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IN THE HIGH COURT OF JUSTICE  
BUSINESS AND PROPERTY COURTS  
OF ENGLAND AND WALES  
BUSINESS LIST (ChD)  
**[2024] EWHC 506 (Ch)**



No. BL-2023-000569

Rolls Building  
Fetter Lane  
London EC4A 1NL

Thursday, 25 January 2024

Before:

MASTER PESTER

B E T W E E N :

MBS RECOVERY LIMITED

Claimant/Respondent

- and -

KENNETH GEORGE QUINNEY

Defendant/Applicant

MR D LEWIS (instructed by Morr & Co LLP) appeared on behalf of the Claimant/Respondent.

MR M WEAVER (instructed by Freeths LLP) appeared on behalf of the Defendant/Applicant.

J U D G M E N T

**(Via Microsoft Teams)**

(Transcript prepared without the aid of documentation)

MASTER PESTER:

Introduction

- 1 This is my judgment on an application dated 30 June 2023 to set aside a judgment in default obtained by the claimant on 7 June 2023 (“the Default Judgment”).
- 2 The application to set aside the Default Judgment is made on two bases:
  - (1) That the proceedings were not properly served upon the defendant in accordance with CPR Rule 6.9 such that the Default Judgment must be set aside under CPR Rule 13.2; and/or
  - (2) that the defendant has a real prospect of successfully defending the claim, and/or that there are other good reasons why the Default Judgment should be set aside and that he has acted promptly in making the application in the circumstances such that the Default Judgment ought to be set aside under CPR rule 13.3.
- 3 The claimant is a UK resident English company. The defendant is an Australian national. In the particulars of claim there is a plea that at all material times relevant to this claim he was resident in England, but that in 2021 he left the UK and moved to Spain. I understand that is not admitted on the part of the defendant, though I am not sure anything turns on it for present purposes.
- 4 I should say something about the basis of the claim. The claim, as set out in the claimant’s particulars of claim, concern equitable remedies for the defendant’s appropriation to his own use and benefit of £3.5 million of monies held at all times upon express trust for the principal, as defined. “The principal” is defined as being MSL Services Limited (“MSL Belize”), a Belize company, together with its predecessor companies. See paras.2 and 3 of the particulars of claim. The precise identity of “the predecessor companies” is not identified.
- 5 It then said that the equitable interests pleaded below were assigned by the principal to the claimant. The claimant is a wholly owned subsidiary of MSL Belize. Paragraph 10 pleads how the express trust arose. There is then a plea that from 2018 to 2020, the defendant undertook that he would, as a trustee, accept and control monies belonging to the principal. That is at paragraph 11(3). There is then a further plea that the defendant procured the receipt of a total of just over £6.5 million. It is also pleaded that the defendant charged the principal £10,000 a month in fees for purported services, and there is a further plea that the defendant acted dishonestly, and various particulars are given at paragraph 18. Then the claim is made that the defendant is liable in equity to the claimant as assignee of the principal’s equitable interest in the sums paid over, together with proprietary rights to recover.
- 6 In terms of remedy, the claimant seeks an order that the defendant do pay the sum of just over £3.5 million which is said to be the actual sum that has been misappropriated, and held upon constructive trust; an order that the defendant pay to the claimant the sum of £310,000 as damages or restitution; orders for tracing and accounting; interest and such further or other relief as the court thinks fit.

