Neutral Citation Number: **[2023] EWHC 3245 (Comm)**

Case No: CC-2022-MAN-000007

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
CIRCUIT COMMERCIAL COURT

Date: 18 September 2023

Before :

HHJ Halliwell sitting as a judge of the High Court at Manchester

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Between :

GEOFFREY GALLEY	**Claimant**
- and -	
ROYAL FOREX LTD	**Defendant**

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- -

The Claimant appeared in person
Ms Alexandra Whelan (instructed by **Karam Missick & Traube LLP**) for the **Defendant**

Hearing date: 26 July 2023

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JUDGMENT

HHJ Halliwell:

(1) Introduction

1. This is my reserved judgment on the Defendant's application ("**the Application**") for an order setting aside a default judgment dated 10 August 2022 ("**the Default Judgment**") and an order dated 28 November 2022 ("**the November 2022 Order**") assessing damages in the sum of £363,120. The November 2022 Order was made pursuant to the Default Judgment.

2. The Application is dated 1 June 2023 but was not sealed until 14 June 2023. It was originally made, pursuant to *CPR 13.3(1)(a),* on the basis only that the Defendant has a real prospect of successfully defending the claim. However, by an application ("**the Amendment Application**") dated 19 July 2023, the Defendant applied for permission to amend the Application so as to rely on *CPR 13.3(1)(b)* ("some other good reason" to defend) and advance a case that "the Defendant was not validly served with the claim and therefore seeks to rely on *CPR 13.2*".

3. At the hearing before me on 26 July 2023, Ms Alexandra Whelan of counsel appeared on behalf of the Defendant. The Claimant, Mr Geoffrey Galley, appeared in person. Until 3 July 2023, Smooth Commercial Law Limited ("**Smooth**") acted as his solicitors in these proceedings but, since then, the Claimant has conducted the case in person, owing, he says, to lack of funds.

4. At the hearing itself, I gave the Defendant permission to amend the Application so as to rely on *CPR 13.2,* on the basis that the Claim "was not validly served", and enlarge its case under *CPR 13.3(1)* so as to contend that "there is some other good reason why judgment should be set aside or the Defendant allowed to defend the claim". I also gave the parties permission to file and serve further evidence and, in the light of the judgments of the Court of Appeal in *FXF v English Karate Federation Ltd [2023] EWCA Civ 891*, to make further written submissions. The judgments of the Court of Appeal in *FXF* were given on the same day as the hearing before me.

5. Following the hearing, the Defendant took the opportunity to file evidence in relation to the issue of service. Both parties also took the opportunity to file written submissions in relation to the Court of Appeal's guidance in *FXF*.

(2) Background

6. According to the Particulars of Claim, the Claimant is a UK resident and the Defendant is a company registered in Cyprus but authorised by the Financial Conduct Authority to provide financial services in the UK. It is alleged that the Claimant invested funds on the Defendant's investment platform and, owing to breaches of the Defendant's regulatory duties to the Claimant and its duties to him at common law, he incurred substantial losses. The claim was for damages, statutory interest and further or other relief.

7. Through his solicitors, the Claimant issued proceedings on 27 January 2022. Whilst not endorsed on the Claim Form itself, the Particulars of Claim was filed and sealed at the same time. He also filed Notice for Service out of the jurisdiction in Form N510 on the basis that the Court's permission was not required since the court had power to determine the claim under *Sections 15A* to *15E* of the *Civil Jurisdiction and Judgments Act 1982* and, although party to a consumer contract within the *Section 15B(1)* of the *1982 Act*, the Defendant was not a consumer.

8. At this stage, the Defendant's solicitors were AG Erotocritou LLC ("**AG Erotocritou**"), a firm based at Limassol in Cyprus.

9. By letter dated 4 February 2022, Smooth sent AG Erotocritou, "by way of service", a set of documents, including Form N1, Particulars of Claim, Initial Disclosure List and accompanying documents and Form N510. AG Erotocritou were advised that "if you do not have instructions to accept service of proceedings please let us know and we will arrange service directly on your client".

10. By letter dated 8 February 2022, AG Erotocritou advised Smooth that they were not authorised to accept service and, under the law of Cyprus, service on lawyers was not permissible.

11. Smooth thus arranged for service to be effected on the Defendant itself at its registered office in Cyprus. This was achieved through a licenced process server and judicial bailiff at the Nicosia District Court, Mr Vassos Argyrou. It appears from his affidavit of service that Mr Argyrou saw to it that, on 18 February 2022, "the petition documents" were personally "received by Georgos Kadis, the Secretary at the Registered Office". It can reasonably be inferred that this included Smooth's covering letter dated 9 February 2022 together with the Claim Form, Particulars of Claim, Initial Disclosure List, accompanying documents and Form 510. It is not

suggested otherwise. Indeed, the Defendant has exhibited to its evidence filed in support of the Application a copy of the covering letter, initialled on 18 February 2022, together with copies of the relevant documents.

12. However, the exhibited documentation did not include a Response Pack or translations of the Greek documents and Ms Whelan thus invites me to infer that these documents were not included in the documentation served on 18 February 2022. Moreover, when the Defendant instructed a firm of legal consultants, Athos Demetriou Associates LLC ("**Athos Demetriou**"), for discrete advice in relation to the issue of service, Athos Demetriou observed that, having carried out a search, "…it appears that the Secretary of the Company was (at the time of service) Dilea Secretarial Limited and not, as stated in the affidavit of service, George Kadis". They provided this advice in a letter dated 1 August 2023 which was forwarded to the Court pursuant to my directions following the hearing on 26 July 2023.

