IN THE HIGH COURT OF BELIZE

CLAIM No. Civ 542 of 2021 (No.1)

BETWEEN:

CORALS COMPANY LIMITED

Claimant

AND

ALFREDO LIZARRAGA

Defendant

Appearances:

Mr Allister T Jenkins for the claimant
No appearance for defendant

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27 June 2024

9 July 2024

JUDGMENT

Law, practice and procedure – Default judgment – Part 12 of the CPR – CPR 12.5 and CPR 12.10(4) and (5) – A judge and not the court office decides on default judgment claims seeking "some other remedy" – No two-step procedure for applications for default judgment in claims for "some other remedy" – Unless struck out, a defence or acknowledgement of service, albeit filed late, is a bar to entry of default judgment

[1] **HONDORA J:** The facts of this case throw into sharp relief some of the practice and procedure challenges inherent in Part 12 of the Civil Procedure Rules, 2005 (CPR) on default judgments. These challenges are by no means unique to our jurisdiction. Many common law countries have encountered much of the same. But this is no salve for those like the claimant that have used the default judgment procedure in the hope of a just and expeditious resolution of their claims only to encounter delays, complex rules of procedure and inevitable litigation costs. The clarifications contained in this judgment should assist in resolving some of the issues with default judgment applications.

[2] In making my decision, I have been greatly assisted by the skeleton arguments and excellent oral submissions made by Mr Jenkins, legal counsel for the claimant, to whom I am grateful.

I. Context

[3] The claimant, Corals Company sells tobacco products and operates in Belize's Corozal Free Zone. Its case as set out in its claim form and statement of claim is that on 18 January 2018, it entered into a contract of employment with Mr Lizarraga, the defendant. It avers that the terms of that contract were partly oral and partly written. The contract required Mr Lizarraga to perform numerous functions, including transporting foreign currency, i.e., United States dollars, to the United States of America (United States). The foreign currency was derived from Corals Company's business operations in the Corozal Free Zone. Mr Lizarraga was required to deposit the foreign currency into his (Mr Lizarraga's) bank account in the United States, and acting on the instructions of Corals Company, to pay a company called Oriental Group Inc. from which Corals Company sourced merchandise for resale in the Belize Corozal Free Zone.

[4] It would appear that one part of the parties' legal relationship was based on a contract for services and another part on a contract of services. That said, I make no definitive ruling as I do not need to do so for purposes of this judgment. In addition, I have not had the benefit of any submissions on this point.

[5] Corals Company contends that (a) between January and March 2020, it gave Mr Lizarraga an aggregate sum of US$258,000 to deposit into his account and pay on instructions for merchandise; (b) of the total sum, Mr Lizarraga only transferred US$84,000 to Oriental Group Inc.; and (c) despite demand, Mr Lizarraga has refused to account for and to return the balance of US$174,000 and has fraudulently misappropriated the same.

[6] Corals Company also contends that on 18 January 2020, it loaned Mr Lizarraga BZ$15,000, repayment of which was going to be effected through periodic deductions from Mr Lizarraga's salary. However, since it terminated Mr Lizarraga's contract over his failure to account for the foreign currency handed over to him, the full amount of the loan remains due and owing. Corals Company avers that despite demand, Mr Lizarraga has refused to pay back the loan amount.

II. Chronology

[7] A notable and regrettable feature of this case is that it has remained firmly stuck, since October 2021, at the default judgment application stage. It appears that the delay in progressing the resolution of this dispute

was due in part to the Covid-19 pandemic and the claimant's and/or court office's interpretation of the default judgment procedures as set out in Part 12 of the Civil Procedure Rules (CPR).

[8] Below, I set out part of the chronology leaving aside matters not germane to the Corals Company's application for default judgment.

