IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

COMMERCIAL

[2015] EWHC 328 (Comm)

No. 2014 Folio 110

Rolls Building

Friday, 6th February 2015

Before:

MR. JUSTICE POPPLEWELL

B E T W E E N :

(1) CHRISTOPHER TAYLOR
(2) JANET LILIAN BEVAN TAYLOR — Claimants

- and -

(1) GIOVANI DEVELOPERS LTD
(2) ANDREW PURCELL — Defendants

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MR. J. DAVIES (instructed by Highgate Hill Solicitors) appeared on behalf of the Claimants.

MR. B. HARDING (instructed by Gateley LLP) appeared on behalf of the First Defendant.

THE SECOND DEFENDANT did not appear and was not represented.

J U D G M E N T

(As approved by the Judge)

MR. JUSTICE POPPLEWELL:

1 The First Defendant is a company registered in Cyprus and domiciled there for the purposes of the Judgments Regulation. It carried on business at the material time as a property developer. They are a married couple who bought a property off-plan from the First Defendant in 2010 in substitution for another property which they had earlier bought off-plan from the First Defendant in 2008. The second defendant, Mr. Purcell, was a financial adviser, whom the Claimants allege was the agent of the First Defendant in making a number of misrepresentations about the property and available finance.

2 There are two applications before the court. The first in time is the Claimants' application for judgment in default of acknowledgment of service which was issued on 25th June 2014. The second is an application by the First Defendant, made on 19th September 2014, for a retrospective extension of time within which to challenge the jurisdiction of the court. The logical way in which to deal with the applications is in reverse chronological order. This is my judgment in relation to the extension application.

3 I should set out briefly the Claimants' evidence of the events which give rise to the claim, which is as follows. The Claimants are individuals of moderate means, aged 69 and 72. Between 2003 and 2008, they consulted Mr. Purcell as their financial adviser about long-term financial planning and pension provision. In May 2008 Mr. Purcell wrote to them regarding an opportunity to purchase off-plan property in Cyprus. It was, they say, Mr. Purcell who introduced them to the holiday developments which were to be built by the First Defendant in Cyprus, and it is their case that at all times Mr. Purcell acted as the First Defendant's agent. Their case is that Mr. Purcell made various representations regarding this opportunity, in particular in respect of the way the purchase would be financed and the rental potential of the property. They say that they were told that they would receive funding of 80% of the purchase price via a mortgage, and that no further payments would need to be made before completion. They say they were told that they would be able to let the property to tourists, and representations were also made as to completion of the property and location of the property, all of which representations they say turned out to be untrue. Their case is that they initially agreed to purchase a property on a development known as Kymma and signed a contract in relation to that property on 28th July 2008. They paid a £2,000 reservation fee, £69,870 by way of deposit, and legal fees of £1,500. They say that by the end of 2009 it had become apparent that the First Defendant was unable to arrange a mortgage to fund their purchase of the Kymma property and that they therefore requested the return of the money they had paid. They say that they were told that was not

possible, and were told that they could purchase a property on a different development, called Aqua Residence with the benefit of a mortgage. They therefore agreed and entered into a contract to purchase that property in about June 2010. In due course no mortgage was available and the Aqua Residence property has not been completed.

4 The procedural chronology starts in July 2013. On 22nd July 2013 a Claim Form was issued in 2013 Folio 978 by the Claimants against the First Defendant and Mr. Purcell, and additionally against the organisation for which Mr. Purcell was working at the time of the alleged representations. That claim form was issued in the Commercial Court because a large number of claims have arisen out of off-plan purchases of properties in Cyprus, which were the subject matter of an order of Cooke J that they be heard in the Commercial Court. In June 2013, I heard a case management conference to manage those claims.

5 The general endorsement in the 2013 Claim Form was as follows:

> "The Claimants claim against the First, Second and Third Defendants rescission and/or damages and/or declaratory relief and/or restitutionary relief and/or interest pursuant to section 35A of the Senior Courts Act 1981 for breach of contract, negligent misstatement, negligence and/or misrepresentation under the Misrepresentation Act 1967 and under common law in relation to the sale of property known as and situated at K105, Block K (Katherine), Aqua Residence, Pyla, Larnaca, Cyprus sold by the First Defendant through and on the advice of the Second and Third Defendants, who were the Claimants' financial advisers. Alternatively, the Claimants claim corresponding relief under Cypriot law and/or relief under the Laws of Cyprus Cap. 149.
>
> The Claimants believe that the English Courts have jurisdiction in this matter on the basis that the Claimants are English domiciled consumers; alternatively that a co-defendant is domiciled in England; alternatively (with respect to the tort claims) that the harmful event occurred in England; alternatively (in respect of the contractual claims) that the obligation was to be performed in England, alternatively that the dispute arose out of the operation of an agency situated in England."

