IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

CAUSE NO: G 0219 OF 2015

BETWEEN:

CEDRUS INVESTMENTS LTD

PLAINTIFF

AND:

(1) HARUN ABIDIN
(2) TATA ARTHA GROUP

DEFENDANTS

Appearances:	**Ms. Anna Peccarino of Travers Thorp Alberga for the Plaintiff**
	Mrs. Terrence Caudeiron of TMC Chambers and Ms. Christine Bodden of Quality Law Services co-counsel for the Defendants
Before:	**The Hon. Justice Cheryll Richards Q.C.**
Heard:	**6th December 2018**
Draft Judgment:	**13th December 2018**
Further Hearing:	**24th December 2018**

HEADNOTE

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

JUDGMENT

INTRODUCTION

1. The Plaintiff is a company incorporated in the Cayman Islands carrying on an investment management business including private wealth management and institutional asset management.

2. The First Defendant, Harun Abidin is an Indonesian national, resident in Indonesia, and he is a 95% shareholder of the Second Defendant Tata Artha Group.

3. The matter for the Court's consideration is a Summons filed by the Defendants on the 12th October 2018 seeking to set aside a Default Judgment in this matter.[1] The Default Judgment was issued by the Grand Court on the 31st May 2017, following non-compliance with an "Unless Order" dated 21st April 2017. The Unless Order was made on the application of the Plaintiff and required the Defendants, by no later than 4pm on the 28th day after its making, to file and serve an amended Defence or confirm in writing to the Plaintiff that no amended Defence was to be filed, failing which the Plaintiff would be at liberty to enter Judgment on the Claim, and the Defendant's Counterclaim would be dismissed.

4. On the same day that this Unless Order was made, Mourant Ozannes, the Defendants' Attorneys, were given leave to come off record and were to serve a copy of the Order evidencing this leave on the Plaintiff's Attorneys and on the First Defendant by e-mail and on the First and Second Defendants by DHL courier to their address in Indonesia 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.

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

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

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

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

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

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

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

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

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

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.

15. On the 24th February 2016 a Defence and Counter Claim was filed by the Defendants.

16. The Plaintiff's Summons filed on the 23rd February 2016 seeking Judgment under GCR O.19 r. 2 was not proceeded with.

17. On the 18th March 2016, the Plaintiff filed a Reply to the Defence and Counterclaim.

18. On the 18th April 2016 the Plaintiff filed a Summons seeking an Unless Order re Discovery.

19. On the 30th May 2016 the Plaintiff filed a Summons seeking directions for trial and for Further and Better Particulars.

20. The Parties exchanged lists of documents and responses to Requests for Further and Better Particulars on the 31st May 2016 and that the Defendants responded to the Plaintiff's request for Amended responses to the Plaintiff's Request for Further and Better particulars on the Defence and Counterclaim on the 5th August 2016.

21. On the 4th August 2016, a Summons was filed by the Defendants seeking leave to file an Amended Defence and Counterclaim. The Amended Defence was attached in draft form. An amendment was made to paragraph 3 of the Defence inserting an admission that the First Defendant's investment account dated 9th January 2012 with the Plaintiff was designated by the Plaintiff as a "high net worth/sophisticated" investment account.

22. On the 15th February 2017, pursuant to the Plaintiff's Summons filed on the 21st November 2016, a Directions Order was issued by the Court, granting leave to amend, to both parties, and giving directions for trial including as to expert witnesses. The trial was to be set down on the first available date after the 12th June 2017.

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

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

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

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

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

THE ISSUES IN DISPUTE

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

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

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

i. US$1 million at 9.75% per annum interest;

ii. US$300,000 at 12.5% per annum interest with a 6 % origination fee;

iii. AU$500,000 at 10% per annum interest with a 3% origination fee; and

iv. AU$504,000.00 at 13% per annum interest rate with an 8% origination fee.

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

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

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

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

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

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

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

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

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

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

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

AFFIDAVITS IN SUPPORT OF THE APPLICATION TO SET ASIDE

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

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

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

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

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

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

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

AFFIDAVITS IN RESPONSE TO THE APPLICATION TO SET ASIDE

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.

