THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

7 December 2018

CUNICO RESOURCES NV AND OTHERS v DASKALAKIS AND ANOTHER
[2018] EWHC 3382 (Comm)

BEFORE: MR JUSTICE ANDREW BAKER

CASE SUMMARY

The conditions for judgment in default under CPR 12.3(1) were not satisfied where a defendant had filed an acknowledgment of service late but (just) prior to the default judgment application and there is no application to set aside that acknowledgment of service.

The claimants brought two actions (the "2017 Claim" and the "2018 Claim") against the two defendants, individuals who had worked for the Cunico group. The defendants were domiciled in Switzerland when the proceedings were brought and the claims fell within the material scope of the Lugano Convention.

This judgment dealt with two applications relating to the 2018 Claim: Cunico Marketing's application dated 4 July 2018 for judgment in default against Mr Daskalakis under CPR 12.3(1) and Mr Daskalakis' cross-application dated 10 July 2018 for a retrospective extension of time for filing an acknowledgment of service ("AoS"). The time for filing an AoS expired on 6 June 2018 and Mr Daskalakis filed his AoS on 4 July 2018, an hour before Cunico Marketing filed its application for default judgment. To the extent required by his application for an extension of time, Mr Daskalakis also applied for relief from sanctions for the late filing of his AoS.

The main issue for consideration was whether an AoS filed late, but before a request or application for judgment in default under CPR 12.3(1), precludes the grant of such judgment, the issue being one of the proper construction of the conditions set out in CPR 12.3(1). Andrew Baker J set out three possible meanings of CPR 12.3(1) which emerge from the authorities:

1. CPR 12.3(1) only allows the court to grant default judgment where, at the time of judgment, there is no AoS and the time for acknowledging service has expired;
2. CPR 12.3(1) allows the court to grant default judgment so long as, at the time the request or application for default judgment is filed there was no AoS and the time for acknowledging service had expired;
3. CPR 12.3(1) allows the court to grant default judgment where a timely AoS was not filed, irrespective of any AoS later filed, *ex hypothesi* after expiry of the time period set under CPR Part 10.

For Cunico Marketing to succeed, the third meaning would need to be correct as Mr Daskalakis filed the AoS late but just prior to the default judgment application.

Andrew Baker J took the view that the language of CPR 12.3(1) naturally conveys the first meaning, setting out his reasoning as follows ([43]):

> "*Starting, as one should, simply by reading CPR 12.3(1), in my judgment* "*… the claimant may obtain judgment … 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*", *naturally read, connotes that:*

> *i) there are two cumulative requirements, (a) and (b); and*
> *ii) the requirements are set by reference to the circumstances as they stand when judgment is obtained.*"

The judge considered that the natural meaning does not convey a single requirement that the defendant did not file within the time required, but two cumulative requirements, that the defendant has not filed the AoS and that the time has expired ([44]-[45]). He considered that this accords with the purpose of CPR 12.3, which gives the claimant the option of obtaining a judgment without the merits of his claim ever being considered, where the defendant is not participating in the proceedings, but which is not designed or intended as a means of avoiding the need to prove a disputed claim. Where the defendant is playing procedural games or acting abusively, the remedy is that a late-filed AoS or defence is liable to be set aside under CPR 3.10 ([47]-[50]).

Andrew Baker J considered that the second meaning, where the determinative moment is when the request for default judgment is filed or the application issued, is unsatisfactory as the language of CPR 12.3 does not state or imply that this date has any bearing, nor is there any reason why it ought to. As to the third meaning, Andrew Baker J considered that, although there is some support for it, there is authority against it in *Unilever plc v Pak Supermarket* [2016] EWHC 3846 (IPEC) ([53], [89]).

After considering the relevant authorities in more depth ([55]-[88]), the judge provided the following summary ([89]):

> "*This full review of the authorities (assuming there are no others I should have considered) leads me to the following summary, leaving aside which of these views were or were not part of the ratio for any actual decision, namely that: -*
>
> *i) the first meaning has the support of Blair J in ESR Insurance Services and (all things being equal) would have had my own support;*
>
> *ii) the second meaning has the support of Popplewell J, Phillips J and HHJ Hacon;*
>
> *iii) the third meaning has the support of Neuberger J (as he was at the time) and Morison J, but in circumstances where I wonder whether their support for that meaning would subsist today;*
>
> *iv) the third meaning also has the apparent, but not definitive, support of Popplewell J, but that support for the third meaning is inconsistent with his firm support for the second meaning and was expressly not followed by Phillips J and HHJ Hacon;*
>
> *v) the third meaning has the more unequivocal support of Deputy Master Pickering and Jefford J, both of whom declined to follow Phillips J's view but were unaware of HHJ Hacon's, but in my respectful view Deputy Master Pickering and Jefford J's views are unpersuasive and unsatisfactory*."

Andrew Baker J considered that even if *McDonald & McDonald v D&F Contracts Ltd* [2018] EWHC 1600 (TCC) (Jefford J) could be read as deciding that the third meaning is correct, he would decline to follow it. *Unilever plc v Pak Supermarket* [2016] EWHC 3846 (IPEC), which determined that the third meaning was not correct, was not considered in *McDonald*, and he would follow *Unilever* ([90]).

It was unnecessary to decide between the first and second meanings as Cunico Marketing's case depended upon the third meaning being correct. Had it been necessary to do so, Andrew Baker J would not have made the decision *de novo* but would have adopted the second meaning, following the authorities and preponderance of views expressed against the first meaning. However, he would have done so with a real sense of concern that those decisions and views are wrong to reject the first meaning and that the second meaning was not the natural reading of the language of CPR 12.3(1). He would have done so in the hope that the question might reach the Court of Appeal for a definitive ruling ([92]).

In conclusion, the conditions for judgment in default under CPR 12.3(1) were not satisfied as Mr Daskalakis filed an AoS late but (just) prior to the default judgment application and there was no application to set aside that AoS. The default judgment application was therefore dismissed ([93]).

As to Mr Daskalakis' application for retrospective permission to extend time to file his AoS or relief from sanctions, it was appropriate on the facts to waive CPR 11(2) to enable Mr Daskalakis to challenge jurisdiction notwithstanding that his AoS was filed out of time. Accordingly, the question of an extension of time did not arise ([101]-[102]). Had the question arisen, the judge would have exercised his discretion (applying the principles in *Denton v TH White Ltd* [2014] EWCA Civ 906) to refuse an extension (*inter alia* on the basis that Mr Daskalakis' default was substantial and it was entirely his fault that he did not file a timely AoS). This would not have been the end of the 2018 Claim at first instance for Mr Daskalakis, as he would have his right to apply under CPR 13.1 for the default judgment to be set aside by showing that he has a real prospect of success on the merits or that there is other good reason to allow the claims against him in the 2018 Claim to proceed to trial ([104], [117]).