13. The Defendant disputes the Court's jurisdiction. However, it has never filed an acknowledgment of service. Accordingly, on 10 March 2022, Smooth submitted a Request for Judgment by default. Having done so, it filed a copy of Mr Argyrou's affidavit of service dated 6 April 2022.

14. By letter dated 27 May 2022, Smooth forwarded to AG Erotocritou further copies of the relevant documentation in English and Greek. This included copies of the Claim Form, the Particulars of Claim and Response Pack. They also warned AG Erotocritou that they had submitted a request for judgment in default and were awaiting the Court's decision.

15. The Defendant then instructed solicitors in England to correspond further with Smooth, namely Karam Missick & Taube LLP ("**KMT**"). By letter dated 27 June 2022, KMT referred Smooth to their letter dated 9 February 2022 and observed that, whilst they assumed Smooth had thus purported to effect service on the Defendant, service was "ineffective" since there were concurrent proceedings between the parties in Cyprus and the parties were subject to an "agreed exclusive jurisdiction clause". KMT also sought to rely on *CPR 6.33(2B)* which authorises service without permission outside the UK where the contract provides for the court to have jurisdiction to determine the claim. However, this is not, of course, the provision on which Smooth was itself relying to validate service.

16. By this stage, Smooth's Request for Judgment by default had been referred to HHJ Cawson KC who required clarification, before giving judgment, of the basis on which Smooth maintained permission of the court was not required for service out of the jurisdiction. By letter dated 22 June 2022, Smooth advised the Court that they relied on *CPR 6.33(2)(b)(ii)* on the footing that, whilst not a consumer, the Defendant was party to a consumer contract to which *CPR 6.33(2)* and *Article 17* of the *Judgments Regulation* applied.

17. On 10 August 2022, HHJ Cawson KC made the Default Judgment on the basis that the Claimant had filed an affidavit proving service on the Defendant on 18 February 2022, at its registered office, and the Defendant had failed to file an Acknowledgment of Service. He adjudged that the Defendant must pay an amount to be assessed by the court and listed the case for a disposal hearing on 3 November 2022.

18. The disposal hearing was listed before HHJ Hodge KC. The Defendant did not engage with the Claimant in relation to the disposal hearing nor did it attend the hearing itself. However, the Claimant was represented by counsel and filed, in advance of the hearing, a substantial witness statement. The hearing bundle itself amounted to some 759 pages. At the end of the hearing, HHJ Hodge KC gave judgment for the Claimant ("**the Damages Judgment**") assessing damages in the sum of £363,120 with interest in the sum of £24,622.52. The Defendant was ordered to pay the Claimant's costs, subject to detailed assessment on the standard basis, with an interim payment on account of costs in the sum of £50,000, payable by 4pm on 17 November 2022. Although the Damages Judgment was given on 3 November, the November 2022 Order was not drawn up and sealed until 28 November 2022. At 11:49 am on 28 November 2022, Smooth then emailed the November 2022 Order to KMT.

19. Six months later, on 1 June 2023 or thereabouts, the Claimant made the Application together with a supporting witness statement from Constantine Zavros, a director of the Claimant. On 14 June 2023, the Application was sealed and entered on CE File. On 20 July 2023, the Amendment Application was sealed on 20 July 2023 and entered on CE File. It was accompanied by a witness statement dated 19 July 2023 from Marc Taube, a senior partner of KMT.

(3) The Rule 13.3(1) Application

20. *CPR 13.3(1)* confers a discretionary jurisdiction on the court to set aside or vary regular judgments if "(a) the defendant has a real prospect of successfully defending the claim; or (b) it appears to the court that there is some other good reason" to vary or set aside the judgment or permit the defendant to defend. However, *CPR 13.3(2)* expressly provides that, in considering whether to vary or set aside the judgment, the court must consider whether the application was made promptly.

21. In *FXF (supra*), the Master of the Rolls re-affirmed the Court of Appeal's guidance in *Gentry v Miller [2016] EWCA Civ 141,* at [24] on the correct approach for dealing with an application to set aside judgment under *CPR 13.3(1).* This involves applying, as follows, the well-known three stage test in *Denton v TH White [2014] EWCA Civ 906* after first addressing the statutory requirements of *CPR 13.3*.

> "The first questions that arise… are the express requirements of [*CPR 13.3*], namely whether the defendant has a real prospect of successfully defending the claim or whether there is some other reason why the judgment should be set aside, taking into account whether the person seeking to set aside the judgment made an application to do so promptly. Since the application is one for relief from sanctions, the *Denton* tests then come into play. The first test as to whether there was a serious or significant breach applies, not to the delay after the judgment was entered, but to the default in serving an acknowledgement that gave rise to the sanction of a default judgment in the first place. The second and third tests then follow, but the question of promptness in making the application arises both in considering the requirements of CPR Part 13.3(2) and in considering all the circumstances under the third *Denton* stage."

22. Dealing, in turn, with each of part of the test, I am certainly persuaded that the Defendant would have a real prospect of successfully defending the claim if the same were to proceed to trial.

