Case No: BL-2019-000480

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION

Neutral Citation Number: [2019] EWHC 1940 (Ch)

The Rolls Building,
7 Rolls Building, Fetter Lane, London,
EC4A 1NL

Friday, 24 May 2019

BEFORE:

MRS JUSTICE FALK

BETWEEN:

HANSON & ORS

Claimants

- and -

CARLINO & ANOR

Defendant

MR T GRANT, QC and **MR R TURNER** (instructed by Harbottle & Lewis) appeared on behalf of the **Claimants**
MR C RAFFIN (instructed by Irwin Mitchell) appeared on behalf of the **Defendants**

JUDGMENT
(Approved)

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(Official Shorthand Writers to the Court)

1. MRS JUSTICE FALK: This is my decision on an application for judgment against the First Defendant, Mr Carlino, in default of acknowledgement of service or in default of defence, made by an in-time application notice dated 20 May. There are also two other short notice applications before me, to which I refer below.

2. The underlying claim in this action is a claim by the Claimants seeking remedies for an alleged misappropriation of over £2 million from, in particular, the Fourth and Fifth Claimants, who it is said were set up as joint ventures between the First and Second Claimants and the First Defendant. The Second Defendant has, I understand, been dissolved, so this decision concerns the First Defendant only.

3. I need to go through the background in some detail, but will first briefly explain the two other applications in front of me. As already mentioned, the application for default judgment was made on 20 May. At that stage no acknowledgement of service and no defence had been filed or served. On the following day, 21 May, a late acknowledgement of service was filed. In response to that late acknowledgement of service the Claimants filed an application notice dated 21 May to set aside the acknowledgement of service under CPR 3.1 and 3.10. That application was on short notice, the normal three clear days not having elapsed before the date of this hearing. The third application was handed to the court this morning, and that is an application by the First Defendant for an extension of time for service of a defence and a retrospective extension of time for filing an acknowledgement of service. In response the Claimants continue their applications and press for default judgment. The First Defendant, who is appearing by counsel who was instructed only yesterday, asks that the three applications I have referred to be heard as interim applications by order and that I make suitable directions for their listing.

4. Turning to the background, the procedural history is significant. Following a number of months of correspondence between the solicitors then acting for the First Defendant and the Claimants' solicitors, a letter of claim was sent in early February 2019. That appears to have had the effect of the First Defendant dispensing with the services of the solicitors who had been corresponding with the Claimants' solicitors for a number of months. No solicitors were immediately instructed in their place. Although there was some suggestion that Eversheds might be instructed, in the event that did not occur.

No response was received to the letter of claim, although the First Defendant was using at least one other firm of solicitors in other matters. As a result of not receiving a response to the letter of claim, these proceedings were issued on 5 March and personally served on Mr Carlino at his home address on 7 March. That is important. He for some time denied having been served. Unfortunately for him, a photograph was taken of him being served and he has now accepted that he was personally served on 7 March. What he was served with included an on-notice application for a proprietary injunction and ancillary orders.

5. That interim application was heard by Mann J on 18 March, a hearing that Mr Carlino chose not to attend. When the order for the injunction which was made by Mann J was attempted to be served on Mr Carlino, it seems that Mr Carlino took a number of steps apparently to evade service. That led to Mann J making a further order on 22 March for substituted service in which he stated that Mr Carlino appeared to be seeking to evade service. That order for substituted service provided for email service and, in addition, for service to be made by post to what is now accepted to be Mr Carlino's home address, and to a firm of solicitors who act for Mr Carlino on other matters.

6. In the absence of compliance with the information provisions in the injunction, a further order was made by Fancourt J on 8 April, again at a hearing which Mr Carlino chose not to attend despite being given notice of it. Fancourt J made an order for Mr Carlino's examination on oath before a judge of this court. At this stage I understand that service by email started to prompt spam responses (at least to emails sent by one of the solicitors). This led to an application heard by Birss J on 1 May, at which he issued a bench warrant for Mr Carlino to be arrested and brought before the court for examination.

7. It is worth referring briefly to certain correspondence at that time. By that stage, a firm of solicitors called LCL Solicitors had been instructed by the First Defendant. I was shown an email sent by someone at LCL on 29 April informing the Claimants' solicitors that they had been instructed and indicating that the paperwork intended to be served on the First Defendant had gone to a property that was being rented out, and it was only when the tenants passed the documents, which had apparently spilled out of

the envelope, on that the First Defendant became aware of them. That is demonstrably untrue and has been shown to be untrue.

8. I should also refer to a couple of comments from Birss J in his judgment, where he said, "Mr Carlino's recent conduct has been one of disregarding court proceedings and has included making untrue statements regarding his knowledge of such proceedings". There was also evidence which was accepted by Birss J that in fact the First Defendant must have received a particular document by email, rather than it being passed on in hard copy only and via tenants.

