



Neutral Citation Number: [2018] EWHC 3382 (Comm)

Case Nos: CL-2017-000402 & CL-2018-000025

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Rolls Building, Fetter Lane, London EC4A 1NL
(but handed down in the Crown Court at Manchester)

Date: 7 December 2018

Before :

MR JUSTICE ANDREW BAKER

Between :

CL-2017-000402 ('the 2017 Claim')

**CUNICO RESOURCES NV
CUNICO MARKETING FZE
FENI INDUSTRIES AD**

Claimants

- and -

**KONSTANTINOS DASKALAKIS
ARVIND MUNDHRA**

Defendants

CL-2018-000025 ('the 2018 Claim')

**CUNICO MARKETING FZE
- and -
KONSTANTINOS DASKALAKIS
ARVIND MUNDHRA**

Claimant

Defendants

Thomas Grant QC and Caley Wright (instructed by **Hogan Lovells International LLP**) for
Cunico Resources NV and Cunico Marketing FZE
Alain Choo Choy QC (instructed by **Wallace LLP**) for the **Defendants**
Feni Industries AD did not appear and was not represented on this hearing
Hearing dates: 5, 6, 7 November 2018

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE ANDREW BAKER

Mr Justice Andrew Baker :

Introduction

1. The defendants, Mr Daskalakis and Mr Mundhra, worked for the Cunico group, respectively from late 2004 to January 2016 and from August 2005 to October 2015. The group operated in base metals industries and markets. The name ‘Cunico’ is an amalgam of the periodic table abbreviations for copper (Cu), nickel (Ni) and cobalt (Co). The defendants’ primary jobs were CEO and CFO respectively of Feni Industries AD (‘Feni’), the main industrial operating subsidiary of the group, incorporated and operating in FYR Macedonia. Feni owned and operated a ferronickel production plant in Kavadarci and the Rzanovo iron and nickel mine 50 km or so south of the city.
2. Cunico Resources NV (‘Resources’) was incorporated in the Netherlands, to become the group holding company, in May 2007. Cunico Marketing FZE (‘Marketing’) was incorporated in Dubai, UAE, in July 2007, and operated in the Jebel Ali Free Zone as the main market-facing trading entity in the group. Resources had no operating activities. It existed as a holding company for the operating subsidiaries as investment assets, with a single dedicated (full-time) employee. Marketing traded by purchasing ore from other Cunico subsidiaries, and bailing the ore to a ferronickel plant within the group under a ‘tolling agreement’, for conversion by the plant to finished ferronickel. Marketing then sold the finished product to the market. Under the tolling agreement, fees for converting Marketing’s ore into finished ferronickel would be payable by Marketing to the operator of the ferronickel plant (e.g. Feni).
3. Thus, the group became the Cunico group only in May 2007, when Resources was incorporated, whereas the defendants joined in late 2004 and August 2005. That does not matter for the purposes of this judgment and I shall refer to the group as the Cunico group throughout.
4. The Cunico group was owned, at the time of the events said to give rise to claims against the defendants, as a joint venture between International Mineral Resources BV (‘IMR’) and BSGR Cooperatief UA (‘BSGR’). Latterly, IMR has effectively all but bought BSGR out, via the intervention of proceedings in the Amsterdam Enterprise Chamber, so that today Resources is owned as to c.80% by Summerside Investments S.a.r.l., IMR’s parent company, with 50% of the remainder owned by each of IMR and BSGR.
5. So-called ‘Advisory Contracts’ were signed as between Marketing and each of the defendants, in 2007 and again in 2010, that contained a jurisdiction provision in these words: *“In case of disagreements, they shall be solved in the Court of the United Kingdom”*. The claimants say that provision gives this court jurisdiction over their respective claims against the defendants under Article 23 of the Lugano Convention. It is common ground that the defendants were domiciled in Switzerland when proceedings were brought and that the claims brought against them are within the material scope of the Lugano Convention, so indeed it governs the question of jurisdiction in this case. It is also common ground that, in this international business context, the reference in the Advisory Contracts to *“the Court of the United Kingdom”* should be interpreted to mean the courts of England and Wales.

6. Feni is now subject to a form of insolvency process in Macedonia pursuant to which a trustee in bankruptcy has been appointed who has control of Feni's affairs. There is a dispute that does not require to be considered at this stage whether any rights Feni may have against the defendants have been validly assigned to Resources. Because of that dispute, Feni, acting by the trustee in bankruptcy, is separately represented in the proceedings generally. But it made no separate appearance in or submissions on the applications argued before me. They were therefore argued by Mr Choo Choy QC for the defendants and by Mr Grant QC for Resources and Marketing, but Mr Grant's submissions on behalf of Resources as (so it claims) assignee of Feni's rights dealt also with the position of Feni.
7. It is clear to me that all of the claims advanced against them are disputed on the merits by the defendants. Those merits do not fall to be considered at this stage, although in the case of Mr Daskalakis, why they have not yet been addressed in any detail is of some relevance to his application identified in paragraph 8(ii)(b) below.
8. The following applications are presently before the court:
 - i) In the 2017 Claim, the defendants' application dated 11 January 2018 challenging jurisdiction. The principal issue is whether the claims made are matters relating to individual contracts of employment so as to engage Section 5 of the Lugano Convention. It is common ground that any claims that do engage Section 5 cannot be brought here.
 - ii) In the 2018 Claim,
 - a) Marketing's application dated 4 July 2018 for judgment against Mr Daskalakis in default under CPR 12.3(1), and
 - b) Mr Daskalakis' cross-application dated 10 July 2018 for a retrospective extension of time for filing an acknowledgment of service. His time for doing so expired on 6 June 2018. He filed acknowledgment of service on 4 July 2018, an hour before Marketing filed its default judgment application. To the extent the extension of time application involves or requires it, Mr Daskalakis applies for relief from sanctions for the late filing of his acknowledgment of service.
9. This judgment deals with those applications in the 2018 Claim. There will be a separate judgment on the jurisdiction application in the 2017 Claim.
10. It will be relevant to the applications dealt with now to know that the defendants have also applied to challenge jurisdiction in the 2018 Claim, by application dated 26 July 2018, relying on the same grounds as they raise in respect of Marketing's claims in the 2017 Claim. That application was not listed for consideration at this stage, but the parties agreed that the outcome of the jurisdiction challenge in the 2017 Claim will determine it. That involves an acceptance by Marketing that Mr Daskalakis should be entitled to challenge jurisdiction in the 2018 Claim even though he filed his acknowledgment of service late. His application challenging jurisdiction was then made within 28 days of that filing, the time limit on the face of things set by CPR 11(4) as modified in the Commercial Court by CPR 58.7.

