Hilary Term
[2023] UKPC 3
Privy Council Appeal No 0010 of 2022

JUDGMENT

Lux Locations Ltd (Appellant) *v* Yida Zhang (Respondent) (Antigua and Barbuda)

From the Court of Appeal of the Eastern Caribbean Supreme Court (Antigua & Barbuda)

before

Lord Lloyd-Jones
Lord Leggatt
Lord Stephens
Lady Rose
Lord Richards

JUDGMENT GIVEN ON
31 January 2023

Heard on 5 December 2022

Appellant
Thomas Roe KC
Andrew O'Kola
Daniel Goldblatt
(Instructed by OMO Law Chambers (Antigua))

Respondent
Barry Gale KC
David Dorsett
James Gale
(Instructed by Axiom DWFM Ltd (West End))

LORD LEGGATT:

Introduction

1. This appeal raises questions about the proper approach to the grant of a default judgment for a remedy other than an award of money where the relevant procedural rule says that judgment "shall be in such form as the court considers the claimant to be entitled to on the statement of claim." An initial question is whether such a default judgment can be appealed at all or whether, as the Court of Appeal held in this case, the only means of challenging it is to apply to the High Court to set the judgment aside.

2. To put the claim advanced in the statement of claim in context, it is necessary to outline the now lengthy history of litigation between the parties.

The parties and the agency agreement

3. The appellant, Lux Locations Ltd ("Lux"), is an estate agency which was engaged by the respondent, Mr Yida Zhang, an international investor of Chinese nationality, to assist in buying a large parcel of land (around 6 km^2 in Antigua. Lux was engaged on written terms that, if Mr Yida or an affiliate acquired the land, Mr Yida would pay Lux a commission equal to 9% of the purchase price. The agency agreement also stated that Lux would be responsible for paying, out of its commission, any other commissions pre-agreed with Lux to facilitate the sale. Lux had agreed to pay such a commission, equal to 4% of the purchase price, to an architect, Johann Hesse, in return for his assistance in lobbying the Government for approvals needed for the purchase.

The first action

4. Mr Yida's company, Yida International Investment Antigua Ltd ("Yida Ltd"), acquired the land in August 2014 at a price of US $60m. Mr Yida did not, however, pay Lux its commission. His associate, Mr Kenneth Kwok, wrote to Lux saying that foreign exchange was not available in China to pay the commission and proposing a new agreement under which Lux's right to be paid commission would be replaced by an exclusive right to act as estate agent for the sale of any of the land. When Lux rejected this proposal, an alternative proposal was made to link the payment of the commission to the sale of land by Mr Yida. Lux rejected this proposal too and brought an action ("the first action") suing Mr Yida for the commission of US $5.4m (9% of the US $60m purchase price) payable under the agency agreement.

5. Mr Yida defended the claim and counterclaimed for rescission of the agency agreement, alleging that he had been induced to enter into the agreement by various fraudulent misrepresentations. Some months later Mr Yida amended his defence to add a further allegation. He now claimed that, at or about the time when the written agency agreement was made, the parties had also made a separate oral agreement, which they had apparently never thought fit to record in writing, that the obligation to pay Lux the commission of 9% would only take effect if Lux negotiated a purchase price of US $30m (half the price actually agreed).

The consent order

6. The trial of the first action was scheduled to commence on 7 March 2017 and on that day the parties attended court with their lawyers. Counsel for Mr Yida, Mr Damien Benjamin, asked the judge for time to discuss settlement, which was granted. Terms of settlement were then negotiated and embodied in a consent order. The consent order was signed by the parties themselves and by their respective counsel. The order was then made by the judge after its terms had been explained to her in open court in the presence of the parties and their counsel. The consent order provided for judgment to be entered for Lux against Mr Yida in the sum of US $3m, plus interest at the rate of 8% per annum and legal costs (including sales tax) of US $345,000. Mr Yida was ordered to pay these sums within 21 days.

7. Before the settlement was agreed, Mr Hesse (who was present at court) had agreed that he would forgo the share of Lux's commission that Lux had agreed to pay to him. The principal judgment sum of US $3m represented the rest of Lux's commission. Under the terms of the consent order Lux therefore stood to receive the full net sum that it had expected to receive after paying Mr Hesse. The agreement of Mr Hesse to forgo his commission would not, however, have relieved Mr Yida of the obligation to pay the full sum of US $5.4m to Lux if he had lost at trial. The consent order thus achieved a substantial reduction in Mr Yida's potential liability.

Proceedings to enforce the judgment

8. Mr Yida did not pay the judgment debt within 21 days as ordered. So Lux began enforcement proceedings. On 4 April 2017 Lux obtained a provisional charging order over the shares held by Mr Yida in his company, Yida Ltd. On 23 April 2017, Mr Yida's lawyer, Mr Benjamin, sent an email message to Lux's attorney saying that Mr Yida was having practical difficulties, to do with banking arrangements, in remitting the necessary money to Antigua. On 12 May 2017 Mr Yida paid US $705,486.39 in part satisfaction of the judgment debt. But he did not pay anything more to Lux.

9. On 23 May 2017 Lux's application for a final charging order over Mr Yida's shares was heard. Mr Yida is recorded in the order as being "absent due to illness" but was represented by his counsel, Mr Benjamin. Mr Yida had made an affirmation dated 18 May 2017 stating that his failure to pay the judgment debt was due to practical difficulties with remitting funds to Antigua and "humbly ask[ed] the Court not to grant" a charging order. The judge was unmoved by that request and made a final charging order, to take effect unless the balance of the judgment debt was paid within 14 days.

The second action

10. Mr Yida still did not pay the balance of the judgment debt. Instead, he launched a counter-attack. On 3 July 2017 Mr Yida commenced an action ("the second action") against Lux and its proprietors, Mr and Mrs Dyson, along with two other defendants claiming damages for conspiracy in a sum of US $6,350,555.89. (No explanation was given of how this sum was calculated.) The statement of claim alleged that the defendants had conspired to raise the purchase price of the land from US $30m to US $60m and that Mr and Mrs Dyson had made misrepresentations on which Mr Yida had relied, being essentially the same ones that had been alleged in the first action. Lux applied to have the statement of claim struck out as an abuse of process on the grounds that the pleaded allegations had either been made - or, in so far as they were new, ought to have been made - in the first action, which had been finally resolved by the consent order.

Orders for sale

11. While this strike-out application was pending, Lux continued the process of enforcing the judgment in its favour by applying next for an order for the sale of Mr Yida's shares in Yida Ltd. At a hearing on 19 October 2017 (at which Mr Yida was again represented by counsel) this application was adjourned to be heard on 14 December 2017 and the judge granted an interim injunction to stop Mr Yida in the meantime from taking any step to dispose either of his shares or of any of the land owned by his company.

12. On the return date of 14 December 2017, neither Mr Yida nor anyone representing him attended court. The judge made an order for valuation of the land and shares, sale of the shares and payment of the judgment debt out of the proceeds of sale. The injunction was continued.

13. Mr Yida failed to comply with terms of this order which required his cooperation. So on 26 February 2018 Lux applied to the court for further relief to enable the sale of the shares to take place. Mr Yida responded on 23 March 2018 by applying for a stay. In an affidavit sworn on the same day, Mr Yida referred to the conspiracy claim made in the second action. (By this time Lux's application to strike out the claim had been heard but judgment was reserved.) Mr Yida also said that he had instructed his lawyer to bring a fresh action to set aside the consent order and that his lawyer was finalising the necessary papers for filing. It will be necessary to return in more detail to the grounds for Mr Yida's claim to be entitled to have the consent order set aside, but the essence of Mr Yida's affidavit evidence was that, when he signed the consent order, he misunderstood the nature of the document he was signing and thought it was a release of Mr Hesse's claim for commission. He did not realise that it was in fact a settlement agreement. The reason given for seeking a stay was that, if Mr Yida were to pay the judgment sum to Lux and his claims against Lux were ultimately successful, there would be little, if any, chance of his getting his money back.

14. On 19 April 2018 Wilkinson J declined to entertain Mr Yida's application for a stay and made the further orders sought by Lux to facilitate the sale of Mr Yida's shares in Yida Ltd.

