

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2 CIVIL DIVISION

3 CAUSE NO: G 0219 OF 2015

4
5 BETWEEN:

6 CEDRUS INVESTMENTS LTD

7 PLAINTIFF

8 AND:

9 (1) HARUN ABIDIN

10 (2) TATA ARTHA GROUP

11 DEFENDANTS

12
13 Appearances:



14 Ms. Anna Peccarino of Travers Thorp Alberga
for the Plaintiff

15 Mrs. Terrence Caudeiron and Ms. Christine
16 Bodden of Quality Law Services for the
17 Defendants

18 Before:

The Hon. Justice Cheryll Richards Q.C.

19 Heard:

6th December 2018

20 Draft Judgment:

13th December 2018

21 Further Hearing:

24th December 2018

22
23 HEADNOTE

24 *Civil Division – Civil Procedure Rules – Application to Set Aside Default*
25 *Judgment following non-compliance with unless order.*

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28 JUDGMENT



INTRODUCTION

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3 1. The Plaintiff is a company incorporated in the Cayman Islands carrying on an investment
4 management business including private wealth management and institutional asset
5 management.
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- 7 2. The First Defendant, Harun Abidin is an Indonesian national, resident in Indonesia, and
8 he is a 95% shareholder of the Second Defendant Tata Artha Group.
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- 10 3. The matter for the Court's consideration is a Summons filed by the Defendants on the
11 12th October 2018 seeking to set aside a Default Judgment in this matter.¹ The Default
12 Judgment was issued by the Grand Court on the 31st May 2017, following non-
13 compliance with an "Unless Order" dated 21st April 2017. The Unless Order was made
14 on the application of the Plaintiff and required the Defendants, by no later than 4pm on
15 the 28th day after its making, to file and serve an amended Defence or confirm in writing
16 to the Plaintiff that no amended Defence was to be filed, failing which the Plaintiff would
17 be at liberty to enter Judgment on the Claim, and the Defendant's Counterclaim would
18 be dismissed.
19
- 20 4. On the same day that this Unless Order was made, Mourant Ozannes, the Defendants'
21 Attorneys, were given leave to come off record and were to serve a copy of the Order
22 evidencing this leave on the Plaintiff's Attorneys and on the First Defendant by e-mail
23 and on the First and Second Defendants by DHL courier to their address in Indonesia
24 and on their Attorneys, Virtus Law LLP, a Singapore Law Firm by e-mail.

¹ The Plaintiff elected not to proceed with an application for security for costs.

1 5. By Application dated 23rd May 2017, the Plaintiff sought the issue of the Default
2 Judgment as:

3
4 i. The Defendants had been served with an original sealed copy of the Unless Order
5 as this had been handed to the Defendants' Attorney outside the courtroom on the
6 said 21st April 2017 and subsequently a copy of the Order had been sent by e-mail
7 to the said Attorney on the 24th April 2017; and

8
9 ii. The Defendants had failed to comply as they had not filed an amended Defence or
10 confirmed that they did not intend to file same.

11
12 6. By the Summons filed on the 12th October 2018, about 16 months after the Default
13 Judgment was issued on the 31st May 2017, the Defendants now seek the following
14 Orders:

15 i. That the Defendants be allowed time to file their Defence to the Judgment
16 entered on 31st May 2017 [*as exhibited hereto*] and that the Judgment of
17 same date be set aside because:

18 a. The Defendants' failure to file a defence was not willful and
19 deliberate;

20 b. The Defendants' application to set aside the Default
21 Judgment was made as soon as reasonably possible after
22 they became aware of the Judgment and there was a
23 reasonable explanation for any delay;

24 c. The Defendants have a meritorious defence or a defence
25 worthy of investigation; and



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d. The Defendants have a real prospect of successfully
defending the claim for reasons set out in the Affidavits and
exhibits of Mr. Harun Abidin dated 12th October 2018; and

ii. That the Plaintiffs do pay the costs of this Application.

7. In light of the reliance placed by both sides on the history of this matter, I set out for the
record the sequence of events in so far as they appear to be material.





HISTORY

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8. On the 2nd December 2015, a Writ of Summons and Statement of Claim was filed by the Plaintiff against the two Defendants seeking repayment of loans, interest and late fees in the sum of \$2,071,240.30.
9. On the 3rd December 2015, an *ex parte* Summons for leave to file out of the jurisdiction was filed by the Plaintiff. This was supported by the First Affidavit of Mr. Melvin Patterson dated 7th December 2015 which asserted that the Plaintiff has a good case.
10. On the 8th December 2015, an *ex parte* Order was made by the Court granting leave to serve out of the jurisdiction.
11. On the 14th January 2016, the Affidavit of Damba Akmala was filed. Mr. Akmala states that he is an Attorney in Indonesia and that personal service was effected on the First Defendant.
12. On the 22nd January 2016, an Acknowledgment of Service was filed by Mourant Ozannes on behalf of both Defendants, indicating an intention to defend.
13. On the 5th February 2016, the Defendants filed a Summons seeking an extension of time for the filing of a Defence and the making of an application to challenge the jurisdiction of the Court. The basis for the request included difficulty in making contact with the First Defendant who was said to be travelling.
14. On the 24th February 2016, the Court extended time by 28 days to 4th March 2016.

- 1 15. On the 24th February 2016 a Defence and Counter Claim was filed by the Defendants.
- 2
- 3 16. The Plaintiff's Summons filed on the 23rd February 2016 seeking Judgment under GCR
- 4 O.19 r. 2 was not proceeded with.
- 5
- 6 17. On the 18th March 2016, the Plaintiff filed a Reply to the Defence and Counterclaim.
- 7
- 8 18. On the 18th April 2016 the Plaintiff filed a Summons seeking an Unless Order re
- 9 Discovery.
- 10
- 11 19. On the 30th May 2016 the Plaintiff filed a Summons seeking directions for trial and for
- 12 Further and Better Particulars.
- 13
- 14 20. The Parties exchanged lists of documents and responses to Requests for Further and
- 15 Better Particulars on the 31st May 2016 and that the Defendants responded to the
- 16 Plaintiff's request for Amended responses to the Plaintiff's Request for Further and
- 17 Better particulars on the Defence and Counterclaim on the 5th August 2016.
- 18
- 19 21. On the 4th August 2016, a Summons was filed by the Defendants seeking leave to file an
- 20 Amended Defence and Counterclaim. The Amended Defence was attached in draft form.
- 21 An amendment was made to paragraph 3 of the Defence inserting an admission that the
- 22 First Defendant's investment account dated 9th January 2012 with the Plaintiff was
- 23 designated by the Plaintiff as a "high net worth/sophisticated" investment account.
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1 22. On the 15th February 2017, pursuant to the Plaintiff's Summons filed on the 21st
2 November 2016, a Directions Order was issued by the Court, granting leave to amend,
3 to both parties, and giving directions for trial including as to expert witnesses. The trial
4 was to be set down on the first available date after the 12th June 2017.

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6 23. Pursuant to this Directions Order, on the 15th February 2017, the Plaintiff filed an
7 Amended Writ and Statement of Claim. The primary amendments were as to the high-
8 risk nature of the Plaintiff's business and as to the deposits made by the First Defendant
9 as collateral for the loans.

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11 24. On the 17th February 2017, the Defendants' Attorneys filed a Summons for an Order of
12 declaration that they had ceased to be the Attorneys on record for the Defendants. That
13 summons was not heard on the first appointed date of 27th March 2017 and was instead
14 re-listed by Notice of Hearing to the 21st April 2017.

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16 25. On the 7th April 2017, the Plaintiff filed its Summons for the Unless Order which was
17 supported by the First Affidavit of Mr. Rani Jarkas, the Chairman of Cedrus Investments.

18
19 26. On the 12th October 2018 the Defendants filed the Summons to Set Aside the Default
20 Judgment which was supported by the First Affidavit of the First Defendant, Mr. Abidin,

21
22 27. On the 6th November 2018 Quality Law Services and TMC Chambers filed a Notice of
23 Appointment as Attorneys for the Defendants.



1 THE ISSUES IN DISPUTE

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3 28. By the Amended Writ of Summons and Statement of Claim, the Plaintiff states that it
4 carries on investment management business only with sophisticated investors and high
5 net worth individuals.

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7 29. In January 2012, the Plaintiff was introduced to the First Defendant who is the President,
8 Commissioner and owner of the Second Defendant. In February 2012, the First
9 Defendant deposited over US\$12 million worth of securities into a margin account with
10 the Plaintiff as collateral for the loans that he intended to obtain from the Plaintiff.

11 30. Between June 2012 and January 2014, the two Defendants entered into promissory notes
12 with the Plaintiff as follows:

- 13
14 i. US\$1 million at 9.75% per annum interest;
15 ii. US\$300,000 at 12.5% per annum interest with a 6 % origination fee;
16 iii. AU\$500,000 at 10% per annum interest with a 3% origination fee; and
17 iv. AU\$504,000.00 at 13% per annum interest rate with an 8% origination fee.



18
19 31. Each of the four loans was secured by a lien against the margin account.

20
21 32. Between June 2014 and November 2014, the Defendants entered into various extensions
22 of the promissory notes and in February 2015 a further agreement, whereby the loans
23 were restructured.