(a) Claim form and statement of claim

[9] On 12 August 2021, Corals Company issued a claim form and sought:

> "(1) A declaration that the Defendant held the sum of US$174,000 in trust for the Claimant;
>
> (2) An order for the account and immediate repayment of US$174,000 by the Defendant to the Claimant, being the funds unlawfully misappropriated and unaccounted for by the Defendant;
>
> (3) Damages in the sum of BZ$15,000 for breach of a personal loan agreement;
>
> (4) Interest on any amount [] owing by way of damages, pursuant to section 166 and 167 of the Supreme Court of Judicature Act, Chapter 90 of the Laws of Belize or equitable interest;
>
> (5) Such further or other relief as the Court thinks fit;
>
> (6) Cost *(sic).*"

(b) Service of Claim form and statement of claim

[10] In its **11 October 2021** application for default judgment, Corals Company alleged that it served its **12 August 2021** claim form and statement of claim upon Mr Lizarraga on **13 September 2021**. However, that assertion is at odds with the affidavit of service and the acknowledgement of service filed on behalf of Mr Lizarraga in which it is stated that he was served with the claim form and statement of claim on **9 September 2021.** That inconsistency is most likely a typographical error on the claimant's part. Consequently, I proceed on the basis that Mr Lizarraga was served with the claim form and statement of claim on **9 September 2021**.

(c) Filing of acknowledgement of service and defence

[11] Mr Lizarraga filed his acknowledgement of service on 11 October 2021 at 19:34:09 and his defence on 11 October 2021 at 21:51:57. Both sets of pleadings were filed on Mr Lizarraga's behalf by the law firm Myles and Banner through the court's electronic case management system.

[12] The acknowledgment of service was filed late, i.e., outside the 14 calendar days prescribed by CPR 9.3(1). Reckoned from 9 September 2021, the defendant ought to have filed its acknowledgement of service on or before 24 September 2021. Similarly, the defence was filed late. That pleading ought to have been filed on or before 8 October 2021.

(d) First application - for default judgment

[13] On **11 October 2021** at 17:39:58, i.e., on the same day that Mr Lizarraga filed his defence, Corals Company filed an application for default judgment. It made its application on the basis that Mr Lizarraga had not filed an acknowledgment of service. That application was given a hearing date of **21 March 2022** and was set for hearing before Chabot J. It is surprising that the matter was set down for hearing five months from the date on which the application for default judgment was filed. That said that period coincided with the height of the COIV-19 pandemic and limited judicial resources. These and potentially other factors might explain the listing decision.

[14] In its *ex parte* application the claimant indicated, in the material part, that it was seeking:

> "(a) Pursuant to Rules 12.10(4) and (5) of the [High Court] (Civil Procedure) Rules 2005, that the Court grants permission to enter judgment and determines the terms of judgment the Court considers the Claimant to be entitled to on the Statement of Claim."

[15] As appears in **para. 9** above, the claimant made its application under CPR 12.10(4) and (5) because its claims were for "some other remedy".

[16] Based on the pro forma court report form, on 7 April 2022, the Registrar considered and granted Corals Company's application on the papers. On the file there is a perfected order date-stamped **8 April 2022** and signed by the Registrar. That order reads:

> "This Court hereby grants default judgment and the terms of the judgment to be determined by the Court."

[17] According to that 8 April 2022 order, Mr Jenkins, counsel for the claimant, appeared before the Registrar on 31 March 2022 after which the Registrar issued the order granting the claimant's application for default judgment with the terms to be determined by the court. Those assertions are inaccurate. The court record indicates that the Registrar's decision on the claimant's application was made on the papers, i.e., without a hearing. The order also refers to the claimant's "8th day of October 2021" application, which is incorrect because although dated 8 October 2021, Corals Company's application for default judgment was filed on 11 October 2021.

[18] Below, I consider the regularity of the 8 April 2022 order. The question arising pertains to whether the court office has authority to enter default judgments in claims for "some other remedy".

(e) Second application - for terms of default judgment

[19] On **17 June 2022**, Corals Company issued another application and this time for terms of the default judgment.

III. Issues arising for determination

[20] The following issues arise for resolution in this matter, i.e.:

(a) whether the court office has authority to grant default judgments on claims for "some other remedy" and consequently whether the 8 April 2022 default judgment order was regular;

(b) whether, on the facts, Corals Company is entitled to a default judgment order; and

(c) to which remedies is Corals Company entitled?