The second action is struck out

15. On 28 June 2018 judgment was handed down in the second action granting Lux's application to strike out the statement of claim as an abuse of the court's process.

This action

16. On 23 November 2018 Mr Yida began the new action foreshadowed in his affidavit eight months earlier. The remedy sought was an order that the consent order be set aside and for repayment of the money that Mr Yida had paid to Lux under the terms of the consent order. It is this action which is now before the Board.

17. The claim form and statement of claim were served on 23 November 2018 at an address in Antigua which was the office of the attorneys who had acted for Lux in the earlier proceedings. They returned the papers on the basis that they were not instructed to accept service on behalf of Lux. This overlooked the fact, however, that the office of the attorneys was also Lux's registered office so that service at that address was valid. The claim form and statement of claim were served again at the

same address on 4 February 2019 and this time service was immediately acknowledged.

18. Relying on the original service of the claim form and statement of claim, Mr Yida on 12 February 2019 filed a request for a default judgment for failure to file a defence within the prescribed period of 28 days. On receipt of the request, a deputy registrar wrote to Mr Yida's attorneys to say that a default judgment could not be entered by the court office because the remedy claimed was one other than a sum of money. The deputy registrar referred to rule 12.10(4) and (5) of the Eastern Caribbean Civil Procedure Rules ("the Rules"), which state:

> "(4) Default judgment where the claim is for some other remedy shall be in such form as the court considers the claimant to be entitled to on the statement of claim.
>
> (5) An application for the court to determine the terms of the judgment under paragraph (4) need not be on notice but must be supported by evidence on affidavit …"

19. On 20 February 2019 Mr Yida made an application for the court to determine the terms of the default judgment under rule 12.10(4). On 7 March 2019 Lux filed a defence to the claim and on 8 March 2019 Lux applied for an extension of time for filing the defence and an order striking out the statement of claim or, alternatively, for summary judgment. Lux's application was supported by an affidavit of Mr Dyson who described the circumstances in which the consent order was made and also explained how it had come about that the defence had been filed late.

The judgment of Robertson J

20. Both applications were heard at the same time by Robertson J and judgment was reserved. While judgment was awaited, Lux's attorney came across on the court file an affidavit from Mr Yida's former lawyer, Mr Benjamin, describing how he had negotiated the terms of the consent order on behalf of Mr Yida and on Mr Yida's instructions (given through a translator). Lux applied for permission to put this affidavit in evidence. The judge refused permission on the ground that the affidavit could with reasonable diligence have been deployed at the hearing.

21. On 20 March 2020 Robertson J gave judgment deciding that: (1) the statement of claim disclosed a valid claim and ought not to be struck out; (2) default judgment

should be entered for the remedy claimed by Mr Yida; and (3) it was unnecessary to consider Lux's applications to extend time for filing the defence and for summary judgment.

The decision of the Court of Appeal

22. The judge granted Lux leave to appeal from her decision to the Court of Appeal. Mr Yida applied to have the order granting leave to appeal set aside and the notice of appeal struck out on the ground that the Court of Appeal has no jurisdiction to hear an appeal from a default judgment and that the only recourse for the defendant is to apply under Part 13 of the Rules to have the judgment set aside. The merits of the appeal and of the application to strike it out were fully argued together at a hearing before the Court of Appeal on 1 October 2020. In a judgment given on 11 January 2021, Thom JA (with whom Baptise JA and Webster JA(Ag) agreed) held that Lux's notice of appeal should be struck out. The judgment did not in these circumstances deal with the substantive merits of the appeal.

23. The main reason given for the Court of Appeal's decision was that a default judgment is not a "judgment or order of the High Court" within the meaning of section 31(1)(b) of the Eastern Caribbean Supreme Court Act ("the Act"). This states:

> "(1) Subject to the provisions of this Act or any other enactment –
>
> …
>
> (b) an appeal shall lie to the Court of Appeal, and the Court of Appeal shall have jurisdiction to hear and determine the appeal, from any judgment or order of the High Court …"

Section 31(2) provides for certain exceptions and qualifications to this general rule, one of which is that no appeal shall lie under section 31:

> "(g) without the leave of the Judge or of the Court of Appeal from any interlocutory judgment or any interlocutory order given or made by a Judge …"

Section 31(2)(g) is itself subject to various exceptions but none of them is material for present purposes. Section 31(3) defines the term "Judge" in section 31(2) to mean a judge of the High Court.

24. The Court of Appeal held that the reference to "the High Court" in section 31(1)(b) of the Act does not include members of the court office who provide administrative support to the High Court and that the phrase "any judgment or order of the High Court" refers only to judicial decisions and not to administrative acts performed by the court office: see para 38 of the judgment. The Court of Appeal further held that the grant of a default judgment is an administrative act performed by the court office and not a judicial decision. The principal basis for this conclusion was rule 12.5 of the Rules, which states:

> "The court office at the request of the claimant must enter judgment for failure to defend if –
>
> (a) (i) the claimant proves service of the claim form and statement of claim; …
>
> (b) the period for filing a defence and any extension agreed by the parties or ordered by the court has expired;
>
> (c) the defendant has not –
>
> (i) filed a defence to the claim …; and
>
> (d) (if necessary) the claimant has the permission of the court to enter judgment."

25. It is common ground that, when Mr Yida's request for a judgment for failure to defend was filed with the court office, all the relevant conditions in rule 12.5 were satisfied. (The fourth condition was not applicable as the permission of the court to enter judgment was not necessary.)

26. Rule 12.5 has to be read together with rules 12.10 to 12.12, which prescribe the content of the default judgment to be entered where the conditions in rule 12.5 are satisfied. The effect of rule 12.10(1) is that, where the claim is for a sum of money or, in the case of a claim for goods, requires or would allow the defendant to pay the

value of the goods as assessed by the court rather than requiring the goods themselves to be delivered, the content of the default judgment is fixed by the Rules. The judgment therefore can and must be entered by the court office without more ado. Where, however, as in this case, the claim is for "some other remedy," an application to the court to determine the terms of the judgment is required by rule 12.10(4) and (5), quoted at para 18 above.

27. The Court of Appeal took the view that, even where the court determines the terms of the judgment under rule 12.10(4), the default judgment "remains an administrative order and not a judicial order": para 32. Two reasons were given for this conclusion. First, it was said that, in determining the remedy to be granted, "the court does not in any way examine the merits of the claim." This is because, the defendant not having filed a defence, the claimant's allegations are treated as true and conclusive of liability for the purposes of the default judgment: para 32. Second, it was said that, where a default judgment is granted by a judge, the nature of the default judgment does not change and the judge in these circumstances is performing a function of the court office: para 33. For the power to do this, reference was made to rule 2.6, which states:

> "(1) Where these Rules refer to an act being done by the court office or require or permit the performance of an act of a formal or administrative character, that act may be performed by a member of the court staff authorised generally or individually in writing by the Chief Justice.
>
> (2) Where these Rules expressly so provide, any other functions of the court may be carried out by a member of the court staff authorised in writing by the Chief Justice.
>
> (3) *If a step may be taken by a member of the court staff* –
>
> (a) that person may consult a judge, master or registrar before taking the step; and
>
> (b) *that step may be taken by a judge*, master or registrar *instead of a member of the court staff*." (emphasis added)

28. In the view of the Court of Appeal, where a default judgment is granted by a judge pursuant to rule 12.10(4), a step required to be performed by the court office

(entry of judgment for failure to defend) is being taken by the judge instead of a member of the court staff.

29. For these reasons, the Court of Appeal decided that, as the grant of a default judgment is an administrative act and not a judicial decision, the default judgment in favour of Mr Yida was not a "judgment or order of the High Court" within the meaning of section 31(1)(b) of the Act, with the result that the Court of Appeal had no jurisdiction to hear an appeal from the judgment.