24
25 33. By that extension agreement the Defendants agreed that the sum owing was
26 US\$2,071,885.02 including interest up to February 2015.

1 34. In March 2015 following default of the repayment obligation under this agreement, the
2 Parties entered into a further agreement.

3
4 35. Following additional defaults, the Plaintiff liquidated shares on the First Defendant's
5 margin account, applied them to the loans, interest and various fees and claimed the sum
6 of US\$2,071,240.30.

7
8 36. The Defendants in response to the Claim assert that the Plaintiff undertook to provide
9 investment and advisory services to them and owed them a fiduciary duty to act in good
10 faith and in their best interests as well as a duty to exercise reasonable skill and care in
11 the handling of their funds. Further, the Defendants assert that the Plaintiff in breach of
12 its duties, liquidated securities in the First Defendant's brokerage account and failed to
13 render a true, full and accurate accounting of its operations of that account. It is further
14 claimed by the Defendants that the sale price at which the Plaintiff liquidated the First
15 Defendant's securities did not match the market price and that the sale proceeds were
16 applied towards advisory fees, including unauthorised penalty fees and charges instead
17 of to reduction of the margin balances.

18
19 37. The Defendants assert that interest rates payable were excessive when compared to
20 market rates.

21
22 38. The Defendants in their counter claim, seek in part a true full and accurate accounting,
23 payment of all sums found to be due to them and equitable compensation of the
24 Plaintiff's breach of fiduciary duties. Alternatively, the Defendants seek a set off of all
25 amounts due to them against any sum properly due from the Defendants to the Plaintiff
26 after the accounting claimed.



1 39. Put in summary form as I understand it, the Defendants are claiming that with security
2 valued at US \$20 million (and not \$12 million as asserted by the Plaintiff) and an averred
3 basic loan amount of just over \$2 million, the amount now claimed as being what is
4 owed, cannot be correct. Further that the fees charged and rates applied were excessive
5 and not in accordance with market values.

6 40. The Directions Order made by the Court on the 15th February 2017, included an order in
7 the following terms:

8 *“ Each party be permitted, if so advised, to instruct one expert each and to rely on*
9 *one expert opinion on matters of commercial interest rates and business practice*
10 *commonly found in commercial/investor loan markets; such evidence to be*
11 *exchanged by 4pm on 15 May 2017.”*

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AFFIDAVITS IN SUPPORT OF THE APPLICATION TO SET ASIDE

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3 41. In his First Affidavit dated 16th October 2018, the First Defendant states that the reason
4 for the delay in bringing proceedings to set aside the Default Judgment is that he was not
5 in receipt of it until the 23rd August 2018. On that date, he received a brown envelope
6 from a courier which contained a letter from the Supreme Court of New South Wales
7 together with the Plaintiff's Application of 23rd May 2017, Default Judgment dated 31st
8 May 2017 and the Order of the Grand Court dated 21st April 2017. It was also then that
9 he learned that Mourant Ozannes had ceased to be the Attorneys on the record. He had
10 engaged a Singapore based Law Firm, Virtus Law LLP which in turn engaged Mourant
11 Ozannes Cayman to address the Writ.

12
13 42. In his Second Affidavit of 29th November 2018, the First Defendant further states that
14 following his retaining of Virtus Law LLP and the filing of matters in Court, there was
15 a pause in the proceedings during 2017 and he assumed that his Attorneys were taking
16 care of minor issues and that he would be informed when his input became necessary.
17 He has checked and did not find any e-mail sent to him by either of his two Attorneys.
18 He has never had direct communication with the Cayman Law Firm representing him.
19 His instructions were given to Mr. Zin, an Attorney at Virtus Law LLP. Mr. Zin resigned
20 from that Firm. He also states that the loan arrangements with the Plaintiffs were signed
21 by him as a way to return to him the profits generated from his shares without it attracting
22 the attention of the Government Tax regime of Indonesia. By October 2016, the
23 Government had declared an amnesty to persons keeping funds outside of Indonesia.



1 43. Over time when he realised that the value of his shares was falling, he reported the matter
2 to the Indonesian Police on the 13th November 2015. He also refers in his Affidavit to
3 certain newspaper articles.

4
5 44. I indicated during the hearing that I could not see how I could take into account such
6 material and I pay no regard to them.

7
8 45. He asks that consideration be given to the fact that prior to the issue of the Unless Order
9 he did not have a history of defying Court Orders.

10
11 46. He produces as an exhibit to this Second Affidavit a document entitled “Advisory
12 Agreement”. It purports to be an agreement between Tata Artha Group and the Plaintiff
13 and is *inter alia* in the following terms, “*Whereas Tata Artha desires to engage Cedrus*
14 *Investments Ltd. as its sole and exclusive Advisor to provide Financial Advisory Services*
15 *and Investment Banking services*”. The duties of the Advisor included assisting with the
16 listing of a public company and raising money by way of public offering.

17
18 47. Also attached to the said Affidavit are nineteen (19) wire transfer records of transfers
19 from Mr. Abidin to Cedrus Investments Ltd. There are two Share Registry Transfer
20 documents evidencing the transfer of twenty five million (25,000,000) ordinary shares
21 from Cokal Ltd at the behest of Mr. Abidin to Cedrus Investments.



AFFIDAVITS IN RESPONSE TO THE APPLICATION TO SET ASIDE

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48. By his Second Affidavit filed 5th December 2018, Mr. Rani Jarkas, the Chairman of Cedrus Investments states that the Default Judgment obtained in the Cayman Islands was registered by Order of the Supreme Court of New South Wales on the 9th August 2017 and that from the date of that Registration to the present, the Plaintiff has been taking steps to enforce the judgment in Australia. Following the Registration, the First Defendant brought an application to stay the enforcement of the Judgment which was filed on the 3rd October 2018.

49. Mr. Jarkas asserts his belief that the Set Aside Application was filed solely as a bad faith attempt to delay and derail the Australian enforcement proceedings.

50. On the 6th November 2018, the Defendants withdrew their application to stay the Australian proceedings and were ordered to pay the Plaintiff's costs. Mr. Jarkas also produces as part of exhibit RJ 2 to his Affidavit, an email response from Mourant Ozannes indicating that the Default Judgment had been sent to Virtus Law and to the personal e-mail of the First Defendant on the 15th June 2017. He asserts that there is no justifiable reason for the Default Judgment to be set aside.



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51. In his Third Affidavit dated 6th December 2018, Mr. Jarkas denies involvement in any scheme to do with taxes and states that the First Defendant's assertion that he had no knowledge of the Default Judgment until August 2018 cannot be true as the New South Wales Judgment enforcing the Default Judgment was served on him on the 11th August 2017. He produces as RJ3 to his Affidavit, the Affidavit of Ahmad Adnan, a solicitor in Indonesia who attests to sending a person from his office with the registered Judgment to the offices of Mr. Abidin on the said date. The envelope was handed to a person in that office.



THE SUBMISSIONS

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3 52. Counsel for the Defendants relied on the case of *R. Ebanks, Powery, A. Ebanks and*
4 *Bodden and Bodden*² and submitted that the applicable rule is GCR O.3 r.5 by which
5 the Court may extend or abridge the period by which a person is required, or authorised
6 by any order to do any act in any proceedings. Counsel also referred to the case of *Grand*
7 *Cayman Golf Resorts Ltd. v. East End Aggregate Ltd.*³ noting that the discretion to
8 extend time for compliance with an Unless Order should be exercised cautiously. An
9 important consideration is whether or not the Respondent has suffered prejudice. The
10 Defendants' submissions included the following:-

- 11 i. While this application was filed some 16 months after the Default Judgment
12 had been entered, the Court should bear in mind that for part of that time,
13 the Defendants were unrepresented. This had been foreshadowed for some
14 time and as of 21st April 2017, the Defendants were without representation.
- 15 ii. The First Defendant was not served with the Order and any dilatoriness on
16 his part can be explained by the fact that he was waiting to hear back from
17 his lawyers.
- 18 iii. The Unless Order was made in circumstances where there had not been a
19 history of failure to comply with orders (See *R. Ebanks and others v.*
20 *Bodden and Bodden*⁴), and further it was made at time when the Court and
21 the Plaintiff would have been aware that the Defendants' Attorneys were
22 imminently making an application to come off record.

² [2004- 05] CILR Note 28

³ [2001] CILR Note 25

⁴ [2004] -05 CILR Note 28



1 iv. The Plaintiff has suffered no prejudice as a result of what had occurred. The
2 Plaintiff was already in possession of the Amended Defence and of all the
3 material required.

4 v. While there might be some prejudice to the Plaintiff in terms of costs, the
5 prejudice to the Defendants would be greater should they not be allowed to
6 proceed with their defence.

7 vi. Costs in respect of the application should be reserved and not be awarded
8 on an indemnity basis.

9
10 53. Counsel drew the Court's attention to the overriding objective as set out in the Grand
11 Court Rules that the Court should be enabled to deal with every cause in a just,
12 expeditious and economical way and that the said Rules should be liberally construed to
13 give effect to that overriding objective and in particular to secure the just, most
14 expeditious and least expensive determination of every cause or matter on its merits.

15
16 54. Counsel sought to distinguish the case of *Brown v. Horvat Properties (Cayman Islands)*
17 *Ltd. and Horvat*⁵ and stressed that in the instant case, there was no evidence of the
18 Defendants' contumacious default or the likelihood of its recurrence and no evidence
19 that the Plaintiff's case would be seriously and irretrievably prejudiced or made
20 nugatory.