## Background

- 7 The proceedings were issued on 13 April 2023. On the same day the claimant applied for permission to serve out of the jurisdiction. On 28 April 2003 I made an order granting permission to serve out of the jurisdiction, although it was sealed on 2 May 2023. The operative parts of that order are as follows.:
- (1) The claimant has permission to serve the claim form, particulars of claim and any other document in these proceedings on the defendant at Villa Marie Calais, Los Naranjos de Santa Rosa 22, Urb: Santa Rosa 296050, Malaga or elsewhere in Spain.
  - (2) The defendant has 21 days after service on him of the particulars of claim in which to respond by either:
    - (a) filing and serving an admission;
    - (b) filing and serving a defence; or
    - (c) filing and serving an acknowledgement of service, and where an acknowledgment of service is filed and served, the defendant has a further 14 days in which to file and serve his defence.
- 8 There is a letter dated 3 May 2023, addressed to Villa Marie by the claimant’s solicitors. Morr & Co. It is said to have been sent on 4 May 2023. The operative parts of that letter are as follows. It says at the beginning that: “Enclosed by way of service on you are the following sealed court documents...” – and then it lists the claim form, the particulars of claim, initial disclosure, the sealed order of the court permitting service of all documents in these proceedings in Spain, the acknowledgment of service form, an admission form and a Form N9B (defence and counterclaim). It draws attention to paragraph 2 of the sealed order setting out time limits in which the defendant is to respond by either filing and serving an admission, filing and service a defence, or filing and serving an acknowledgement of service.
- 9 On 19 May 2023, there is a further letter from the claimant’s solicitors. This effectively, in substance, repeats the contents of the earlier letter, but it adds at the end the following:
- “Please note that these documents have already been served upon you by letters dated 3 and 4 May 2023.”
- 10 We also have a statement, dated 24 May 2023, of personal service from a Spanish process server to the effect that on 24 May 2023 at 5.26 p.m. service was effected on an individual called Preja Andrei Ioan. The process server confirms that he “served the documents exhibited hereto and marked RG1” upon that individual and the process server has added this bit “... who confirms that Mr Kenneth Quinney lives there, but is now in Argentina and agree (sic) to collect the documents.”
- 11 The defendant says, via his solicitor, that he was first made aware of the proceedings on 26 May 2023, when he was notified of them by that neighbour in Spain, and he instructed solicitors on 29 May 2023, namely Freeths LLP. Two certificates of service have been filed by the claimant’s solicitors at court. The first certificate of service, which is dated 25 May 2023 (it is on the standard form), on the box that says “On what day did you serve?” there is the date of 24 May 2023. Then the “date of service” box has been filled in “25 May 2023”. By the box “What documents did you serve?” there is the claim form, particulars of claim,

initial disclosure, response pack and court order permitting service out. By the box “On whom did you serve?” it says “Kenneth Quinney”. Where it says, “How did you serve the documents?”, two boxes have been ticked. One is the box “by delivering to or leaving at a permitted place”, and, secondly, the box “by other means permitted by the court”. Under the heading “Please specify” it says, “by international post to Spain.” One might observe that is not entirely accurate. The service or purported service which took place on 24 May 2023 was not effected, it seems to me, by international post to Spain; it was in fact, as we have seen, service by leaving documents, as the process server explains, with a neighbour. There is then a statement of truth stating “I believe the facts stated in the certificate are true” and it is signed by Ms Sally Hutchings, who gives her position or office held as “Legal Director/Solicitor”.

- 12 We then have a second certificate of service. This one is dated 2 June 2023. Again, it has been filed by Ms Hutchings. This one gives the date “On what day did you serve?” as 4 May 2023 and the “date of service” box has been filled in as 11 May 2023, and the same boxes about “how did you serve the documents?” have been ticked.
- 13 Now, one might ask: what is the basis in the second certificate of service for giving the date of service of 11 May 2023? There is no evidence as to this, but the claimant’s skeleton argument explains that international post to Spain takes between three and five working days and so “A conservative seven days were allowed as a reasonable period for service, and accordingly the date of service is 11 May 2023”. So, we have the letter being sent on 4 May and then allow seven days and that takes one to 11 May 2023.
- 14 On 2 June 2023, the claimant’s solicitors made a request for a default judgment. On 7 June 2023 the Default Judgment was indeed entered in favour of the claimant. There seems to have been some muddle when this was sealed, but I do not think anything turns on that. The Default Judgment orders the defendant to pay the claimant a total of £4,789,568.70 inclusive of costs.
- 15 An acknowledgment of service was then filed on 9 June 2023. There is evidence from an e-mail from the defendant’s solicitors calculating the defence would then be due 14 days thereafter on 27 June 2023. On 29 June 2023 a defence and additional claim was filed in draft, settled by leading counsel. But of course by that point, the Default Judgment had been entered.

