

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand
London
WC2A 2LL

BEFORE:

MASTER DAGNALL

BETWEEN:

JUSTICE INVESTMENTS LTD

CLAIMANT

- and -

VISALIA ENEGIA SL T/A NACE	<u>(1) DEFENDANT</u>
PABLO ABEJAS GARCIA	<u>(2) DEFENDANT</u>
ALEJANDRO ORTEGA HERRERO	<u>(3) DEFENDANT</u>
CARMEN DONCEL RODRIGUEZ	<u>(4) DEFENDANT</u>
FELPUGOS ABEJAS SL	<u>(5) DEFENDANT</u>

Legal Representation

Mr Martin Haschka (Advocate) on behalf of the Claimant

Mr Ian Andrews (Advocate) on behalf of the Claimant

Mr Simon Gilson (Barrister) on behalf of the First and Second Defendants

Mr Antony Pidgeon (Solicitor) on behalf of the First and Second Defendants

Third, Fourth and Fifth Defendants not in attendance nor represented

Other Parties Present and their status

None known

Approved Judgment

Judgment date: 19 February 2024

Reporting Restrictions Applied: **No**

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Master Dagnall:

1. In this matter before me, I have considered a number of requests dated 1 December 2023 by the Claimant for default judgment against the Third, Fourth and Fifth Defendants.
2. The Claimant's claim, as set out in the particulars of claim signed by counsel, are to the effect that they are the holding company of a subsidiary company which was at least previously known as Vivier and Company Limited ("Vivier"), and that they entered into transactions whereby the subsidiary provided some €2 million to the Fifth Defendant under the terms of a loan agreement which provided for the Fifth Defendant: to use the monies by way of making an investment in the First Defendant; to, in due course, repay the capital of the €2 million loan with interest to the subsidiary, Vivier; and to pay what was called a profit share to the Claimant to be calculated by reference to the First Defendant's profits.
3. The Claimant asserts that, the monies having been provided, the Defendants, in one way or another, managed to alter or fail to implement what had been agreed, with the result that the Fifth Defendant failed to make payments which were due to Vivier, but also has failed to make payments in relation to the profit share to the Claimant.
4. Vivier has taken steps of its own to seek to enforce the loan agreement against the Fifth Defendant, but these proceedings have been brought, at least presently, by the Claimant alone in tort for alleged wrongs committed by the Defendants.
5. A claim is made in breach of fiduciary duty against the First Defendant, and claims are made for deceit, unlawful means conspiracy and lawful means conspiracy against all of the Defendants.
6. The proceedings having been issued on 11 April 2023, I made an order granting permission to serve the various Defendants out of the jurisdiction in Spain. I have been provided with certificates of service, which satisfy me that the various Defendants were served in accordance with that order.
7. The First and Second Defendants chose to actively defend the proceedings and have filed full defences, in which they deny numerous elements of the claims and advance various defences, and have agreed a general stay of the proceedings with the Claimant, which resulted in an order of Master Thornett on 23 August 2023, which provides that the proceedings are so stayed.
8. The Third, Fourth and Fifth Defendants, however, have not sought to file any acknowledgments of service or defences, as required by the rules. In those circumstances, the Claimant sought (and seeks) judgment in default.
9. I raised questions as to whether this was appropriate either generally or specifically in terms of the request for judgment, which sought particular financial figures, those being figures which were said would have been the amount of the profit share had the matter proceeded as the Claimant contended had been agreed between all the various parties.

10. My general concern was under Civil Procedure Rule 12.9 which reads:

“Claim against more than one defendant
12.9

(1) A claimant may obtain a default judgment on request under this Part on a claim for money or a claim for delivery of goods against one of two or more defendants, and proceed with the claim against the other defendants.

(2) Where a claimant applies for a default judgment against one of two or more defendants—

(a) if the claim can be dealt with separately from the claim against the other defendants—

(i) the court may enter a default judgment against that defendant; and

(ii) the claimant may continue the proceedings against the other defendants;

(b) if the claim cannot be dealt with separately from the claim against the other defendants—

(i) the court will not enter default judgment against that defendant; and

(ii) the court must deal with the application at the same time as it deals with the claim against the other defendants.