6 That Claim Form was not served on the First Defendant before it expired four months after issue. It was served on Mr. Purcell but after the expiry of the four months, and he issued an application for the claim to be struck out on those grounds.

7 The Claimants therefore commenced new proceedings by the Claim Form in this action, 2014 Folio 110, on 4th February 2014. The Claim Form was identical to the 2013 Claim Form save only that the defendants were the First Defendant and Mr. Purcell. The endorsement was in identical terms.

8 On 20th May 2014, the Claim Form was served by a Cypriot process server on the First Defendant in Cyprus. Although what was served was the 2014 Claim Form, the covering letter under which it was served made a reference in its heading to the previous claim, i.e. 2013 Folio 978.

9 On 10th June 2014 the 21 days for filing an acknowledgment of service expired without any acknowledgement being filed.

10 On 15th July 2014 the Claimants issued an application for judgment in default of acknowledgment of service.

11 On 7th August 2014the Claimants' solicitors sent a letter to the First Defendant in Cyprus serving application for judgment in default of acknowledgment of service.

12 On 13th August 2014 English solicitors instructed on behalf of the First Defendant, called Protopapas Solicitors, entered an acknowledgment of service on behalf of the First Defendant. That was 64 days out of time. The acknowledgment of service indicated that the First Defendant intended to challenge jurisdiction. Under CPR Rule 11(4), as applied in the Commercial Court under Rule 58.7, such an application to challenge jurisdiction has to be made within 28 days of the acknowledgement of service in default of which the defendant is deemed to have accepted the jurisdiction of the Court under Rule 11 (5). That 28-day period expired on 10th September 2014, without a Part 11 application to challenge jurisdiction having been issued.

13 The First Defendant issued its application seeking to challenge jurisdiction on 19th September 2014, and included within it an application for an extension of time within which to make the application for the period of nine days which was necessary. It is common ground that such an extension can be granted retrospectively despite the deeming effect of Rule 11(5): see the judgments of Lord Collins J in *Sawyer v. Atari* [2006] EWHC 2351 (Ch) and *Texan Management Ltd v Pacific Electric Wire & Cable Company Ltd* [2009] UKPC 46.

14 The first question which arises is whether the First Defendant can apply for an extension of time of nine days within which to mount the jurisdiction challenge without also seeking an extension of time for entering an acknowledgement of service. Rule 11(2) provides:

> "A defendant who wishes to make such an application [to dispute the court's jurisdiction or argue that the court should not exercise its jurisdiction] must first file an acknowledgement of service in accordance with Part 10."

15 On behalf of the First Defendant, Mr. Harding argued that an acknowledgment of service which complied with the formalities of Part 10 satisfied Rule 11(2), whether or not it had been served timeously. On behalf of the Claimants, Mr. Davies submitted that in order to qualify under Rule 11(2), an acknowledgment of service must comply in all respects with Part 10, and an acknowledgment of service which does not comply with the time provisions set out in Part 10 is not an acknowledgment of service in accordance with Part 10.

16 The Claimants' submissions are to be preferred on this question. The wording of Rule 11(2) is clear. The acknowledgment of service must be "in accordance with Part 10". There is no reason to treat that as requiring compliance with only some parts of Part 10 and not others.

17 If an acknowledgment of service is not served within time, then there must be some means by which a Claimant can have that acknowledgment of service treated as ineffective unless the Court grants an extension of time. The effect of the submissions advanced on behalf of the First Defendant by Mr. Harding was that if a defendant entered an acknowledgment of service, albeit out of time, that was sufficient to trigger the right to defend the claim, the right to challenge jurisdiction and the right to resist a judgment in default of acknowledgment of service. He was unable to point to any provision of the Rules under which a Claimant would be entitled to have the acknowledgment of service set aside for being out of time. That seems to me to point clearly towards a need on the part of the defendant to seek an extension of time if the acknowledgment of service is to be treated as effective for its main purposes, which are to enable the claim to be defended or to enable a challenge to jurisdiction to be advanced, and to prevent judgment being entered in default of acknowledgment of service.