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⁵ [1992- 1993] CILR N-5a

1 55. In *Pearce and Seymour and Seymour*,⁶ Murphy J. refused to set aside a default
2 judgment dated 13th July 1998 of which the Defence had been aware from as early as
3 10th July 1998. The application was not made until the 13th August 1998, which time
4 period the Court viewed as unacceptable delay. The Court was not prepared to entertain
5 the application to set aside the default Judgment on the basis of delay alone but noted,
6 additionally, that the affidavit material proposed in support contained nothing to explain
7 the delay in applying or to establish a meritorious defense much less a “real prospect of
8 success.”

9
10 56. In the case of *Denton and Others v. TH White Limited and Others*⁷, the English Court,
11 applying the Civil Procedure Rules and the reforms made after the ‘Jackson Report’
12 considered a three-stage test for a Court in evaluating circumstances in which one party
13 has sought relief from sanctions pursuant to the Rules. The Court should first assess the
14 seriousness or significance of the failure to comply with any Rule, Practice Direction or
15 Court order. The second stage is to consider why the default occurred. The third stage
16 is to evaluate all the circumstances of the case so as to enable the Court to deal justly
17 with the application. The Court clarified that it is not that an application for relief will
18 automatically fail if there is a serious and or significant breach and there is no good
19 reason for the breach. CPR rule 3.9 (1) requires that in every case the Court will consider
20 all the circumstances of the case so as to enable it to deal justly with the application. The
21 promptness of the application will be a relevant circumstance to be weighed in the
22 balance along with other past or current breaches.

⁶ 13th August 1998
⁷ [2014] EWCA Civ. 906



1 57. Each side sought to rely on this case - with Counsel for the Plaintiff asserting that the
2 guidance therein should be followed strictly and Counsel for the Defendants stating that
3 the case referred to a different set of rules, but may nevertheless be borne in mind in
4 considering the instant matter. I take note of GCR O. 1 r 5 as to the non-applicability of
5 English rules and that *The Supreme Court Practice 1999* may be relied on where
6 appropriate as an aid to the interpretation and application of these Rules.

7
8 58. In *Tasarruf Mevduati Sigorta Fonu and Others v. Wisteria Bay Limited and Others*⁸
9 the Court allowed the Plaintiff's application for striking out, referencing the failure of
10 the Defendants to comply with three separate unless orders of the Court, to explain
11 adequately why they had not done so and to show that they should be allowed to continue
12 with the proceedings. The Court considered the breaches of the Defendant to be
13 deliberate and inexcusable.

14
15 59. Counsel for the Defendants also relied on the case of *Mitchell v. News Group*
16 *Newspapers*⁹ in pointing to the circumstances under which the Unless Order was made.
17 In that case it was stated that a good reason for the default could be to show that the
18 period for compliance originally given was unreasonable although it appeared to be
19 reasonable at the time.



⁸ [2008] CILR 231

⁹ [2013 EWCA Civ. 1537]

1 60. Following release of a Draft Judgment on the 13th December 2018, the Plaintiff made
2 further clarifying submissions dated 18th December 2018. The Defendants provided
3 further written submissions on the 24th December 2018 and both parties were afforded
4 an opportunity to make further oral submissions on that date.

5
6 61. By written skeleton argument dated 5th December 2018, on the legal test to be applied to
7 this matter, the Plaintiff had submitted as follows:

8 *“The Default Judgment was obtained pursuant to GCR O.19. Order 19 r.9 states*
9 *that the Court may set aside or vary a judgment entered in pursuance of O.19. The*
10 *Court has an unfettered discretion to exercise and the onus is clearly on the*
11 *applicant (i.e. the Defendants in this instance to show that there is a just reason to*
12 *allow the application.)*

13 *The application of the Courts discretion as to whether a default judgement should*
14 *be set aside is well established per Evans v. Bartlam [1997] AC 473, and on which*
15 *guidance has been provided by the English Court of Appeal in Alpine Bulk Transport*
16 *Co. Inc. v. Saudi Eagle Shipping Co. inc. [1986] 2 Lloyd’s Rep. 221 (Saudi Eagle)*
17 *and both of which have been applied and approved in the Cayman Islands in*
18 *Embassy Investments Limited v. Houston Casualty Company (unreported, CICA 9*
19 *of 2012 on Appeal from FSD 94 of 2011).”*

20
21 62. By further submissions dated 18th December 2018 Counsel for the Plaintiff submitted:-
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1 “The “default judgment” was not entered in default of a defence but as a result of
2 the Defendants’ failure to comply with the terms of an Unless Order. The Unless
3 Order was made following a breach of the terms of an Order for Directions made
4 by the Court which included a direction for the Defendants to file an Amended
5 Defence, if so advised, in reply to the Plaintiff’s Amended Statement of Claim or to
6 confirm that none would be filed so as to progress to the next stage of the
7 proceedings, a Defence and Counterclaim having already been filed.”
8

9 63. The Plaintiff submitted further that:-

10 “*As the judgment was entered as a result of the Defendants’ failure to comply with*
11 *the unless order, the Defendants’ application to set aside judgment is tantamount to*
12 *an application for relief from the sanction imposed in the unless order and the*
13 *applicable test for determining whether to grant relief from sanctions is analogous*
14 *to the three stage test in the **Denton** Case.”*
15

16 64. On the facts, Counsel for the Plaintiff submitted that the delay of close to 16 months is
17 unreasonable and there is no good reason for it. The Plaintiff has obtained a judgment
18 and taken steps to enforce it. The Plaintiff incurred costs of some \$230,000.00 in doing
19 so. If the Judgment is set aside, there will be serious prejudice to the Plaintiff as a result.
20 Submissions on the 6th December 2018 also included the following:
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- 1 i. The First Defendant's claim that he had not been in receipt of the Default Judgment
2 was inaccurate and misleading. Indeed the Affidavit of Mr. Jarkas demonstrates that
3 the First Defendant was in fact served with the Default judgment on 11th August
4 2017 and not August 2018 as he claims.
- 5
- 6 ii. The Unless Order was made at a time when the Court was aware that the Defendants'
7 Attorneys were intending to come of record and the timeframe for compliance was
8 such that the Defendants would have had sufficient time to instruct other Attorneys.
9 At the time the Order was made, the Attorneys were still on record and the Plaintiff
10 was entitled to effect service upon them.
- 11
- 12 iii. The Affidavit of Domenic Martino dated 15th August 2016 which is attached to the
13 Third Affidavit of Rani Jarkas provides evidence that the First Defendant never
14 sought or received investment advice from the Plaintiff.
- 15
- 16 iv. The promissory notes and agreements bear the signature of the First Defendant and,
17 in particular, the agreement of February 2015 evidences his agreement as to the sum
18 owed of US \$2,071,885.02 including interest.
- 19
- 20 v. The First Affidavit of Mr. Rani Jarkas which is dated 7th April 2017 sets out the
21 eleven attempts to resolve the matter prior to the filing of the Writ. That Affidavit
22 also sets out the chronology and details the First Defendant's conduct in delaying
23 matters by seeking various extensions at the last minute.



1 vi. The catalyst for the present action of the Defendants was the Plaintiff's application
2 to register and enforce the Default Judgment in Australia. By this Set Aside
3 Application, the Defendants are seeking to frustrate that process and this amounts to
4 an abuse of the process of the Court.

5
6 vii. The application should be dismissed and costs should be awarded in the Plaintiff's
7 favour on an indemnity basis.

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9 65. Counsel for the Plaintiff placed reliance on the case of *Nolan v. Devonport*¹⁰ in which
10 the Court in applying the English Civil Procedure Rules 1998 Part 3. R. 3 emphasized
11 the duty to act promptly in seeking to set aside a Judgment obtained in default. The
12 Second Defendant in that case sought to set aside the Judgment obtained against her and
13 her husband, seven years after it had been made and one year after she had become aware
14 of it, the Court declined to grant the application as it had not been reasonable for her to
15 sit back and wait to enforce the Judgment before seeking to set it aside. The Court stated
16 that it was clear that the real reason for seeking to set aside the Judgment was to frustrate
17 its enforcement. Her application was an abuse of the Court's process and the Court
18 granted an application to strike it out.

19
20 66. The case of *Regency Rolls Ltd. and Anor v. Carnall*¹¹ was also relied on as to the issue
21 of promptness.

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¹⁰ [2006] EWHC 2015

¹¹ [2000] EWCA 379



1 67. In further submissions on 24th December 2018, the Plaintiff submitted inter alia that:

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3 i. The Unless Order was made following consideration of all the evidence and material
4 before the Court including consideration as to dilatory conduct on the part of the
5 Defendants leading up to the breach of the Order for Directions made 15th February
6 2017 which led to the making of the Unless Order.

7
8 ii. The Court in exercising its discretion to make the Unless Order was satisfied that
9 the Defendants had knowledge of the hearing and had been advised of the
10 implications of the making of the Order for directions. Counsel referred to the
11 Reasons of Williams J. of 15th February 2017 on the making of the Directions Order
12 which are *inter alia*:

13 *“So in summary, at this stage the Defendants are represented at this hearing,*
14 *having been informed about the application by their attorneys, but have chosen*
15 *not to put the attorney in the position to properly represent them at this hearing.*
16 *That is their choice. I therefore move to consider the content of the Summons”.*
17

18 iii. The Defendants in this application to set aside judgment are essentially asking the
19 Court to set aside orders that were made as an exercise of the Judges’ discretion and
20 have to meet the high burden of proof necessary to satisfy the Court that the Judges’
21 discretion was improperly exercised.