23. In support of the Application, the Defendant has filed a draft Defence and Counterclaim dated 1 June 2023 in which it contends that the Claimant must be treated as an elected professional client, not an inexperienced retail investor, and takes issue with the factual basis for the claim. It contends that information about the parties' initial communications is held in a data storage facility in the Ukraine which

cannot now be accessed owing to the Russian invasion. On this basis, it thus seeks to qualify its case. Moreover, significant parts of the claim are subject only to a bare denial. However, the issue about the Claimant's status requires further examination; it could not be fully resolved on the documentation available. This is significant because it has an obvious bearing on the nature and scope of the Defendant's duties. More generally, the Claimant's case was and is based on disputed factual allegations which could not be resolved properly without being tested in cross examination. In any event, there is also an issue, albeit not properly developed in the draft Defence, about the law governing the contract. The Defendant maintains that the contract was expressly governed by the law of Cyprus. This also raises a triable issue and, since the claim, as formulated, is not based on the law of Cyprus, would, in itself, be capable of furnishing the Defendant with a real prospect of successfully defending the case.

24. If this were not so, the Defendant has also demonstrated there is "some other good reason" to set aside or vary the judgment, as provided by *CPR 13.3(1)(b),* on the basis that there is a triable issue as to whether the contract successfully incorporated a clause providing for the courts of Cyprus to have exclusive jurisdiction and there are concurrent proceedings in Cyprus which were issued prior to the commencement of the current proceedings in England. Ms Whelan also relies on the service irregularities, deployed later in support of the Defendant's case under *CPR 13.2,* as "some other good reason" to set aside the judgment. I shall deal with the merits of this part of its case later. I accept that errors of procedure falling short of a defect, under *CPR 13.2,* are capable of furnishing a defendant with "some other reason" to set aside judgment if a cogent case for doing so can be established and the court does not exercise its powers to rectify the error under *CPR 3.10*. However, for reasons that will become apparent later, I am not persuaded that this consideration adds meaningfully to the Defendant's case under *CPR 13.3(1)(b).*

25. I must next consider, under *CPR 13.3(2),* whether the Application was made promptly. The short answer is that it was not made promptly.

26. Although the Default Judgment was made on 10 August 2022, it was not sealed until 2 September 2022. It was recorded in the order that it should be served by Smooth. Unfortunately, the Claimant now conducts the proceedings in person and, whilst he has filed a witness statement in response to the Application, this does not properly address the issues in relation to service. In Paragraph 21 of his witness statement

dated 1 June 2023, Constantine Zavros, a director of the Defendant, confirmed that, once obtained, the Default Judgment was served on the Defendant. In contrast, Mr Traube stated, in Paragraph 9, of his statement dated 19 July 2022 that "the Defendant was not provided with a copy of the [Default Judgment]. This firm made numerous attempts to obtain [the Default Judgment] but those attempts were unsuccessful as we were informed by the court that all orders are uploaded on the CE-filing portal. When a member of staff rang the CE-filing service, they informed us that they were unable to trace a copy of the [Default Judgment] on their records".

27. The most likely explanation is that, whilst Smooth sent a copy of the Default Judgment to the Defendant, they did not send a copy to KMT, the Defendant's English solicitors and the Defendant did not itself forward a copy to KMT. If Smooth did not send a copy to KMT, this is not entirely surprising since Smooth had been advised that KMT were not authorised to accept service on the Defendant's behalf. KMT's commentary in relation to the CE-Filing system is a little odd because it can be seen from the CE-File Case Event Log that a sealed copy of the Default Judgment was uploaded when sealed. This would have been obvious to anyone viewing the CE-File from that time. At the very latest, KMT ought to have had access to the CE File and thus been in a position to view the Default Judgment once they filed notice they were acting for the Defendant, namely on 15 June 2023, upwards of a month before Mr Traube's statement dated 19 July 2023. Indeed, his statement was entered on CE File the day after his witness statement was signed.

28. In any event, the Default Judgment cannot have come as any surprise to the Defendant since its Cypriot solicitors were advised that the Claimant had requested judgment by default in an email dated 27 May 2022.

29. On any analysis, the Application was not made promptly. It was made upwards of eight months after the Default Judgment was sealed and six months after the November 2022 Order was drawn up, sealed and emailed to KMT, namely on 28 November 2022. The Defendant's Cypriot lawyers were advised of the Claimant's request for judgment as long ago as 27 May 2022. It is likely that a copy of the Default Judgment was delivered to the Defendant shortly after it was sealed on 2 September 2022. In the unlikely event the Default Judgment was not brought to the attention of the Defendant's officers shortly after it was sealed and sent to the company, a copy of the November 2022 Order was emailed to KMT on 28 November

2022. Since the November 2022 Order was made pursuant to the Default Judgment, the Defendant ought to have been aware of the Default Judgment at this stage at the very latest. In all likelihood, any inquiry would swiftly have elicited an informative response.