(a) Court office's authority to grant default judgments in claims for "some other remedy"

[21] I am of the view that the 8 April 2022 order issued by the court office and signed by Registrar granting Corals Company's request for judgment in default with the terms of the judgment to be determined by the court was made in error. I rule as such for several reasons.

[22] As appears from Corals Company's application dated 8 October 2021, its claim is "*for some other remedy*". CPR 12.10(4) provides:

> "Default judgment where the claim is <u>for some other remedy</u> shall be in such form as the <u>court considers</u> the claimant to be entitled to on the statement of claim." [Emphasis added]

[23] CPR 12.10(5) provides:

> "An application for the court to determine the terms of the judgment under paragraph (4) need not to be on notice but must be supported by evidence on affidavit…"

[24] In my view, decisions on applications for default judgment on claims for "some other remedy" (CPR 12.10(4) and (5) are and must be made by a judge and not the court office. The references to "*the court*" in CPR 12.10(4) and (5) mean and must be read to mean a judge of the High Court and not the court office or Registrar (see section 5 of the Senior Courts Act, 2022).

[25] If the intention were otherwise, i.e., if the intention was to give the court office power to issue default judgments in relation to claims for "some other remedies", this would have been clearly stated. In addition, if that was the drafters' intention CPR 12.10(4) would be otiose. That rule would have been omitted

altogether if the court office's power to issue default judgments was unlimited or extended to include cases involving claims for "some other remedy".[1]

[26] In practice, it is difficult to envisage a situation in which a judge would decide the terms of a remedies order to which a claimant is entitled in a case where the claimant is seeking "some other remedy" but refrain from issuing a ruling on whether the claimant is entitled to be granted judgment in default and leaving that decision to the court office. I say this in view of section 45 of the Senior Courts Act, 2022, which provides that:

> "The Court, in the exercise of the jurisdictions vested in it by this Act, shall, in every cause or matter pending before it, grant, either absolutely or on such terms and conditions as the Court thinks just, all such remedies whatever as any of the parties thereto may appear to be entitled to in respect of any legal or equitable claim properly brought forward by them in the cause or matter, so that, as far as possible, all matters in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of those matters avoided."

[27] In the case of ***Lux Locations Ltd v Zhang*** [2023] UKPC 3, the Privy Council noted (at para. 33) that the task of determining the terms of a judgment in relation to a claim for some other remedy was "*not an administrative matter but a task that requires an exercise of judgment by a judge*." The Privy Council expressed that view, which I share, in the context of Rule 12.10(5) of the Eastern Caribbean Civil Procedure Rules as it was then, and which was similar to our current CPR 12.10(5).

[28] In the matter before me, Carols Company chose or was required by the court office to use, or the court office opted to apply (the facts are unclear) a two-step procedure which resulted in the court office issuing an order for default judgment and the claimant needing to make a second application for terms of the default judgment.

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[1] This issue is obiter but relevant to the ongoing process of updating the Civil Procedure Rules, 2005. In ***Lux Locations***, the Privy Council noted, and I believe correctly, that there is and should only be one default judgment issued in the case of a claim seeking "some other remedy". It pointed out at para. 43 that in the context of applications for default judgments seeking say, damages, which may be made to the court office with terms to be determined by the court that:

> "Indeed, under the English Civil Procedure Rules it is not possible to obtain more than one default judgment against the same defendant in the same case. If a claimant wishes to obtain a default judgment for both a sum" of money and some other remedy, CPR rule 12.4 expressly requires an application to be made. This situation is not expressly dealt with in the Eastern Caribbean Civil Procedure Rules, <u>but this may be how the Rules should be interpreted. If so, then rule 12.13(b) is otiose, as a situation in which a default judgment is entered before an application under rule 12.10(4) and (5) is determined cannot arise. However, while this represents an infelicity in the drafting of the Rules, it is not a point of sufficient weight to affect the clear meaning of rules 12.5 and 12.10. The presence of rule 12.13(b) cannot wag the dog by creating a two-step procedure for which rules 12.5 and 12.10 do not provide</u>."
> [Emphasis added]

[29] In ***Lux Locations***, the Privy Council noted that the two-step procedure in the context of what was then Rule 12.10(4) and (5) of the Eastern Caribbean Civil Procedure Rules was erroneous (see para. 35-41 thereof).