22
23 68. The Plaintiffs submit further that the Defendants’ remedy in respect of their claim not to
24 have been informed by their lawyers is a claim in negligence against their lawyers. The
25 Plaintiff should not be penalised for this. The history of failure to comply does not have
26 to be failure to comply with a Court Order. The chronology of the case as set out in the
27 Affidavit of Rani Jarkas filed 13th April 2017 shows a number of instances where the
28 Plaintiff had to file summonses to force the Defendants to comply with deadlines.
29



1 69. Counsel for the Plaintiff relied on the cases of *Pearce v. Seymour*¹², and *Regency Rolls*
2 *Limited and ORs v. Murat Anthony Carnall*¹³ and submitted that the Defendants had
3 failed to act promptly and that even on the most generous interpretation of the evidence,
4 which is that the Defendants did not have notice of the Default Judgment until 23rd
5 August 2018, there was still a delay of almost three months which is on any view an
6 inordinate delay.

7
8 70. In further reply Counsel for the Defendants sought to distinguish the circumstances in
9 the case of *Pearce v. Seymour*. Counsel submitted that it is clear that the Defendant
10 drew the ire of the Court having repeatedly defied the orders of the Court, making a
11 last minute application to set aside on the morning of the trial and not having filed
12 the necessary paperwork. Finally and fatally, the Court formed a view that the
13 Defendant had no “real prospect of success” if they were allowed to pursue the
14 defence.

15
16 71. Additionally Counsel submitted that there is no evidence that the Defendants are seeking
17 to frustrate enforcement judgment and that in each of the cited cases including those
18 dealing with the application of CPR rule 39.3(5) the Court considered whether the party
19 had a reasonable prospect of success. Delay is only one of the factors to be taken into
20 consideration where the Court exercises its discretion to set aside a default judgment and
21 in the cases of *Pearce* and *Regency Rolls*, the Court came to the conclusion that the
22 cases of the Defendants had no merit and therefore the default judgments would not be
23 set aside.

¹² Supra

¹³ Supra



1 72. Counsel stated the Defendants are seeking the mercy of the Court, that the First
2 Defendant was now handling the matter personally rather than through an intermediary
3 Attorney as evidence of which he had sent a representative to Court for the hearing of
4 the application.

5
6 **THE LEGAL PRINCIPLES**
7

8 73. I have considered with care the detailed submissions as to fact and law made by both
9 sides and I have reviewed the material in the Court file and the bundles provided by
10 Counsel. With the clarification from the Plaintiff that the Default Judgment was not
11 obtained pursuant to GCR O.19, I reconsidered the matter¹⁴ in light of the relevant
12 authorities and the correct applicable test.

13
14 74. This is not an appeal against the making of the Unless Order. It must therefore have been
15 accepted that the Unless Order was properly made in the exercise of the Court's
16 discretion. I am being asked to consider the additional material filed on this application
17 and the case as a whole and to exercise a discretion as to whether or not relief should be
18 granted from the sanction imposed by the said Order.

19
20 75. GCR Order 3 r.5(1) states:
21
22
23
24
25
26



¹⁴ *Mid-Town Acquisition L.P. v. Essar Global Fund Limited* [2017] 2 CILR 776; *Vringo Infrastructure Inc.* [2015] EWHC 214 (Pat); *In the Matter of L and B (Children)* [2013] UKSC 8; *Dr. Valerie Stewart v Peter Engel and BDO Stoy Hayward* QBCMI 2000/0032/A3.

1 “*Extension, etc. of time (O.3, r.5)*
2

3 5. (1) *The Court may, on such terms as it thinks just, by order extend*
4 *or abridge the period within which a person is required or*
5 *authorised by these Rules, or by any judgment, order or direction,*
6 *to do any act in any proceedings.*

7 (2) *The Court may extend any such period as is referred to in*
8 *paragraph (1) although the application for extension is not made*
9 *until after the expiration of that period.*

10 (3) *The period within which a person is required by these Rules, or*
11 *by any order or direction, to serve, file or amend any pleading or*
12 *other document may be extended by consent (given in writing)*
13 *without an order of the Court being made for that purpose.”*
14

15 76. The guiding principles with respect to extensions of time where there has been non-
16 compliance with Unless Orders are set out at paragraph 3/5/9 and following of the
17 Supreme Court Practice 1999. The power to grant extensions of time where there has
18 been a failure to comply with such orders should be exercised cautiously and automatic
19 extensions of time should not be granted except on stringent terms either as to payment
20 of costs or bringing money into Court. Further guidance is provided where the
21 application is made after the time for compliance has expired.
22

23 77. In the case of *Re Jokai Tea Holdings Ltd*¹⁵, the Court considered the test to be applied
24 where the Defendants were in breach of an unless order which required further and better
25 particulars to be served within 56 days failing which the Plaintiff Bank would be entitled
26 to judgment. Due to an error on the part of their solicitors, the specified day was given
27 as 15th January 1988 when it was in fact 5th January 1988.
28



¹⁵ [1992] 1 W.L. R. 1196

1 78. The Court in *Re Jokai Tea Holdings Ltd* considered that there were two applicable
2 principles of law, one of which was that a litigant who fails to comply with a preemptory
3 order of the Court will not normally be permitted to continue to litigate either that or any
4 other actions based on the claim or defence. The Court considered the cases of *Birkett*
5 *v. James*¹⁶ and *Janov v. Morris*¹⁷ and noted that the basis for the principle is that orders
6 of the Court must be followed. A party who deliberately and without proper excuse
7 disobeys an order is not allowed to proceed. It is only if a party can explain,
8 convincingly, that outside circumstances account for the failure to comply, and that there
9 was no deliberate flouting of the Court's order, that his conduct will not be said to be
10 contumelious and the consequences of such conduct will not flow. The Court stated:-

11 *"In my judgement, in cases in which the court has to decide what are the*
12 *consequences of a failure to comply with an Unless Order, the relevant question is*
13 *whether such failure is intentional and contumelious. The Court should not be astute*
14 *to find excuses for such failure since obedience to orders of the court is the*
15 *foundation on which authority is founded. But if a party can clearly demonstrate*
16 *that there was no intention to ignore or flaunt the order and that the failure to obey*
17 *was due to extraneous circumstances, such failure to obey is not to be treated as*
18 *contumelious and therefore does not disentitle the litigant to rights which he would*
19 *otherwise have enjoyed."*

20
21 79. In applying this principle, the Court identified the relevant question as being whether
22 apart from the Defendants' conduct in failing to comply with the Unless Order, leave to
23 amend the defence should be given and if so whether the failure to comply was
24 contumelious. In that case the Court found that although the Defendants should have
25 acted with greater diligence, the failure to comply with the Unless Order was primarily
26 due to the mistake as to the date of expiry of the Order and the obstructive conduct of
27 the Bank in relation to the documents.

¹⁶ [1978] A.C. 297

¹⁷ [1980] 1 W.L.R. 1389



1 80. The Court further stated that the explanation provided by the Defendants showed that
2 they were not defying or ignoring the Court Order and it was therefore impossible to
3 characterize their conduct as contumelious. The Court concluded that the failure to
4 comply with the Unless Order did not provide sufficient reason for refusing to exercise
5 the discretion of the Court to give leave to amend the defence and to have a trial of the
6 dispute on the merits.

7
8 81. In his judgment, Parker LJ stated his view that there must be degrees of appropriate
9 consequences even where the conduct of someone who has failed to comply with a penal
10 order can properly be described as contumelious. In summary that there should be
11 proportionality between the conduct and the punishment imposed.