30. This still left Lux's appeal in relation to its applications to extend time for filing its defence, to strike out the statement of claim and for summary judgment. The Court of Appeal held that the judge was not required to consider these applications as they were made after Mr Yida had requested a default judgment. Rule 12.5 requires that, on receipt of such a request, the court office must enter judgment for failure to defend if the conditions set out in that rule are satisfied, as they were in this case. The Court of Appeal took this to mean that the judge had no power to rule on Lux's applications, citing its earlier decision in *Rolle v Lander* [2014] ECSCJ No 234: see para 40.

The Board's approach to procedural issues

31. The Board recognises that matters of procedure are often best left to be decided by the courts of the jurisdiction from which an appeal is brought, which will naturally have greater knowledge than the Board of the conditions and norms of civil litigation in which the rules of procedure have effect: *Bergan v Evans* [2019] UKPC 33, para 2. In this case, however, the Court of Appeal's decision turns on questions of interpretation of the Act and the Rules which, as it appears to the Board, are matters of law that do not engage or depend on any local conditions or practice and are apt for determination on a further appeal. The Board is fortified in this view by the fact that the Court of Appeal itself (in a constitution presided over by the Chief Justice) has granted discretionary leave to appeal under section 122(2)(a) of the Constitution on the ground that "the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to H[is] Majesty in Council."

Critique of the Court of Appeal's reasoning

32. The proposition that the judgment and order of Robertson J (supported by some 14 pages of reasoning) is not a judicial decision is a startling one, which the Board is unable to accept. There is in the Board's view no justification, as a matter of

language or otherwise, for regarding a default judgment granted by a High Court judge under rule 12.10(4) as outside the scope of the phrase “any judgment or order of the High Court” in section 31(1)(b) of the Act.

33. The Board will consider below the nature of the determination required by rule 12.10(4) and the contention of the Court of Appeal that it involves no examination of the merits of the claim. Even if the Court of Appeal were right, however, that the sole question for the court is whether or not to grant the remedy claimed on the assumption that the allegations in the statement of claim are true, answering that question is not an administrative matter but a task that requires an exercise of judgment by a judge. That is the obvious reason for requiring the terms of the judgment to be decided by the court where the claim is for “some other remedy”. Furthermore, the task is not one which may be performed by a member of the court staff. As the decision is not one of a formal or administrative character and as the Rules do not expressly provide (as they do in relation to monetary claims) that the function may be carried out by the court office or a member of the court staff, rule 2.6 (quoted at para 27 above) does not permit a member of the court staff to determine an application to the court under rule 12.10(4) and (5). The Court of Appeal was therefore wrong to say that, when she heard Mr Yida’s application and granted a default judgment under those provisions, Robertson J was taking a step required to be performed by the court office. She was acting in her capacity as a judge of the High Court and taking a step which, on the contrary, cannot be taken by a member of the court staff.

34. The Board thus considers it clear that the judgment granted by Robertson J is a judgment of the High Court that falls within section 31(1)(b) of the Act. Although the expression “interlocutory” used in section 31(2)(g) is not defined in the Act, the test of whether an order or judgment is final or interlocutory specified in the Rules is whether “it would be determinative of the issues that arise on a claim, whichever way the application could have been decided”: see rule 62.1(3)(b). Applying this test, the judgment granted on Mr Yida’s application to the court under rule 12.10(4) and (5) is an interlocutory judgment because, if the application had been refused, it would not have been determinative of the issues that arise on the claim. It follows that in order to appeal from the judgment the leave of the judge or of the Court of Appeal was required by section 31(2)(g) of the Act. That condition was satisfied, however, as the judge granted leave to appeal from her order. The Court of Appeal was therefore wrong to hold that it did not have jurisdiction to hear and determine the appeal.

The two-step procedure argument

35. The primary argument made on Mr Yida's behalf to support the Court of Appeal's decision is that, where the claim is for "some other remedy" and the conditions in rule 12.5 are satisfied, the Rules on their proper interpretation provide for a two-step procedure. It is said that, first, the court office enters a default judgment which provides for the terms of the judgment to be determined by the court. This resolves the issue of liability. Then, at the second stage, the court determines the terms of the judgment granted by the court office (and thereby specifies the appropriate remedy).

36. In support of this interpretation, counsel for Mr Yida drew an analogy with a default judgment entered on a claim for an unspecified sum of money. On such a claim rule 12.10(1)(b) requires judgment to be entered for the payment of a sum of money to be decided by the court. This judgment is conclusive of liability and there is then a second stage at which the court assesses the amount of money to be paid by the defendant. In the same way, it is argued, on a claim for "some other remedy" the court office must enter a default judgment which is conclusive of liability and there is then a second stage at which the court determines the remedy to be granted to the claimant.

37. In further support of this interpretation of the Rules, reliance is placed on rule 12.13 (headed "Defendant's rights following default judgment"). This states:

> "Unless the defendant applies for and obtains an order for the judgment to be set aside, the only matters on which a defendant against whom a default judgment has been entered may be heard are –
>
> (a) the assessment of damages …;
>
> (b) an application under rule 12.10(4);
>
> (c) costs;
>
> (d) enforcement of the judgment; and
>
> (e) the time of payment of the judgment debt.

- Part 13 deals with setting aside or varying default judgments"

The point is made that rule 12.13(b) presupposes that a default judgment may be entered *before* an application is made to determine the terms of the judgment under rule 12.10(4). Furthermore, the matters listed in the rule do not include an application to strike out the statement of claim, for summary judgment or for an extension of time for filing the defence. This is logical, counsel for Mr Yida submit, as at the stage when an application is made under rule 12.10(4) and (5) liability has already been determined in the claimant's favour on the basis of the allegations made in the statement of claim.

38. In this case no default judgment was entered by the court office on receipt of Mr Yida's request for judgment. As described at para 18 above, Mr Yida's attorneys were told by a deputy registrar that, because the claim was for "some other remedy," it was necessary to make an application to the court under rule 12.10(4) and (5). Counsel for Mr Yida submit that this was an error by the court office and that Mr Yida ought not be disadvantaged by this error. The proceedings should therefore be approached as if the court office had entered a default judgment on receipt of Mr Yida's request as, on Mr Yida's case, it was required to do.

Why the two-step theory is erroneous

39. Vigorously as this theory was advanced by counsel for Mr Yida, the Board does not consider it to be a tenable interpretation of the Rules.

40. The Rules do not say that, on a claim for "some other remedy," the court office must enter a default judgment before an application for the court to determine the terms of the judgment under rule 12.10(4) has been made. Reading rules 12.5 and 12.10 together, it is apparent that, whatever the nature of the claim, only one default judgment is envisaged, the content of which is provided for by rule 12.10. Where the claim is for a sum of money, the form of the default judgment is prescribed by rule 12.10(1) and the court office can and should therefore proceed to enter judgment immediately. Where, on the other hand, the claim is for a remedy other than money - either an order to deliver goods or "some other remedy" - a decision of the court is needed before judgment can be entered.

41. Rather than assisting Mr Yida's argument, the comparison with a claim for an unspecified sum of money in the Board's view shows why his argument is wrong. As

already mentioned, on a claim for an unspecified sum of money where the conditions in rule 12.5 are satisfied, rule 12.10(1)(b) requires a default judgment to be entered for the payment of a sum of money to be decided by the court. Rule 16.2 set outs the procedure for assessing damages after such a judgment has been entered. This procedure is not part of the default process but in effect involves a trial of the issue of quantum. By contrast, where the claim is for some other remedy, the rules do not provide for a default judgment to be entered for relief to be determined in accordance with some further procedure. Rather, rule 12.10(4) requires default judgment to be "in such form as the court considers the claimant to be entitled to on the statement of claim". It follows that default judgment cannot be entered before a determination by the court under rule 12.10(4) has taken place.

42. The Board does not in any event consider that a judgment whose terms remain to be determined by the court is a coherent concept. If the terms of the judgment are to be determined by the court, there can be no judgment until the court has decided on its terms. A judgment which as yet has no terms is as empty a concept as a book with no pages or a football or cricket team with no players.