9. Once the bench warrant was issued, Mr Carlino decided to engage to an extent. He might have been encouraged to do so by the imminent risk of arrest. He did not engage at the stage the police attended to try to execute the bench warrant, but he did in fact attend the court for cross-examination. That cross-examination was before Morgan J, and at that hearing the First Defendant did eventually accept that he lived at the property at which he had originally been served. That was his residential address, at which there are no tenants. At the hearing the First Defendant answered certain questions, but Morgan J adjourned the hearing and made a detailed order requiring the provision of information. This of course was against a background of a failure to comply with the information provisions in the order originally granted by Mann J. Morgan J ordered an affidavit to be provided by 17 May. An affidavit was provided. I was shown it. On a very initial look, it appears to provide significantly less detail than might be expected given the nature of the questions to which the First Defendant was being asked to respond.

10. As I have already mentioned, following the service of the default judgment application which occurred on Monday this week, an acknowledgement of service was filed, together with, this morning, an application to extend time.

11. Dealing with time limits first, the First Defendant was personally served with both the claim form and the Particulars of Claim on Thursday, 7 March. There were minor subsequent changes to those Particulars of Claim, and Amended Particulars of Claim were served on 18 April. The time to file an acknowledgement of service on the face of it expired on 25 March (taking account of the additional two business days provided

for under CPR 6.14). The point was made on behalf of the First Defendant that the certificate of service attached to the application for default judgment in fact related to the Amended Particulars of Claim. However, even by reference to the date of the Amended Particulars of Claim, time has run out.

12. The Claimants' position is that because the First Defendant has filed no defence and has filed a late acknowledgement of service, and only did that after the application for default judgment was made, the court may enter judgment in default of acknowledgement of service or indeed in default of a defence under CPR 12.3.

13. Counsel for the First Defendant rightly pointed to the fact that there is some ongoing controversy as to the position where an acknowledgement of service is filed after an application for default judgment but before the decision, although it is right to say that it was recognised by Andrew Baker J in the *Cunico* case (*Cunico Resources NV & Ors v Daskalakis & Anor* [2018] EWHC 3382 (Comm)) that the preponderance of judicial opinion is in favour of the conclusion that the court can grant default judgment in circumstances where an acknowledgement of service has been filed, where that filing was made only after the application for default judgment. He did note however that the point is not straightforward and that there is one reading of CPR 12.3, which might be regarded as the natural reading, which suggests that default judgment may only be entered in default of acknowledgement of service if that acknowledgement of service has not been filed at the date of the judgment.

14. I do not need to decide which view is correct in this case, because it is possible to grant judgment in default of a defence as an alternative to judgment in default of an acknowledgement of service, relying on CPR 12.3(2). There has been no defence. There is an application for an extension of time but no defence has been filed, and the conditions set out in CPR 12.3(2) are met. That provides that judgment in default of a defence may be obtained only where an acknowledgement of service has been filed but a defence has not been filed, and the relevant time limit has expired. In this case 28 days has expired from the date of service of each of the original Particulars of Claim and the Amended Particulars of Claim.

15. Counsel for the First Defendant referred me to *Unilever plc v Pak Supermarket* [2016] EWHC 3846 (IPEC) where he suggested that the judge had reached a different conclusion at paragraph 14. I do not agree with his reading of that case. That was a case where, as I understand the facts, a defence was filed as well as the acknowledgement of service before an application for judgment in default. That is a different set of facts and is not what I am dealing with here. The defence has not been filed. So I consider that it is within my power to grant judgment in default of defence. I may well have power to grant judgment in default of acknowledgement of service, but I do not need to decide that.

16. I do however need to take account of a number of factors. The first is the obvious point that the First Defendant has now made an application for extensions of time, both in relation to the acknowledgement of service and the defence. I should clearly have regard to that application, or to the possibility that such application might succeed, in reaching a decision as to whether to grant a default judgment.

17. It is I think accepted by both parties that I am entitled to have regard to the principles in *Denton v White* [2014] EWCA Civ 906 in considering this point. Those are the well-known principles as to whether the delay has been serious and significant, the reasons for the delay, and the requirement to consider all the circumstances of the case. I will come back to that in more detail. I was also rightly referred by the First Defendant's counsel to *Walsham Chalet Park Ltd (t/a the Dream Lodge Group) v Tallington Lakes Ltd* [2014] EWCA Civ 1607. That is a case in relation to CPR 3.4(2)(c), which was an application to strike out a statement of case, but I understood it to be uncontroversial that in deciding how to determine whether to exercise a power under CPR3.10 the court should have regard to similar principles. In *Tallington Lakes* it was emphasised at [44] that in a strike-out application the proportionality of the sanction itself is in issue. A distinction was drawn between a strike-out application and an application for relief from sanction, and reference was made to a statement by Lord Neuberger in another case that "the striking out of a statement of case is one of the most powerful weapons in the court's case management armoury and should not be deployed unless its consequences can be justified".