The Three Meanings

11. Marketing accepted that it could not ask for default judgment to be entered if it could not persuade the court that it has jurisdiction in respect of the claims made against Mr Daskalakis in the 2018 Claim. However, Mr Daskalakis did not acknowledge service in accordance with CPR Part 10, he did so 28 days after the period set by CPR Part 10.
12. On the face of things, Mr Daskalakis is therefore not entitled to challenge jurisdiction, unless he obtains a retrospective extension of time and/or relief from sanctions (see CPR 11(2)). But that is or may be a separate question to whether his late-filed acknowledgment of service precludes any judgment in default under CPR 12.3(1).
13. That issue, i.e. whether an acknowledgment of service filed late, but before a request or application for judgment in default under CPR 12.3(1), precludes the grant of such a judgment, is an important issue of principle. It is the subject of conflicting first instance decisions and *obiter dicta*.
14. The issue is one of the proper construction of the conditions fixed by CPR 12.3(1) for the obtaining of judgment in default. Three suggested constructions emerge from the prior decisions ('the three meanings'):
 - i) firstly, that CPR 12.3(1) only allows the court to grant default judgment where, at the time of judgment, there is no acknowledgment of service and the time for acknowledging service has expired ('the first meaning');
 - ii) secondly, that CPR 12.3(1) allows the court to grant default judgment so long as, at the time the request or application for default judgment is filed, there was no acknowledgment of service and the time for acknowledging service had expired ('the second meaning');
 - iii) thirdly, that CPR 12.3(1) allows the court to grant default judgment where timely acknowledgment of service was not filed, irrespective of any acknowledgment of service later filed, *ex hypothesi* after expiry of the time period set under CPR Part 10 ('the third meaning').
15. In the present case, Marketing needs the third meaning to be correct. Only that third meaning prevents Mr Daskalakis' late-filed acknowledgment of service from defeating the application for default judgment (unless, if at all, that acknowledgment of service is first set aside by the court). Which meaning is correct will also define what sanctions (express or implied) arise under the CPR for the filing of an acknowledgment of service late, but prior to any request or application (as applicable) for judgment in default, so as to be the subject of Mr Daskalakis' cross-application, to the extent it seeks relief from sanctions.

Authority

16. Before I look more closely at the relevant language of the CPR, I first summarise the prior first instance judgments to which I referred above, focusing at this stage just on what has or has not been decided, as opposed to matters of reasoning.

17. The first in time to which I was referred by counsel, but to which no reference appears to have been made in later decisions, is *Boeing Capital Corporation v Wells Fargo Bank Northwest et al.* [2003] EWHC 1364 (Comm), a decision of Morison J. Judgment in default was granted against the second defendant under CPR 12.3(1) despite the late filing, on the morning of the hearing, of an acknowledgment of service. Morison J's decision is therefore authority for the proposition that CPR 12.3(1) does not have the first meaning. *Boeing Capital* is not a decision as between the second and third meanings, since the late acknowledgment of service came after the application for judgment in default had been issued.
18. From what he said in *Boeing Capital* at [9], it seems Morison J was shown, and agreed with, a judgment of Neuberger J, as he was then, dated 21 November 2001. That must be *Coll v Tattum* [2001] 11 WLUK 526, to which again no reference appears to have been made in the subsequent cases (except, but not by name, in *Boeing Capital*). The defendant acknowledged service and filed a defence on the day of the hearing of the claimant's application for judgment in default. Neuberger J granted an extension of time and therefore refused to grant judgment in default. Whilst not necessary to that decision, and therefore *obiter*, Neuberger J, as I read his judgment, interpreted CPR 12.3(1) as having the third meaning.
19. *ESR Insurance Services Ltd (in administration) v Clemons et al.* [2008] EWHC 2023 (Comm) (Blair J) is like *Coll v Tattum*, in that judgment in default was refused because an extension of time was granted in respect of a late acknowledgment of service, filed after the default judgment application had been issued and served. By contrast to *Coll v Tattum*, however, Blair J doubted, *obiter*, whether judgment in default could have been granted anyway, reading CPR 12.3(1) as having the first meaning (see at [8], [16]). (I say that Blair J read CPR 12.3(1) as having the first meaning not only because of the way he expressed himself, but also because the late acknowledgment of service in that case came after the application for default judgment, so only the first meaning would have prevented default judgment from being entered had Blair J not extended time.)
20. In *Talos Capital Ltd et al. v JCS Investments Holdings XIV Ltd et al.* [2014] EWHC 3977 (Comm), Flaux J (as he was then) dealt with an application by the second defendant, Mr Flynn. Although initially described (at [1]) only as an application for an extension of time for filing acknowledgment of service and contesting jurisdiction, it seems from [44] and [45]-[62] that Flaux J was also dealing with Mr Flynn's actual application to challenge jurisdiction under CPR Part 11. Flaux J refused to extend time, set aside the acknowledgment of service, and dismissed the application to challenge jurisdiction. He also held, *obiter*, that the challenge to jurisdiction would have failed in any event. *Talos Capital* does not decide anything about the meaning of CPR 12.3(1), but one aspect of how Flaux J expressed himself has had an influence in subsequent judgments.
21. In *Taylor et al. v Giovani Developers Ltd et al.* [2015] EWHC 328 (Comm), Popplewell J refused an extension of time within which to challenge jurisdiction and granted judgment in default despite a late acknowledgment of service filed after the application for judgment in default had been issued and served. Popplewell J's decision, like *Boeing Capital*, *supra*, is therefore authority for the proposition that CPR 12.3(1) does not have the first meaning. Popplewell J was referred to, but disagreed with, the *obiter* view of Blair J in *ESR Insurance Services*, *supra*. Since the

late acknowledgment of service came after the default judgment application had been issued, *Taylor v Giovani* does not decide between the second and third meanings. I consider below what Popplewell J said about them.