[30] Similarly, in this jurisdiction, CPR 12.5 as read with CPR 12.10(4) and (5) should **no**t be read to require a two-step default judgment application procedure for cases relating to "some other remedy". Claimants must make one application, which must be brought before a judge for resolution.

[31] In ***Lux Locations***, the Privy Council correctly noted that:

> "The Rules do not say that, on a claim for 'some other remedy', the court office must enter a default judgment before an application for the court to determine the terms of the judgment under rule 12.10(4) has been made. Reading rules 12.5 and 12.10 together, it is apparent that, whatever the nature of the claim, only one default judgment is envisaged, the content of which is provided for by rule 12.10. Where the claim is for a sum of money, the form of the default judgment is prescribed by rule 12.10(1) and the court office can and should therefore proceed to enter judgment immediately. Where, on the other hand, the claim is for a remedy other than money – either an order to deliver goods or "some other remedy" – a decision of the court is needed before judgment can be entered." [Emphasis added]

[32] At para. 41, the Privy Council observed and correctly so that:

> "…where the claim is for some other remedy, the rules do not provide for a default judgment to be entered for relief to be determined in accordance with some further procedure. Rather, rule 12.10(4) requires default judgment to be 'in such form as the court considers the claimant to be entitled to on the statement of claim'. It follows that default judgment cannot be entered before a determination by the court under rule 12.10(4) has taken place."

[33] The Privy Council's highly persuasive opinion is applicable to our CPR 12.10(4), which is similar to the old Rule 12.10(4) of the Eastern Caribbean Civil Procedure Rules.

[34] In a nod to the type of sports for which the Caribbean region is famous for, the Privy Council in an incisive statement expressed the view that it did not:

> "…consider that a judgment whose terms remain to be determined by the court is a coherent concept. If the terms of the judgment are to be determined by the court, there can be no judgment until the court has decided on its terms. A judgment which as yet has no terms is as empty a concept as a book with no pages or a football or cricket team with no players." (See para. 42 thereof)

[35] The Privy Council's critique of the rule and practice relating to the grant of default judgments with terms to be determined by the court should, of necessity, draw attention to our CPR 12.10(1)(b). This rule does not fall for consideration in this matter. Consequently, my remarks are obiter. However, that rule is likely to result in litigation such as in this case. CPR 12.10(1)(b) provides:

> "Default judgment – (b) on a claim for an unspecified sum of money, shall be judgment for the payment of an amount to be decided by the court."

[36] CPR 12.10(1)(b) can be interpreted to mean that claimants are required to seek default judgments through the court office for claims in which the remedy sought is payment of unspecified sums of money for failure to file an acknowledgment of service or defence with the amount to be awarded being determined by a judge.

[37] It is well worth restating that in practice, a judge will assess (a) whether the unspecified sum of money claimed is in principle based on a valid cause of action; (b) whether the claimant is entitled to the prayed-for remedy, i.e., payment of the unspecified sum of money; and (c) the amount of money that should be granted to the claimant based on the assertions outlined in the claim form and statement of claim and affidavit envisaged in CPR 12.10(5). This reality raises questions on the purpose served by and the practical benefits derived from the two-step procedure set out in CPR 12.10(1(b), which requires the court office to enter a default judgment on a claim for unspecified sums of money with the terms to be decided by a judge.