43. The strongest point made on behalf of Mr Yida is that rule 12.13(b) presupposes that a default judgment may be entered before an application is made under rule 12.10(4) and (5). The explanation for this offered by counsel for Lux is that a claimant may obtain a default judgment for, say, damages to be assessed and then ask the judge also to grant some other remedy such as an injunction. The English case of *Brett Wilson LLP v Person(s) Unknown* [2015] EWHC 2628 (QB), [2016] 4 WLR 69, is said to be an example. In that case, however, no default judgment had been entered before the judge heard an application to award both an injunction and damages. Indeed, under the English Civil Procedure Rules it is not possible to obtain more than one default judgment against the same defendant in the same case. If a claimant wishes to obtain a default judgment for both a sum of money and some other remedy, CPR rule 12.4 expressly requires an application to be made. This situation is not expressly dealt with in the Eastern Caribbean Civil Procedure Rules, but this may be how the Rules should be interpreted. If so, then rule 12.13(b) is otiose, as a situation in which a default judgment is entered before an application under rule 12.10(4) and (5) is determined cannot arise. However, while this represents an infelicity in the drafting of the Rules, it is not a point of sufficient weight to affect the clear meaning of rules 12.5 and 12.10. The presence of rule 12.13(b) cannot wag the dog by creating a two-step procedure for which rules 12.5 and 12.10 do not provide.

The nature of the court's determination under rule 12.10(4)

44. It follows that the court office was right to inform Mr Yida's attorneys that, because his claim was for "some other remedy," a default judgment could not be entered other than under rule 12.10(4) on an application to the court. But it is still necessary to consider the argument, which the Court of Appeal accepted (see para 27 above), that, in determining the terms of the judgment under rule 12.10(4), the court should not consider the merits of the claim but should treat the allegations in the statement of claim as true and conclusive of liability and should decide on that assumption what remedy is appropriate.

45. Counsel for Mr Yida submit that this is the proper approach even where there is a one-step procedure, as is indisputably the case under the English Civil Procedure Rules. In support of this submission they cite *Football Dataco Ltd v Smoot Enterprises Ltd* [2011] EWHC 973 (Ch), [2011] 1 WLR 1978, where Briggs J considered the meaning of what was then rule 12.11(1) (now rule 12.12(1)), which states:

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

Briggs J said, at para 16, that when asked to give default judgment under this rule the court is not called upon to form any view about the merits of the claimant's claim, whether as a matter of fact or law. He also made the point, at para 18, that the need for an application to the court is triggered not by reference to anything connected with the legal foundation for the cause of action, but rather by the nature of the relief sought. He concluded, at para 19:

> "I do not consider that rule 12.11(1) requires the court to second-guess an assertion in the particulars of claim that, as a matter of law, the facts alleged provide the claimant with a cause of action. Rather, the purpose of the requirement for an application is either to enable the court to tailor the precise relief so that it is appropriate to the cause of action asserted, or otherwise to scrutinise the application in particular circumstances calling for more than a purely administrative response."

46. This approach has been followed by judges at first instance in several subsequent English cases: see eg *Otkritie International Investment Management Ltd v Jemai* [2012] EWHC 3739 (Comm); and *Chelsea Football Club Ltd v Greenwood* [2019] EWHC 190 (QB). A similar interpretation of the rule was adopted by Warby J (it appears without reference to *Football Dataco*) in *Sloutsker v Romanova* [2015] EWHC 2053 (QB), para 84, and *Brett Wilson LLP v Person(s) Unknown* [2015] EWHC 2628 (QB), [2016] 4 WLR 69, para 18, where he said:

> "This rule enables the court to proceed on the basis of the claimant's unchallenged particulars of claim. There is no need to adduce evidence or for findings of fact to be made in cases where the defendant has not disputed the claimant's allegations. That in my judgment will normally be the right approach for the court to take. Examination of the merits will usually involve unnecessary expenditure of time and resources and hence contrary to the overriding objective. It also runs the risk of needlessly complicating matters if an application is later made to set aside the default judgment …"

Sloutsker and *Brett Wilson* were both cases in which the remedy claimed included an injunction to restrain further publication of defamatory allegations. Warby J qualified his observations by saying that:

> "the general approach outlined above could need modification in an appropriate case, for instance if the court concluded that the claimant's interpretation of the words complained of was wildly extravagant and impossible, or that the words were clearly not defamatory in their tendency."

See *Sloutsker*, para 86; *Brett Wilson*, para 19.

47. The Board would agree that the approach outlined in these cases is a sound general approach, subject to two qualifications. First, it is important to note that in none of these cases was the defendant actively seeking to contest the claim or the application for a default judgment. The only case among those mentioned above where the relevant defendant appeared at the hearing of the application is the *Chelsea Football Club* case. The defendant there appeared in person to oppose the club's application for a default judgment granting an injunction to restrain him from illegally reselling tickets to football matches; but although he described the claim against him as a "scandal", he had not provided a witness statement or a defence nor identified

any grounds for disputing the claim. In none of these cases, therefore, was the court dealing with a situation where, as in this case, by the time the application for judgment was heard the defendant had demonstrated an intention to defend the claim and set out positive grounds for doing so. It will be necessary to consider whether the same principles apply in such a situation.

48. Second, even where the defendant has not put forward any positive defence to the claim, the approach of treating the allegations pleaded in the statement of claim as valid without examining their factual or legal merits cannot be regarded as an inflexible rule. Neither the cases mentioned above, nor earlier case law, suggest that it is. In particular, such an approach would not be appropriate if it appears to the court that the statement of claim does not disclose any reasonable ground for bringing the claim or is an abuse of the court's process.

The position in principle

49. A rule which requires the court to give "such judgment as the claimant is entitled to", or judgment "in such form as the court considers the claimant to be entitled to", on the statement of claim leaves open the possibility that the court considers that the claimant is not entitled to any judgment on the statement of claim. The logical implication is that, where this is so, no judgment should be entered. That is also what the overriding objective of dealing with cases justly requires. Suppose, for example, that the only remedy claimed in the statement of claim is an injunction - say to stop a book from being published or to require a building to be demolished - and the court considers that, on the facts alleged, applying the relevant legal principles, it is not appropriate to grant any such injunction. It would not be right in those circumstances, nor compatible with the wording of the rule, for the court to grant a remedy which the court does not consider the claimant to be entitled to on the statement of claim. In such a situation the court should therefore decline to grant default judgment.

50. The same applies, in the Board's view, where it appears to the court that the statement of claim is one that ought to be struck out, for example because it is incoherent, does not disclose a legally recognisable claim or is obviously ill-founded. The aim of the default judgment procedure is to provide a speedy, inexpensive and efficient way of dealing with claims which are uncontested and to prevent a defendant from frustrating the grant of a remedy by not responding to a claim. Those objectives, however, do not justify a court in giving judgment on a claim which is manifestly bad or an abuse of the court's process, even if the defendant has failed to take the requisite procedural steps to defend it. The public interest in the effective administration of

justice is not advanced, and on the contrary would be injured, by granting the claimant a remedy to which the court considers that the claimant is not entitled.

51. It is true, as Briggs J pointed out in the *Football Dataco* case (see para 45 above), that the need for an application to the court is triggered not by anything connected with the legal foundation of the claim, but by the nature of the relief sought. Where the remedy sought is an award of money only, a default judgment can be obtained automatically by an administrative process without any judicial scrutiny. But it does not follow that, where an application to the court is required, the court should only ever consider what remedy is appropriate given the allegations made and have no regard to whether those allegations have any legitimate basis. The underlying policy reason for requiring the safeguard of judicial scrutiny where a remedy other than money is claimed must be that granting such a remedy potentially involves greater interference with rights and freedoms of the defendant (and perhaps others) than entering a money judgment which the defendant can apply to set aside. If the safeguard is to be meaningful, it should operate as a filter for manifestly ill-founded or improper claims.

52. In the *Football Dataco* case Briggs J did not suggest otherwise. The question which concerned him was whether a default judgment should be given when a reference had been made to the Court of Justice of the European Union in another case raising the same legal issue. The fact that the legal basis of the claim was the subject of uncertainty was held not to be a sufficient reason to decline to grant default judgment. The decision was expressly limited, however, to cases "where the particulars of claim disclose a cause of action which is not obviously bad" (para 24). Likewise, in the defamation cases referred to at para 46 above, Warby J made it expressly clear that the general approach which he outlined would not be suitable where, for example, the claim could be seen to be unsustainable.