22. Judgment in default of acknowledgment of service was also granted, by Phillips J, in *Almond et al. v Medgolf Properties Ltd et al.* [2015] EWHC 3280 (Comm). An acknowledgment of service on behalf of two of the defendants was produced at the hearing and given, purportedly by way of service, to the claimants' solicitors, but it was never filed. Phillips J refused an application to adjourn to allow those defendants to apply for an extension of time for acknowledgment of service. Strictly, therefore, *Almond v Medgolf* does not decide anything as to the meaning of CPR 12.3(1), as the result would have obtained (given the refusal of an adjournment) whichever of the three meanings is correct. Again, I consider below what Phillips J said about them.
23. In *Unilever plc v Pak Supermarket* [2016] EWHC 3846 (IPEC), HHJ Hacon, sitting as a judge of the High Court, refused to grant judgment in default where an acknowledgment of service had been filed, late but before the application for default judgment was issued. HHJ Hacon's decision is therefore authority for the proposition that CPR 12.3(1) does not have the third meaning. It is not a decision as between the first and second meanings, as either would have led to the same result.
24. In *Billington v Davies et al.* [2016] EWHC 1919 (Ch), Deputy Master Pickering refused to grant an application for an extension of time for defence where a defence was filed and served, late, the day before what had been listed to be the hearing of the claimant's application for judgment in default under CPR 12.3(2). Because of that last-minute development, by agreement, the hearing and Deputy Master Pickering's judgment dealt only with the application for an extension of time for the defence (see at [1]). The Deputy Master expressed a view that CPR 12.3(2) had a meaning equivalent to the third meaning. However, because of the limited scope of the hearing and the judgment, on that basis he said only (at [14]) that in consequence, since the extension of time was refused, "*there [is] no bar to me considering the Claimant's application for default judgment*", and (at [40]) that he would consider further with counsel how that application should be dealt with.
25. It seems from a later judgment in the case, *Billington v Davies* [2016] EWHC 2969 (Ch) (Barling J), that Deputy Master Pickering did not in fact grant judgment in default. Such judgment was subsequently granted, it seems, by Birss J, at a hearing not attended by the defendant. Barling J's subsequent decision was to refuse an application to set aside that default judgment. *Unilever, supra*, does not appear to have been cited or considered, there does not appear to be any record of any judgment that may have been given by Birss J, and before Barling J it does not appear that the correctness of Deputy Master Pickering's view on the meaning of CPR 12.3(2) was argued. I do not regard *Billington v Davies* as authority deciding anything relevant to the decision before me.
26. Finally, there is *McDonald & McDonald v D&F Contracts Ltd* [2018] EWHC 1600 (TCC) (Jefford J), in which again *Unilever, supra*, does not appear to have been cited or considered. Judgment in default of defence was granted under CPR 12.3(1), although a (late) defence was in fact filed on 31 October 2017, the day before the claimants made their request for judgment in default. The court office declined to enter judgment upon that request, since a defence had been filed, so the claimants

issued and served an application for judgment in default. Jefford J granted judgment in default but also a stay of execution to allow the defendant to apply to set aside (if so advised) on the basis either that the defence, filed late but before any request for default judgment, precluded the grant of judgment in default, or that there was a real prospect of defending the claim on the merits, or both. What, if anything, Jefford J thereby decided as to the meaning of CPR 12.3(1) is not an easy question. The editors of the White Book suggest, at note 12.3.1, that the *McDonald* case “clarifies the position and is a welcome decision”. As will be seen below, I disagree.

CPR Provisions

27. The first provision to note, not considered in the authorities summarised above, is CPR 3.10, by which:

“Where there has been an error of procedure such as a failure to comply with a rule or practice direction—

(a) the error does not invalidate any step taken in the proceedings unless the court so orders; and

(b) the court may make an order to remedy the error.”

28. CPR 10.1-10.2 provide, so far as material, as follows:

“10.1 Acknowledgment of service

(1) This Part deals with the procedure for filing an acknowledgment of service.

(2) ...

(3) A defendant may file an acknowledgment of service if—

(a) he is unable to file a defence within the period specified in rule 15.4; or

(b) he wishes to dispute the court’s jurisdiction.

(Part 11 sets out the procedure for disputing the court’s jurisdiction.)

10.2 Consequence of not filing an acknowledgment of service

If—

(a) a defendant fails to file an acknowledgment of service within the period specified in rule 10.3; and

(b) does not within that period file a defence in accordance with Part 15 or serve or file an admission in accordance with Part 14,

the claimant may obtain default judgment if Part 12 allows it.”

The closing words, “*if Part 12 allows it*”, mean that, contrary to one of Marketing’s submissions, CPR 10.2 does not say that default judgment may be entered after a

(late) acknowledgment of service has been filed. That depends on what Part 12 says and in particular, therefore, on what CPR 12.3(1) means.