18 I am fortified in that analysis by the judgment of Flaux J in *Talos Capital Ltd. & Ors. v. JSC Investment Holdings XIV Ltd.* [2014] EWHC 3977 (Comm) in which he had to consider an application for an extension of time both for acknowledgment of service and for time in which to mount a Part 11 jurisdiction challenge, in circumstances which are analogous to the present case. He treated an application for extension of time in relation to the acknowledgment of service

as being necessary because otherwise the acknowledgment of service would be treated as a nullity and would be capable of being set aside as such: see in particular paras. 30, 33 and 44 of that judgment.

19 I turn to the question as to whether there should be an extension of time for service of the acknowledgment of service. That is an application to which, as is common ground, the principles in *Mitchell* and *Denton* apply. Those principles are well known. They involve three stages. At the first stage the court must consider the seriousness and significance of the default which engages Rule 3.9. Secondly, it must identify its cause. Thirdly, it must evaluate all the circumstances of the case, including the two matters specifically mentioned in Rule 3.9, namely the need for litigation to be conducted efficiently and at proportionate cost, and the need to enforce compliance with the rules.

20 Addressing the matter in that order, so far as concerns the seriousness and significance of the default, the delay in this case is of 64 days. I regard that as a considerable period of delay against the time permitted of 21 days. It is a default which is properly categorised as significant and serious.

21 Turning to the second stage, the cause of the delay, in Ms. Sabin's first witness statement on behalf of the First Defendant what was said was that she was instructed that the Claim Form was served on the First Defendant on 7th August 2014. At para.10 she says:

> "Upon receipt of the Claim Form, I am instructed that the First Defendant noted that the facts and matters set out in the Claim Form were identical to those contained within an earlier Claim Form (Claim Number 2013 folio 978) served on 20 May 2014 and that the First Defendant was confused by this. Acting by its then solicitors, Protopapas Solicitors, it filed an Acknowledgment of Service in relation to the 2014 Claim Form on 13 August 2014."

22 That proved to be untrue, and was corrected by Ms. Sabin in a second witness statement made on 3rd February of this year. At para.6 she explained:

> "At paragraph 9 of my First Witness Statement I set out my then instructions that the Claim Form in Claim No. 2014-110 was served on the First Defendant on 7 August 2014. I now understand from Antonis Antoniou, Director of the First Defendant, following him checking his papers that the Claim Form in this matter was in fact served on 20 May 2014. However, the confusion appears to have arisen because of the fact that the correspondence under cover of which the proceedings were served referred to the Claim Number 2013 Folio 978, which is in fact the

> Claim Number relating to proceedings that appear to have been issued in 2013."

23 Ms. Sabin went on at para.11 to say:

> "Notwithstanding the passage of time the First Defendant is still unable to properly understand the claim made in the current proceedings. I am now instructed by Mr. Antonis Antoniou, Director of the First Defendant, that when the First Defendant received the Claim Form, it came very much 'out of the blue'. I am told that the directors were in a state of shock as they did not expect to receive Court papers from the English Court as they had understood that they could not be sued in the UK given the wording of the Contract of Sale. There is now shown and produced to me ... a copy of the Contract of Sale. The choice of law and jurisdiction clause is at Clause 25(b)."

24 The clause referred to, Clause 25(b), is in the following terms:

> "The present Agreement consists of ten pages plus all the appendixes and is drawn up in the English language. Furthermore this Agreement shall be governed by and construed in accordance with the laws of the Republic of Cyprus, and further 'The PURCHASER' and 'The VENDORS' declare that they have read and understood all the contents of this agreement."

