that was how the figure in the request for judgment had been calculated, given the witness statement from Mr Ewan Cooper dated 22 September 2023. Accordingly, during Mr Warwick KC's submissions, I invited Mr Topping to address me on how the figure had been calculated. He confirmed what had been my understanding (and seemingly the understanding of Mr Price when he prepared his statement of 7 September 2023) that the difference in the figures arose not from the double counting of interest but rather from the effect of exchange rate fluctuations.

22. The Defendant's alternative argument is, as I have indicated, that the judgment should have been entered in AED, not sterling. Mr Warwick KC contends that a litigant who seeks to enter a default judgment must be trusted correctly to follow the procedure of CPR Part 12. That includes, where the claim is for default judgment for a specified amount, the judgment being for "the amount of the claim" (CPR12.5(2)). That requirement could not be met here, where the claim is principally for a sum expressed in AED and, even on the Claimant's secondary case, is for a different sterling sum than that in the request for judgment.

23. Mr Warwick KC concedes that paragraph 40.2.18 of the White Book and the authorities therein support the proposition that the court has the power to give judgment in either a foreign currency or sterling. However, an application for default judgment does not involve the court exercising any such power. Rather, the entry of default judgment for a specified amount is a simple administrative process where, so long as the applicant certifies certain matters, the court will enter the judgment in the amount sought. In particular, since a request for default judgment is not likely to be referred to a judge, if it is open to the Claimant to request judgment in a different currency than that of the Claim Form, the determination as to the currency of the judgment would be that of the Claimant rather than the Court.

24. Mr Warwick KC urges me to find that it is simply not open to a Claimant to pick its currency and that, since the claim was expressed primarily in AED and that was the currency of the loan, the Claimant should not have sought judgment in sterling

25. If the court were exercising a judgment as to the appropriate currency, the circumstances here would, the Defendant contends, point strongly in favour of judgment in AED:

    a. AED was the currency of the original loans;
    b. The Dubai judgment was in AED;
    c. In the Particulars of Claim, the primary currency of the pleaded case is AED;
    d. The Defendant has paid AED 500,000;
    e. Proceedings in Dubai are ongoing;
    f. Currency fluctuations point in the direction of entering judgment in the currency of the contract and the litigation in the foreign jurisdiction.

26. If on the other hand the Claimant was at liberty to seek judgment in sterling the Defendant contends that the judgment should have been in the amount sought in the Particulars of Claim, namely £1,278,024.26 (plus any subsequent interest and recoverable costs). The Claimant was not at liberty to apply a later exchange rate in seeking judgment in sterling.

27. In support of this proposition, Mr Warwick KC drew my attention to the potential dilemma of a Defendant in the position of Mr Patel who had no defence to the claim that had been brought. He might reasonably not file a Defence in circumstances in which he has no arguable defence to the claim. However he would do so in the assumption that any judgment entered as a result was expressed in the figures claimed in the Claim form, rather than a different figure based on a different exchange rate.

(2) The Claimant's case

28. As I have identified above, the Claimant contends that the sum sought in the request for judgment is based upon a different exchange rate than that upon which the Particulars of Claim is based. This is explained in the witness statement of Mr Cooper.

29. The Claimant contends that he was entitled to seek judgment in sterling. The contract does not specify that payments may only be made in AED. Accordingly the Court had a discretion to enter judgment in sterling see paragraph 40.2.18 of the White Book and the authorities referred to therein.

30. In fact, the Claimant puts his case rather higher than this, referring, through the statement of Ms Stanway, to his being "*absolutely entitled to calculate the currency exchange rate as at the date when payment is due, which is the date of the judgment request and when the judgment is then made."* No authority is referred to for this proposition. It is not obviously supported by the passage from the White Book at paragraph 40.2.18, which refers to the Court having a power to give judgment in differing currencies and goes on to say, "*it is not clear whether the claimant has the right to elect that the judgment should be expressed in sterling or in a foreign currency."*

31. More generally, the Claimant seeks to rely on the conduct of the Defendant throughout the litigation, which has been to seek to use any means to avoid meeting

his liabilities. Even now, notwithstanding the judgment entered both in Dubai and in England, only a small part of the debt has been repaid. The court should not tolerate what is an obvious attempt by the Defendant to delay matters further.