Legal principles

- 16 For the purposes of this judgment, I now set out in full CPR rules 6.9(2) and 6.9(3):

“(2) Subject to paragraphs (3) to (6), the claim form must be served on the defendant at the place shown in the following table...

<b>Nature of defendant to be served</b>	<b>Place of service</b>
1. Individual	Usual or last known residence.
3. Individual being sued in the business name of a partnership	Usual or last known residence of the individual; or principal

	or last known place of business of the partnership.
4. Limited liability partnership	Principal office of the partnership; or any place of business of the partnership within the jurisdiction which has a real connection with the claim.
5. Corporation (other than a company) incorporated in England and Wales	Principal office of the corporation; or any place within the jurisdiction where the corporation carries on its activities and which has a real connection with the claim.
6. Company registered in England and Wales	Principal office of the company; or any place of business of the company within the jurisdiction which has a real connection with the claim.
7. Any other company or corporation	Any place within the jurisdiction where the corporation carries on its activities; or any place of business of the company within the jurisdiction.

(3) Where a claimant has reason to believe that the address of the defendant referred to in entries 1, 2 or 3 in the table in paragraph (2) is an address at which the defendant no longer resides or carries on business, the claimant must take reasonable steps to ascertain the address of the defendant's current residence or place of business ('current address')."

17 CPR rule 6.14, headed "Deemed Service", is also worth setting out in full as follows:

“6.14 A claim form served within the United Kingdom in accordance with this Part is deemed to be served on the second business day after completion of the relevant step under rule 7.5(1).”

18 There is there at CPR rule 7.5 the table setting out various dates. It is common ground that rule 6.14 has no application to proceedings served outside the United Kingdom. We are here dealing with service in Spain.

19 CPR rule 12.3. sets out the conditions under which a default judgment may be obtained. 12.3(1) provides as follows:

“(1) The claimant may obtain judgment in default of an acknowledgment of service only if at the date on which judgment is entered –

(a) the defendant has not filed an acknowledgment of service or a defence to the claim (or any part of the claim); and

(b) the relevant time for doing so has expired.”

20 CPR rule 13.2 then provides what needs to be done on an application to set aside a default judgment. A default judgment must be set aside pursuant to CPR rule 13.2(a) in circumstances where (a) the conditions in CPR rule 12.3(1)(b) were not satisfied, that being the relevant time for filing of the acknowledgment of service had not expired when the default judgment was obtained; or where proper service of the claim form and particulars of claim had not been effected. I refer here also to the notes in the *White Book* at p.442 Volume 1, which explains that rule 13.2 refers to judgment in default being set aside irrespective of the defendant’s lack of prospects of success if the claim has not been served.

21 There is an alternative basis for setting aside default judgment pursuant to CPR rule 13.3(1) (a) and/or (b), namely where:

“(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 why –

(i) the judgment should be set aside or varied; or

(ii) the defendant should be allowed to defend the claim.”

22 As to what is meant by a “real prospect”, the court applies the well-known test derived from *Easy Air Limited v Opal Telecom Limited* [2009] EWHC 339 (Ch), at [15]. It is also clear that, on an application to set aside judgment in default under the second limb, one refers to the well-known test in *Denton v TH White Ltd* [2014] EWCA Civ 906; [2014] 1 WLR 3296 and the conditions set out in that judgment.

23 In this case it is submitted on behalf of the defendant that he did not become aware of the claim until 26 May 2023, only 12 days prior to the Default Judgment was obtained, and that he acted thereafter promptly and reasonably.