[38] Ultimately, rules of procedure must be simple to understand and apply. In addition, it is best if they do not contain redundant or duplicative administrative and procedural steps. Rules are and must be designed as much for the litigant in person as they are for attorneys, court staff and judges. They should also promote judicial economy – plagued as this system is with increasing workloads and by limited resources. In this regard, there is merit in aiming for simplicity and adopting only those procedural steps that are objectively essential in ensuring the just, efficient and effective resolution of disputes at proportionate cost.

[39] Regarding the matter at hand, CPR 12.5 as read with CPR 12.10(1) and (5) should be read to require only one default judgment application. The reason for my ruling is premised on the fact that a judge that is presented with an application for default judgment is required to and must consider and decide whether the claimant is entitled to the order they seek both as a matter of fact and law. This renders the first administrative step aimed at the court office redundant.

[40] In this regard, I find the ruling in ***Lux Locations*** particularly compelling. In that case, the Privy Council noted that it would be inappropriate and contrary to the overriding objective for a judge to ignore the question whether the claimant is entitled to the remedy they seek.[2] The Privy Council's statements in para. 49-51 of

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[2] I recite the Privy Council's statements in para. 49-51 in full for ease of reference. The Board stated:

> "49. A rule which requires the court to give "such judgment as the claimant is entitled to", or judgment "in such form as the court considers the claimant to be entitled to", on the statement of claim leaves open the possibility that the court considers that the claimant is not entitled to any judgment on the statement of claim. The logical implication is that, where this is so, no judgment should be entered. That is also what the overriding objective of dealing with cases justly requires. Suppose, for example, that the only remedy claimed in the statement of claim is an injunction - say to stop a book from being published or to require

the ***Lux Locations*** judgment on the principles of what is required of a judge faced with a default judgment application are undoubtably correct.

[41] On the facts of this matter, I find that:

(a) On 11 October 2021, Corals Company Limited filed an *ex parte* application pursuant to CPR 12.10(4) and (5) for default judgment and determination of the terms of the judgment in default of an acknowledgment of service; and

(b) on 8 April 2022, the court office entered an order granting the claimant default judgment with the terms to be determined by the court.

[42] On the law, I find that:

(a) the 8 April 2022 order granting the claimant default judgment was irregular and was entered in error as the claimant's case pertained to "some other remedy"; and

(b) decisions on requests for default judgment pertaining to some other remedies is reserved and must be made by a judge pursuant to CPR 12.4 or CPR 12.5 as read with CPR 12.10(4) and (5) and not by the court office.

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a building to be demolished - and the court considers that, on the facts alleged, applying the relevant legal principles, it is not appropriate to grant any such injunction. It would not be right in those circumstances, nor compatible with the wording of the rule, for the court to grant a remedy which the court does not consider the claimant to be entitled to on the statement of claim. In such a situation the court should therefore decline to grant default judgment.

50. The same applies, in the Board's view, where it appears to the court that the statement of claim is one that ought to be struck out, for example because it is incoherent, does not disclose a legally recognisable claim or is obviously ill-founded. The aim of the default judgment procedure is to provide a speedy, inexpensive and efficient way of dealing with claims which are uncontested and to prevent a defendant from frustrating the grant of a remedy by not responding to a claim. Those objectives, however, do not justify a court in giving judgment on a claim which is manifestly bad or an abuse of the court's process, even if the defendant has failed to take the requisite procedural steps to defend it. The public interest in the effective administration of justice is not advanced, and on the contrary would be injured, by granting the claimant a remedy to which the court considers that the claimant is not entitled.

51. It is true, as Briggs J pointed out in the *Football Dataco case* (see para 45 above), that the need for an application to the court is triggered not by anything connected with the legal foundation of the claim, but by the nature of the relief sought. Where the remedy sought is an award of money only, a default judgment can be obtained automatically by an administrative process without any judicial scrutiny. But it does not follow that, where an application to the court is required, the court should only ever consider what remedy is appropriate given the allegations made and have no regard to whether those allegations have any legitimate basis. The underlying policy reason for requiring the safeguard of judicial scrutiny where a remedy other than money is claimed must be that granting such a remedy potentially involves greater interference with rights and freedoms of the defendant (and perhaps others) than entering a money judgment which the defendant can apply to set aside. If the safeguard is to be meaningful, it should operate as a filter for manifestly ill-founded or improper claims. [Emphasis added]

[43] Based on the above, I hereby set aside the 8 April 2022 default judgment on the basis that it was irregular and made in error.