The historical position

53. This is also consistent with how earlier versions of the rule in England and Wales have been interpreted for well over a century. What is now rule 12.12(1) of the English CPR has a pedigree which dates back to the first rules of court made after the Judicature Acts of 1873 and 1875. The Rules of Court of 1875 made specific provision for default judgment in relation to certain claims such as those for a debt or liquidated sum. For all other actions, Order XXIX, rule 10, provided that:

> "if the defendant makes default in delivering a defence or demurrer, the plaintiff may set down the action on motion

> for judgment, and *such judgment shall be given as upon the statement of claim the court shall consider the plaintiff to be entitled to*." (emphasis added).

Materially similar wording has continued to be used in England and Wales to the present day.

54. From its inception the rule has been interpreted as giving the court a discretion whether to grant the relief sought or indeed any relief. In *Charles v Shepherd* [1892] 2 QB 622 the claimant appealed to the Court of Appeal from a decision refusing to enter a final judgment under what had by then become Order XXVII, rule 11 of the Rules of the Supreme Court 1883. In dismissing the appeal, Lord Esher MR said, at pp 623-4:

> "We have consulted the members of the other division of the Court of Appeal upon the question of the construction to be placed upon Order XXVII, r 11, and we are of opinion, upon the true construction of that rule - first, that the Court is not bound to give judgment for the plaintiff, even though the statement of claim may on the face of it look perfectly clear, if it should see any reason to doubt whether injustice may not be done by giving judgment; it has a discretion to refuse to make the order asked for …"

55. The same view was taken in more modern times by the Court of Appeal in *Phonographic Performance Ltd v Maitra* [1998] 1 WLR 870. In that case the claimant applied in default of defence for a permanent injunction to restrain breaches of copyright in certain sound recordings. The defendants did not appear at the hearing but the judge granted an injunction limited to six months only, taking the view that to grant an injunction of unlimited duration would, in the circumstances, be an abuse of process. The Court of Appeal disagreed with the judge on that point and allowed the claimant's appeal. Lord Woolf MR, giving the judgment of the court, nevertheless (at p 876E) endorsed the judge's view that the court had a discretion to refuse to grant an injunction or to grant it on such terms and conditions as are just. (The Board notes in passing that it was not suggested - and, so far as the Board is aware, has never been suggested - that the Court of Appeal of England and Wales lacked jurisdiction to hear the appeal as it was not from a "judgment or order of the High Court" within the meaning of section 16(1) of the Senior Courts Act 1981.)

56. Rule 12.10(4) of the Rules has clearly been modelled on the corresponding English rule. It is therefore reasonable to infer that it was intended to have the same

established legal meaning. As discussed, the rule has consistently been interpreted as affording the court a discretion to decline to grant any default judgment if the court considers that it would be unjust to do so. Even if the defendant has done nothing to show that it has a defence to the claim, it would be wrong to enter judgment on the statement of claim if it appears to the court that the statement of claim is one that ought to be struck out.

The relevance of the late filing of a defence

57. As already observed, this case differs from the authorities so far discussed in that Mr Yida's application for a default judgment was actively opposed by Lux which, by the time of the hearing, had (i) filed a defence and (ii) applied for an extension of time for doing so. Two issues arise. The first is whether in such circumstances the court should proceed to hear the claimant's application at all. The second is whether, if it should, the court in dealing with the application should take into account the pleaded defence or any evidence filed by the defendant to show that it has a good defence to the claim.

58. On a plain reading of rule 12.5, it might be thought that the time at which all the conditions set out in that rule must be satisfied is when judgment is entered. That interpretation also fits naturally with the terms of rule 13.2(1), which states:

> "The court must set aside a judgment entered under Part 12 if judgment was wrongly entered because in the case of –
>
> …
>
> (b) judgment for failure to defend – any of the conditions in rule 12.5 was not satisfied."

On this interpretation filing a defence, albeit late, before a default judgment has been entered would have the consequence that such a judgment cannot be entered as one of the conditions in rule 12.5 is not satisfied.

59. Another possible interpretation is that the condition in rule 12.5(c)(i) that the defendant has not filed a defence should be construed as referring to a *timely* defence, so that filing a defence late will not prevent the entry of a default judgment unless the defendant obtains an extension of time until the date when the defence was filed.

60. There are also two intermediate possibilities. One is that the time when the conditions in rule 12.5 must be satisfied is when the claimant makes a request to the court office to enter judgment. A variant of this approach would be, where the claim is for "some other remedy," to treat the critical time as the time when an application under rule 12.10(5) is made.

61. In England and Wales where, until recently, the corresponding rules were similarly ambiguous, there were conflicting authorities on this question, all at first instance. Some took the reference to a defence to mean a timely defence: see eg *Coll v Tattum* (2002) 99(3) LSG 26. At least one case took the critical date in circumstances where an application to the court is required to be the date of the application: *Taylor v Giovani Developers Ltd* [2015] EWHC 328 (Comm), para 37. Other decisions favoured the view that the filing of a defence, however late, precluded the entry of default judgment: see eg *Cunico Marketing FZE v Daskalakis* [2018] EWHC 3382 (Comm), [2019] 1 WLR 2881; *Smith v Berrymans Lace Mawer Service Co* [2019] EWHC 1904 (QB). On 6 April 2020, CPR 12.3 was amended so as to give legislative effect to the latter interpretation by providing that judgment in default of defence may be obtained only where a defence has not been filed (and the relevant period for doing so has expired) "at the date on which judgment is entered."

62. In the Eastern Caribbean, where no such change to the Rules has been made, the leading case is *Rolle v Lander*, cited by the Court of Appeal and by the judge in the present case. The claim there was for a specified sum of money. A defence was filed after the time for doing so had expired and after the claimant had made a request for judgment but before judgment in default was entered (following a hearing before a master). On an appeal to the Court of Appeal (there being no suggestion that the Court of Appeal lacked jurisdiction to hear the appeal) the defendant argued that judgment had been wrongly entered because by the time the judgment was entered a defence had been filed so that condition 12.5(c) was not satisfied. The defendant's counsel cited *Attorney General v Matthews* [2011] UKPC 38, para 16, where the Board pointed out that:

> "There is no rule which states that, if the defendant fails to file a defence within the period specified by the CPR, no defence may be filed unless the court permits."

63. The Court of Appeal dismissed the appeal, holding that the critical question was whether a defence had been filed before the request for judgment was made and that nothing said in *Attorney General v Matthews* was inconsistent with that interpretation. As no defence had been filed at that time, the subsequent filing of a defence could not avail the defendant.

64. Counsel for Lux have not sought to argue that *Rolle v Lander* was wrongly decided and the Board proceeds on the basis that the conditions in rule 12.5(b) and (c)(i) are satisfied if a defence has not been filed and the period for filing a defence has expired at the time when the claimant's request or application for judgment is made. (It is unnecessary in this case to choose between these alternatives.) It does not automatically follow, however, as the judge and the Court of Appeal in this case seem to have assumed, that if where an application to the court is required under rule 12.10(4) and (5) the defendant files a defence after the application has been issued and applies for an extension of time for doing so, the court should ignore the defence and the cross-application. All that was decided in *Rolle v Lander* was that the late filing of a defence, between the date of a request for default judgment and the date on which the court considers the request, does not by itself disentitle the claimant from obtaining default judgment. There was in that case no application made for an extension of time for filing the defence. The Court of Appeal did not decide that, where such an application is made after the claimant has filed a request or application for judgment, the court may not consider it.

65. Rule 13.3(1) gives the court power to set aside a default judgment which has been properly entered under Part 12 only if the defendant –

> (a) Applies to the court as soon as reasonably practicable after finding out that judgment had been entered;
>
> (b) Gives a good explanation for the failure to file an acknowledgement of service or a defence as the … case may be; and
>
> (c) Has a real prospect of successfully defending the claim."

Although these conditions are expressed as necessary conditions (save where the defendant satisfies the court that there are exceptional circumstances), they are also generally treated as sufficient to justify setting aside the judgment.