29. CPR 10.5 requires an acknowledgment of service to be signed by the defendant or the defendant's legal representative (CPR 10.5(1)(a)) and to include the defendant's address for service (CPR 10.5(1)(b), with a cross-reference to CPR 6.23 for rules as to addresses for service).
30. Turning to CPR Part 11, CPR 11(1) provides that a defendant who wishes to dispute jurisdiction or argue that the court should not exercise jurisdiction may apply for an order declaring that the court has no jurisdiction or should not exercise jurisdiction, but by CPR 11(2), "*A defendant who wishes to make such an application must first file an acknowledgment of service in accordance with Part 10*". If a defendant files an acknowledgment of service but does not make an application under CPR 11(1) within 14 days of that filing, "*he is to be treated as having accepted that the court has jurisdiction to try the claim*" (CPR 11(5)). (In the Commercial Court, that limit is 28 days rather than 14 days: CPR 58.7.)
31. Dealing with that language of Part 11 straight away, filing acknowledgment of service "*in accordance with Part 10*" is a procedural requirement for the making of an application under CPR 11(1). That is what CPR 11(2) says. A late-filed acknowledgment of service is not filed "*in accordance with Part 10*". So a defendant who applies under CPR 11(1) without having first filed a timely acknowledgment of service requires an extension of time or a waiver of the procedural requirement. That explains *Talos Capital, supra*. It means that the dismissal of the Part 11 application in that case did not require the setting aside of the acknowledgment of service, although it was in fact set aside. (For the avoidance of doubt, I think it clear that Flaux J was setting aside the acknowledgment of service independently of its ceasing to have effect under CPR 11(7) once the challenge to jurisdiction failed.)
32. Flaux J said at [33] and [44] that he was setting the acknowledgment of service aside "*as a nullity*", although (so far as I can see) there was no application to set it aside and, as I have observed already, setting it aside was not necessary to the decision of the applications before Flaux J. His references to a late acknowledgment being a 'nullity' are the uses of language that have had an influence in some of the default judgment cases, as I explain below. An acknowledgment of service set aside by the court ceases to have effect and, in law, is thereupon treated as a nullity. That is what setting something aside means. But if Flaux J meant to suggest that an acknowledgment of service is a nullity when filed late, prior to being set aside and whether or not it is ever set aside, then, with respect, I cannot agree; and to the extent that at [33] and [44] he expressed the view that if an extension of time was refused, the acknowledgment of service had to be set aside (with no exercise of discretion involved), that was unnecessary to the decision before him and again I do not agree. There is no provision to that effect in the CPR and CPR 3.10(a) is to precisely contrary effect.
33. Even the statement that upon being set aside, an acknowledgment of service is treated as a nullity may require a little care. Assuming it to have been proper in form, a late-filed acknowledgment of service will have given an address for service for the defendant complying with CPR 6.23. If the acknowledgment of service is set aside, that will cease to be an address for service, but service of documents in the

proceedings previously effected by using that address is not retrospectively invalidated.

34. There is a clear and important difference between, firstly, whether some effect or consequence obtains under the CPR only upon some step being taken in timely fashion and, secondly, whether a step not taken in timely fashion may be set aside, undoing the effect or consequence it otherwise had or would have had. Thus, where there has not been timely acknowledgment of service, a defendant is disabled from applying under CPR 11(1) (absent an extension of time or waiver) because CPR 11(2) requires timely acknowledgment before an application under CPR 11(1), not because the acknowledgment of service is a nullity. The existence of that requirement on the language of CPR 11(2), with its consequence under Part 11 for a late acknowledgment of service, is uninformative as to whether a defendant who files a late acknowledgment of service “*has not filed an acknowledgment of service*”, which is the language of CPR 12.3(1) to be construed here.

35. That brings me to CPR 12.3. So far as material, it is as follows:

“(1) The claimant may obtain judgment in default of acknowledgment of service only if –

(a) the defendant has not filed an acknowledgment of service or a defence ...; and

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

(2) Judgment in default of defence may be obtained only –

(a) where an acknowledgment of service has been filed but a defence has not been filed;

(b) in a counterclaim made under rule 20.4, where a defence has not been filed,

and, in either case, the relevant time limit for doing so has expired.”

36. Although in many cases judgment in default, where available, may be obtained by filing a request in a form prescribed under Part 12, in some cases an application must be made. One such case is where a defendant has been served with the claim outside the jurisdiction under CPR 6.32(1), 6.33(1), 6.33(2) or 6.33(2B) (see CPR 12.10(b)(i)). In the present case Marketing made an application and not just a request because it claims to have served Mr Daskalakis in Switzerland under CPR 6.33(1). I put it that way because if Mr Daskalakis’ challenge to the jurisdiction is well founded, then service on him in Switzerland was not permitted by CPR 6.33(1) and will be apt to be set aside on that ground.

37. CPR 12.11(4) supplements CPR 12.10(b)(i) as follows:

“An application for a default judgment may be made without notice if –

(a) the claim under the Civil Jurisdiction and Judgments Act 1982, the Lugano Convention, the Judgments Regulation or the 2005 Hague

Convention was served in accordance with rules 6.32(1), 6.33(1), 6.33(2) or 6.33(2B) as appropriate;

(b) the defendant has failed to file an acknowledgment of service; and

(c) notice does not need to be given under any other provision of these Rules.”