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

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

i. While this application was filed some 16 months after the Default Judgment had been entered, the Court should bear in mind that for part of that time, the Defendants were unrepresented. This had been foreshadowed for some time and as of 21st April 2017, the Defendants were without representation.

ii. The First Defendant was not served with the Order and any dilatoriness on his part can be explained by the fact that he was waiting to hear back from his lawyers.

iii. The Unless Order was made in circumstances where there had not been a history of failure to comply with orders (See ***R. Ebanks and others v. Bodden and Bodden***[4]), and further it was made at time when the Court and the Plaintiff would have been aware that the Defendants' Attorneys were 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

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

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

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

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

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

[5] [1992- 1993] CILR N-5a

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

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

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

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

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

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

[8] [2008] CILR 231
[9] [2013 EWCA Civ. 1537

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

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

> *"The Default Judgment was obtained pursuant to GCR O.19. Order 19 r.9 states that the Court may set aside or vary a judgment entered in pursuance of O.19. The Court has an unfettered discretion to exercise and the onus is clearly on the applicant (i.e. the Defendants in this instance to show that there is a just reason to allow the application.)*
>
> *The application of the Courts discretion as to whether a default judgement should be set aside is well established per Evans v. Barttlam [1997] AC 473, and on which guidance has been provided by the English Court of Appeal in Alpine Bulk Transport Co. Inc. v. Saudi Eagle Shipping Co. inc. [1986] 2 Lloyd's Rep. 221 (Saudi Eagle) and both of which have been applied and approved in the Cayman Islands in Embassy Investments Limited v. Houston Casualty Company (unreported , CICA 9 of 2012 on Appeal from FSD 94 of 2011)."*

62. By further submissions dated 18th December 2018 Counsel for the Plaintiff submitted:-

"The "default judgment" was not entered in default of a defence but as a result of the Defendants' failure to comply with the terms of an Unless Order. The Unless Order was made following a breach of the terms of an Order for Directions made by the Court which included a direction for the Defendants to file an Amended Defence, if so advised, in reply to the Plaintiff's Amended Statement of Claim or to confirm that none would be filed so as to progress to the next stage of the proceedings, a Defence and Counterclaim having already been filed."

63. The Plaintiff submitted further that:-

"As the judgment was entered as a result of the Defendants' failure to comply with the unless order, the Defendants' application to set aside judgment is tantamount to an application for relief from the sanction imposed in the unless order and the applicable test for determining whether to grant relief from sanctions is analogous to the three stage test in the ***Denton*** *Case."*

64. On the facts, Counsel for the Plaintiff submitted that the delay of close to 16 months is unreasonable and there is no good reason for it. The Plaintiff has obtained a judgment and taken steps to enforce it. The Plaintiff incurred costs of some $230,000.00 in doing so. If the Judgment is set aside, there will be serious prejudice to the Plaintiff as a result. Submissions on the 6th December 2018 also included the following:

i. The First Defendant's claim that he had not been in receipt of the Default Judgment was inaccurate and misleading. Indeed the Affidavit of Mr. Jarkas demonstrates that the First Defendant was in fact served with the Default judgment on 11th August 2017 and not August 2018 as he claims.

ii. The Unless Order was made at a time when the Court was aware that the Defendants' Attorneys were intending to come of record and the timeframe for compliance was such that the Defendants would have had sufficient time to instruct other Attorneys. At the time the Order was made, the Attorneys were still on record and the Plaintiff was entitled to effect service upon them.

iii. The Affidavit of Domenic Martino dated 15th August 2016 which is attached to the Third Affidavit of Rani Jarkas provides evidence that the First Defendant never sought or received investment advice from the Plaintiff.

iv. The promissory notes and agreements bear the signature of the First Defendant and, in particular, the agreement of February 2015 evidences his agreement as to the sum owed of US $2,071,885.02 including interest.

v. The First Affidavit of Mr. Rani Jarkas which is dated 7th April 2017 sets out the eleven attempts to resolve the matter prior to the filing of the Writ. That Affidavit also sets out the chronology and details the First Defendant's conduct in delaying matters by seeking various extensions at the last minute.

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

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

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

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

[10] [2006] EWHC 2015

[11] [2000] EWCA 379

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

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

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

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

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

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

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

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

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

[12] Supra
[13] Supra

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

THE LEGAL PRINCIPLES

73. I have considered with care the detailed submissions as to fact and law made by both sides and I have reviewed the material in the Court file and the bundles provided by Counsel. With the clarification from the Plaintiff that the Default Judgment was not obtained pursuant to GCR O.19, I reconsidered the matter[14] in light of the relevant authorities and the correct applicable test.