30. Since the Defendant did not make the Application until June 2023, it was plainly made otherwise than promptly within the sense envisaged by *CPR 13.3(2).*

31. Whilst, in his witness statement dated 1 June 2023, Mr Zavros has sought to provide an explanation for the Defendant's delay, his explanation is of minimal assistance to the Defendant. He states that he only became a director on 8 July 2022 and, prior to his appointment, there was a rapid and significant change of management. He says "this was mostly as a result of the major health concerns of the UBO which peaked in 2022 and continues presently". He also states that "the present matter concerning the UK claim is now being dealt with at the earliest practical time under my management". However, this cannot amount to a full explanation since, at all times, the stance taken on behalf of the Defendant in correspondence was to challenge the jurisdiction of the English Court and advance a case based on ineffective service of process. It was on this basis that the Defendant appears, albeit inadvisedly, not have to have engaged with the proceedings in England until the Application was finally issued in June 2023. If Mr Zavros was appointed as a director as long ago as 8 July 2022, he was appointed more than a month before the Default Judgment itself. He has not explained how it can be said that the claim was dealt with "at the earliest practical time" under his management, whether by applying to set aside the Default Judgment or otherwise. Nor has he explained how, if at all, the "health concerns of the UBO" or "changes of management" were causative of the Defendant's delay.

32. Bearing in mind the Court of Appeal's guidance in *FXF (supra)*, I shall next apply the three stage test in *Denton (supra)* based on the guideline considerations in *CPR 3.9(1)* for an application requiring relief from sanction and, more generally, the Overriding Objective in *CPR 1.1*.

33. The first and second stages of the test are specifically applicable with reference to the Defendant's failure to file an acknowledgment of service within the 14 day period in *CPR 10.3(1)(a),* ie the 14 day period commencing on 18 February 2022. The third stage is based, more widely, on the overall context and justice of the case.

34. The court must initially consider the seriousness and significance of the breach. In my judgment, the Defendant's failure to file an acknowledgment of service within the period provided in *CPR 10.3* was serious and significant. It cannot reasonably be argued otherwise and counsel for the Defendant did not seek to do so in her supplemental written submissions dated 28 July 2023. Filing an acknowledgment of service at the outset is a critical step if the defendant wishes to dispute the court's jurisdiction under *CPR 10* or chooses not to file a Defence. *CPR Part 11* specifically provides for a defendant to apply for an order declaring that the court does not have jurisdiction to try a claim but, if it wishes to do so, it must first file an acknowledgment of service. In the present case, the Defendant challenged the Court's jurisdiction in correspondence but chose not to file an acknowledgment of service notwithstanding the provisions of *CPR 11.1(2)*. The Defendant's failure to comply with the Rules was plainly serious. It was also significant in the sense that it derailed the procedure for the disposal of proceedings. In the absence of an acknowledgment of service, there could be no hearing to determine the court's jurisdiction under the statutory procedure under CPR 11 nor, alternatively, could there by any collaboration with respect to the orderly conduct of the substantive proceedings, including the steps for initial disclosure under *PD 57AD*. This was directly contrary to the principles of the Overriding Objective.

35. The second stage of the *Denton* test requires me to consider why the default occurred, ie why the Defendant failed to file an acknowledgment of service at any time prior to the Default Judgment. In her Supplemental Submissions, Ms Whelan referred me back to the explanation, in Para 44-46 of her initial Skeleton Argument, as to why the Application was not made promptly based on the contents of Mr Zavros's witness statement and the existence of concurrent proceedings in Cyprus. Of course, the explanation for the Defendant's initial default is distinct from the explanation for its delay in applying to set aside the Default Judgment. However, in my judgment, Mr Zavros's explanation, if so intended, for the initial default is no more illuminating than his explanation for the delay in applying to set aside judgment. No proper explanation has been given as to how the chronological sequence in which Mr Zavors was appointed as a director, the putative managements changes and the health concerns of the UBO might somehow have been causative of the Defendant's failure to file an acknowledgment of service.

36. In my judgment, the Defendant has not provided a satisfactory explanation for its default nor, indeed, any explanation which can properly be reconciled with the evidence as a whole. The most likely explanation for the Defendant's default in filing an acknowledgment of service is that it was content to assume it had not been served out of the jurisdiction in accordance with the Rules and thus decided not to engage in the proceedings mindful that concurrent proceedings had already been commenced in Cyprus and that, to engage in the English proceedings, would inevitably involve the consumption of significant legal costs. If so, this was ill-advised. Once Mr Argyrou had delivered the Claim Form and Particulars of Claim to the Defendant at its registered office, the Defendant could not safely assume it had not been properly served. Once served, the Defendant was entitled to acknowledge service and dispute the Court's jurisdiction. This was the obviously the approach it should have taken. It can only be surmised that the Defendant failed to provide its professional advisers with comprehensive information pertaining to the steps taken by the Claimant to serve court process or, alternatively, obtain professional advice in relation to service and the steps available to it to challenge the Court's jurisdiction. There is no evidence that the Defendant was advised negligently. However, if this were so, it would not amount to an explanation for the Defendant's default on which it can properly rely in the absence of good reason to the contrary.

37. At the third stage, I must consider the overall circumstances of the case so to enable the Application to be dealt with justly giving particular weight to the need, specifically identified in *CPR 3.9(1),* for litigation to be conducted efficiently and at proportionate costs and to enforce compliance with the rules and practice directions. I must do so bearing in mind the guidance in *Denton (supra),* at *[35],* that "the more serious or significant the breach the less likely relief will be granted unless there is a good reason for it".

38. In addressing this aspect of the *Denton* test, the material "breach" or default is the Defendant's failure to file an acknowledgment of service within 14 days of service. However, since 6 April 2020, it has been expressly provided by *CPR 12.3(1)* that a default judgment can only be entered if the defendant has not filed an acknowledgment of service "at the date on which judgment is entered". In the present case, the Default Judgment was not entered until 10 August 2022. Although the Claimant served the Claim Form and Particulars on 18 February 2022 and Defendant

then had 14 days to file its acknowledgment of service, it could have avoided judgment in default had it filed an acknowledgment of service at any time prior to 10 August 2022.