38. CPR Part 13 provides for the setting aside of a default judgment obtained under Part 12. CPR 13.2 mandates setting aside where the judgment “*was wrongly entered*” because either (i) any of the conditions under CPR 12.3 was not satisfied or (ii) the claim was satisfied in full before judgment was entered. CPR 13.3 provides for a discretion to set aside where the defendant has a real prospect of defending the claim successfully or where for other good reason the judgment should be set aside or varied or the defendant should be allowed to defend the claim. Where application is made to set aside a default judgment as a matter of discretion under CPR 13.3, on the basis that there is a real prospect of success for a defence on the merits (or other good reason), the question arises whether that amounts to seeking relief against the availability of a judgment under CPR 12.3 as a sanction for the defendant’s original procedural default.
39. If unconstrained by authority, I would have said it does not, because the availability of a judgment under Part 12 carries with it the availability of an order under Part 13 setting such judgment aside. That is to say, the burden, by way of sanction upon the defendant, of a default judgment regularly entered, is the obligation to persuade the court that there is a real prospect of successfully defending the claim (or other good reason for there not to be summary disposal), and that the just result is therefore that the default judgment be set aside. In the latter respect, the discretion is unfettered, except (if this be a fetter) that CPR 13.3(2) enjoins the court to consider as one relevant factor whether the application to set aside was made promptly. To make an application to set aside under CPR 13.3, accepting and seeking to discharge that burden, to my mind is to accept and operate under the CPR sanction for the original procedural default, not to ask for relief from it. The application that would involve relief from sanctions in the arena in which CPR 13.3 also operates would be an application, after default judgment had been entered, at the time regularly, for an extension of time for the filing of acknowledgment of service (or defence) whereby retrospectively to undo the basis for that judgment so as then to require the judgment to be set aside (i.e. set aside under CPR 13.2).
40. However, the contrary view was adopted by the Court of Appeal, *obiter*, in *Regione Piemonte v Dexia Crediop SpA* [2014] EWCA Civ 1298, at [39]-[40], (followed, but where the point was conceded and therefore not argued, in *Gentry v Miller (Practice Note)* [2016] EWCA Civ 141, [2016] 1 WLR 2696). The view that an application under CPR 13.3 is an application for relief from sanctions in respect of the original procedural default that enabled the default judgment to be entered was also taken, *obiter*, by Coulson J (as he was then) in *Redbourn Group Ltd v Fairgate Development Ltd* [2017] EWHC 1223 (TCC), at [17]-[18]. In *Hockley v North Lincolnshire and Goole NHS Foundation Trust*, 19 September 2014, unrep., HHJ Richardson QC, took the view that an application under CPR 13.3 is not an application for relief from sanctions, but that the principles governing such applications should be applied nonetheless.

41. There is thus no authority binding me to the view that on an application under CPR 13.3, the approach to relief from sanctions under CPR 3.9 and *Denton v TH White Ltd* [2014] EWCA Civ 906, [2014] 1 WLR 3926 applies, with reference to the failure to file acknowledgment of service (or defence) upon the basis of which the default judgment was regularly granted. It would be open to me to adopt, rather, the analysis in paragraph 39 above. I take this aspect no further in this judgment, however, as it is not necessary to resolve it.
42. Finally, by CPR 15.4, the general rule as to time for filing a defence is that a defence must be filed within 14 days after service of the particulars of claim or 28 days after service of the particulars of claim “*if the defendant files an acknowledgment of service under Part 10*”. (The time limit for defence is modified for cases in which the claim is served out of the jurisdiction without permission: see CPR 6.35, modified in the Commercial Court by CPR 58.10.) The question obviously arises whether (leaving aside any extension of time, if granted) an acknowledgment of service filed late is an acknowledgment of service filed “*under Part 10*” (cf “*in accordance with Part 10*” in CPR 11(2)). That question does not arise on this default judgment application under CPR 12.3(1), however. If a late-filed acknowledgment of service does not buy extra time for defence under CPR 15.4, that does not require the court to say that the defendant “*has not filed an acknowledgment of service*” when it comes to CPR 12.3(1)(a). (CPR 15.3, like CPR 10.2, refers to the possibility of a judgment in default, but only “*if Part 12 allows it*”.)

Discussion

43. Starting, as one should, simply by reading CPR 12.3(1), in my judgment “... *the claimant may obtain judgment ... only if (a) the defendant has not filed an acknowledgment of service or a defence ...; and (b) the relevant time for doing so has expired*”, naturally read, connotes that:
- i) there are two cumulative requirements, (a) and (b); and
 - ii) the requirements are set by reference to the circumstances as they stand when judgment is obtained.

That is to say, the language of CPR 12.3(1) naturally conveys the first meaning. I think a litigant in person of ordinary intelligence, reading CPR 12.3(1), would be very surprised to be told, upon filing acknowledgment of service, that she had not done what was required to prevent default judgment from being entered against her thereafter. If she was aware, or was then made aware, that she had filed late, but she was also aware of or was directed to read CPR 3.10, she would conclude that her acknowledgment of service was not invalidated by being late.

44. Judgment is obtained when it is entered on the papers or pronounced in court if there is a hearing – ‘the claimant may obtain judgment’ and ‘the court may enter or pronounce judgment’ are, to my mind, synonymous. To say the claimant may obtain judgment ‘only if the defendant *has not filed*’ naturally conveys that the court may not enter judgment if the defendant has filed. To fix, as two, cumulative, ‘only if’ requirements, (a) that ‘the defendant *has not filed*’ and (b) that the time for filing ‘*has expired*’, does not naturally convey a single requirement just that the defendant did not file within the time required. If a late filing is subsequently set aside by the court

(CPR 3.10 again), that may change everything. But unless and until a filing is set aside, a defendant who has filed is not a defendant who has not filed. (I repeat – see paragraph 32 above – a late-filed acknowledgment of service is not a ‘nullity’.)