(3) Discussion

32. As foreshadowed above, I am persuaded by the evidence of Mr Cooper that the reason for the discrepancy in the figures is the use of a different exchange rate rather than double counting of interest. Quite simply, Mr Cooper's figures add up; the argument advanced by the Defendant does not do so, since the amount that it is suggested has been transposed from the Particulars of Claim to the request for judgment is in fact different to the figure in the request. I can understand why the similarity in the figures might lead to the suspicion that there is transposition of the figure with an associated minor error. But when one analyses Mr Cooper's calculations, it is far more likely that there is no error at all but rather the Claimant has used a later exchange rate.

33. The more interesting question is whether it was open to the Claimant to do this. I accept Mr Warwick's argument that the process of entering a default judgment is normally an entirely administrative act in which there is no judicial input. There is certainly no evidence of any judge having considered the amount or currency of the judgment sought here and therefore it cannot be said that the court has exercised a power to enter judgment in a particular currency. Rather, it has simply entered judgment for the sum sought by the Claimant in its request for judgment in the currency of that request.

34. I was told during this hearing that there are no authorities on whether it is open to a party requesting a default judgment to use a different currency than that in which the claim is expressed in the Claim Form or Particulars of Claim and/or to seek judgment for a different figure than that in the Claim Form or Particulars of Claim. Notwithstanding Mr Warwick's encouragement to rule broadly on this issue, I hesitate to do so, since I have not heard submissions on the broader consequences of so doing.

35. However, 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.

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:

[8] See for example the statement of Mr Zebida.

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

[9] CPR12.4 says that judgment in default in the stated circumstances "may" be entered by filing a request, not that it "must" be entered in this way, I see no ground for considering that it was not open to the Claimant to seek a default judgment by application under Part 23, which is the necessary way to obtain a judgment in default in the circumstances set out in CPR12.11, rather than request under CPR12.4.

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.

40. I must therefore go on to consider:

    a. Whether the Defendant applied to set aside promptly (and if not, what affect that has on the application);
    b. Whether relief from sanction should be granted.

Delay

(1) The Defendant's case

41. The Defendant observes that what constitutes promptness under CPR 13.3(2) varies from case to case. In particular, it would be wrong to measure the promptness of the application from the date of when judgment was entered if the Defendant did not know that it had not been entered until a later date.

42. In any event, whether the Defendant acted in a prompt manner is not the sole deciding factor and the court should instead look to the overall consequences that follow from the failure to set aside the judgment. The failure to set aside judgment would lead to injustice against the Defendant in light of a wrong amount owed. Thus, the Defendant argues that the court's consideration of the promptness of the Defendant's application should be weighed against other competing considerations. In this exercise, Mr Warwick KC submits that the promptness of the application should be outweighed by the injustice that would follow from refusing the Defendant's application to vary the default judgment.

(2) The Claimant's case

43. The Claimant takes the position that the Defendant's application to vary the default judgment was not made promptly. Mr Topping emphasises the fact that the default judgment was handed down on 23 September 2022. It was served by email and post, in accordance with an earlier order for alternative service on 14 October 2022, as demonstrated by certificates of service on the court file dated 18 October 2022. It remained unchallenged until 7 September 2023. Mr Topping submits that the Defendant's application to vary the default judgment was clearly delayed and that the Defendant was not oblivious to the proceedings that led to the default judgment being awarded against him but rather chose a path of inaction.

44. Although Mr Topping concedes that the promptness of the Defendant's application is only one factor of the Court's general discretion provided by CPR 13.3(1) to set aside judgment he submits that it should be a deciding one given the nature of the facts stated above. Mr Topping concludes that the Defendant's delay in making the application is far removed from the concept of promptness under CPR 13.3(2) and thus should play an important factor in the court's rejection of the Defendant's application to vary the default judgement.

(3) Discussion

45. The requirement for the court to consider whether the Defendant has act promptly to set aside a default judgment is consistent with the overriding objective of CPR 1.1. Whilst a Defendant is rightly allowed to challenge a default decision that is said to be wrong, the law recognises that they should not use such application in order to

frustrate or hinder legitimate steps taken by the opposing party to recover what they are owed. Whilst I accept Mr Warwick's position that what constitutes acting promptly will vary from case to case, the objectives that CPR 13.3(2) seeks to achieve remain clear. It is important to pay close attention to these objectives when looking to the Defendant's behaviour and deciding whether relief from sanctions is available.

46. As indicated above, subject to whether the Defendant has applied promptly and whether he is entitled to relief from sanction, I would vary the judgment. Nevertheless, there was a clear lack of promptness in making the application. As Mr Topping is right to emphasise, upon entering default judgment on 23 September 2022, the Defendant did not file an application under CPR 13.3(1) until 7 September 2023, almost a year later. In light of this fact, it cannot be concluded that the Defendant acted in a prompt manner under CPR 13.3(2).