66. If at the hearing of an application for the court to determine the terms of a default judgment under rule 12.10(4) it can be seen on the material before the court that the conditions in rule 13.3(1)(b) and (c) are satisfied, it is a waste of resources, and in the Board's view wrong in principle, for the court to enter a judgment which proper grounds have already been shown for setting aside. The just and expedient course in

such a case is to exercise the court's discretion to decline to enter judgment in the first place.

67. This is also how historically the matter has been approached. In *Gibbings v Strong* (1884) 26 Ch D 66 a defence was delivered late but before the hearing of a motion for judgment under Order XXIX, rule 10 (quoted at para 53 above). The judge refused to look at the defence and gave judgment for the relief claimed in the statement of claim. The Court of Appeal held that this was a wrong approach. The Earl of Selborne LC said, at p 69, that:

> "if a defence has been put in, though irregularly, I think the Court would do right in attending to what it contains. If it were found to contain nothing, which, if proved, would be material by way of defence, the Court would disregard it. If, on the other hand, it discloses a substantial ground of defence, the Court will not take the circuitous course of giving a judgment without regard to it, and obliging the defendant to apply … to have that judgment set aside on terms, but will take steps to have the case properly tried on the merits."

68. *Gibbings v Strong* was cited with approval and a similar approach adopted in *Wallersteiner v Moir (No 1)* [1974] 1 WLR 991. The applicable English rule was then RSC Order 19, rule 7(1), which provided that "on the hearing of the application the court shall give such judgment as the plaintiff appears entitled to on his statement of claim." The judge had given judgment on such an application for declarations that Dr Wallersteiner had been guilty of fraud, misfeasance and breach of trust. The application was opposed by Dr Wallersteiner who also appeared in the Court of Appeal arguing that he had a good defence to the claim against him. In relation to the claim for declarations, the Court of Appeal was persuaded that, particularly given the nature of the relief sought and the irremediable damage that a judgment declaring him to be guilty of fraud would do to Dr Wallersteiner's reputation, such a judgment should not be given against him on the pleading. Lord Denning MR, after quoting the wording of the rule, said, at p 1007B-C:

> "Although the word 'shall' is used in that rule, it is clear from the authorities that it is not imperative but directory. The court will not enter a judgment which it would afterwards set aside on proper grounds being shown: see *Graves v Terry* (1882) 9 QBD 170 and *Gibbings v Strong* (1884) 26 Ch D 66. A

> judge in chambers has a discretion which he will exercise on the same lines as he will set aside a judgment in default."

69. The test under the Eastern Caribbean Civil Procedure Rules for setting aside a judgment in default differs from that under the English CPR in one significant respect. Rule 13.3(1)(b) makes it a condition for setting aside a judgment which has been properly entered under Part 12 for failure to defend that the defendant gives a good explanation for the failure to file a defence. (There is no equivalent provision in the English CPR.) Where at the hearing of an application under rule 12.10(4) and (5) the court considers that such an explanation has been given and that the defendant has a real prospect of successfully defending the claim, the court should, for the reasons given, decline to enter judgment and grant an appropriate extension of time for filing a defence.

70. It is a further question, not explored in argument on this appeal, whether if an application for an extension of time for filing the defence is made before judgment has been entered, but only after an application for a default judgment has been made, the court has a broader discretion to grant an extension of time even without a good explanation for the failure to file a defence. On the one hand, it can be said that, as no judgment has yet been entered, the conditions which must be satisfied on an application to set aside a default judgment do not apply. Moreover, if an extension of time is granted, the conditions for entering a default judgment will (retrospectively) cease to have been met. On the other hand, the logic of treating the critical time as the time at which a request or application for judgment is made is that a claimant should not be disadvantaged or a defendant advantaged by the adventitious factor of how long it takes before the request is considered or an application heard. This logic might suggest that the court should not treat a defendant as better off by reason of any development which occurs after the request or application is made. On this approach, the court should only grant an application to extend time for filing a defence made after the claimant has applied for a default judgment under rule 12.10(4) and (5) to which it was entitled when the application was made if the grounds would justify setting such a judgment aside.

71. Although the Board does not think it necessary to decide the question, there is force in the latter view. It may also, however, be noted that, even after a default judgment has been entered, the requirement to give a good explanation for the failure to file a defence is not inflexible. Under rule 13.3(2) the court retains a broad discretion to set aside a default judgment if satisfied that there are exceptional circumstances. The same must, at the least, apply where an application to extend time for filing a defence is made before a default judgment has been entered.

The Board's conclusions so far

72. Before proceeding further, it may be useful to summarise the Board's key conclusions on the proper approach to an application for default judgment where the claim is for some other remedy. In summary:

(i) The court should first of all determine whether the relevant conditions in rule 12.5 (or rule 12.4) are satisfied. The Board is proceeding on the basis that for the purposes of rule 12.5(b) and (c)(i) it is sufficient that the defendant had not filed a defence (and the period for doing so had expired) at the date of the application.

(ii) Even if the relevant conditions are satisfied, the court should not grant a default judgment if there is material before the court at the hearing of the application which would justify setting such a judgment aside.

(iii) If there is no such material, the court should proceed to determine what remedy (if any) the claimant is entitled to on the statement of claim. For this purpose, the court will treat the allegations made in the statement of claim as true and legally valid unless (and to the extent that) it appears to the court that the statement of claim does not disclose any reasonable ground for bringing the claim or is an abuse of the process of the court.

(iv) An appeal lies to the Court of Appeal from the court's decision on the application in the ordinary way.

73. Applying these principles to the procedure followed in the present case leads to the following conclusions:

(i) The Court of Appeal was wrong to hold that the default judgment granted in this case was not a "judgment or order of the High Court" within the meaning of section 31(1)(b) of the Act, such that the judgment was unappealable.

(ii) The Court of Appeal and the judge were wrong to hold that Lux's application for an extension of time for filing its defence could or should not be considered at all because it was made after Mr Yida's application for a default judgment.

(iii) The Court of Appeal was wrong to hold that in dealing with the application for a default judgment under rule 12.10(4) and (5) it was not relevant or necessary to consider whether the statement of claim ought to be struck out.

(iv) The Court of Appeal was wrong to strike out the notice of appeal and ought to have ruled on Lux's appeal from the judge's decision.

Should the Board remit the appeal from the judge's decision?

74. Where the Board concludes - as it has here - that the Court of Appeal wrongly acceded to a preliminary objection with the result that it failed to determine the merits of the appeal, the Board will often think it right to remit the case to the Court of Appeal to make such a determination: see eg *Manderson-Jones v Société Internationale de Télécommunications Aéronautiques* [1998] 1 WLR 1486. Reasons for ordinarily following this course include the fact that it is normally appropriate that the courts of the jurisdiction concerned should address issues before the Board does so and that any decision of the Board will be better informed if the Board has the benefit of the reasoning of both lower courts. In this case, however, the Board considers that it should, exceptionally, exercise the power that it undoubtedly has to deal with matter itself rather than remit it: cf *Stubbs v Gonzales (Practice Note)* [2005] UKPC 22, [2005] 1 WLR 2730.

75. The Board's reasons for adopting this course are a combination of three factors. First, remitting the appeal would inevitably cause significant further cost and delay in what has already been a protracted proceeding. Although the Court of Appeal heard argument on the merits of the appeal on 1 October 2020, so much time has now passed since then (added to which one of the members of the court has since retired) that it would in practice be necessary for the case to be reargued if it were remitted. Second, the merits of the appeal have been fully argued before the Board and the Board is able to decide the outstanding issues now without the need for any further hearing. Third, the Board considers that, having identified the approach which the judge ought to have followed, the remaining issues do not raise any point of difficulty. In these circumstances it is convenient for the Board to decide the remaining issues and achieve much needed finality.