45. The ordering of the two requirements, (a) and (b), also conveys, or reinforces, that meaning. It connotes that the basis upon which judgment is entered is that there is no acknowledgment of service or defence (requirement (a)), and the court when asked to enter judgment will naturally ask itself, first, whether that is so. If it is not so, i.e. if the court finds that there is an acknowledgment of service or defence, requirement (b) is not reached for consideration. Put another way, the way CPR 12.3(1) is expressed and structured, the question when the time for acknowledgment of service expired is not relevant if the court finds that one has been filed, and the question when the time for defence expired is not relevant if the court finds that one has been filed.
46. Just as it is relevant, in my view, to bear in mind that the language is intended as much for litigants in person as it is for experienced solicitors or barristers, it is important to recall that in practice it falls to be applied predominantly by court staff, processing requests for default judgment in simple debt or damages claims, rather than by judges considering applications. It is telling, to my mind, that in *McDonald, supra*, the court staff’s response to a request for judgment, when finding a defence on file, was not to check whether it had been filed late so that judgment might be entered as sought; it was to decline the request for a default judgment, leading the claimant to make an application in circumstances that are not in fact contemplated by the CPR, as Jefford J noted at [10]. The approach of the court staff at the TCC in that case seems to me the natural response to the language of CPR 12.3(1) (and that of the related practice direction at CPR 12PD 4.1), i.e. to check for any last-minute filing before issuing any judgment. Thus, my own reaction to what happened in *McDonald* would have been to think that the court staff understood the rules, rather than to invent a procedure not provided for by them (*cf*, with respect, Jefford J at [22]).
47. In my judgment also, the first meaning accords with the purpose of CPR 12.3. Even bearing fully in mind that dealing with cases justly includes enforcing compliance with the rules (CPR 1.1(2)(f)), ultimately and fundamentally courts exist to resolve disputed claims by reference to their merits. The default judgment regime of CPR 12.3 is a specific feature of the initial process of getting a claim going. It exists, as such a regime has done since long before the CPR, to give the claimant the option of obtaining a final judgment he can seek to enforce, without the merits of his claim ever being considered, in cases where the defendant is not participating in the proceedings to contest the claim, on the ground that indeed the defendant is not participating.
48. Where that option is exercised so that a regular default judgment is entered, if there is no prompt application to set it aside by reference to a real prospect of successfully defending the claim (or other good reason), that will tend to encourage a reasonable expectation that the proceedings have concluded, subject only to enforcement of the judgment, and that the judgment should stand. Hence – if it needed to be made express – the specific reference to considering on an application to set aside under CPR 13.3 whether it has been made promptly, and the possibility, therefore, that such an application may be refused if not made promptly even if there would have been a real prospect of a successful defence.

49. But the default judgment regime under CPR 12.3 is not and in my view was never designed or intended, at all events speaking generally, as a means of avoiding the need to prove a disputed claim, if the claimant can, at a trial, after pre-trial processes suited to the case and managed by the court under the CPR. In some of the reasoning in the prior decisions, judges have, to my mind, with respect, rather lost sight of that. A defendant playing procedural games, or acting abusively in some other way, can expect no sympathy from the court; but the remedy is that such a defendant's late-filed acknowledgment of service or defence, if it be an aspect of their game-playing or other abuse, will be liable to be set aside under CPR 3.10, relief from which sanction may well not be granted in those circumstances (although the particular facts of the case would need to be considered with care).
50. Marketing submitted that the language of CPR 12.3 "*cannot mean that an application/request for judgment in default may be automatically defeated simply by a defendant even at the last moment before judgment is entered lodging with the court an acknowledgment of service. ... [That] would make a mockery of the rules.*" (original emphasis). That submission essentially begs the question of purpose I have just addressed. It assumes that a defendant who intends to participate, and is participating by the time the court comes to consider entering or pronouncing judgment in default, is a target of the default judgment regime. It also fails to recognise that the issue will arise in only a tiny proportion of cases being processed by the courts. Confirming the first meaning to be correct would not affect the smooth working of CPR 12.3 in the vast majority of cases where it arises, those being cases where indeed the defendant does not intend to respond to the proceedings so as to contest the claim (but equally does not admit the claim). In fact, confirming the first meaning should not give rise to any practical difficulty at all. It simply requires that the court file is checked before any default judgment is entered. Further, and although it reflects views that have been expressed in some of the cases, I do not share the sense of outrage, implicit in Marketing's submission, that a defendant who comes on the record to participate in the proceedings, contesting the claim, but does so late, should be entitled to insist that *prima facie* any final judgment in the case should be upon a final determination of the merits. To repeat, such a defendant might be playing games or acting otherwise abusively; but there is no warrant for presuming that always to be the case, let alone straining to give CPR 12.3 something other than its natural meaning in order to give effect to such a presumption (which I think is what is required to give CPR 12.3 the third meaning).
51. That the first meaning is correct is also indicated or reinforced, in my judgment, by the following:
- i) The language of Forms N225 and N227, for use when requesting that judgment be entered in default, requiring the claimant to state that the defendant has not filed (not that he did not file on time). (Strictly, that on its own is inconsistent with the third meaning rather than consistent only with the first meaning; but it is not on its own.)
 - ii) Reflecting that language, the invariable practice, in my experience, where under the rules an application has to be made, rather than just a request on one of the practice forms, is that the claimant's solicitors will check with the court for any late filing before they sign off on the application. I have never seen a case in which it has occurred to a solicitor, aware of a (late-filed)

acknowledgment of service, to proceed to issue the application regardless. Indeed, in the present case, Marketing's solicitors followed exactly that practice, checking just before their application papers were finalised and sworn whether Mr Daskalakis had filed a (late) acknowledgment of service. In the event, the timing was so close, his acknowledgment being filed almost exactly (but only) 1 hour before the application was issued, that the application was issued in the belief that no acknowledgment had been filed. I am confident, upon the evidence of the care that Marketing's solicitors sought to take to check that indeed there was no late acknowledgment before issuing, that if they had realised an acknowledgment of service had just been filed, this default judgment application would never have been issued. (As with (i) above, strictly, the practice described here, and illustrated by the facts of the instant case, tells against the third meaning rather than necessarily telling between the first and second meanings.)

- iii) The language of CPR 12 PD 4.1, requiring the court to be satisfied, when it disposes of an application under CPR 12.3, that the defendant has not filed.
- iv) The language of CPR 13.2. A default judgment will have been wrongly entered if the claim had been satisfied in full when judgment was entered (CPR 13.2(c)). That confirms that CPR 12.3(3)(b) – "*the claimant may not obtain a default judgment if – ... (b) the defendant has satisfied the whole claim*" on which judgment is sought – has reference to when judgment is entered, not to some earlier moment. Likewise the other circumstances in which, by CPR 12.3(3), "*the claimant may not obtain a default judgment if –*".