39. I am not persuaded that the Defendant has provided a reasonable explanation for its failure to file an acknowledgment of service within the initial 14 day period. However, the Defendant's failure to file an acknowledgment of service at any time prior to 10 August 2022 is illuminating since it suggests that the Defendant took a deliberate decision not to file an acknowledgment of service after it was presented with a lengthy opportunity to assess the Claimant's steps to effect service and reflect on what it should do. In her written Supplemental Submissions, Ms Whelan submitted that "the Defendant took the view that it had not been validly served (as set out in the Defendant's English solicitors' letter of 27 June 2022) and the Claimant's solicitors failed to engage with the Defendant in correspondence as to service". However, the relevant letter dated 27 June 2022 from KMT to Smooth was designed to advance the Defendant's case in correspondence, including the Defendant's case in relation to service, rather than the advice it had been given. Smooth's response was by letter dated 11 July 2022. It is correct that this did not engage with the procedural points taken by KMT, most of which were of a technical nature. However, having previously warned AG Eroticou that they had submitted a request for judgment by default, they advised KMT that judgment was awaited. At least this was implicit in its observation that "no order for judgment had been given in this claim as of yet".

40. In the absence of a reasonable explanation for the Defendant's default, I must thus consider whether relief should be granted owing to the overall circumstances and justice of the case. In addition to her submissions about the explanation for the Defendant's default, Ms Whelan submitted that (1) the Defendant has "a real prospect of successfully defending the claim"; (2) it also has "a real prospect of successfully resisting the jurisdiction of the English Court"; (3) "the delay (and any failure to provide an adequate explanation) does not eclipse the merits of the proposed defence or the Defendant's jurisdiction challenge"; and (4) "in all the circumstances, the [Defendant] deserves the opportunity to challenge the jurisdiction of the English court and/or defend the claim". Miss Whelan's submissions in relation the Defendant's prospect of challenging the jurisdiction of the courts are coupled with an observation that there are parallel proceedings on foot in Cyprus which were commenced prior to

the English proceedings. In submitting that the Defendant's delay does not "eclipse" the merits of the Defendant's jurisdiction challenge, Ms Whelan was borrowing from an observation on the part of the Master in *FXF (supra),* endorsed by the Master of the Rolls at [71], that the unexplained delay of the defendant in applying to set aside judgment did not, in the circumstances of that case, "*eclipse* the merits of the proposed defence" (My italics).

41. Regardless of the chosen metaphor, it is implicit in Ms Whelan's submissions that, once properly addressed and applied, her enumerated considerations outweigh the specific requirements of *CPR 13.3(2)* and *CPR 3.9(2)* and the outcome of the first and second stages of the *Denton* test so as to warrant the grant of relief. I am not persuaded that this is so.

42. The specific requirements of *CPR 13.3(2)* (promptness of application to set aside judgment) and *3.9(2)(a)* (efficient conduct of litigation and at proportionate cost) and *(b)* (enforcement of rules and practice directions) are particularly resonant in the present case. As indeed are the requirements in the Overriding Objective for cases to be dealt with justly and at proportionate cost, saving expense, ensuring that they are dealt with expeditiously and fairly and allotting to them an appropriate share of the court's resources.

43. In the present case, the application to set aside judgment was not issued until June 2023, upwards of eight months after the Default Judgment and six months after the November 2022 Order. The November 2022 Order was itself made following a hearing at which detailed evidence was adduced and the Judge addressed by counsel. After hearing the evidence, HHJ Hodge assessed damages in the sum of £363,120 with accrued interest of £24,622.52. He ordered the Defendant to pay the Claimant's costs of the proceedings with an interim payment on account of costs in the sum of £50,000 payable by 4pm on 17 November 2022. None of these amounts have been paid by the Defendant. At the hearing on 26 July 2023, the Claimant advised me that, in consequence, he is no longer able to fund legal representation and was thus reduced to attending before me in person.

44. Weighed against this, it is true that the Defendant would have had a real prospect of successfully defending the claim and challenging the jurisdiction of the English court had it chosen to do so promptly in accordance with the Rules. It should not lightly be

denied the opportunity to do so. However, this opportunity was available at the outset. The Defendant could have acknowledged service and filed a defence. Alternatively, it could have acknowledged service and challenged the court's jurisdiction under the statutory procedure in *CPR Part 11* or, if there were grounds on which to challenge the proceedings as an abuse of process, it could have applied to strike out the proceedings under *CPR 3.4*. All of these options were open to the Defendant when the Claim Form and Particulars of Claim were formally served. As it happens, it instructed lawyers in Cyprus and London but chose not to take such action. Instead it took technical points in relation to service and omitted to engage with the proceedings until June 2003, upwards of fourteen months after the Claim Form and Particulars of Claim were first formally served. By that time significant court time and costs had been consumed. It is regrettable that the merits of the Defendant's case will not now be explored in these proceedings. This includes its case on the points initially open to the Defendant in relation to the jurisdiction of the court. However, the Defendant has brought this on itself.