12
13 82. The case of *Re Jokai Tea Holdings Ltd.* was considered in the case of *Hytec*
14 *Information Systems Ltd. v. Coventry City Council*¹⁸. In that case, the Court at first
15 instance found that the Defendant had failed to comply with an Unless Order requiring
16 service of further and better particulars and that the failure had been deliberate. The
17 Court held;

18
19 *“Since an unless order was an order of last resort failure to comply would*
20 *ordinarily activate the sanction it imposed; that where there had been such failure*
21 *the court would consider the overall justice of the particular case and would in*
22 *general only exonerate a party in default where the circumstances of that default*
23 *were outside his control; that, although it was not an invariable rule, a party was*
24 *generally bound by the conduct of his legal representatives; and that, accordingly,*
25 *since the conduct of the defendant’s representatives could not excuse the failure to*
26 *comply with the unless order the pleading had properly been struck out.”*
27

¹⁸ [1997] 1 W.L.R. 1666



1 83. Ward LJ reviewed a number of cases, and observed that each case would be dependent
2 on its own facts. The learned Judge encapsulated the general legal approach in terms of
3 seven matters as follows:-

- 4 “(1) *An unless order is an order of last resort. It is not made unless there is a*
5 *history of failure to comply with other orders. It is the party’s last chance*
6 *to put his case in order.*
7 (2) *Because that was his last chance, a failure to comply will ordinarily result*
8 *in the sanction being imposed.*
9 (3) *This sanction is a necessary forensic weapon which the broader interests of*
10 *the administration of justice require to be deployed unless the most*
11 *compelling reason is advanced to exempt his failure.*
12 (4) *It seems axiomatic that if a party intentionally or deliberately (if the*
13 *synonym is preferred) flouts the order then he can expect no mercy.*
14 (5) *A sufficient exoneration will almost inevitably require that he satisfies the*
15 *court that something beyond his control has caused his failure to comply*
16 *with the order.*
17 (6) *The judge exercises his judicial discretion in deciding whether or not to*
18 *excuse. A discretion judicially exercised on the facts and circumstances of*
19 *each case on its own merits depends on the circumstances of that case; at*
20 *the core is service to justice.*
21 (7) *The interests of justice require that justice be shown to the injured party for*
22 *the procedural inefficiencies caused by the twin scourges of delay and*
23 *wasted costs. The public interest in the administration of justice to contain*
24 *those two blights upon it also weighs very heavily. Any injustice to the*
25 *defaulting party, though never to be ignored, comes a long way behind the*
26 *other two.”*

27
28
29 84. The learned Judge agreed with the Judge at first instance who had considered the
30 contumacious conduct of counsel and the fact that there had been four separate orders
31 of the Court, none of which had been properly complied with.
32
33
34
35



1 85. In his judgment Auld L.J. agreed with the judgments of the Court in *Caribbean*
2 *General Insurance Ltd. v. Frizzell Insurance Brokers Ltd*¹⁹ that the essential notion
3 in play is whether a party's failure to comply with an order is inexcusable in the sense
4 of being without a reasonable excuse. The learned Judge stated:

5 *"In my judgment, there is no need to confine the test to that of an intentional disregard*
6 *of a court's peremptory order, whether or not it is characterised as flouting,*
7 *contumelious, contumacious, perverse, obstinate or otherwise. Such an intent may be*
8 *the most usual circumstance giving rise to the exercise of this jurisdiction. But failure to*
9 *comply with one or a number of orders through negligence, incompetence or sheer*
10 *indolence could equally qualify for its exercise. It all depends on the individual*
11 *circumstances and the existence and degree of fault found by the court after hearing*
12 *representations to the contrary by the party whose pleading it is sought to strike out."*
13

14 86. Lord Woolf M. R. noted the resulting hardship of the decision on the Defendant who
15 may or may not have been able to proceed with an action on his counterclaim. The
16 learned Judge concluded that in the circumstances of that case the defendant was the
17 author of his own misfortune.

18
19 87. On the issue of proportionality, in the case of *Beeforth v. Beeforth and others*²⁰ the
20 English Court of Appeal overturned the decision of the Judge at first instance. The Court
21 stated that while the Judge had given consideration to the seven guiding principles set
22 out in *Hytec Information Systems Ltd. v. Coventry City Council*, he had paid
23 insufficient attention to the need for a balancing exercise, for proportionality or put
24 another way to consider "*whether the punishment fitted the crime.*" In that case the
25 circumstances included that the relief given was of some complexity as it included inter
26 alia certain restrictive orders.

¹⁹ [1994] 2 Lloyd's Rep. 32

²⁰ [1998] Lexis Citation 1418



1 Additionally there was some real doubt as to whether the judgment had fully resolved
2 all the outstanding issues between the parties. The Court concluded that justice required
3 that the case should be tried if it could not be settled.
4

5 88. In *Woodrow v. Chalk Catering Limited*²¹, the Court referred to the case of *Beeforth v.*
6 *Beeforth and Others* and stated that the conduct must on the facts of the case and in
7 connection with the case be sufficiently grave to justify the whole or part of a litigant's
8 case being struck out.
9

10 89. The guidance provided by the case of *Hytec Information Systems Ltd. v. Coventry City*
11 *Council*, has been followed in the Grand Court case of *R. Ebanks, Powery, A. Ebanks*
12 *and Bodden v. Brooks*²². It was held therein that in considering the application of a
13 defaulting party to set aside a stay following non-compliance with an unless order those
14 principles are to be applied. In that case the Court concluded after reviewing the history
15 of the matter which included the fact that the action had commenced some eight years
16 prior and four separate unless orders had been breached, that it could not be satisfied that
17 something beyond the control of the Plaintiffs had caused the failure to comply with the
18 most recent order and that there were no circumstances which justified a departure from
19 the usual result.
20
21
22
23

²¹ WCA 2A 2LL, dated 3rd February 1999

²² [2004] -05 CILR Note 28



1 90. In the 2008 case of *Tasarruf Mevduati Sigorta Fonu and Others v. Wisteria Bay*
2 *Limited and Others*²³ in the context of failings re discovery, the Grand Court referred
3 inter alia to the cases of *Beeforth v. Beeforth and others* and *Woodrow v. Chalk*
4 *Catering* in considering whether to grant the Plaintiff's application to strike out the
5 Defendants' defence and counterclaims. The Court noted that the Defendants had failed
6 to comply with three separate Unless Orders of the Court and to adequately explain why
7 they had not done so.

8
9 91. The Court concluded against the background of circumstances which included the
10 reasonable inference that certain documents of pivotal importance to the Plaintiffs' case
11 had been deliberately suppressed, that even with concerns as to proportionality of the
12 just sanction in mind, there was a real risk that the conduct of the defendants amounted
13 in the circumstances of the case to an abuse of the process of the Court which had made
14 further conduct of the proceedings unsatisfactory.



²³ [2008] CILR 231

1 APPLICATION OF LEGAL PRINCIPLES

2 92. In applying the principles to the instant case with the caveat that the cases provide
3 guidance only and each case must be decided on its own facts, on this application to set
4 aside the Default Judgment, I am required to consider the circumstances surrounding
5 non-compliance with the Unless Order which non-compliance lead to the entry of the
6 Default Judgment.

7
8 93. On the 21st November 2016, the Plaintiff filed a summons for directions which was to
9 be heard on the 15th February 2017. On that date, the Court made a directions Order
10 which required the Defendants to serve an amended Defence by 4pm on the 30th March
11 2017.

12
13 94. Following non-compliance of that Order, on the 21st April 2017, the Court made an order
14 which stated that unless the Defendants within 28 days filed and served an amended
15 defence or confirm in writing that no amended defence was to be filed, the Plaintiff
16 would be at liberty to enter judgment on the claim and the Defendants' counterclaim. On
17 the said date the Court granted leave to the Defendants' Attorneys to come off the record.
18 An application was filed by the Plaintiff on the 23rd May 2017 and judgment was entered
19 on the 31st May 2017.



1 95. The Unless Order was made following non-compliance with the order of 15th February
2 2017. It was the last chance for the Defendants to put their case in order. Counsel for
3 the Plaintiff has pointed to the slow responses of the Defendants in the course of the
4 litigation as set out at paragraphs 19 to 27 of the Affidavit of Rani Jarkas filed 7th April
5 2017. There have clearly been delays by the Defendants which lead to periods of
6 extensions granted by the Court.

7
8 96. Counsel for the Defendant says that these are no more than such as would occur within
9 the usual course of litigation and that this was a single breach of an Unless Order, there
10 being no previous history.

11
12 97. In *Woodrow v. Chalk Catering*, the Court said:

13
14 *“A single failure to comply with an order could be said to constitute a history of*
15 *failure to comply but such a short history is not characteristic of the cases in which*
16 *the principles in this area of the law have developed. It is repeated failures which*
17 *have normally given rise to the concern expressed by the court. The concept of giving*
18 *a party “a last chance” would not be normally be associated with giving a party a*
19 *second chance.”*
20

21 98. A failure to comply with the Unless Order resulted in the imposition of the sanction of
22 entry of the Default Judgment. This sanction is necessary in the interests of the
23 administration of justice and should be imposed and in this case should remain in place
24 unless the most compelling reason is given to exempt the failure.

25
26 99. I have next considered whether the Defendants failure to comply with the Order was
27 intentional or deliberate.



1 100. I note that the initial Directions Order was made on 15th February 2017, about two
2 months before the Defendants' Attorneys were granted leave to come off record and that
3 the notes of Williams J. record that the Defendants were aware of the summons but had
4 not placed the Attorneys in a position to respond thereto. Two days later the Defendants'
5 Attorneys filed a summons for an order of declaration that they had ceased to be the
6 Attorneys on record for the Defendants. That summons was not heard on its first
7 appointed date of 27th March 2017 but was relisted for the 21st April 2017. In the interim
8 on the 7th April 2017, the Plaintiff filed its summons seeking an Unless Order in respect
9 of the Defendants non-compliance with the Directions Order of 15th February 2017. Both
10 summonses were heard on the same day with the Plaintiff's summons proceeding first.

11
12 101. The Unless Order was made on the 21st April 2017 at a time when their Attorneys were
13 still on record. The submission of Counsel for the Plaintiff that the Defendants were
14 represented and must therefore have been aware of the two orders of the Court must be
15 accepted. Proper service was effected upon the Defendants of both orders and of the
16 subsequent Default Judgment. What then was the reason for non-compliance?