### Evidence

24 On this application I have a witness statement of Jade Flint who is the defendant's solicitor at Freeths. I do not intend to summarise all of what is said there in this judgment, but noticeably what she says, at paragraph 8, is that the defendant is usually resident in the UK but has been in Argentina temporarily since 20 May 2023. She says the defendant flew out to Argentina from the UK and will return to the UK in July. Then she says, at paragraph 9, that the defendant's first awareness of these proceedings came on 26 May 2023 when he was notified by a neighbour of his property in Spain that they had received court documents in his name. Then she says:

“The defendant accordingly contacted my firm on 29 May 2023 in order to instruct us in relation to the proceedings.”

25 There is no evidence that has been filed in response to this. I do, of course, take into account, in considering the claimant's response, the certificates of service themselves.

### My decision

26 My view is that this is one of those cases where a Default Judgment must be set aside under CPR Rule 13.2. I will set out my reasons fairly shortly. I cannot be satisfied on the evidence before me that valid service was effected on 11 May 2023, as the second certificate suggests. Counsel for the claimant submitted that a certificate of service was “sacrosanct”. I do not understand what is meant by that, and no authority was relied upon to support that submission. Unlike service within the UK, there is no deemed service in relation to foreign service. As I understand it, what both parties were submitting to me, it was common ground that the question of whether the proceedings had been validly served abroad is to be decided as a factual issue on the balance of probabilities.

27 In this case, I have no evidence from Ms Hutchings. Very commonly when there are issues about the validity of service, a party puts in evidence from their solicitor stating that “On such and such day I posted such and such documents or gave instructions to someone to do that, who in turn confirmed to me that that it was done”. There is no evidence of that sort before the court.

28 The claimant relies on the two certificates of service. At the moment I will pass over the fact that there are two certificates of service, which is itself, in my view, somewhat curious. I accept, of course, that Ms Hutchings would not have filed a certificate of service had she not taken steps to confirm that this was the true position and that she believed it to be true. I simply note that she has not chosen to explain what those steps to confirm the position may have been. It is, of course, true that the certificate of service itself contains a statement of truth in this form: “I believe that the facts stated in the certificate are true.” So, I accept entirely that the relevant documents were posted on 4 May 2023. But it seems to me there is then the second question, which is whether the material set out under cover of the letter of 3 May 2023 was ever delivered. As to this, there is simply no positive evidence such as any tracing information or tracking information to support the submission that it reached its intended destination. As against that, I have clear evidence from the defendant's solicitors at paragraph 9 as to what the defendant says was the first awareness of the proceedings.

29 There is also paragraph 18 of Ms Flint's witness statement, which says the following:

“Fundamentally the defendant did not see the proceedings purportedly served on 3 and 4 May 2023 as at the date of this witness

statement. It is also unclear why the claimant has purported to serve the proceedings on more than one occasion.”