25 The Claimants' solicitor, Dr. Alexander-Theodotou, responded to para.11 in a witness statement which was made yesterday. She suggested that it was disingenuous to suggest that the Claim Form came as a surprise to the First Defendant or that there had been no adequate prior warning. She explained that in October 2013 she had had a meeting with a Mr. Lefteris Souttos of the First Defendant to discuss the potential claim. He was, she said, held out by the First Defendant as its business development manager, and its sales and business development director, and has remained, she understands, employed by or engaged by the First Defendant until September 2014. She explains that at the meeting she referred to the misrepresentations which the Claimants were alleging, explained why it was said they were untrue, discussed the return of the deposit to them, and indicated that unless the deposit was returned, she had instructions to issue proceedings. She goes on in her witness statement to state that she also visited a Mr. Giovanni Kouzalis of A&G Kouzalis LLC, Cypriot advocates, who were representing the First Defendant, with regard to these Claimants and other clients whom she represented. She expressed the belief that Mr. Kouzalis would have referred the matter to the First Defendant because that was what he said he would do. She explains that, having received instructions

to commence proceedings, she arranged to collate more documents in the case and Mr. Kouzalis provided some of those documents in November 2013.

26 That is the evidence I have which casts any light on what can be said about the reasons for an acknowledgement of service not being filed until 64 days after it was due. I infer from the timing of the service that it was in fact prompted by receipt of the application for judgment in default.

27 Mr. Harding submitted that the explanation given in para.6 of Ms. Sabin's second witness statement, and the confusion that is there referred to, is a sensible and reasonable explanation for the First Defendant not having entered an acknowledgment of service timeously. I am not able to accept that submission. As I read the witness statement, what is said in para.6 is put forward to explain the confusion that existed in the instructions which Ms. Sabin had been given as to the date of service of the Claim Form. It is not put forward as a reason which was in the mind of anyone at the First Defendant for failing to enter an acknowledgment of service. Although there was a reference on the face of the letter to the 2013 Claim Form, what was served was the 2014 Claim Form, which made clear on its face that there was a need to respond by entering an acknowledgment of service. The explanation which is put forward at para.11 of Ms. Sabin's second witness statement is wholly unsatisfactory. It is shown to be unreliable in suggesting that the claim came very much out of the blue, by what Dr. Alexander-Theodotou says in her second witness statement. In any event, what it amounts to is that a deliberate decision was taken not to respond purportedly on the basis that the choice of law clause in the sale contract meant that any proceedings had to be brought in Cyprus, although the clause referred to is plainly not a jurisdiction clause. My conclusion on the state of the evidence is that no adequate explanation for the failure to enter an acknowledgment of service has been put forward and that the inference to be drawn is that it was a deliberate decision not to participate because the proceedings were regarded as proceedings which ought properly to have been brought in Cyprus.

28 Turning to the third stage of the analysis under the principles in *Mitchell* and *Denton*, I have in mind in particular the consideration that litigation should be conducted efficiently and at proportionate cost, and the interests of justice in this particular case. Where there is a serious delay and it is as a result of a deliberate decision, then *prima facie* both of those interests dictate that an extension of time should be refused. The proper and efficient conduct of litigation is not served by parties being entitled to decide not to participate and then allowed to change their minds after a significant and serious delay merely because they are faced with the consequences that an application for judgment in default of acknowledgment of service has been made. Moreover the amount of the claim is modest by comparison with the cost's consequences to the Claimants of

allowing the First Defendants to defend the claim or challenge jurisdiction. Moreover there is inevitably prejudice to the Claimants in the further delay that that course would involve, although it is fair to say that the Claimants have not pursued the claim, either before or after the commencement of proceedings, with great alacrity. Nevertheless to impose upon the Claimants, who are of modest means and advancing years, the burden of the cost and delay involved in allowing the First Defendant to reopen a final judgment which arose as a result of a deliberate decision on his part, would involve substantial injustice.

29 Nevertheless, for the reasons which I have endeavoured to identify, in my view, the justice of the case lies in refusing the application for an extension of time. This was a significant and serious delay as a result of a deliberate decision not to participate in the proceedings.

30 In those circumstances, it is not necessary for me to consider separately whether I would have granted the nine-day extension required for making the jurisdiction challenge, but I shall simply indicate that, had I regarded it as appropriate to grant an extension in relation to acknowledgment of service, I would not have thought it right to refuse the additional nine days. However, if I were wrong in my conclusion that it is necessary for someone in the position of the First Defendant to seek an extension of time for service of the acknowledgment of service in order to seek an extension of time in relation to making the jurisdiction challenge, then I would have regarded the relevant period which fell to be considered as one which was not properly to be regarded as nine days, but to be regarded as 73 days, being the total period of time, and I would have declined to exercise my discretion to grant an extension of time for making the jurisdiction challenge for the same reasons that I have refused an extension of time in relation to an acknowledgment of service.