45. The Defendant's Application to set aside judgment under *CPR 13.3* must thus be dismissed.

(4) The Rule 13.2 Application

46. *CPR 13.2(a)* provides that "the court *must* set aside a judgment entered under *Part 12* [in default of acknowledgment of service] if judgment was wrongly entered because…any of the conditions in *rule 12.3(1)* ... was not satisfied." The court's jurisdiction is mandatorily exercisable. A defendant's prospects of successfully defending the case are not identified as a condition for relief in an application under *CPR 13.2* and the three-stage test in *Denton* is inapplicable. In *FXF (supra),* the Court of Appeal was exclusively concerned with the principles applicable to the jurisdiction in *CPR 13.3.*

47. For present purposes, the material conditions of *CPR 12.3(1)* are that the defendant has omitted to file an acknowledgment of service and the relevant time for doing so has expired. By virtue of *CPR 10.3(1)(a),* the relevant time expires 14 days after service of the particulars of claim where, as in the present case, the claim form states that particulars of claim are to follow.

48. The issue in the present case is whether the Defendant was served with the Particulars of Claim prior to judgment. The Default Judgment was based on Mr Argyrou's affidavit of service dated 6 April 2022 in which it was alleged that, on 18 February 2022, the relevant documentation was served on the Defendant "…at the address Limasol Avenue (2015) Strovolos No. 128-130…" and "received by Georgos Kadis, the Secretary at the Registered Office".

49. Smooth did not file a certificate of service in Form N215. Moreover, Mr Argyrou's affidavit was not filed within the 21 day period for a certificate of service under *CPR 6.17(2)*. It was not sworn until 6 April 2022 and it was only entered on CE File on 1 June 2022. However, it is not a pre-condition for a valid default judgment that such a certificate is filed, *Henrikson v Pires [2011] EWCA Civ 1720*.

50. The critical question is whether, in the light of Mr Argyrou's affidavit, the Defendant was properly served with the Particulars of Claim on 18 February 2022, the date given. This is upwards of 14 days before the Claimant submitted its request for judgment in default and the Court ultimately gave judgment.

51. *CPR 6.40(3)* provides for service out of the UK by three alternative methods. As alternatives to service through state or consular channels, this includes service by a method permitted by a Civil Procedure Convention or Treaty (*CPR 6.40(3)(b))* and any other method permitted by the law of the country where the claim form or other document is to be served (*CPR 6.40(3)(c))*. However, *CPR 6.40(4)* provides that nothing in these provisions or in any court order authorises or requires a person to do anything which is contrary to the law of country where the claim form or other document is to be served.

52. The UK and Cyprus are each party to *the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 1965* ("***the Hague Service Convention***"). *Article 10* of the *Hague Service Convention* provides as follows.

> "Provided the State of destination does not object, the present Convention shall not interfere with –
>
> (a) the freedom to send judicial documents, by postal channels, directly to persons abroad,

(b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,

(c) the freedom of any person interested in a judicial destination to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination."

53. In his affidavit of service, Mr Argyrou described himself as "Judicial Bailiff at the Nicosia District Court". This proposition is unchallenged and, in their letter dated 1 August 2023, Athos Demetriou stated that Mr Argyrou is a licensed process server in Cyprus. I am thus satisfied that, at the date of service, Mr Argyrou was or can be treated as an official or other competent person through which the Claimant was entitled to effect service of the Claim Form and Particulars of Claim under *Article 10(c)* of the *Hague Service Convention*.

54. The issue is thus whether Mr Argyrou effected service on the Defendant in accordance with the law of Cyprus. It is at least implicit in Mr Traube's witness statement dated 19 July 2023, that Mr Argyrou failed to do so. This is on the basis that, in Para 8 of his witness statement dated 19 July 2023, Mr Traube stated that, "without waiving privilege," he understood "from the Defendant's Cypriot lawyers that…for service to be deemed correctly effected in Cyprus, it must be served on the treasurer or secretary of a corporate body pursuant to *Order 5(7)* of the *Civil Procedure Rules of Cyprus*…". Having done so, he stated, baldly, that this "was not the case". Whilst his statement is infelicitously worded, the gist of his evidence is thus that service was not effected on the treasurer or secretary of the Defendant. However, he did not provide further particulars nor did he deal with Mr Aryrou's affidavit of service.

55. By the time, Mr Traube made his witness statement, KMT had been on the record as the Defendant's solicitors for upwards of a month. They filed notice of change on 15 June 2023. Moreover, by then, Mr Argyrou's affidavit of service had been on CE File for upwards of a year. As such, it was openly accessible to KMT at the latest from the

time they filed notice stating that they were acting for the Defendant in these proceedings.

56. However, at the hearing on 26 July 2023, it appeared KMT and, through them, counsel were unaware of Mr Argyrou's affidavit. At the risk of being seen to be over indulgent to the Defendant, I thus provided Ms Whelan, at the hearing itself, with hard copy of Mr Argyou's affidavit and certain other documents on CE File and then gave the Defendants the opportunity to file evidence *inter alia* in respect of Mr Argyrou's affidavit together with expert evidence on the law of Cyprus. This was for the purpose of clarifying and assessing the merits of the Defendant's case in relation to service. In my judgment, once Mr Argyrou's affidavit was filed, it was and is incumbent on the Defendant to file specific evidence challenging the factual contents of Mr Argyrou's affidavit to successfully advance a case based on irregular service. I thus presented the Defendant with a further opportunity to do so.

