[2015] EWHC 3280 (Comm)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

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

Tuesday, 19 May 2015

BEFORE:

MR JUSTICE PHILLIPS

Case No: 2014-828
[Now 2014-000441]

BETWEEN:

IAN ALMOND & OTHERS

Claimants

and

MEDGOLF PROPERTIES LIMITED & OTHERS

Defendants

Case No: 2013-1309
[Now 2013-000541]

LIJANA ARMAILAITE & OTHERS

Claimants

and

MEDGOLF PROPERTIES LIMITED & OTHERS

Defendants

(Transcript of the Handed Down Judgment of
WordWave International Limited
Trading as DTI
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

MR A MILNER (instructed by **Highgate Hill Solicitors**) appeared on behalf of the Claimants

MR H WEBB (instructed by **Jeffrey Green Russell**) appeared on behalf of the Third & Nineteenth Defendants in Case No. 2013-000541

Judgment (1)
Approved

1. MR JUSTICE PHILLIPS: There are before the court applications by the claimants in two separate proceedings, one commenced in 2013, folio number 1309, the other commenced in 2014, folio number 828. In each case the application is for judgment to be entered in default of an acknowledgment of service.

2. An application is necessary for a number of reasons, including the fact that proceedings were served on the defendants out of the jurisdiction and that the relief sought is of a nature for which the claimants require a court decision, in particular, the rescission of certain contracts.

3. The defendants to each action are the same, numbering twenty-nine in total. The application for default judgment in each set of proceedings is against only certain of those defendants.

4. Two of the defendants against whom default judgment is sought in claim 2013-1309 appear today represented by Mr Webb of counsel, instructed by Jeffrey Green Russell. The history of the matter, as far as those defendants is concerned, is that they were served with the claim form out of the jurisdiction in proceedings 1309 in 2014 and their acknowledgment of service was due on 21 April of that year.

5. By November last year, Jeffrey Green Russell were instructed and indeed knew about the hearing of this application for default judgment which was listed for that month. That hearing was adjourned to today, notification being given of today's hearing on 7 May of this year; that is eleven days ago. It was only today at this hearing that an acknowledgement of service was purportedly served on the claimants' representatives on behalf of those two defendants. Mr Webb has confirmed that that acknowledgement of service has not been filed at court.

6. A preliminary question arises as to whether or not the claimants are entitled to default judgment against those defendants in such circumstances. Mr Webb, who was instructed at short notice and was therefore not in a position to serve a skeleton argument, has nevertheless advanced arguments, having been given time to consider the authorities relied upon by Mr Milner, who appears today as counsel for the claimants.

7. Mr Webb submits that the effect of CPR 12.3.1 is that a claimant is not entitled to judgment in default if, before that judgment is entered, the defendant has filed an acknowledgment of service or a defence of the claim. Rule 12.3.1 reads:

> "*(1) The claimant may obtain judgment in default of an acknowledgment of service only if –*
> *(a) the defendant has not filed an acknowledgment of service or a defence to the claim (or any part of the claim); and*
> *(b) the relevant time for doing so has expired.*"

8. Mr Webb submits that the rule states two conditions, namely, the absence of a filed acknowledgment of service and, secondly, relevant time having expired. He argues that the fact that the second condition was met, i.e. the relevant time has expired, does not mean that the first condition is met if an acknowledgement has been filed out of time.

9. This point was considered by Popplewell J in Taylor v Giovani Developers Ltd [2015] EWHC 328 (Comm), a judgment in litigation between different parties but in relation

to similar issues, that is, disputes as to developments in Cyprus in which the claimants had been induced to invest. Faced with the same argument, Popplewell J recorded the following:

> "*36. The next point that is taken is that the condition in Rule 12.3(1)(a) is not satisfied because the First Defendant has filed an acknowledgment of service, albeit late and without, as I have decided, it being appropriate to grant an extension of time. Mr. Harding referred me to some dicta of Blair J in ESR Insurance Services Ltd. v. Clemons & Ors. That was a case in which, on the facts, Blair J granted an extension of time and therefore the point now under consideration did not arise, although he expressed himself as saying he had some doubt as to whether a default judgment could be entered where there had in fact been an acknowledgment of service, albeit late.*
>
> *37. In my view, there are potentially two answers to this point the first of which is decisive. The relief to which the claimant is entitled must be judged by reference to the date of the application. At that time, Rule 12.3 was indisputably fulfilled because there had been no acknowledgment of service then entered and time had expired. In my view, a defendant cannot defeat a claimant's entitlement to relief at the date on which the application is made by subsequently serving an acknowledgment of service outside the time allowed for by the rules, in circumstances where there has been no extension of time, a fortiori where there has been an application for an extension of time which has been refused. That is sufficient of itself to dispose of the point. Secondly, there is much force in the argument that what is meant in Rule 12.3 by an acknowledgment of service is a timeous acknowledgement of service; if so even in circumstances (which are not the circumstances of this case) in which an application for judgment in default of acknowledgment of service is made after an acknowledgment of service has been served out of time, Rule 12.3 would be fulfilled in the absence of any extension of time by the court.*"

10. Mr Webb submits that I should not follow Popplewell J's approach, as he submits the preferable reasoning is that the defendant who has filed acknowledgment of service should not be liable to have judgment against him, no matter when that acknowledgment of service was filed. He submits that this coincides with how the matter is dealt with when judgment in default can be entered administratively, where, if an acknowledgment of service is on file, the court will not grant such a judgment, reflected in the note to CPR 10.2, which reads,

> "*However there is nothing to prevent a defendant filing a late acknowledgment of service if the claimant has not entered a default judgment in the interim*."

11. Contrary to that submission, I entirely agree with Popplewell J's first ground for rejecting the contention, namely, that the position must be viewed as of the date of the application for default judgment is made. That is sufficient to dispose of the point in

this case. It would be highly unsatisfactory and would make a nonsense of the procedure if a defendant could avoid a default judgment being entered against him by way of application if he files an acknowledgment of service after the application notice but any time up to and including the moment before judgment is pronounced. In my judgment, the question of whether or not a defendant has filed an acknowledgment of service must be judged at the point of which the application is made.

12. The second ground on which Popplewell J rejected the submission in the Taylor case was that an acknowledgment of service, which is out of time, would not fall within Rule 12.3 and is effectively invalid for those purposes, picking up on reasoning earlier in his judgment at paragraphs 17 to 18 and applying the reasoning for Flaux J in Talos Capital Limited and Others v JSC Investment Holdings [2014] EWHC 3977 (Comm).

13. That further reasoning on the face of it creates an inconsistency with the first line of reasoning, because if an acknowledgment of service is invalid for the purposes of CPR 12.3 if out of time, then that would be an answer regardless of whether an acknowledgment of service was filed prior to the application notice. It would also entail that a claimant would be entitled to automatic default judgment where permission of court is not required, even if there is an acknowledgment of service on file when the request for judgment presented, putting the court offices in the position of having to determine whether acknowledgment of service was valid or not.

14. Therefore I rest my decision on the first ground articulated by Popplewell J in the Taylor case. I consider that it is unnecessary to decide the second point, but, like Blair J in the ESR Insurance Services Limited v Clemons case, I have some doubt whether default judgment could be entered where there had, in fact, been acknowledgment of service, albeit late, prior to the application notice.

15. However, it seems to me that there is a further and complete answer to the defendants' contention in this case, which is that, as Mr Webb has accepted, an acknowledgment of service has not been filed. On any basis filing is a requirement in avoiding a default judgment; providing a copy to the claimants at the hearing cannot on any basis suffice to avoid default judgment. I am, therefore, satisfied that the defendants cannot resist default judgment at this hearing on the basis of their late provision of an acknowledgment of service to the claimants.

16. Mr Webb applies for an adjournment in order to make an application for an extension of time for his acknowledgment of service. However, given the history of the matter and given that no explanation is provided for the delay and, in particular, the fact that nothing has been done in the last eleven days since Jeffrey Green Russell were notified of this hearing, I see no basis whatsoever on which an adjournment should be granted. In the absence of any explanations, other than the vague assertion that the defendants' solicitors have some difficulties in obtaining instructions from Cyprus via an agent, there does not seem to be any reason to grant an indulgence to these defendants.

17. Mr Webb did not suggest that an adjournment should be granted in order to enable him to file the acknowledgment of service, but in my judgment the same reasoning would apply in that regard. I dismiss the application for an adjournment.

18. Costs cannot be summarily assessed on present information. Mr Milner has fourteen days to make submissions regarding costs. Mr Webb will have seven days thereafter to comment. A decision will then be made on the papers.