47. If this judgment were to be varied to a sum in AED (or an alternative sum in sterling, though that would not be my preferred variation), this would have clear consequences for the Claimant. In particular, he would have to invite the court to revisit the Charging Order that has been made, doubtless causing greater expense and delay. That would give a further opportunity to the Defendant to obfuscate and avoid payment in a case where there is a clear history of the Defendant doing what he can to frustrate this judgment and avoid repaying the underlying debt.

48. Mr Warwick invites the court to recognise that the promptness of the application is not the core matter that the court should consider. This touches on the relevance of the merits of the claim when looking to set aside a default judgment. Whilst the Defendant does not seek to rely on 13.3(1)(a), Mr Warwick argues that the result of the default judgment is one of injustice against the Defendant.

49. There clearly are situations in which a default judgment obtained creates an injustice. Most obviously, a Claimant cannot simply draw a sum out of thin air and claim default judgment against the Defendant for that sum. Another clear example was alluded to in Mr Warwick's oral submissions, in which he submitted (albeit incorrectly) that the Claimant's calculation for the default judgment included the double counting of interest. If it had done so, that would be another example of a clear and obvious error that might be said to create an injustice.

50. But is the injustice created by the default judgment enough for the court to disregard the Defendant's lack of promptness in submitting the application? In my judgment, the Defendant does not do enough to demonstrate why the lack of promptness should be outweighed on the facts. Whilst I have concluded that a judgment in AED or a different sterling equivalent would have been more appropriate, that is not the only matter for the court to consider. The requirement that the Defendant's application be made promptly is of great importance as to deciding whether to vary the default judgment. I agree with Mr Topping that the Defendant's prolonged inaction following the default judgment weighs heavily against his current application to set aside the default judgment. Furthermore, I disagree with Mr Warwick's position that the injustice that follows the default judgment is one that encourages the court to disregard the Defendant's lack of promptness and overshadows the important objectives of what CPR 13.3(1) is trying to achieve.

51. For these reasons stated above, I reject Defendant's application to vary the default judgment under CPR 13.3. Despite this outcome, for the sake of completeness I will now look to whether the Defendant would have passed the necessary tests for relief from sanctions.

Relief from Sanctions

(1) Defendant's case

52. The Defendant's written submissions did not deal with the application of Denton principles to the application. In oral submission, Mr Warwick KC described the breach here as "curious" in the sense that it was not necessarily properly considered as a breach at all. As he put it, the hypothetical litigant referred to at paragraph 27 above might not file a defence at all on the simple but rational ground that they did not believe that they had a defence but rather might accept that they were liable to pay the pleaded sum. In those circumstances, their default should not be categorised as "serious." Further, it was contended that the Defendant's failure to file a defence might have been because he accepted that he did not have in fact have an arguable defence.

53. As to the circumstances of the case more generally, Mr Warwick KC repeated his submissions that the court should look to the significance of allowing an erroneous

judgment to stand. Indeed, he came close to suggesting that some different test than that in Denton should be applied in the context of an application to set aside a default judgment. He drew my attention to paragraph 21 of Lord Millet's judgment Strachan v The Gleaner [2005] 1 WLR 3204:

> *"A default judgment is one which has not been decided on the merits. The courts have jealously guarded their power to set aside judgments where there has been no determination on the merits, even to the extent of refusing to lay down any rigid rules to govern the exercise of their discretion..."*

54. In grounds of appeal filed after this judgment was sent out in draft, Mr Warwick KC raised the argument that FXF v English Karate was in fact wrongly decided, the court having failed to consider the effect of the binding decision of the House of Lords in Evans v Bartlam [1937] AC 473. This issue was not argued before me during the hearing but, in refusing to give permission on this ground, I have commented that I do not see how a judgment of the House of Lords handed down in 1937 could not bind the Court of Appeal on the true construction of the code established by the Civil Procedure Rules 1998 (as amended). I have not otherwise revised the draft judgment to address this issue since it was not argued before me.

(2) The Claimant's case

55. The Claimant relies on the Defendant's lack of promptness. He draws attention to the fact that this application has been bedevilled by delay and procedural inefficiency on the Defendant's part. Even when the judgment was challenged, the Defendant originally did so through the obviously incorrect route of seeking to vary a judgment of the Circuit Commercial Court in the TOLATA claim. What the Defendant is seeking to do is no more than yet another attempt to avoid discharging his undisputed indebtedness to the Claimant.