(b) Whether Corals Company is entitled to be granted a default judgment order

[44] In the exercise of this court's inherent jurisdiction and pursuant to section 45 of the Senior Courts Act, I turn next to consider whether on a *de novo* consideration of Corals Company's application, it is entitled to, and whether this court should grant, the default judgment order prayed for.

[45] On the facts, Corals Company made its application pursuant to CPR 12.4 on the basis that Mr Lizarraga had not filed an acknowledgement of service. However, as noted above, on the same day (i.e., 11 October 2021) when Corals Company filed its application for default judgment for failure to file an acknowledgment of service, Mr Lizarraga filed the acknowledgment of service and his defence to the claim. Corals Company is aware that Mr Lizarraga filed his defence. Granted, Corals Company has not sought to amend its application but that is immaterial. I will consider whether Corals Company is entitled to default judgment based on the pleadings before me, which include a defence to the claim. Consequently, I proceed to assess Corals Company's entitlement to a default judgment under CPR 12.5 as read with CPR 12.10(4) and (5).

[46] CPR 12.5 provides:

> "The court office must enter judgment for failure to defend at the request of the claimant, if –
> (a) the claimant proves service of the claim form and statement of claim;
> (i) []
> (ii) []; **<u>and</u>**
>
> (b) the defendant has not –
> (i) filed a defence to the claim or any part of it (or such defence has been struck out or is deemed to have been struck out under Rule 22.1(6); or
> (ii) []
> (iii) [] **<u>and</u>**
>
> (c) the claimant has the permission of the <u>court</u> to enter judgment (where necessary)." [Emphasis added]

[47] The key issue that arises pertains to how I should proceed in view of CPR 12.5(b). In addressing this issue, I have opted to borrow from Andrew Baker J's judgment in ***Cunico Resources N.V v Daskalakis***, [2018] EWHC 3382 (Comm), at 14 and pose for consideration the following pertinent questions, i.e., whether CPR 12.5:

(a) only allows the court to grant default judgment where, <u>at the time of judgment</u>, there is no defence and the time for filing a defence has expired ('the first meaning');

(b) allows the court to grant default judgment so long as, <u>at the time the request or application for default judgment is filed</u>, there was no defence and the time for filing a defence had expired ('the second meaning'); or

(c) allows the court to grant default judgment where the defence was not filed on time, irrespective of any defence later filed ('the third meaning').

[48] Andrew Baker J raised these questions in the context of the controversy on the proper interpretation of the England and Wales Civil Procedure Rule 12.3 (as it was then)[3]. That Rule was in its material respects similar to CPR 12.5.

[49] I share the view expressed by Andrew Baker J that the court is not entitled to and should not grant default judgment *if at the time of judgment,* a defendant has filed its defence or if relevant, has filed its acknowledgement of service (see ***Cunico Resources***, para. 43-49. See also ***Smith v Berrymans Lace Mawer Service Company*** [2019] EWHC 1904 (QB) at para. 23).

[50] Notably, rule 12.3(1) of the England Wales CPR was amended in 2020. The amendment followed Andrew Baker J's analysis in ***Cunico Resources*** of the then inconsistent practice, procedure and jurisprudence in that jurisdiction on default judgments. The amended rules now reflect the law as pronounced by Andrew Baker J.[4]

[51] CPR 12.5(d)(i) provides that the court office must at the claimant's request enter judgment for failure to defend if "*the defendant has not (i) filed a defence*". Obviously, as noted above, if the claim subject to the

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[3] The England and Wales CPR 12.3 as it was then and so far as material read:

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

(2) Judgment in default of defence may be obtained only –
(a) where an acknowledgment of service has been filed but a defence has not been filed; (b) in a counterclaim made under rule 20.4, where a defence has not been filed, and, in either case, the relevant time limit for doing so has expired."