(3) A claimant may not enforce against one of two or more defendants any judgment obtained under this Part for possession of land or for delivery of goods unless—

(a) they have obtained a judgment for possession or delivery (whether or not obtained under this Part) against all the defendants to the claim; or

(b) the court gives permission”

and whether there was any interaction between the stayed claims against the First and Second Defendants and the default judgments which were sought to be obtained against the Third, Fourth and Fifth Defendants which meant that on the requests for default judgment or other application those claims could not:

“be dealt with separately from the claim[s] against the other defendants.”

11. My specific concern was whether the claims were for specified sums of money such that any default judgment should simply be for the amount sought; or whether they were, in fact, claims for unspecified amounts of money, in which case the Court should make an order for damages to be assessed, as set out in Civil Procedure Rules 12.4 and 12.5.

12. Mr Andrews, Assistant Company Secretary of the Claimant, speaking for it in the light of the medical condition of its director, Mr Haschka who had intended to speak for it at the hearing, has provided a skeleton argument and made submissions in which he submits, firstly, that the claims against the various Defendants are not so

interrelated so as to mean that they cannot be dealt with separately and where the Claimant is prepared to accept at this hearing that no default judgment and nothing which the Court does in granting it or implementing it should be binding on the First and Second Defendants.

13. With regards to my specific concern, he submits, firstly, that, in principle, these are claims for specified sums of money, where, in the particulars of claim, it is stated that the Claimant has suffered certain specific particulars of loss, even though damages are only claimed in general terms; and, secondly, that the Claimant is, effectively, claiming on the basis of what would have happened if the arrangement had proceeded as intended. He says that that the Claimant's primary case is that this is not a situation where the relevant wrong, if it had not been committed, would have resulted in the transaction simply not taking place and where damages should be calculated on the basis of a difference between what has been paid out on the Claimant's side and what has been received in return, but rather on the basis that what has happened is that there was a first stage, which was the relevant agreement which proceeded satisfactorily, and then at least the Third, Fourth and Fifth Defendants engaged in a wrongful second stage, which resulted in the Claimant's then existing rights and their value being lost, and so the Claimant can simply claim for the value of those particular rights, which are said to be the relevant profit share.
14. Mr Andrews submitted that this could all be demonstrated relatively simply in actual and accounting terms. He said further that the Court, particularly if relevant material was produced, should be prepared to proceed on a paper basis without a further hearing; but if there was to be a further hearing, it would be desirable for counsel to be instructed to represent the Claimant.
15. Mr Gilson, for the First and Second Defendants, was primarily concerned to avoid anything occurring which could, in any way, prejudice his clients in the future while the matter is merely presently stayed as against them.
16. He drew my attention not only to CPR 12.9 but to the White Book notes at 12.9.1. I bear in mind that it is made clear in those notes, by reference to the case law, that the Court should be very concerned about granting a default judgment, in particular, where a situation of alternatives was being alleged; and where, if a default judgment was granted against some Defendants on the basis of one alternative, there would then be a complete inconsistency if the action was pursued against other Defendants on the basis of the opposing alternative. However, it seems to me, that the case law cited supports the proposition that where there is not such an inconsistency, a court will be much more ready to grant a default judgment.
17. Mr Gilson also drew my attention to the decision in *Page v Champion Financial Management Ltd & Ors* [2014] EWHC 1778 (QB) and, in particular, paragraphs 62 to 69 in which Mr Simon Picken QC, sitting as a deputy High Court judge, held that there was no actual jurisdictional difficulty in a court granting potentially inconsistent default judgments, albeit that it would require strong circumstances to persuade the court to risk that possibility.
18. I am satisfied, as I have already said, that the Third, Fourth and Fifth Defendants have been served, and have failed to comply with the rules with regards to acknowledgment of service and defences and, further, that in those circumstances,

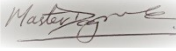
under CPR part 12 but, also, otherwise, under part 3 of the Civil Procedure Rules, the Court can, in principle, grant default judgments against them.