[LATER]

31 I turn to the Claimants' application for judgment in default of acknowledgment of service. The application is made under Rule 12.3, which provides:

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

32 The Claimants in this case are obliged to seek a judgment in default by making an application (rather than upon a request) to the court for two reasons. Firstly, under Rule 12.4(2), the Claimants wish to obtain a default judgment on a claim

which consists of claims for other remedies than those set out in Rule 12.4(1), which are essentially money sums, an amount of money to be decided by the court, or for delivery of goods. Secondly, under Rule 12.10(b), an application has been to be made where the judgment in default of acknowledgment of service is sought against a defendant who has been served with the claim out of the jurisdiction under Rule 6.32(1), i.e. under the Civil Jurisdiction and Judgements Act 1982, where permission is not required by that Act.

33 On such an application the practice direction to Rule 12 provides that evidence must be adduced on a number of matters. Paragraph 4.1 provides that the court must be satisfied that the Claim Form has been served on the defendant. Paragraph 4.3 requires that where service has taken place:

> "(1) outside the jurisdiction without leave under the Civil Jurisdiction and Judgments Act 1982, or the Lugarno Convention or the Judgments Regulation ...
>
> ... the evidence must establish that:
>
> (a) the claim is one that the court has power to hear and decide,
>
> (b) no other court has exclusive jurisdiction under the Act or the Lugarno Convention or Judgments Regulation to hear and decide the claim, and
>
> (c) the claim has been properly served in accordance with Article 20 of Schedule 1 to the Act, Article 26 of the Lugarno Convention, paragraph 15 of Schedule 4 to the Act, or Article 26 of the Judgments Regulation."

Paragraph 4.5 provides:

> "Evidence in support of an application [of the kind referred to in para.4.3] must be by affidavit."

34 If the evidence establishes those matters, then the judgment to which the Claimants may be entitled is identified in Rule 12.11 in following terms:

> "Where the claimant makes an application for a default judgment, judgment shall be such judgment as it appears to the court that the claimant is entitled to on his statement of case."

35 A number of points are taken on behalf of the First Defendant as to why those requirements have not been satisfied. First, it is said that the evidence which is relied on is in the form of witness statements of Dr. Alexander-Theodotou and

not, as required by para.4.5 of the practice direction, in the form of an affidavit. That is so. On behalf of the Claimants, Mr. Davies has offered an undertaking that the evidence which is currently in the witness statements will be verified by affidavit. In the circumstances of this case, I regard that as a satisfactory way of dealing with the requirement under para.4.5. I would not have regarded it as appropriate to dismiss the application without affording the Claimants an opportunity to put the evidence on affidavit, and I am prepared to accept an undertaking to that effect rather than adjourning the hearing to await the provision of that affidavit evidence.

36 The next point that is taken is that the condition in Rule 12.3(1)(a) is not satisfied because the First Defendant has filed an acknowledgment of service, albeit late and without, as I have decided, it being appropriate to grant an extension of time. Mr. Harding referred me to some dicta of Blair J in *ESR Insurance Services Ltd. v. Clemons & Ors.* That was a case in which, on the facts, Blair J granted an extension of time and therefore the point now under consideration did not arise, although he expressed himself as saying he had some doubt as to whether a default judgment could be entered where there had in fact been an acknowledgment of service, albeit late.

37 In my view, there are potentially two answers to this point the first of which is decisive. The relief to which the claimant is entitled must be judged by reference to the date of the application. At that time, Rule 12.3 was indisputably fulfilled because there had been no acknowledgment of service then entered and time had expired. In my view, a defendant cannot defeat a claimant's entitlement to relief at the date on which the application is made by subsequently serving an acknowledgment of service outside the time allowed for by the rules, in circumstances where there has been no extension of time, *a fortiori* where there has been an application for an extension of time which has been refused. That is sufficient of itself to dispose of the point. Secondly, there is much force in the argument that what is meant in Rule 12.3 by an acknowledgment of service is a timeous acknowledgement of service; if so even in circumstances (which are not the circumstances of this case) in which an application for judgment in default of acknowledgment of service is made after an acknowledgment of service has been served out of time, Rule 12.3 would be fulfilled in the absence of any extension of time by the court.