17
18 102. The First Defendant in his First Affidavit of 16th October 2018 states:

19
20 *"The reason why there has been a delay in my bringing proceedings to set aside the*
21 *Default judgement is that I was not in receipt of the Default judgement dated 31st*
22 *May 2017 until 23rd August 2018."*

23
24 103. In his Second Affidavit of 29th November 2018 the Second Defendant states:-
25





1 “There was a pause in the proceedings during 2017 and I assumed that the attorneys
2 were taking care of minor issues and that I would be informed when my input became
3 necessary.”

4
5 104. The reason which he gives for non-compliance with the Order of the 15th February 2017
6 and the Unless Order of the 21st April 2017 is that he was not aware of them. It appears
7 that he is saying that he left the matter up to his Attorneys, so that either one or both
8 failed to comply with the Orders of the Court unknown to him. He has not directly
9 addressed the issue of a change in his Attorneys or his state of knowledge as to his
10 Attorneys coming off record or when he knew that they would be no longer acting for
11 him. His explanation is that he was waiting to hear back from his Attorneys and only
12 became aware of what was happening in August 2018. He last communicated with his
13 Singapore Attorney, Mr. Zin in September 2016.

14
15 105. Counsel for the Plaintiff’s point which has some force is that there is every indication
16 that he was aware of the Orders through his Attorneys and if with that awareness he
17 failed to comply, his failure must therefore have been deliberate and intentional. The
18 Defendants seek to make a distinction between the knowledge of their Attorneys and the
19 personal knowledge of the First Defendant. In the usual course, no distinction will be
20 made between a litigant and his Attorney. The cases are clear (*Hytec Information*
21 *Systems Ltd. v. Coventry City Council*, *Ebanks and Others v. Bodden and Bodden*)
22 that in the ordinary case, the Court should not seek to distinguish between the litigant
23 himself and his advisers. There is nothing in the circumstances of this case which
24 provides a basis for treating this as anything other than the ordinary case.

1 106. The further point follows that a sufficient exoneration will almost inevitably require that
2 the First Defendant satisfies the Court that something beyond his control caused the
3 failure to comply with the orders. There is nothing in what he has said that would serve
4 to prove on balance that the failure was due to circumstances beyond his control.

5

6 107. Counsel on his behalf submitted that it was beyond his control as he did not have the
7 requisite knowledge. He was dependent on his Attorneys to keep him advised of the
8 matter. She submitted further that the Attorneys did not advise him that they were
9 coming off record and that when he found out that he had no Attorneys he took
10 immediate steps to deal with the situation. Counsel asked the Court to note that on the
11 very day immediately after the making of the Unless Order, the Defendant would have
12 been without representation. The Plaintiff in response points to GCR O.67 r. 6(2) which
13 requires unless the Court otherwise directs that the Defendants be served with the
14 application for withdrawal. The Plaintiff therefore submitted that the Defendants must
15 have been aware that the Attorneys were no longer representing them. This is an
16 important point. I note also that the Order made permitting withdrawal required service
17 directly on the Defendant by e-mail.

18

19 108. As to the knowledge of the First Defendant after his Attorneys had ceased to be on
20 record, Counsel for the Plaintiff submits that as they had not received formal notification
21 from Mourant Ozannes they were under the Grand Court Rules entitled to serve the
22 Defendants' Attorneys on record with the Default Judgment obtained.

23

24





1 109. The evidence from the Plaintiff on this is twofold. Exhibited to the Second Affidavit of
2 Mr. Jarkas is an e-mail from Mourant Ozannes dated 18th October 2018 confirming that
3 the Default Judgment of 31st May 2017 had been forwarded to Allan Tan of Virtus
4 Law/Stephen Harwood and to the First Defendant directly at his personal e-mail address
5 on 15th June 2017.

6
7 110. Secondly Mr. Jarkas in paragraph 5 of his Third Affidavit states that the First Defendant
8 was personally served with the judgment from the New South Wales Court. He explains
9 that this judgment specifically referred to the Default Judgment. Mr. Jarkas produces in
10 support of this assertion, the affidavit of Ahmad Adnan dated 31st August 2017. Mr.
11 Adnan states that he sent an individual in his employ, Mr. Haryanto to the offices of the
12 First Defendant and that individual handed an envelope containing the New South Wales
13 Judgment to an employee of the First Defendant, a Mr. Wanto who said that he would
14 hand it to the First Defendant.

15
16 111. The First Defendant denies receiving notification of the Default Judgment until the 23rd
17 August 2018 when he received a package from a post courier who left it at his office. He
18 noted that the address for service on the envelope had been incorrectly stated as Blok E1
19 and not E 7-9.

20
21 112. This then is the state of the evidence on this important issue. The fact that an e-mail has
22 been sent does not confirm that it has been received. There are no delivery or read
23 receipts, screenshots or e-mail server downloads or follow up correspondence. In effect
24 I am left to assume from the material that the First Defendant *must have* personally
25 received it.

1 113. I am not here considering whether or not the manner of service was technically correct,
2 I am considering whether I can safely make a positive finding as to his state of
3 knowledge after he ceased to be represented by Mourant Ozannes and how he came to
4 be bound by this judgment for the purpose of assessing the degree of fault to be ascribed
5 to him. On the evidence as it stands and on balance my view is that I must give him the
6 benefit of the doubt on this particular issue.

7
8 114. There is however a second aspect of the matter. Even if the First Defendant is given the
9 benefit of the doubt and his account is to be accepted that he had no knowledge of the
10 Unless Order and Default Judgment until August 2018, he gives as the reason for the
11 delay in following up on the matter, as waiting to hear from his Attorneys and that he
12 was unaware that his Attorneys on record Mourant Ozannes had ceased to act. Further
13 that his Singapore Attorney Mr. Zin had left the Firm. It is surprising that within the
14 lengthy time period between May 2017 and August 2018, he would not have made
15 inquiries as to the progress of his case and appointed other Attorneys. He was plainly
16 not diligent in pursuing the matter in which he had filed a counterclaim. It is doubtful
17 whether it could be said that waiting to hear from one's Attorneys is a sufficiently good
18 reason for his lack of diligence. In my view his conduct was dilatory in the sense of
19 being slow to act.

20
21 115. The discretion to be exercised whether or not to excuse the failure must consider the
22 facts and circumstances of this particular case and of import is service to justice. The
23 interests of justice require that justice be shown to the Plaintiff for the procedural
24 inefficiencies caused by delay and wasted costs.





1 116. In this regard the Plaintiff has submitted that the prejudice includes the following: (1)
2 legal costs and incidental expenses of enforcing a properly obtained judgment in
3 Australia; (2) the time lost pursuing the claim against the Defendants in Cayman (the
4 directions' timetable was suspended on the making of the judgment and no trial date was
5 set, with the result that if judgment is set aside, the earliest trial date that may be set will
6 not be for at least another year) plus the 16 or so months' delay caused as a result of the
7 Defendants' failure to challenge the judgment before now; (3) further considerable legal
8 costs and incidental expenses of proceeding to trial in circumstances where a judgment
9 was (by the Defendants' own admission) properly obtained and the failure to apply for
10 it to be set aside and the consequential 16 months' delay in the hearing of that application
11 cannot in any way be attributed to any fault or failing on the part of the Plaintiff.
12

13 117. In carrying out the balancing exercise, I must bear in mind that any injustice to the
14 Defendants though not to be ignored is substantially less important or comes a long way
15 behind that to the Plaintiff. In this case the possible injustice to the Defendants would be
16 in not having their case decided on the merits as against the Plaintiff who has proceeded
17 on the basis of the Default Judgment properly obtained and who will have a further delay
18 in respect of a claim filed as long ago as December 2015.
19

20 118. The factors against exercising my discretion in favour of the Defendants' application for
21 relief include the following:

- 22 i. That the judgment was properly obtained.
- 23 ii. That it was a result of the failure of the Defendants to comply with the 15th February
24 2017 Directions Order of the Court and with the Unless Order of 21st April 2017, so
25 there is a history of some delay.

- 1 iii. It was the responsibility of the First Defendant to maintain contact with his Attorneys
2 and to ensure that he was advised as to the progress of his case. He did not do so.
3 There is personal fault in addition to any fault which he may seek to attribute to his
4 Attorneys.
- 5 iv. The delay following the making of the Unless Order in respect of which an extension
6 of time would require to be granted if the Judgment is set aside is a lengthy one.
- 7 v. The explanation for the delay is poor and shows that at the very least the First
8 Defendant was slow to act.
- 9 vi. In the period which has elapsed since the Judgment was obtained the Plaintiff has
10 acted on the Judgment and has registered it in Australia.

11

12 119. In the Defendants favour there is the fact that the matter had proceeded to some
13 significant degree and that the Unless Order was made at a time of transition in respect
14 of his Attorneys. A Defence had been filed. Further and Better Particulars had been
15 provided and a Draft Amended Defence was on the papers. While there were occasions
16 when the Defendants sought extensions of time to file materials, there was no history of
17 repeated failures on the part of the Defendants to comply with Orders of the Court prior
18 to the 15th February 2017.



1 120. While no single factor is determinative and the matter must be looked at as a whole, if
2 these were the entirety of the considerations to be applied, they would lead inexorably
3 to refusing the application to set aside. The delay has been significant, the excuses of the
4 First Defendant are weak. At best he was indolent until prompted by the action taken to
5 enforce the judgment in Australia. At worst, as the Plaintiff put it, he was deliberately
6 ignoring the Court and possibly seeking to frustrate the enforcement of the judgment.
7 On this latter aspect, I note that his response to the enforcement of the judgment is
8 equally consistent with being jolted from indolence by the newly received knowledge of
9 what was taking place and the inevitable response would have been to seek to make the
10 appropriate applications.