Extension of time

76. The Board has held that the judge and the Court of Appeal ought to have considered Lux's application for an extension of time for filing a defence. Had they done so, the Board thinks it clear that the proper course would have been to grant the extension sought. Although Lux's former attorneys were mistaken in believing that the service of the claim form and statement of claim at their office on 23 November 2018 was invalid and therefore in returning the documents, that mistake, while plainly not an excuse, is a good explanation for Lux's failure to acknowledge service and file a defence at that time. After the documents were served again on 4 February 2019, Lux acted with reasonable promptness, taking account of matters explained in the affidavit of Mr Dyson sworn on 8 March 2019 including the retainer of a new firm of attorneys on 27 February 2019. The defence filed on 7 March 2019 clearly demonstrated that Lux had a real prospect of successfully defending the claim. Even if, therefore, judgment in default had already been entered, the material before the court at the hearing of the application under rule 12.10(4) and (5) would have justified setting the judgment aside. In these circumstances the court ought not to have entered judgment and should instead have extended the time for filing the defence to 7 March 2019.

The statement of claim

77. There is another, separate reason why in the Board's opinion the judge was wrong to grant a default judgment. This is that she accepted the statement of claim as valid and thought that it ought not to be struck out. Having considered the allegations made in the statement of claim against the background of the previous history of the litigation, the Board is satisfied that the statement of claim is an abuse of the process of the court on which Mr Yida is therefore not entitled to a judgment.

78. In the statement of claim Mr Yida admits that at the commencement of the trial of the first action on 7 March 2017 he signed the consent order, as did his lawyer, settling the action and consenting to judgment for Lux in the sum of US$ 3m plus interest and costs. His claim to have the consent order set aside is based on two purported legal grounds. The first (although the phrase is not used in the statement of claim) is the legal doctrine known as non est factum ("it is not my deed"). The second is that Mr Yida's lawyer allegedly had no authority to settle the action or sign the consent order on his behalf. The Board will consider these grounds in turn.

Non est factum

79. It a basic rule of the common law that a person who signs a contractual document is bound by its terms whether he or she has read or understood the document or not. That is so even if the person concerned is a foreigner who cannot read English: *The Luna* [1920] P 22. The justification for the rule is the fundamental importance for the orderly conduct of business of being able to treat a person's signature as proof of their consent without having to inquire into the person's state of mind or other circumstances at the time when the document was signed.

80. The doctrine of non est factum affords a very limited exception to this rule. Under this doctrine, as established by the decision of the House of Lords in *Saunders v Anglia Building Society (sub nom Gallie v Lee)* [1971] AC 1004, a person is not bound by his or her signature of a contractual document if (a) the person mistakenly signed the document, (b) the document was fundamentally different from what that person thought it to be, and (c) the person took "all reasonable precautions in the circumstances" to understand the nature of the document before signing it. Mr Yida asserts that this doctrine applies in the present case such that he is not bound by his signature of the consent order.

81. The factual allegations pleaded in the statement of claim on which Mr Yida relies for this purpose are: that he speaks no English and does not understand English; that he signed a document which he believed to be a release document involving Mr Johann Hesse in respect of part of Lux's claim for commission when in fact it was a consent order consenting to judgment in favour of Lux in the sum of US$ 3 million plus interest and costs; that Mr Yida's translator never explained to him that the document he was signing was a consent order settling both Lux's claim and his counterclaim in the first action; and that he signed the consent order in "a total misapprehension and misunderstanding of what he was signing and agreeing to."

82. Although there is no specific plea that Mr Yida took reasonable precautions to ensure that he understood what he was signing, the Board would not be prepared to treat the statement of claim as invalid merely on that account. The Board is content to accept that the allegations pleaded in the statement of claim, if taken purely at face value, at least arguably support a plea of non est factum.

83. There are, however, cases where, exceptionally, allegations pleaded in a statement of case need not be taken at face value even at the stage of considering whether the claim is one that the defendant should be called on to answer. These include cases where the statement of case makes factual allegations which are so

incredible that they cannot possibly be true. In judging whether a case falls into this category, the court is not confined merely to looking at the statement of case itself but is entitled to take account of other matters, including the history of the proceedings and the degree of implausibility of the allegations. Allegations will not be struck out if the court considers that there is any realistic possibility that, after investigation through the ordinary process of litigation, they might be proved at a trial to be true. It is, however, an abuse of the court's process to require a defendant to answer, or the court to deal with, allegations which the court is satisfied are manifestly ill-founded and incapable of proof.

84. An example of such a case is *Lawrance v Lord Norreys* (1890) 15 App Cas 210, where the House of Lords affirmed the decision of the Court of Appeal to strike out the statement of claim and dismiss the action as an abuse of process on the ground that "the story told in the pleadings is a myth, which … has no substantial foundation" (p 220, per Lord Herschell). Lord Watson, concurring, said, at p 222, that it was "legitimate to examine not only the pleadings in this suit, but the whole probabilities of the case, and the judicial history of the claim." His conclusion, having done so, was that "the statement of claim presents to my mind a tissue of improbabilities which ought not to be sent to proof."

85. In the Board's opinion, the same can be said of Mr Yida's allegation that he signed the consent order settling the first action without understanding what he was signing. The judge took the view that, even though this allegation might be regarded as implausible, it raises an issue of fact which could only be resolved by evidence given at trial. The Board considers this to be too charitable a conclusion. When viewed against the background of the previous history of the litigation between the parties, the allegation made by Mr Yida is so obviously incapable of proof that it cannot justify using the court's process. The Board is influenced by the following points:

(i) Assuming it to be true that Mr Yida does not speak or understand English, he nevertheless accepts that he was accompanied to court on 7 March 2017 not only by his associate, Mr Kwok, who according to Mr Yida's affidavit of 23 March 2018 also acted as a translator, but also by a professional translator, Mr Mintao Huang. The assertion that both these individuals, at least one of whom was there specifically for the purpose of translating any relevant communications for him, failed to explain the nature of the document he signed is wholly implausible.

(ii) The statement of claim does not say whether Mr Yida asked for the consent order to be translated to him before he signed it. It is, however, inconceivable - and would have involved a clear failure to take reasonable

precautions were it true - that Mr Yida signed what was obviously a legal document relating to the court case without having first asked the translator to translate the document so that he knew what he was signing. It is not alleged that the translator was not competent or mistranslated the consent order. The only realistic inference is therefore that Mr Yida understood the nature of the document.

(iii) Mr Yida was also accompanied to court by his lawyer (Mr Benjamin), who negotiated with Lux's representatives the terms of settlement which were then embodied in the consent order. It is fanciful to suppose that Mr Yida's lawyer would have entered into such negotiations, let alone agreed terms of settlement, without receiving Mr Yida's instructions through the translator to do so.

(iv) It is equally fanciful to suppose that Mr Yida's lawyer would have signed the consent order himself, or invited or permitted Mr Yida to sign it, without satisfying himself through the translator and/or Mr Kwok that Mr Yida understood and agreed to the terms of settlement recorded in the consent order.

(v) It is also probable that Mr Yida discussed the terms of settlement recorded in the consent order with Mr Kwok who, as an English speaker, must have understood those terms.

(vi) The reason for Mr Yida's presence at court on 7 March 2017 (as acknowledged in the statement of claim) was to attend the trial of the first action. On his case it is inexplicable why the trial did not take place. It is simply not believable that Mr Yida left court on that day without realising that the reason why the trial had not gone ahead was that he had settled the action.

(vii) Although Mr Yida alleges that he believed the document he signed to be a release document involving Mr Hesse, he has given no explanation of how he could possibly have held that belief. He has not alleged that anyone misrepresented the nature of the document to him. Furthermore, the release by Mr Hesse of his claim to part of Lux's commission self-evidently would not have dispensed with the need for Lux's claim and Mr Yida's counterclaim to be tried. It therefore makes no sense to suggest that signing such a document without also settling the action could have avoided the commencement of the trial.

(viii) Mr Yida alleged in his affidavit of 23 March 2018 that he discovered the effect of the consent order two days later, on 9 March 2017, when his lawyer told him through the translator that he had to pay money to Lux. He says that he was "shocked and surprised" by this discovery. If it were true that Mr Yida had signed the consent order under "a total misapprehension and misunderstanding of what he was signing and agreeing to" which he discovered two days later, it is improbable that he would have done nothing about it for over a year. It is even more improbable that he would, without raising any issue about his agreement to settle the first action, first have made a part payment of the judgment debt on 12 May 2017 and then made an affirmation on 18 May 2017 in which explained his failure to pay the balance solely by reference to alleged difficulties in remitting funds to Antigua.