(3) Discussion

56. I accept that the Defendant must meet the test for relief of sanctions. As noted in paragraph 17 of this judgment, following the decision of FXF v English Karate it is now clear that the relief from sanction test set out in Denton v White is applicable to CPR 13.3. I reject the suggestion that I need not follow that judgment on the ground that it was decided *per incuriam* for reasons already given.

57. The test in Denton v White is based on the principles of CPR 3.9 and requires the court to take the following three-stage approach:

    a. The court identify and assess the seriousness or significance of the failure to comply with any rule, practice direction or court order
    b. The court should consider why the failure or default occurred
    c. The court will consider all the circumstances of the case, so as to enable it to deal justly with the application.

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. 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.

59. There is no clear reason why the application of the Denton tests should be considered on the facts of this case. Instead, the court has consistently reaffirmed that relief of sanctions test apply to CPR 13.3(1) without caveat (see paragraph 39 of Regione Piemonte v. Dexia Crediop SpA [2014] EWCA Civ 129). Indeed, the Master of Rolls observed in FXF v English Karate, at paragraph 66:

> "*The Denton tests are actually peculiarly appropriate to the exercise of the discretion required once the two specific matters mentioned in CPR Part 13.3 (merits and delay in making the application to set aside) have been considered"*

60. This is not to say that the merit of the application to vary the erroneous judgment is irrelevant. It is clear that the third criterion in Denton requires the court to take a

broad look at the circumstances which must include that injustice that it is alleged would arise if the judgment is not set aside. For example, where (as is arguably the case here) there is a clear error leading to an excessive judgment, the court may be more willing to grant relief from sanction than it would be if the error were less clear cut.

61. At the first stage of the Denton test, I am satisfied that the Defendant's default in failing to file a defence is of seriousness and significance. As a consequence of this default, the Defendant was sanctioned and a default judgment was obtained under CPR 12.3(2). Looking to the second stage, the Defendant has provided no reason as to why a defence was not filed. It is suggested on behalf of the Defendant this may be because he realises that does not have an arguable defence to the claim, though it is at least as likely that it is because the Defendant simply refuses to engage with the court process. The Defendant's failure to put in evidence as to why this error has occurred and why it took so long to make the application points in the direction of there being no explanation that would survive the light of day.

62. Finally, at the third stage the court must consider all the circumstances of the case to help deal with the application justly. In paragraph 32 of Denton v White, it was emphasised that at this stage the court should consider the need for litigation to be conducted efficiently and proportionate to costs. It was also emphasised that compliance to rules, practice directions and orders should be enforced and encouraged. In looking to all the circumstances of the case to deal justly with the application, the court must also look to the issue of promptness of the Defendant's application discussed under CPR 13.3(2). This was highlighted by Vos LJ (as he then was) at paragraph 24 of his judgment in Gentry v Miller [2016] EWCA Civ 141.

63. As I have noted above, the Defendant did not act promptly or with urgency to set aside the default judgment. Further, looking to matters of efficient litigation and proportionate costs, it becomes apparent that the Claimant's journey to recover his sum has been expensive and frequently frustrated. Given the time passed between the award of the default judgment on the 23 September 2022 and Defendant's application on the 7 September 2023 amounts to just under a year, it is hard to argue that the Defendant has acted in a way that is proportionate and efficient. Even when the Defendant did get round to making this application, he did so in a manner that was

disruptive of these proceedings by issuing the application in the wrong court causing further expense and delay.

64. Balanced against the inexcusable delay in this case is the potential prejudice to the Defendant through this judgement standing. It is true that there is a fair chance that the judgement obtained by the Claimant will led to the Defendant having to pay more than would have been the case had the judgement been expressed in AED. At the most easily accessible spot rate, the sterling equivalent of the claim in Dirham is in fact about £200,000 less than the judgment sum. However the value to the Claimant of the judgement in these proceedings would always be liable to fluctuation if it were expressed in AED. It is possible that there will be change rate fluctuations that made the sterling sum in the judgment worth less than the AED figure in the Claim Form. In any event, whilst the prospective overstatement of the claim through the judgment figure is not an insignificant figure, it is only about 15% of the total claim.

65. Despite lengthy proceedings the Claimant has recovered only a small part of the debt. Is he now to have to incur further cost and delay in seeking to recover what he is entitled to? Whilst I set out my reasons for why I consider AED to be the more appropriate judgment currency than sterling, I do not accept that it is unjust to refuse the defendant's application for relief from sanctions given the delay in bringing the application and the inefficiency that would arise from varying the judgement.

66. Accordingly, if it had been necessary to decide the case on that basis, I would have refused relief from sanction.

Conclusion

67. On the material before me:

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.