19. I am further satisfied that steps have been taken to notify those Defendants, by email addresses which they themselves have used, of this hearing and that they have not attended this hearing, notwithstanding such notifications.
20. It seems to me that this is not one of these situations where the Court should refuse to grant default judgment on the basis of possible inconsistencies and like difficulties.
21. The claims in this particular case are being brought in tort, specifically, against the Third, Fourth and Fifth Defendants, for deceit; and where a judgment in relation to deceit, which is a subjective matter, against one set of Defendants, does not, in any way, carry with it the implication that other Defendants have committed the same or any similar deceit. Likewise, the other claims against these Defendants are in conspiracy; and it is perfectly possible for these Defendants, or two or more of them, to have engaged in an actionable conspiracy between themselves without one or more of the other Defendants being parties to the conspiracy.
22. It does not seem to me that granting default judgment against the Third, Fourth and Fifth Defendants necessarily implies any wrongs as having been committed by the First and Second Defendants; and it also does not seem to me to be a case of alternatives in any way at all. This is not a situation where, by making a finding against the Third, Fourth and Fifth Defendants or granting a judgment against them, I am in any way either stating or not stating that the First and Second Defendants have committed any wrongs.
23. In all those circumstances and subject to the need to protect the First and Second Defendants, it further seems to me that it would be inappropriate, simply because the Claimant and the First and Second Defendants have reached at least some form of accommodation for the moment and for which, for all I know, may well last in the future for a substantial or possibly even everlasting period of time, and because of the fact that they have decided to stay proceedings as between themselves, for that in some way or other to result in an outcome which prevents the Claimant obtaining a default judgment against the Third, Fourth and Fifth Defendants as a result of those Defendants having broken the provisions of the Civil Procedure Rules. At first sight, such an outcome would seem to give rise to a potential denial of justice so far as the Claimant is concerned and give the Third, Fourth and Fifth Defendants, effectively, some form of windfall benefit.
24. It, therefore, seems to me to be appropriate to grant default judgments against the Third, Fourth and Fifth Defendants, so long as the First and Second Defendants can be protected and left in a position where nothing is being determined or, indeed, found to be the case as, against them.
25. I have discussed formulations with Mr Andrews and Mr Gilson, and they are content with a formulation along the lines of the following.

“The default judgment shall not in any way be binding on or affect any defences that are sought to be advanced by the First and Second Defendants. It shall, further, not amount to or give rise to any finding or determination of fact or of law binding on or against the First Defendant and/or the Second Defendant.”

and it does seem to me that that will afford them full protection.

26. I then come on to the specific question as to whether or not I should grant default judgments for particular amounts of money. It does not seem to me that I should do so.
27. In coming to that conclusion, I have considered the recent decisions in *Edward v Okeke & Ors*, being my own decision, [2003] EWHC 1192 (KB) and the decision on appeal from me of Mr Justice Johnson, [2023] EWHC 2932 (KB).
28. In my decision, I came to the conclusion that a claim for damages in tort was generally not a claim for a specified sum. That involved my considering but rejecting a decision, effectively, to the contrary of a chancery master, as he then was, in *Merito Financial Services Ltd v Yelloly* [2016] EWHC 2067 (Ch).
29. On appeal, Mr Justice Johnson found it unnecessary to decide whether my decision or whether *Merito* decision was correct on that particular point; but it seems to me that where my decision fully considered the previous decision and where I am not satisfied that my decision was incorrect, that I should follow it. In any event, Mr Justice Johnson proceeded on the basis that a mere statement of sums said to be particulars of loss in a statement of case was not sufficient to render a claim for a specified sum without something more of greater clarity.
30. It seems to me, for all those reasons, that I should be treating this matter as a claim for an unspecified sum; and therefore, my judgment should be for damages to be assessed.
31. In the particular circumstances, as a matter of case management and as provided for by CPR 12.8, it seems to me that I should give directions for the relevant assessment; and, in circumstances where the Third, Fourth and Fifth Defendants do not seem to be prepared to engage, I should simply provide that: the Claimant should serve a witness statement evidencing the loss claimed and how it is said to have been caused, together with a set of legal submissions as to how the claim is put in law, by a particular date; that the Third, Fourth and Fifth Defendants should have a period of time to respond and the Claimant a period of time to answer should they respond; and that the matter should be listed for a Disposal Hearing.
32. If, of course, the Defendants do respond, then it may be that further directions would be required, but it seems to me that that is all that is required for the moment.
33. I will further make a provision that those Defendants should be served by sending to the email addresses in the circumstances. They will have the usual ability of any party who has not attended the hearing of an application to apply to have it relisted or orders set aside or varied, and it will be for them to decide whether or not, at any point in the future, to take up such an opportunity. Of course, if they do learn of this order and do not apply promptly, that, in itself, may well be held against them, but that is not a matter for me to consider at this particular hearing.
34. For all those reasons, therefore, that is the order which I am going to make. There will, no doubt, be some submissions about costs in due course, but those are the substantive elements.

Approved  11.4.2024

This Transcript has been approved by the Judge.

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