57. As it happens, the Defendants did not file further evidence challenging Mr Argyrou's account save for the contents of Athos Demetriou's letter dated 1 August 2023 filed pursuant to my directions. This contained an observation that "from the search we have carried out it appears that the Secretary of the Company was (at the time of service) Dilea Secretarial Limited and not, as stated in the affidavit of service, George Kadis". However, the Defendant has not challenged the proposition that Mr Argyrou attended its registered office on 18 February and served the court process nor that it was received at the Defendant's registered office by Mr Kadis. Nor has it done anything itself to clarify Mr Kadis's status or role within the company at the time of service. It simply relies on Athos Demetriou's observation that it *appears* to them, from their search, that Dilea Secretarial Limited, not Mr Kadis, was company secretary at the relevant time.

58. The status and connections of Dilea Secretarial Limited are obscure. No doubt, this company was itself correctly recorded as the Defendant's company secretary at the relevant time. However, the Defendant was and is plainly in a better position than anyone else to confirm whether it is aware of the identity of George Kadis and, if so, to confirm his role and status, at the relevant time, in relation to the Defendant itself and Dilea Secretarial Limited. In my order dated 26 July 2023, I gave it the opportunity to do so when providing further evidence with respect to Mr Agyrou's affidavit of service. Since it has chosen not do so, I can reasonably surmise that, at

the time of service, there was, indeed, an individual called George Kadis who was authorised to accept service on the Defendant's behalf, whether as an employee or otherwise, and thus gave Mr Argyrou the impression he was authorised to accept service of court documents on this basis.

59. To what conclusion does this lead? On the available evidence, it leads – in my judgment – to the conclusion that the Defendant was properly served with the Claim Form and Particulars of Claim on 9 February 2002 according to a method prescribed by *CPR 6.40(3)*.

60. For the rules governing service under the law of Cyprus, Athos Demetriou refer to *Section 372* of the Com*panies Act* and *Order 5 rule 7* of the *Civil Procedure Rules* in Cyprus. I am advised that *Section 372* provides that "a document may be served on a company by leaving it at or sending it by post to the registered office of the company". *Order 5 rule 7* provides as follows.

> "In the absence of any statutory provision regulating service of process upon a corporate body, service of an office copy of a writ of summons or other process on the president or other head officer or on the treasurer or secretary of such a body or delivery of such copy at the office or such body shall be deemed good service, and in the case of any company not formed in Cyprus, the copy may be left at its place of business in Cyprus, or if there is no such place, with any person in Cyprus who appears to be authorized to transact business for the company in Cyprus, and such leaving of the copy shall be deemed good service unless the Court or a Judge otherwise orders. And where by any law provision is made for the service of any writ of summons or other process on any corporate body or any society or fellowship or any body or enumber of persons, corporate, or unincorporated, the service of the office copy of a writ may be effected accordingly".

61. It is unclear whether these provisions apply to the originating process of a jurisdiction outside Cyprus. However it is implicit in Athos Demetriou's observations that they do apply to such process. On the face of the relevant provisions, they also appear to provide for service to be effected, in Cyprus, by leaving a document at the office or registered office of a company. However, it is the unchallenged professional advice of Athos Demetriou that "leaving or posting a copy of the judicial document at the

registered address of the company does not constitute good service" in Cyprus. Under the law of Cyprus, "it must be effected on a particular person at the registered address of the company", such as an employee of the company, cit. *NTR Beach Diners Ltd v Adamou Civ App no 373/2012, 15/1/2018 (Cyprus).*

62. Athos Demetriou do not themselves say anything about the status of Mr Kadis. However, in the absence of evidence to the contrary, it appears Mr Kadis was authorised to accept service on behalf of the Defendant, whether as an employee or otherwise, and service on him was effected at the Defendant's registered office, through a licensed process server in Cyprus. Service as such was permitted by the *Hague Service Convention* and the law of Cyprus. It was thus good service for the purposes of *CPR 6.40.*

63. Regardless of whether service was successfully effected according to a method prescribed by *CPR 6.40*, Ms Whelan submitted that service was irregular on the basis that, contrary to *CPR 6.45* and *7.8*, the Claim Form and Particulars of Claim were not accompanied by a translation or Response Pack. It was also at least implicit in her submissions that Mr Galley could not have been entitled to judgment in default because, contrary to *CPR 12.12(7),* it was not shown that no other court had exclusive jurisdiction to hear and decide the case. She submitted that, in the present case, the courts of Cyprus have exclusive jurisdiction to entertain the claim based on an exclusive jurisdiction clause.

64. As a litigant in person, Mr Galley did not specifically challenge these points. However, he made no concessions and maintains he is not bound by an exclusive jurisdiction clause. On the available evidence, it is not possible for me to determine whether Mr Galley contracted upon terms providing for the courts of Cyprus to have exclusive jurisdiction. No doubt, this was also the position in August 2022 when this court gave judgment by default. However, it can be inferred, on the available evidence that, on 18 February 2022, when the Claim Form and Particulars of Claim were served at the Defendant's registered office, the Claim Form and Particulars of Claim were not accompanied by a translation or Response Pack.

65. The next question that arises is whether the default judgment is irregular owing to these defects of procedure. In my judgment, the answers to this questions is no.