(ix) Had Mr Yida signed the consent order mistakenly or believed at the time when he began the second action in July 2017 that he had any ground for denying that he had agreed to settle the first action, he would have made that allegation in the second action to which it would have been directly germane.

(x) The history of non-payment, procrastination and disregard of court orders by Mr Yida that followed the making of the consent order demonstrates the lengths to which he was prepared to go to avoid paying the judgment debt. The fact that his claim not to have understood what he was signing was first made when he had run out of other delaying tactics and his shares in the company used to acquire the land were about to be sold is a further powerful reason to be satisfied that the claim is a fabrication.

86. These are sufficient reasons to conclude that Mr Yida's claim to have the consent order set aside is an abuse of the court's process. But they are not the only reasons. There are two more.

Mr Benjamin's authority

87. Another reason is that, even if Mr Yida's signature of the consent order was not binding, there would still be no justification for setting the order aside. This is because the consent order was also signed by Mr Yida's lawyer, Mr Benjamin, on his behalf and it is not alleged that Mr Benjamin did not know what he was signing. One valid signature is enough.

88. The statement of claim alleges that Mr Yida did not give any instructions to his attorney to compromise or settle the action and that his attorney had no authority from Mr Yida ("though he may have thought that he had such authority in the circumstances") to sign the consent order on behalf of Mr Yida. The notion that Mr Benjamin agreed terms of settlement purportedly on behalf of Mr Yida and signed the consent order without obtaining Mr Yida's express authority to do so is as fanciful and incapable of belief as the allegation that Mr Yida himself did not understand what he was signing. Even if it were true, however, this would not enable Mr Yida to avoid legal liability. Leaving aside the question of implied authority which the Board considers open to argument, a lawyer who has been appointed to represent a client in litigation has apparent authority (or, as it is also sometimes called, ostensible authority) to agree terms of settlement of the action on the client's behalf unless the settlement extends to collateral matters or the lawyer is exceeding an express limitation on his or her authority which is known to the other party to the litigation: see eg *Waugh v HB Clifford & Sons Ltd* [1982] Ch 374.

89. It is not alleged that Mr Yida placed any limitation on Mr Benjamin's authority to agree terms of settlement of the action nor that any such limitation was communicated to Lux. It follows that Mr Yida is on any view bound, as regards Lux, by Mr Benjamin's agreement and signature of the consent order.

90. The judge's reason for not accepting this reasoning was that "there may well be additional information or particulars as they relate to ostensible authority which could have been pleaded. However, their absence does not invalidate the cause of action": see para 14 of her judgment. The Board is unable to envisage, however, what such additional particulars might be, and none have been suggested on Mr Yida's behalf. To displace the ostensible authority deriving from his appointment of Mr Benjamin to act as his attorney, Mr Yida would have to show that he had instructed Mr Benjamin not to settle the action on the terms embodied in the consent order and that Lux was aware of this. Any such suggestion would need to be pleaded and would be inconsistent with the averment that Mr Benjamin "may have thought that he had such authority" (ie to sign the consent order on behalf of Mr Yida). It would in any case be incapable of belief.

91. Counsel for Mr Yida submitted that the court has a discretion to set aside a consent order agreed by a lawyer without actual authority, even if the lawyer had apparent authority to compromise the action on the client's behalf. Reliance was placed on *Neale v Gordon Lennox* [1902] AC 465. In *Neale v Gordon Lennox*, however, the facts were that counsel agreed terms of settlement contrary to the client's express instructions and the lack of consent of the client was brought to the court's attention before the order was drawn up. That on any view of the matter did not happen here.

The position is different where a compromise has been embodied in an order of the court which has been perfected before any limitation on counsel's authority is known to the other party or the court. It is well settled law that in such a case the court will not interfere after perfection of the order: see eg *Marsden v Marsden* [1972] Fam 280. This is consistent with the general law that the court has a limited discretion to reconsider an order before, but not after, the order has been sealed: see eg *AIC Ltd v Federal Airports Authority of Nigeria* [2022] UKSC 16, [2022] 1 WLR 3223.

92. The distinction between the two lines of cases was clearly explained by Bankes LJ in *Shepherd v Robinson* [1919] 1 KB 474, 477-478. Although it is true, as counsel for Mr Yida pointed out, that in *Neale v Gordon Lennox* the order had been drawn up before it was set aside, this came about (as Lord Lindley explained at p 473) only because the plaintiff drew up the order solely for the purpose of applying to have it set aside. On these special facts the drawing up of the order was held not to constitute a bar. But it is clear that the court has no discretion to set aside a consent order where, as in the present case, the order has been perfected before any doubt is cast on the authority of counsel to agree the terms of the order.

93. It was also suggested in argument that Mr Benjamin did not (contrary to what appears to be accepted in the statement of claim) sign the consent order purportedly on behalf of Mr Yida, but only signed it in addition to Mr Yida because rule 42.7(1)(c) of the Rules requires a consent order to be "signed by the legal practitioner acting for each party to whom the order relates." This is a hopeless contention. The obvious purpose of requiring a consent order to be signed by each party's legal representative is to ensure that the terms of the order are agreed by both parties. That purpose is only achieved if the legal representative does indeed sign on the client's behalf. For Mr Benjamin to sign the consent order when it was also signed by Mr Yida may or may not have been a legal requirement. But it was certainly a wise precaution, as Mr Yida's subsequent denial that he agreed to the terms of the order has shown.

Multiplicity of suits

94. There is a further reason why the claim pleaded in the statement of claim is an abuse of the process of the court. If Mr Yida wished to allege that he was not bound by the consent order, he could and should have done so in the second action which he brought in July 2017, not least because claims made in that action relating to the agency agreement and Lux's claim for commission were only capable of succeeding if the consent order could be impugned. On Mr Yida's own case he was aware when the second action was brought that he had signed the consent order in error. Yet no reason has been given for the failure to challenge the consent order in that action and

for seeking to do so instead in a fresh action, brought after the claim in the second action had been struck out.

95. The judge suggested that it was possible for there to be a legitimate reason for a claimant to opt to file a separate claim to set aside the consent order and on this basis concluded that Mr Yida "ought not to be fixed with an abuse of the process of the court without further evidence of such abuse": see para 23(4) of the judgment. It cannot be enough, however, to raise the abstract possibility of a legitimate reason to bring a separate claim when there is no indication of what that reason is or might be. In this case the point is in a sense artificial, as it is plain that the reason why Mr Yida did not include a claim to set aside the consent order in the second action was that he had no basis for making such a claim and had not yet fabricated the allegation that he had not understood what he was signing. This leaves him, however, with an inescapable dilemma. The Board agrees with the submission made by counsel for Lux that, if the allegations made in the statement of claim in this action were indeed true, this would be a textbook example of an abuse of process, applying the principles set out in *Johnson v Gore Wood & Co* [2002] 2 AC 1.

Conclusion on the judge's decision

96. The judge recognised correctly that, in order to decide what judgment Mr Yida was entitled to on the statement of claim, it was necessary to consider Lux's argument that the statement of claim should be struck out because it did not disclose any reasonable ground for bringing the claim and/or was an abuse of the process of the court. For the reasons given, however, the judge ought to have concluded that the statement of claim is an abuse of the court's process. It follows, first, that Mr Yida was not entitled to any default judgment on the statement of claim under rule 12.10(4) and, second, that the statement of claim should be struck out.

97. The Board adds, for completeness, that it cannot be said that the judge improperly exercised her discretion in declining to admit the affidavit of Mr Benjamin in evidence after the hearing had been completed and while judgment was reserved. But that evidence was not necessary to show that the pleaded claim was groundless.

Disposal

98. The Board will humbly advise His Majesty that the appeal should be allowed, the orders of the High Court and the Court of Appeal set aside, the statement of claim struck out and the action dismissed.