38 The next point that is taken is that the evidence in support does not adequately demonstrate that the Court has power to hear and decide the claim, and in particular does not establish that there was a jurisdictional basis for serving the First Defendant in Cyprus under the Judgments Regulation. Mr. Davies on behalf of the Claimants relies on two Articles. First, he invokes Article 15 of the Judgments Regulation which states:

"In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this Section, without prejudice to Article 4 and point 5 of Article 5, if:

(a) it is a contact for the sale of goods on instalment credit terms; or

(b) it is a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or

(c) in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities."

39 Mr. Davies submits that the claim relates to the contract in this case, that the contract was a contract with the Claimants acting as consumers, and that the First Defendant directs his activities to England, and the contact in question falls within the scope of those activities directed to England.

40 On behalf of the First Defendant, Mr. Harding says, first, that the evidence does not establish that the Claimants are consumers. As to that, the evidence is contained in Dr. Alexander-Theodotou's second witness statement, which identifies that they were not purchasing the property in the course of their trades or professions, that they were at the time local government officers prior to their retirement, and that they have never invested in property or anything else professionally. In those circumstances, it matters not whether their purpose in investing in this property was as a financial investment or as a holiday home, or a combination between the two. The test in Article 15 of acting as a consumer draws attention to the criteria of whether it is outside the trade or profession of the putative consumer. The issue has been addressed in a number of authorities, including by Longmore J, (as he then was) in *Standard Bank v. Apostolakis* [2002] CLC 933, in which he held that wealthy private individuals who had entered into forward foreign exchange deals with a bank with a view to profit were not to be treat as consumers for the purposes of Article 15. The contracts in that case were treated as being made outside their particular professions as a civil engineer and a lawyer respectively, because using money in a way which they hoped would be profitable did not mean they were engaging in trade. The contracts in that case were made for the purposes of satisfying their needs, defined as an appropriate use for their income, which were needs in terms of private consumption. The same reasoning would apply to these Claimants if it were their case that the purposes in purchasing the property were solely

investment purposes designed to produce an income to be enjoyed in this country.

41 The second point that is taken by Mr. Harding in relation to Article 15 is that the evidence does not satisfy the requirements of subpara.(c) of showing that the First Defendant was directing its activities to England in relation to this contract. The evidence is that the contract was concluded in England by the Claimants, who are resident here, in discussions with Mr. Purcell, who is also domiciled here. The evidence of Dr. Alexander-Theodotou in her most recent witness statement is that when she met Mr. Souttos, the business development manager and also sales and business development director of the First Defendant, in October 2013, he said in terms that the reason that he could not return the deposit was that the First Defendant did not have it because it had been paid to its agent in the UK who had processed the sale. This was clearly a reference to Mr. Purcell, to whom the sale contracts had been sent for processing. In those circumstances, that is, in my view, satisfactory evidence to show that in relation to this contract the First Defendant was directing its marketing activities to England through its agent, Mr Purcell, who was its agent for the purposes of receiving and keeping the deposit and in relation to the making of the contract more generally.

42 The other jurisdictional provision relied upon by the Claimants is Article 5(3) in relation to the tortious claims on the grounds that the "harmful event" occurred in England, being both where the misrepresentations were made and where the Claimants suffer the loss by paying money to Mr Purcell. The submission is also well founded. The next point which is taken on behalf of the First Defendant is that the evidence does not address the requirement that no other court has exclusive jurisdiction to hear and decide the claim, which, it is submitted, it is for the Claimants to prove rather than for the First Defendant to disprove. Mr. Harding did not identify any other provision under which another court might have exclusive jurisdiction. Insofar as such exclusive jurisdiction might arise under a contract, the only contract which has been produced (and which is not signed) has a clause which is a proper law clause and not an exclusive jurisdiction clause. In those circumstances, I am satisfied that on the current state of the evidence no other court has exclusive jurisdiction to hear and decide the claim.

43 The next point taken on behalf of the First Defendant is that the evidence does not demonstrate that there was proper service of the Claim Form. In this respect, there was an original certificate of service by the Cypriot process server, who certified that the Claim Form had been served, but whose certificate repeated the error contained in the covering letter by having a reference to 2013 Folio 978. The recent evidence contains a certificate from the process server that what was served was the 2014 Claim Form, and indeed there is no issue that

that was what was in fact received on 20th May 2014, as Ms. Sabian, on behalf of the First Defendant, makes clear in her second witness statement.