[4] See the case of ***Galliani and Another v Sartori and*** Ors [2023] EWHC 3306 (Comm) at 30-31 in which Marshal J held:

"30. Rule 13.12 provides that default judgment must be set aside if certain conditions contained in rule 12 for the entry of default judgment have not been satisfied. Among these conditions is the requirement in rule 12.3(1)(a) that "at the date judgment is entered" the defendant has not filed an acknowledgement of service.

31. This wording in rule 12.3(1)(a) was introduced by the Civil Procedure (Amendment) Rules 2020 (SI 2020/82), the explanatory note to which states that this was "to clarify the meaning of the rule as being that an acknowledgment of service or a defence will be a bar to the entry of judgment in default so long as it is filed before judgment is entered". This was done to remove an ambiguity in the previous formulation of the rule and to adopt the approach taken in ***Cunico Resources NV v Daskalakis*** [2018] EWHC 3382 (Comm) namely that, so long as an acknowledgement of service was filed before default judgment was entered, the Page 8 conditions for such a judgment to be obtained would not be satisfied (see ***FXF v English Karate Federation Limited*** [2023] EWCA Civ 891, at [89]). [Emphasis added]

default judgment application pertains to "some other remedy", that rule should be read to mean a judge and not the court office. The sentence "*the defendant has not (i) filed a defence*", which must be given its ordinary grammatical meaning and read in context is clear. It refers to a defence not having been filed. This means that if a defence has, as a matter of fact, been filed then the requirements for the grant of a default judgment would not have been met, even if such defence was filed late.

[52] In my judgment, in this jurisdiction, until set aside, a defence filed outside the prescribed timeframe is not invalid. I was not pointed to any law, rule or practice to the contrary. Consequently, in my view, it is not open to this court to disregard in its consideration of an application for default judgment a defence that is already on file even if it was filed outside the prescribed timeframe.

[53] An acknowledgment of service or defence filed late remains valid until set aside by the court. Proof of this truism is set out in CPR 26.9, which provides:

> "(1) This Rule applies only where the consequence of failure to comply with a Rule, practice direction or court order has not been specified by any Rule, practice direction or court order.
>
> (2) An error of procedure or <u>failure to comply with a Rule</u>, practice direction or court order <u>does not invalidate any step taken in the proceedings</u>, unless the court so orders.
>
> (3) <u>Where there has been</u> an error of procedure or <u>failure to comply with a Rule</u>, practice direction, court order or direction, <u>the court may make an order to put matters right</u>.
>
> (4) The court may make such an order on or without an application by a party." [Emphasis added]

[54] For completeness, there is no provision in the CPR that automatically invalidates a defence (or for that matter an acknowledgment of service) that was filed late. Consequently, a defence filed late is valid (i.e., the pleading remains valid) until set aside by the court. Typically, such an order setting aside a defence filed late is made following an appropriate application by a claimant or following an order issued *mero motu* by the court directing the defendant to make submissions demonstrating why the defence or other relevant pleading filed late in breach of a rule or order of the court should not be struck out. And in the exercise of its discretion and extensive case management powers, a court will make an appropriate determination as the interests of justice require in the circumstances of the case.

[55] In my view, as a matter of law, CPR 26.9 precludes the court from ignoring at the time of judgment the reality that a defence was filed and is on the record before it.

[56] Certainly, there is merit in the argument that the practice that results from an interpretation that deems pleadings filed late as automatically invalid may improve efficiency and increase rates of compliance with

court orders and the CPR, in particular by those legally represented. However, it would be remiss to not consider the implications of such a rule on the many litigants in person that use the High Court with limited and in many cases without access to legal services.

[57] I should also add that I am the view that the second and third 'meanings' of CPR 12.5, which I have outlined in **para. 47** above are incorrect as they are incompatible with the provisions of CPR 26.9. The 'second meaning' would require the court to:

(a) grant default judgment because at the time the request for default judgment was filed the defendant had not filed their defence and the time for filing a defence had expired; and

(b) ignore a defence on file because it was filed late.