52. Finally, before considering the reasoning in the previous decisions, it seems to me that the second meaning, in which the determinative moment is when the request for default judgment is filed or application for default judgment issued, is unsatisfactory. I would say any real choice, in an exercise of construing the language of CPR 12.3, should be between the first and third meanings. Thus:

- i) The language of CPR 12.3 does not say or imply that the date of a claimant's application has any bearing on its soundness.
- ii) There is no reason why the date of request or application for default judgment (as the case may require) ought to have any bearing. The filing of a request or issuing of an application merely sets a legal process in motion within the claim. Its date is of no juridical significance, where no deadline for filing or issuing is set by the rules. (When an application is issued, relative to other circumstances including other steps that may have been taken in the proceedings, may of course be relevant if a discretion falls to be exercised, whether as to the substantive relief sought or as to costs, but that is a different point.)
- iii) It is an odd result, that I think is unlikely to have been intended, that a default judgment should be irregular if acknowledgment of service be filed the day (or an hour) before the application or request for judgment but regular if filed the day (or an hour) after, assuming in each case that the question whether to enter or pronounce judgment is considered after both have occurred. It is coherent to propose that what matters is (only) whether acknowledgment of service (or

defence) was filed on time; and it is coherent to propose that what matters is how things stand when judgment is obtained, i.e. entered or pronounced. But in the absence of language in CPR 12.3 rendering critical the time when the request or application for judgment is made, to my mind that should have no substantive relevance.

- iv) Reflecting (ii) above, there is the separate point that if the first meaning is correct on the language of CPR 12.3(1), a defendant filing a late acknowledgment of service only after a claimant has incurred cost preparing and filing a request or application for default judgment can expect to be required to pay those costs. It is commonplace for the circumstances as they stood when an application is issued to have importance in relation to costs even if circumstances move on by the time the application is determined in such a way as to defeat it as to its substance, or render it moot.

53. I thus find myself, prior to considering the reasoning in the previous decisions, in this position, namely that:

- i) The first meaning is, I think, the meaning naturally conveyed by the language and structure of CPR 12.3(1). That meaning is supported or reinforced by a range of other relevant matters. *Boeing Capital* and *Taylor v Giovani* are, however, authority against that meaning.
- ii) There are powerful reasons to reject the second meaning, and if there is a choice (as a matter of construing CPR 12.3(1)), it should be between the first and third meanings.
- iii) There is no authority, unless it be *McDonald* (a point I consider below), for the third meaning; and there is authority against it (*Unilever*).
- iv) Since Marketing's application in the present case requires the third meaning to be correct, that application fails, unless *McDonald* is authority that I should follow that the third meaning is correct, which would involve deciding not to follow *Unilever*.

54. Having been at pains to analyse with care what the previous decisions have actually decided, I am conscious that in the circumstances of the present case I do not need to decide between the first and second meanings. To that extent, I apprehend this judgment is itself *obiter*, except for its ultimate acceptance or rejection, below, of the third meaning. In view of the range of views that has found expression in the previous decisions, and the comprehensive citation of them from which I have benefited, I hope that the wider discussion within this judgment may be of value nonetheless, if only to serve as a single source for a summary (I hope accurate) of the case-law to date.

55. At the start of his judgment in *Coll v Tattum*, Neuberger J (as he was then) formulated the point that had been raised in the following rather loaded terms, namely whether it is “*open to a Defendant to defeat an application for judgment in default of acknowledgment of service or in default of service of a Defence within the relevant time limit prescribed by the CPR, by simply and without permission acknowledging service [or] serving a Defence before the hearing of the application for judgment in*

default". He found the provisions of the CPR "*not entirely clear*", "*less than clear*" or "*somewhat gnomic*".

56. Neuberger J was minded to construe CPR 12.3(1) as having the third meaning on the basis that "*the general thrust of the CPR is that, if a party to litigation wants to do something after the prescribed time, then he must obtain the consent of the other side if possible (unless the Rules forbid it) or he must obtain the leave of the court*" (and indeed he proposed that that had been the position prior to the CPR), and that "*it is a little difficult to see the point of the time limits for acknowledging service and filing a Defence if they can be effectively disregarded by a defendant with impunity, or at least without any sanction*". With respect, I disagree with that reasoning:
- i) The 'general thrust of the CPR' suggested, so far as matters for present purposes, is contrary to CPR 3.10, not considered in *Coll v Tattum*.
 - ii) The suggestion that the first meaning rendered the time limits nugatory or lacking in a sanction also overlooks CPR 3.10(a) – the sanction is the possibility that, depending on the circumstances, the court might set aside the late-filed acknowledgment or defence. But no application for that was made in *Coll v Tattum* or in the case before me. (As regards acknowledgment of service, there is also the sanction created by CPR 11(2), namely that a defendant who acknowledges service late cannot challenge jurisdiction unless an extension is obtained or relief from that sanction is granted.)
57. Furthermore, it is significant, in my judgment, that Neuberger J regarded the debate as "*somewhat arid*", because "*under the CPR, the court's powers are flexible and, whatever the correct analysis, ... normally ... the court's powers would be exercised so as to achieve ... that which justice on the facts of the particular case require*", and therefore: "*if an application for judgment in default were made after a late acknowledgment of service, or after a late Defence, it may very well be dismissed with costs, even though technically justified*"; and "*where ... the application for judgment in default is made before the filing ..., but a Defence is filed before the hearing of the application, ... [the court's] discretion will normally (especially where there is a bona fide defence) be exercised in favour of extending time, but the Defendant would be expected to pay at least some of the costs*". That is not the approach under *Denton v TH White*, so I am not sure Neuberger J would have been happy now to assume the correctness of the third meaning.
58. The approach that Neuberger J saw as just and correct does obtain, however, if CPR 12.3(1) bears the first meaning, the exceptions to the general cases where in his view an application for judgment in default should be expected to fail (but possibly with the defendant having some liability as to costs) then being the case where there is abuse by the defendant going beyond the mere fact of the lateness of his filing or where there is no arguable defence, justifying the setting aside of the late filing to allow default judgment then to be entered.
59. In *Boeing Capital*, Morison J effectively held that the second defendant was acting abusively in the absence of any arguable defence to the claim. It had been "*lying doggo*" rather than responding to the claim (at [6]); it was "*simply playing for time*" without any merit in its position (at [7]); and there was "*no defence to the claim for the relief sought in the draft order*" (at [11]). The late acknowledgment of service was

not set aside, however, so strictly it is a decision against the first meaning, as I said in my initial review of the cases.