66. The Rules contain a comprehensive code for the commencement of proceedings, service of documents, acknowledgment of service and judgment in default. However, the mandatory jurisdiction in *CPR 13.2* to set aside an irregular judgment in default of acknowledgment of service is only exercisable in a narrow set of circumstances. In the present case, the claim was not satisfied prior to judgment and the Defendant has never filed an acknowledgment of service. Moreover, none of the conditions of *CPR 12.3(3)* are applicable. For the Defendant to succeed on its application to set aside the default judgment under *CPR 12.3*, I must thus be satisfied that, whilst the Defendant has never filed an acknowledgment of service, "the relevant time for it to do so ha[d not] expired" by the time the Claimant submitted its request for judgment or, at the latest, when judgment was given.

67. In the present case, the Claim Form stated that "particulars of claim are to follow". Although the Claimant contends that the Claim Form and Particulars of Claim were served on the same occasion, the Rules thus provided for an acknowledgment of service to be filed "14 days after service of the Particulars of Claim", *CPR 10.3(1)(a).* Since the service allegedly took place on 18 February 2022, upwards of 14 days before the Claimant submitted his request for judgment, the critical issue is thus whether service was validly effected on his behalf on that date.

68. The logic of this is apparent from Colman J's conclusion, in *Shiblaq v Sadikoglu [2004] EWHC 1890,* that since the relevant time for a defendant to file its acknowledgment of service is calculated to commence from the date of service of the claim, there can be no regular default judgment until after the claim form is served in accordance with one of the prescribed methods of service.

69. If the claimant fails to effect service in accordance with one of the prescribed methods, it matters not whether the claim form is given to the defendant, *Olafsson v Gissurarson [2006] EWHC 3162*. However, the irregularity must defeat one of the statutory pre-conditions for a default judgment under *CPR 12.3.* On this basis, non-compliance with the "free standing" statutory requirement to file a certificate of service did not render a default judgment irregular in *Henrikson v Pires [2011] EWCA Civ 1720*.

70. In the present case, the conditions in *CPR 13.2* for setting aside a default judgment do not comprehend nor are they directed to the supplementary provisions in relation to

evidence in *CPR 12.12(7)*. It follows that the putative absence of evidence showing, for the purpose of *CPR 12.12(7)(ii),* that "no other court has exclusive jurisdiction under the Act, the 2005 Hague Convention, the Lugano Convention or Judgments Regulation to hear and decide the claim…" does not lend support to the Defendant's application for an order setting aside the default judgment for irregularity under *CPR 12.2*. In my judgment, the same is true of the absence, contrary to *CPR 6.45* and *7.8*, of a translation or Response Pack to accompany the Claim Form and Particulars of Claim.

71. However, I have jurisdiction, if necessary, to rectify any errors of procedure under *CPR 6.45*, *7.8* and *12.12(7).* It is now well established that the courts' statutory jurisdiction, under *CPR 3.10*, to rectify an error of procedure such as a failure to comply with a rule or practice direction cannot be deployed so as to bypass the requirements of a specific dispensing power, such as the statutory power to dispense with service of a claim form under *CPR 6.16, Ideal Shopping v Mastercard Inc [2012] EWCA Civ 14.* In *Shiblaq* and *Oluffson* (supra), Coleman J and Mackay J each declined to apply *CPR 3.10* in this way so as to validate judgments in default. In *Boxwood Leisure Ltd v Gleeson Construction Services Ltd [2021] EWHC 947 (TCC),* O'Farrell J also declined to exercise her statutory powers to dispense with the service of a claim form. However, rectifying the material errors of procedure in the present case does not involve making an order to dispense with service altogether. On analogy with the view taken by Lord Brown in *Phillips v Symes (No 3) [2008] UKHL 1*, with which Lords Bingham, Rodger and Hale were in agreement and Lord Mance did not dissent, I can simply determine that service was effective notwithstanding the errors of procedure.

72. Moreover, in the present case, there is compelling reason for me to exercise the statutory jurisdiction. This is on the basis that there is no reason to suggest the Defendant was, in any material sense, misled or prejudiced by the material procedural defects, including the omission to provide a translation or response pack and, to the extent its jurisdictional challenge has not been properly resolved, the Defendant has no one to blame but itself or its professional advisers. Although some reliance was placed on the errors in its lawyer's correspondence prior to judgment, there is no evidence that, had it not been for the errors, the Defendant would have elected to serve an acknowledgment of service nor is there other evidence on which I can

reasonably infer that the relevant errors had a material bearing on the Defendant's failure to file an acknowledgment of service at any time prior to the Default Judgment. At all material times, the Defendant was represented by lawyers and can be taken to have been fully aware of the nature of the claim being advanced against it. With full knowledge of the claim, it appears to have taken a deliberate decision not to engage with the UK proceedings.

73. Had the Defendant engaged with the legal proceedings and filed an acknowledgment of service with a view to disputing the court's jurisdiction, this aspect of the case would have been resolved at an early stage. There is a specific procedure for resolving such a dispute under *CPR Part 11*. If it had a good case, this would have been resolved in the Defendant's favour at an early stage. By deliberately failing to engage, the Defendant is itself culpable for the position in which it finds itself. To set aside the Default Judgment owing to the material errors would thus achieve an unjust and disproportionate outcome. Under *CPR 3.10*, I shall thus deem service to have been properly effected to the extent necessary notwithstanding the putative errors of procedure.

(5) Disposal

74. The Application is dismissed.