44 The last point that is taken is that the relief which is sought in the draft order is not something to which the Claimants would be entitled on the face of the Claim Form. The Claim Form claims, as I have indicated in my earlier judgment:

> "... rescission and/or damages and/or declaratory relief and/or restitutionary relief and/or interest pursuant to section 35A of the Senior Courts Act 1981 for breach of contract, negligent misstatement, negligence and/or misrepresentation under the Misrepresentation Act 1967 and under common law in relation to the sale of the property ..."

45 In those circumstances, it appears to me that there is no difficulty under Rule 12.11(1) in the Court granting rescission and granting judgment for damages in an amount which is to be enquired into and assessed, and granting restitutionary relief on the grounds that there should be restitution in an amount which is to be the subject matter of subsequent assessment and enquiry. It is right to say that the amount of the damages or the amount of the restitutionary relief which it would be appropriate to grant does not appear from the Claim Form, it only emerges from the evidence which has been submitted on behalf of the Claimants on this application. If that evidence could properly be taken into account, it would be clear that the appropriate relief would be to make a money sum award in the amount of the sums which have been paid by the Claimants under the contract in the sums of £2,000, £69,870, and to award interest on those sums, both by way of a damages claim and by way of a restitutionary claim.

46 Mr. Harding submitted that where a claimant is entitled to judgment in default of acknowledgment of service for damages to be assessed, or for an amount which is to be enquired into, the defendant should be afforded an opportunity to participate in that assessment or enquiry because the decision to allow the claim to go by default where the claim form does not identify the amount which has been sought should not be taken to be a surrender of the opportunity to dispute the amount in respect of which a judgment is to be given, of which the defendant has no notification from the face of the Claim Form. I see force in that submission, and the Rules suggest that at least where there is a request, rather than an application, for judgment for damages to be assessed, the court may give directions which may include directions aimed at exchange of evidence, disclosure and other matters which would involve both parties participating.

47 I therefore have to consider whether the form in which I give judgment is simply for rescission and for a monetary amount to be determined on a subsequent occasion or whether I should make the assessment today. Mr. Harding, on

instructions, said that he was not in a position to say whether any of the factual bases for quantifying the claim would be the subject matter of challenge, but that the First Defendant ought to have the opportunity hereafter to mount such challenge. It seems to me that, in the light of the evidence which I have, in particular in Dr. Alexander-Theodotou's second witness statement, and the simple facts of the case, the overwhelming probability is that there is no room for any dispute about what the financial consequences should be if the Claimants are entitled to rescind and are entitled to damages for the misrepresentations which are alleged - a judgment to which I have held they are entitled. However, what I propose to do is to proceed to assess the monetary amounts today, but to afford a *locus poenitentiae* to the First Defendant to apply within a limited period with evidence to set aside the judgment on the grounds, and solely on the grounds, that the amounts are otherwise than those which I determine to be appropriate, if so advised.

48 Subject to that *locus poenitentiae*, I will therefore grant judgment in a modified form of the order attached to the application notice. There will be a declaration that the Claimants have validly rescinded the contract of sale referred to in the first witness statement of Dr. Alexander-Theodotou. There will be judgment for the sum of £71,870, being the total amount of the deposit and the reservation fee referred to in the witness statement. There will be an order that the First Defendant pay interest on that sum at a rate of 2% over base rate from time to time from 28th July 2008 until the date of judgment, such amount to be assessed on an application made on paper to the Court if not agreed. There will be a stay of execution on those judgments for 21 days, with a provision that such stay shall be continued if, within that time, the First Defendant makes an application for the amount of the judgment to be varied, supported by evidence. If such an application is made, the parties are to apply in writing to the court for directions as to how it is to be dealt with. I will not now order that it be dealt with on paper but, given that it is likely to involve a dispute of a limited nature and given the size of the sums involved, I express the view that it is very probable that it will be appropriately dealt with on paper.

49 In addition, because the application has essentially succeeded, the First Defendant shall pay the Claimants' costs of the proceedings to date, which are to be subject of a detailed assessment unless otherwise agreed.

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