11
12 121. I bear in mind the observations of Auld LJ on the question of negligence and indolence
13 as being equally capable of amounting to contumelious conduct.

14
15 122. In the case of *Jokai Tea Holdings*, Parker LJ stated:

16
17 *“As to the second point, I have used the expression “so heinous” because it appears*
18 *to me that there must be degrees of appropriate consequences even where the*
19 *conduct of someone who has failed to comply with a penal order can properly be*
20 *described as contumelious or in deliberate disregard of the order, just as there are*
21 *degrees of appropriate punishments for a contempt of court by breach of an*
22 *undertaking or injunction. Albeit deliberate, one deliberate breach may in the*
23 *circumstances warrant no more than a fine, whilst another may in the circumstances*
24 *warrant imprisonment. In each case all the circumstances must be taken into*
25 *account, including the nature of the relief which is sought by the party in default. It*
26 *is one thing for a Plaintiff who has been struck out for want of prosecution to issue*
27 *a writ claiming precisely the same relief the next day. It is quite another for a*
28 *Defendant to raise an arguable defence not previously before the court and thus in*
29 *no way associated with the penal order.”*

30
31
32 123. In that case a distinction was made between an arguable defence not previously before
33 the Court and one which was associated with the penal order.



1 124. In *Woodrow v. Chalk Catering* the Court did not regard the case of *Lownes* as authority
2 for the proposition that where the Court sees a need to bring home to a litigant the
3 unacceptability of certain conduct that the extreme punishment of striking out can be
4 employed to achieve that end if it is not proportional having regard to all the facts in the
5 case. The Court stated that the conduct must on the facts of the case and in connection
6 with the case be sufficiently grave to justify the whole or part of the litigants' case being
7 struck out. Other factors for consideration include whether any specific prejudice has
8 been caused to the plaintiffs which cannot be compensated in orders for costs or in
9 interest, the impact on the administration of justice, and whether a fair trial is still
10 possible.

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12

13 125. Thus notwithstanding the less than satisfactory responses of the First Defendant, I must
14 consider carefully whether the sanction is proportionate, i.e. whether the totality of the
15 conduct of the Defendants in light of all the material now before the Court justifies the
16 ultimate punishment.

17
18 126. In looking at the case as a whole, there were delays prior to the making of the Order of
19 15th February 2017. While I do not consider that on their own they rise to a high level
20 such that they could be described as a persistent disregard for the time table for the
21 proceedings, I take note of them as part of the sequence of events. It is correct as the
22 Defendants submit that prior to 15th February 2017, there was not a pervasive pattern of
23 behavior of breaches of Court orders throughout the course of the litigation.

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1 127. There was however, a reasonable interval of time between the making of the 15th
2 February 2017 Order (of which he was aware through his Attorneys) and the Unless
3 Order of 21st April 2017 during which there could have been compliance or the necessary
4 application for extension could have been made. There was also a reasonable interval of
5 time between the making of the Unless Order and the entry of the Default judgment. It
6 is significant that this is not an application which is being made shortly after non-
7 compliance with the Unless Order. The troubling aspect of the First Defendant's conduct
8 is that even on his own account he sat on his hands for some sixteen months without
9 inquiry of his Attorneys in a case in which he had a substantial counter claim. This is the
10 added factor taken together with all the others which in my view makes his conduct so
11 egregious. He effectively abandoned the matter. Indeed his attention was not drawn back
12 to it, until action was taken to enforce the Judgment.

13
14 128. I considered whether as an alternative a lesser punishment by way of appropriate
15 conditions could be imposed which would serve to compensate the Plaintiff should the
16 matter proceed. The Plaintiff has acted on the Judgment and is at the enforcement stage.
17 While there could be compensation in costs, the Plaintiff will lose a judgment on which
18 it has acted and there will be further delay. The age of the litigation is a factor. I do not
19 consider that costs would be an adequate compensation in these circumstances or that
20 this would be a just result for the Plaintiff.



1 129. In all the circumstances, I do not consider that the punishment imposed is
2 disproportionate to the conduct. The Grand Court Rules provide that the overriding
3 objective of the Rules is to enable the Court to deal with every cause or matter in a just,
4 expeditious and economical way. Further that dealing with a cause or matter justly
5 includes as far as is practicable ensuring that the normal advancement of the proceeding
6 is facilitated rather than delayed.

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ASSESSMENT OF THE MERITS OF THE DEFENDANTS' CASE

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3 132. In the case of *Fiduciary Management Services Limited v. Intermediate Securities*
4 *Limited and Gold*,²⁴ the Court in considering whether a default judgment should be set
5 aside, concluded that since the essential dispute between the parties arose out of a partly
6 written agreement, the omissions from which were capable of competing interpretations,
7 the issues either way would appear suitable for trial. It would therefore be unjust to let
8 the matter go by default.

9
10 133. In the more recent case of *Embassy Investments Limited v. Houston Casualty*
11 *Company*²⁵, the Court of Appeal, confirmed that in exercising a power conferred by
12 GCR O. 19, r9, regard should be had to the guidance given by the Court of Appeal of
13 England and Wales in *Alpine Bulk Transport Co. Inc. v. Saudi Eagle Shipping Co.*
14 *Inc.* This is that while no one case can be authority for another, there are general
15 indications to assist the Court in the exercise of its discretion as follows:-

- 16
17 i. "A Judgment signed in default is a regular judgment from which, subject to (ii)
18 below, the plaintiff derives rights of property.
19
20 ii. The Rules of Court give to the Judge a discretionary power to set aside the default
21 judgment which is in terms 'unconditional' and the Court should not lay down rigid
22 rules which deprive it of its jurisdiction.
23
24 iii. The purpose of this discretionary power is to avoid the injustice which might be
caused if judgment followed automatically on default.
iv. The primary consideration is whether the defendant 'has merits to which the Court

²⁴ [1992-3] CILR 541

²⁵ [2013] 2 CILR 212

1 *should pay heed*' (per Lord Wright at p. 489) not as a rule of law but as a matter of
2 *common sense, since there would be no point in setting aside a judgment if the*
3 *defendant has no defence and if he has shown 'merits' the Court will not, prima*
4 *facie, desire to let a judgment pass on which there has been no proper adjudication."*
5 (Paragraph 34)

6
7 134. The Court of Appeal noted as one of the points arising from the guidance in the *Saudi*
8 *Eagle* case that the approach in a case where the claimant has obtained a regular
9 judgment, even more so where that judgment has been obtained after a hearing at which
10 the defendant was represented is not the same as that obtained in a case where the
11 Claimant is seeking summary judgment or in other circumstances. The Court stated:-

12 *"The reason is that an order setting aside a regular judgment deprives a claimant*
13 *of substantive rights which he has obtained in accordance with the process of the*
14 *court. That should not be done unless the court is satisfied that justice requires it. It*
15 *is necessary, in order "to arrive at a reasoned assessment of the justice of the case"*
16 *(ibid.), for the court to form a provisional view as to the outcome if the case were to*
17 *be fought at trial—the proposed defence must carry some degree of conviction.*
18 *Secondly, if the application of the primary consideration—"whether the defendant*
19 *has merits to which the Court should pay heed" (ibid.)—leads to the conclusion that*
20 *the proposed defence does not carry the required degree of conviction, the court*
21 *should not set aside the default judgment as there would be no purpose to be served*
22 *by doing so. But, thirdly, in addressing the question of whether the defendant has*
23 *merits to which the court should pay heed, it is appropriate for the court to take into*
24 *account the circumstances in which "[the defendant] found himself bound by a*
25 *judgment regularly obtained to which he could have set up some serious defence"*
26 *(ibid.). It is pertinent to have in mind that, in the Saudi Eagle itself, the Court of*
27 *Appeal, in deciding that the defendants had not shown that they had any reasonable*
28 *prospect of success, did take into account their conduct."*
29

30
31 135. Applying the approach in the *Saudi Eagle* case, I have considered whether or not the
32 Defendants on the papers have demonstrated that they have a meritorious defence or real
33 prospect of success.
34



1 136. The First Defendant has now produced by way of his Second Affidavit dated 29th
2 November 2018, what he says is the investment advisory agreement with Cedrus
3 Investments. He has produced evidence of transfers amounting he says to
4 US\$880,718.42.

5
6 137. The Plaintiff denies an investment advisory relationship with the Defendants. By way of
7 amendment to the Statement of Claim the Plaintiff states that in February 2012, the First
8 Defendant deposited over US \$12,000, 000.00 worth of securities into his margin
9 account as collateral for the loans that he intended to obtain from the Plaintiff. Schedule
10 6 to the Statement of Claim shows that the shares were liquidated at a value of
11 AU\$2,555,969.23 and US\$465,093.08. Schedule 4 shows late fees amounting to
12 US\$824,637.30.

13
14 138. In his Second Affidavit the First Defendant refers to documents filed on his behalf in the
15 matter including the Defendants' amended response to the Plaintiff's Response for
16 Further and Better Particulars.