[58] The 'third meaning' would result in a strict liability regime requiring the court to ignore any defence on the record if it was filed late whatever the reason behind non-compliance.

[59] I associate myself with Andrew Baker J's highly persuasive opinion at para. 47 of his judgment in ***Cunico Resources*** judgment, which I restate in full for ease of reference, that:

> "…bearing fully in mind that dealing with cases justly includes enforcing compliance with the rules [however] ultimately and fundamentally courts exist to resolve disputed claims by reference to their merits. The default judgment regime of CPR 12.3 is a specific feature of the initial process of getting a claim going. It exists, as such a regime has done since long before the CPR, to give the claimant the option of obtaining a final judgment he can seek to enforce, without the merits of his claim ever being considered, in cases where the defendant is not participating in the proceedings to contest the claim, on the ground that indeed the defendant is not participating."

[60] And at para. 49, he rightly noted

> "…the default judgment regime under CPR 12.3 is not and in my view was never designed or intended, at all events speaking generally, as a means of avoiding the need to prove a disputed claim…In some of the reasoning in the prior decisions, judges have, to my mind, with respect, rather lost sight of that."

[61] I do not ascribe Andrew Baker J's statement at para. 49 of his judgment to any practice in this jurisdiction. I was not provided with and have not seen any precedent that would suggest that default judgments have been issued mechanically and without due regard to the justice of the matter and only because the defence was filed but out of time. Rather, Andrew Baker' J's excellent analysis of the cases and the practice in England and Wales provides a cautionary tale for the need to prioritise the resolution of disputes on their merits and to grant default judgment where the defendant's conduct establishes that it has no intention to defend a matter or is using court procedures as a dilatory litigation strategy.

[62] I should affirm that I am aware that the decision in the ***Lux Locations*** case was handed down on 31 January 2023 and that on 31 July 2023, Rule 12.10(2) of the Eastern Caribbean Civil Procedure Rules was amended on 31 July 2023 to read:

> "(2) Default judgment where the claim is for some other remedy shall be in such terms as the court considers the claimant to be entitled to on the statement of claim.
>
> (3) The court shall not have regard to any steps taken by a defendant after –
> (a) a request for default judgment; or
> (b) an application for default judgment for some other remedy, has been made."
> [Emphasis added]

[63] Our rules have not been amended and I am not persuaded to follow the course adopted by the Eastern Caribbean jurisdiction. To do such would result in a breach of the clear terms of CPR 26.9.

[64] In the matter before me, it is not in dispute that:

(a) Mr Lizarraga filed a defence to Corals Company's claim, and he did so three days out of time;

(b) per CPR 26.9, Mr Lizarraga's defence, which was filed out of time remains valid until it is formally set aside;

(c) no application was made to set aside Mr Lizarraga's defence;

(d) neither I nor Chabot J issued a decision setting aside Mr Lizarraga's defence; and

(e) it has not been argued and the facts do not suggest (although I make no definitive ruling) that Mr Lizarraga's defence to the claim is fanciful and has no prospects of success.

[65] In the circumstances, I dismiss Corals Company's application for default judgment on the premise that it has not satisfied the requirements set out in CPR12.5 as read with CPR 12.10(4) and (5). I do so reluctantly, given the delays that had dogged this case and the defendant's inexplicable non-action since October 2021.

[66] In view of my ruling, I need not consider the other issue arising in this matter, i.e., on the terms of the default judgment.

[67] To expedite the proceedings and drawing on the provisions of Part 25 of the CPR, I will direct the court office to issue a Notice of Hearing for a case management conference to address any applications that may be made by either of the parties and to ensure that the matter is resolved without further delay.

[68] In the circumstances, I rule as follows:

(a) The 8 April 2022 default judgment granted by the court office was issued in error and is set aside.

(b) The claimant's application for default judgment is dismissed.

(c) No order as to costs.

Dr Tawanda Hondora
High Court Judge