- 30 I have no basis for rejecting that evidence. I accept that it would perhaps have been better for the defendant himself to give that evidence rather than providing it via a solicitor. However, I do not think that it is open to this court simply to reject that evidence on an interim basis absent some positive confirmatory evidence going the other way.
- 31 I also note that such further inferential evidence as does exist tends only to support the contention that the proceedings were not served on the defendant on 11 May 2023. I note again a point that Ms Flint has also picked up on, that no explanation has been given as to why on the claimant’s case service was effected a second time. One inference which might be drawn is that the claimant itself had some doubts about the validity of service.
- 32 I was taken to a further letter dated 2 June 2023 from the claimant’s solicitors addressed to the court, which says the following:
- “We attach a corrected certificate of service in this matter pursuant to the order of Master Pester dated 2 May 2023. We served the claim form, particulars of claim, initial disclosure, response back and court order permitting service out on the claimant (the documents) via International Post on 4 May 2023. The deemed service provisions in CPR 6.2(6) do not apply to proceedings served out of the jurisdiction. We have therefore allowed 7 days as a reasonable period for service and accordingly the date of service is 11 May 2023. We also arranged for the documents to be served by a process server on 24 May 2023, and the previous certificate of service incorrectly included that date as the date of service.”
- 33 Then there is, perhaps I should add, an apology for this error. But that still does not explain why the claimant thought it might be a good idea to carry out service a second time. That is the question that has been raised and in my view has not been answered.
- 34 The second point I note is that it is instructive to note the defendant’s own actions. After the point when he accepts that the proceedings first came to his attention when he was away in Argentina, he very promptly, almost immediately, instructs solicitors and begins to take steps to prepare a defence. Yet, if I were to accept the contrary case being put forward by the claimant, which suggests he was served on or about 11 May 2023, he appears simply to have done nothing, and sat on his hands. That is inconsistent with his subsequent behaviour. I do not say that is in any way determinative. I am however deciding these matters on the balance of probabilities, as both parties agree is the proper test, and it seems to me that is a further pointer towards my conclusion.
- 35 Therefore, it seems to me that this is one of these cases where service did not allow sufficient time to the defendant to file an acknowledgement of service and judgment in default was entered prematurely. Even if valid service took place on 24 May 2023, by handing the documents to the neighbour, which of course is not what was expressly permitted under the order that I made giving permission to serve out of the jurisdiction, then 21 days were available to the defendant in which to file an acknowledgment of service. This was done on 9 June 2023, comfortably within the 21 day period which was specified.



- 36 Accordingly, in my view, the conditions under CPR, rule 12.3(1)(b) were simply not satisfied. Default Judgment must be set aside.
- 37 As I have concluded then I must set aside the Default Judgment. I do not think that it is either necessary or appropriate for me to say very much about the defence as actually filed. I will confine myself simply to a few high level points.
- 38 The defence challenges what is said in the particulars of claim on the following bases: (a) the claim as advanced is done so in part on fictitious account of relevant facts; (b) the defendant dealt with the funds in question pursuant to a written contract, the terms of which are at odds with the claims advanced by the claimant; (c) the defendant denies offering to provide trustee services via limited liability companies; (d) the defendant then has a whole section alleging that a certain individual, Paul Baxendale-Walker, asked the defendant to deal with the funds which he did, the results of which, it is said, is that the claimant is now estopped from bringing the claims and the defendant cannot be said to have acted dishonestly or with any knowledge of breach of trust; (e) the defendant did not appropriate any sums, or sums were being paid out of various bank accounts by a certain Mr Jackson on the specific instructions of Mr Baxendale-Walker; and (f) the fund in question did not belong to the claimant's assignors, but belonged personally to Paul Baxendale-Walker, and as such the claimant has no *locus* to bring this claim. Again, I just give a summary of the defence. At paragraph 3 it makes the point that it is not clear what is meant by the term "predecessor companies" in the particulars of claim and paragraph 12 does raise, in terms, a challenge to the claimant's title to sue.
- 39 The defendant relies on a one-page document. This is headed "Private Contract". It is signed by the defendant, but it is not signed by Mr Baxendale-Walker, who is the person that the defendant now alleges to be behind these proceedings. A comprehensive challenge to the authenticity of this document has been made. I note what has been said about it. I also note that in response to the defence, the claimant filed a document headed "Grounds of Opposition." I am very uncertain as the status of that document. It is not a skeleton. It is not evidence. I have, of course, considered what is said therein. Ultimately, the defendant's counsel on this point said that questions are to be asked of each party's version of events as between the claimant and the defendant. I do not think I should be at this stage saying anything more on that beyond what I have already indicated by way of the summary of the parties' respective cases.

#### Conclusion

- 40 I will therefore set aside the Default Judgment and give the defendant leave to defend. I will hear from counsel at this stage as to what further consequential directions I can usefully give at this juncture.
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**CERTIFICATE**

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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