17
18
19 139. In that document, the Defendants provide a listing of twenty sale dates between 21st
20 December 2012 and 19th February 2016 where they assert that the sale prices at which
21 the Plaintiff liquidated the First Defendant's Securities in CoKal Limited, were less than
22 and did not match prevailing market prices.²⁶ They provide a table detailing the market
23 prices and the sale prices.

24

²⁶ Paragraph 17 on page 10.



1 140. I am mindful that pleadings are not made on oath and are not evidence but it appears that
2 there may well be technical issues between the parties which may require expert
3 evidence from a commercial aspect as to how the calculations were arrived at which
4 resulted in shares of a value of US\$12 million on the Plaintiff's case and US\$20 million
5 on the Defendant's case not being sufficient to repay a loan of a little over \$2 million, as
6 well as to the methods of application and calculation of fees and interest payments. This
7 evidence is not presently available.

8

9 141. I note also that in addition the First Defendant now references in his Second Affidavit,
10 oral discussions and agreements which are not the subject of the written agreements
11 produced. In paragraph 8 of that Affidavit he states that the "the documentation had to
12 show that this was a loan to me when in fact the funds had been generated from my
13 shares." The Plaintiff denies this. In noting this issue in dispute, I bear in mind the
14 approach of the Court in the case of *Fiduciary Management Services Limited*
15 previously referenced.

16

17 142. In forming a provisional view as to the outcome if the case were to be fought at trial in
18 order to arrive at a reasoned assessment of the justice of the case. I am not able to
19 conclude on the whole that the Defendants' case is hopeless. Indeed having considered
20 all the circumstances, I am of the view that there is on the face of the papers some merit
21 in the Defendants' case given the Affidavits filed and that the material provided meets
22 the threshold of a real prospect that the Defendants would likely succeed in challenging
23 the amount claimed.

24



1 It follows that were this matter to be approached in respect of GCR O.19, this aspect
2 would have weighed in favour of granting the application to set aside the Default
3 Judgment in order to secure a just determination of the matter for the Defendant.

4
5 143. In the Privy Council case of *Attorney General v. Universal Projects Ltd*²⁷, on an appeal
6 from Trinidad and Tobago, the Board identified the principal issue in the case as being
7 whether an application by a Defendant to set aside a judgment following non-compliance
8 with a court order extending time for filing a defence, in default of which permission
9 was given to the Claimant to enter judgment was (i) an application to set aside judgment
10 under CPR 13.3 or (ii) an application for relief from sanctions under CPR 26.7 (as
11 applicable in Trinidad and Tobago). Under the former, there were only two
12 considerations, whether the Defendant had a realistic prospect of success in the claim
13 and whether the Defendant acted as soon as reasonably practicable when he found out
14 that the judgment had been entered against him.

15
16 144. Rule 26 was in part in the following terms:-

- 17
18 “1) *An application for relief from any sanction imposed for a failure to*
19 *comply with any rule, court order or direction must be made*
20 *promptly.*
21
22 (2) *An application for relief must be supported by evidence.*
23
24 (3) *The court may grant relief only if it is satisfied that –*
25 *(a) the failure to comply was not intentional;*
26 *(b) there is a good explanation for the breach; and*
27 *(c) the party in default has generally complied with all other*
28 *relevant rules, practice directions, orders and directions.*
29
30 (4) *In considering whether to grant relief, the court must have regard*
31 *to –*
32 *(a) the interests of the administration of justice;*



²⁷ [2011] UKPC 37

- 1 (b) whether the failure to comply was due to the party or his
2 attorney;
3 (c) whether the failure to comply has been or can be remedied
4 within a reasonable time; and
5 (d) whether the trial date or any likely trial date can still be
6 met if relief is granted.
7 (5) The court may not order the Respondent to pay the applicant's costs
8 in relation to any application for relief unless exceptional
9 circumstances are shown."
10

11
12 145. The Defendant in that case argued that if r 26.7 is applied to default judgments, it would
13 produce disproportionate and unjust results. The Board stated that there were several
14 answers to this argument:

- 15 i. "Firstly there is an element of judgment inherent in an assessment of whether the
16 conditions set out in r 26.7(3) have been satisfied.
17 ii. Secondly, in so far as the conditions are regarded as draconian, they serve the
18 purpose of improving the efficiency of litigation.
19 iii. There is no difference between an order which debars a Defendant from defending
20 if he does not serve a defence by a certain date and an order giving the Claimant
21 permission to apply for judgment if the Defendant does not serve a defence by that
22 date.
23 iv. Fourthly, there are ways in which a defaulting party can escape from the draconian
24 consequences of his default. In the present case, for example, the Defendant could
25 have applied for a further short extension of time for service of the defence before
26 16 March."
27

28 146. The Board concluded that the application to set aside the default judgment was in the
29 circumstances of the case an application for relief from sanctions within the meaning of
30 r 26.7.
31

32 147. The submissions of the Defendant in that case included that the Defendant had a strong
33 defence to the claim for \$30 million and would be bound to succeed. The Board indicated
34 that it would accept that this was the case in the Defendant's favour but that the stringent
35 conditions of the rule were not to be circumvented.
36



1 148. The Court in *Eden v. Rubin*²⁸ noted that there is no significant difference between the
2 approach to default under the former Rules of the Supreme Court, the position which
3 was dealt with in *Hytec Information Systems Ltd. v. Coventry City Council*²⁹ and that
4 which is now embodied in the English Civil Procedure Rules.

5
6 149. In the case of *Jokai Tea Holdings Ltd.*³⁰ the Court contemplated that an arguable defence
7 could be shut out depending on the heinous nature of the defaulting party's conduct.

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²⁸ [2011] EWHC 3090 – paragraph 24
²⁹ Supra
³⁰ Supra

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3 **CONCLUSION**

4 150. I conclude from a review of the authorities that in considering whether a litigant should
5 be excused from sanctions, the merits of the case are to be considered as part of the
6 overall circumstances but are not determinative. This is but one aspect and would fall to
7 be considered under the heading of possible injustice to the defaulting party in not having
8 his case heard on the merits.

9 151. The applicable principle is that any injustice to the defaulting party, though never to be
10 ignored, comes a long way behind the twin scourges of delay and wasted costs. I must
11 therefore consider the injustice to the Plaintiff and give this pre-eminence. In doing so
12 I consider but give less weight to that to the Defendants who are at fault. This is a high
13 value claim, the disposition of which has serious consequences for both Parties. If the
14 Default Judgment is not set aside, the Defendants would be required to pay the full sum
15 claimed even if their defence may have merit. The alternatives are for the Defendants
16 to consider whether to file suit against their former Attorneys who the First Defendant
17 alleges did not bring the Orders of the Court to their attention and or file suit on their
18 counterclaim if they are permitted to do so.

19
20 152. I conclude that in all the circumstances of this case, considering the inadequacy of the
21 explanation given by the First Defendant, that his conduct is not excusable. Further that
22 the sanction imposed is not disproportionate to his conduct and the balance of justice
23 requires that his application for relief from the entry of the Default Judgment be refused.
24
25



COSTS

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3 153. The Plaintiff submitted that any costs order should be on an indemnity basis. GCR Order
4 62 r. 4 (11) states that the Court may make an *inter partes* order for costs to be taxed on
5 the indemnity basis only if it is satisfied that the paying party has conducted the
6 proceedings, or that part of the proceedings to which the order relates, improperly,
7 unreasonably or negligently.

8
9 154. In the application of this rule I am guided by the Judgment of the Court in *Helfrecht and*
10 *Chapman and Others*.³¹ In that Judgment the Court noted the long established practice
11 that costs on the indemnity basis should only be awarded in exceptional cases. The
12 Court said that examples in which the awarding of such costs may be appropriate include
13 when the paying party's conduct is considered to have been wholly unmeritorious or
14 oppressive or in contempt of Court.

15
16 155. The Court referenced the case of *Kiam v. MGN Ltd*³² for the reasoning of the Court of
17 Appeal that the conduct would need to be unreasonable to a high degree, rather than
18 merely wrong or misguided.

19
20
21 156. The Plaintiff submitted that the First Defendant has put before the Court false evidence
22 as to when he received knowledge of the Default Judgment and that this application is
23 not made in good faith as he is seeking to bring this application as a means to avoid
24 enforcement in Australia.



³¹ Cause 59 of 2013, Judgment of Williams J. of 14th March 2014

³² 2002 1 WLR 2810

1 157. Had it been the case that the Default Judgment was issued in response to a failure to file
2 an appearance or a Defence, perhaps this argument could have been more forcefully
3 made. As it is the Defendants took steps to defend the matter in the Cayman Islands and
4 but for the First Defendant’s dilatoriness in retaining new Attorneys, the matter would
5 have likely proceeded to trial as per the directions of the Court issued in February 2017.

6
7 158. I am thus not persuaded that the conduct of the Defendants rises to the level which would
8 justify an award of costs on an indemnity basis. I will order that the costs of the Plaintiff
9 for this application are to be paid by the Defendants, such costs to be taxed on the
10 standard basis if they cannot be agreed.

11
12 159. These costs should not include the Plaintiff’s costs for the Security for Costs application
13 which was withdrawn on the morning of the 6th December 2018. It was plainly ill-
14 conceived.

17 **Dated this the 4th day of January 2019**

18 



19 **Honourable Justice Cheryll Richards Q.C.**
20 **Judge of the Grand Court**
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