18. The First Defendant's counsel makes a number of points in support of his submission that the three applications should be heard as interim applications by order. He says there is no material prejudice to the Claimants by doing so, because the interim relief already granted holds the ring and prevents the disposal of his assets. He also says that the First Defendant has engaged in the proceedings, attended court for cross-examination, provided affidavits and evidence, and has now filed an acknowledgement of service and asked for an extension of time, and indeed yesterday appointed new solicitors. Counsel points to the very serious allegations, effectively that the First Defendant stole money, and the significant amount sought by the Claimants, in excess of £3.7 million. The First Defendant's failure to comply with the timetable for the acknowledgement of service has not been substantial, no hearings have been imperilled and, as already indicated, the Claimants would not be prejudiced.

19. I have taken account of all of those factors, and I have taken into account the need for proportionality, as already referred to, applying similar principles to those applied in a strike-out application under CPR 3.4. In my view the right course and the just course, given the background, is to grant judgment in default. In specific response to the points raised on behalf of the First Defendant, I accept that these are very serious allegations, but the problem lies at the First Defendant's door. Throughout most of the proceedings there has been a complete failure by him to engage, including a refusal initially to admit that he had even been served with the proceedings. His evidence just served in support of the application for an extension of time states that he was away for two weeks over Easter in Cyprus and then five days in Devon, over a period when the proceedings had certainly started. He was well aware of the claim and application for interim relief, and during at least part of that time must have been aware that the interim relief had been granted. He has put the Claimants to enormous expenditure, not only with repeated trips to court but also significant expenditure on process servers as he sought to avoid service. I do not get the impression that the First Defendant has been treating the court process with respect.

20. Taking account of the *Denton v White* principles, as I also do, at this stage there is nothing in the witness statements I have seen that provides a really good reason for the delay in engagement. The delay in engagement has been serious and significant, certainly by reference to the date the proceedings started, less so simply by reference to

the date of the Amended Particulars of Claim, but to consider that date in isolation without reference to the broader history of the proceedings to which I have referred would in my view be quite wrong. Although there has been some engagement by the First Defendant, the level of engagement has been extremely limited. He only attended when there was a bench warrant issued. The affidavit provided so far appears (at least on first reading) to be very limited, and there appears to have not been compliance with other orders. Acknowledgement of service was supplied late. He appointed new solicitors yesterday but did previously have solicitors acting for him, so he clearly was in a position to be able to instruct solicitors, if that was a relevant factor, although I would point out that litigants in person are, like represented parties, expected to observe time limits. I accept that to an extent the injunction already granted may hold the ring, although I note that if it is the case that the First Defendant has not complied with the information provisions, then the value of a proprietary injunction is frequently significantly reduced.

21. In all the circumstances I do not accept that there has been no prejudice to the Claimants. The impression given is one of an attempt to frustrate their obtaining justice, and to force them into a further hearing with an extension of time application leading to further delay. Whilst it is the case that no particular hearings have been imperilled, there have been very significant calls on the court's resources. I am the fifth Chancery judge to have had to consider a material application on this matter since March, and this is largely due to the First Defendant's actions.

22. As regards proportionality, I have carefully considered this. As the First Defendant's advisors are well aware, this is not actually the end of the road for them. There is a proper course available to them pursuant to CPR 13.3, under which the First Defendant is entitled to apply to set aside or vary a judgment obtained under Part 12 if he can show he has a real prospect of successfully defending the claims or it appears that there is some other good reason why the judgment should be set aside or varied.

23. I agree with the Claimants that the time has come to shift the onus onto the First Defendant to make out his case. He needs to come and demonstrate positively to the court that he does have such a real prospect, or that there is some other good reason why he should be allowed to defend the claim. But for now think he has taken up quite

enough of the court's resources. This is not a simple matter of being a little late in acknowledging service. Reverting to *Denton* and considering all the circumstances of the case, I am strongly influenced by the history of the proceedings to date and what is clearly a decision of Mr Carlino's choosing not to engage as he should have done at the appropriate stage.

24. In these circumstances I have concluded that the appropriate action is to grant judgment in default of defence, and therefore I do not need to decide whether I am able to grant judgment in default of acknowledgement of service. I make no order on the Claimants' set aside application, and I dismiss the First Defendant's application for an extension of time.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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