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

75. GCR Order 3 r.5(1) states:

[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.

"***Extension, etc. of time (O.3, r.5)***

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

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

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

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

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

[15] [1992] 1 W.L. R. 1196

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

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

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

[16] [1978] A.C. 297
[17] [1980] 1 W.L.R. 1389

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

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

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

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

[18] [1997] 1 W.L.R. 1666

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

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

84. The learned Judge agreed with the Judge at first instance who had considered the contumacious conduct of counsel and the fact that there had been four separate orders of the Court, none of which had been properly complied with.

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

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

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

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

[19] [1994] 2 Lloyd's Rep. 32
[20] [1998] Lexis Citation 1418

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

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

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

[21] WCA 2A 2LL. dated 3rd February 1999

[22] [2004] -05 CILR Note 28

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

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

[23] [2008] CILR 231

APPLICATION OF LEGAL PRINCIPLES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

i. That the judgment was properly obtained.

ii. That it was a result of the failure of the Defendants to comply with the 15th February 2017 Directions Order of the Court and with the Unless Order of 21st April 2017, so there is a history of some delay.

iii. It was the responsibility of the First Defendant to maintain contact with his Attorneys and to ensure that he was advised as to the progress of his case. He did not do so. There is personal fault in addition to any fault which he may seek to attribute to his Attorneys.

iv. The delay following the making of the Unless Order in respect of which an extension of time would require to be granted if the Judgment is set aside is a lengthy one.

v. The explanation for the delay is poor and shows that at the very least the First Defendant was slow to act.

vi. In the period which has elapsed since the Judgment was obtained the Plaintiff has acted on the Judgment and has registered it in Australia.

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

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

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

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

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

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

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

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

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

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

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

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

THE TEST TO BE APPLIED

130. Counsel for the Defendants argues that there are important similarities with respect to setting aside a default judgment under GCR Order 19 and the general guidance to be applied in considering whether to grant relief from sanctions. It is urged that the issue of the justice of the case must be considered in respect of both and that there is overlap which would require whichever test is applied that consideration be given to whether justice requires that the Defendants' case be determined on the merits. They point to the findings of the Court in the case of ***Nolan*** and in other cases cited that there was little merit in the defences to be put forward.

131. As I understand it, there is a distinction between the considerations in respect of an application to set aside a default judgment where no defence has been filed and there has been delay and those in which a sanction has been imposed following breaches of orders of the Court. In respect of the latter it is the conduct and the reasons for the conduct of the defaulting party which are the focus for examination and not the merits of the Defence. While the justice of the case must be considered as a whole including whether there is a meritorious defence, any injustice to the defaulting party is not to be ignored but is of secondary consideration.

ASSESSMENT OF THE MERITS OF THE DEFENDANTS' CASE

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

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

i. *"A Judgment signed in default is a regular judgment from which, subject to (ii) below, the plaintiff derives rights of property.*

ii. *The Rules of Court give to the Judge a discretionary power to set aside the default judgment which is in terms 'unconditional' and the Court should not lay down rigid rules which deprive it of its jurisdiction.*

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

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

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

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

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

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

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

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

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

[26] Paragraph 17 on page 10.

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

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

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

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

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

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

> *"1) An application for relief from any sanction imposed for a failure to comply with any rule, court order or direction must be made promptly.*
>
> *(2) An application for relief must be supported by evidence.*
>
> *(3) The court may grant relief only if it is satisfied that –*
> *(a) the failure to comply was not intentional;*
> *(b) there is a good explanation for the breach; and*
> *(c) the party in default has generally complied with all other relevant rules, practice directions, orders and directions.*
>
> *(4) In considering whether to grant relief, the court must have regard to –*
> *(a) the interests of the administration of justice;*

[27] [2011] UKPC 37

(b) whether the failure to comply was due to the party or his attorney;

(c) whether the failure to comply has been or can be remedied within a reasonable time; and

(d) whether the trial date or any likely trial date can still be met if relief is granted.

(5) The court may not order the Respondent to pay the applicant's costs in relation to any application for relief unless exceptional circumstances are shown."

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

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

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

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

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

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

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

CONCLUSION

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

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

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

COSTS

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

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

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

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

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

[32] 2002 1 WLR 2810

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

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

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

Dated this the 4th day of January 2019

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