60. Counsel for the second defendant squarely took the point, described by Morison J at [8] as “*technical (but none the worse for that)*” that on the language of CPR 12.3(1)(a) and CPR 12 PD 4.1(2), “*it is an essential condition of the giving of judgment for default of an acknowledgment of service that no acknowledgment of service has been filed at any time before the court gives judgment*”. Morison J dealt with the point at [9], saying “*That argument seems to me to be hopeless. It cannot have been the intention of the rule-makers that such would be the position and I am happy to adopt entirely the judgment of Neuberger J [in Coll v Tattum]*”. But he added – mirroring again what Neuberger J had said, and consistently with paragraph 57 above, that “*Of course when a court is faced with an application such as this and a party has indicated, through the late filing of an acknowledgment of service, that it wishes to participate, the court will be likely to permit [the] late filing ... but only in circumstances where it considers that that acknowledgment of service is a genuine preliminary to a defence to the claim. That, in my view, is not the position here. There is no defence which can credibly be argued to the claim brought by Boeing.*”
61. Thus, in deciding (*Boeing Capital*) and considering *obiter* (*Coll v Tattum*) that CPR 12.3(1) does not have the first meaning, and in both cases erring towards the third meaning, Morison J and Neuberger J both effectively took the view, indeed regarded it as obvious, that the filing of a late acknowledgment of service before default judgment had been pronounced should and would (be permitted to) defeat the application for judgment unless the circumstances were such as would justify setting aside the late filing under CPR 3.10.
62. That appears to be how matters lay on the authorities until *Taylor v Giovanni*, except that in *ESR Insurance Services*, Blair J indicated, *obiter*, his preference for the first meaning (which, as I have sought to explain, in fact has the same consequence overall). The editors of the White Book footnoted *ESR Insurance Services* at note 10.2.1, stating that although a default judgment is the “*usual consequence*” of a failure to acknowledge service within time, “*there is nothing to prevent a defendant filing a late acknowledgment of service if the claimant has not entered a default judgment in the interim. It is also apparent that the court has power to extend the time for filing an acknowledgement of service after the time provided for in the Rules has expired (ESR Insurance Services Ltd v Clemons [2008] EWHC 2023 (Comm)).*” They footnoted *Coll v Tattum* (but not *Boeing Capital*) at note 15.4.2, noting Neuberger J’s view that the filing of a late defence required consent or permission, but not accepting the view that therefore judgment in default could be entered in the face of a late-filed defence that was not set aside: “*Nevertheless, it is submitted that the onus is on the claimant to act promptly if they wish to obtain a default judgment. In practice, if the time for filing a defence has expired but the claimant has taken no step to obtain default judgment and the defendant then files a late defence, the court office will accept the defence, file it and proceed as usual so that the claimant will not now be able to obtain default judgment.*” The reference to the claimant having taken no step to obtain default judgment is arguably more redolent of the second meaning than the first; but it is flat contrary to the third.
63. I have just quoted from the 2014 White Book. The 2015 White Book was unchanged, except that *Hockley v North Lincolnshire*, *supra*, was noted at 10.2.1, after the

reference to *ESR Insurance Services*, for the proposition that good reason is required to set aside a judgment in default regularly entered.

64. *Taylor v Giovani* was decided in February 2015. The applications before the court were for judgment in default of acknowledgment of service and for an extension of time to challenge jurisdiction. The Claim Form had been served out of the jurisdiction, in Cyprus, on 20 May 2014, the time limit for filing an acknowledgment of service had expired on 10 June 2014, and the claimant had issued the application for judgment in default on 15 July 2014 and served it by letter dated 7 August 2014. The defendant filed acknowledgment of service on 13 August 2014, 64 days late. The defendant applied to challenge jurisdiction by application issued on 19 September, 37 days after its late acknowledgment of service.
65. Popplewell J considered first a question he formulated in (with respect) slightly convoluted terms, namely “*whether the ... 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 acknowledgment of service*” (at [14]). I understand that to mean, and the first question that arose was in fact, whether because of CPR 11(2) a defendant who files acknowledgment of service late requires an extension of time (or relief from sanctions) to cover that late filing in order to challenge jurisdiction. Popplewell J answered that question in the affirmative at [16] and I agree with his answer: CPR 11(2) makes it a pre-condition to an application to challenge jurisdiction that the defendant first file acknowledgment of service “*in accordance with Part 10*”; that means *inter alia* within the time limit set under Part 10.
66. Popplewell J added, at [17], that that had to be the answer because counsel for the defendant was unable to point to any provision in the CPR under which a claimant could have a late acknowledgment of service set aside. Counsel ought to have pointed to CPR 3.10(a). Popplewell J also said, at [18], that he was fortified in his analysis by *Talos Capital, supra*, in particular by Flaux J’s references to a late acknowledgment of service being treated as a nullity. I have already stated my preferred explanation of *Talos Capital* and my disagreement with Flaux J’s terminology (see paragraphs 31-34 above). So whilst I agree with Popplewell J’s answer at [16] to the question he posed, with respect I do not agree with his further justifications of it at [17]-[18].
67. At [19]-[30], Popplewell J dealt with the application to extend time for acknowledging service, refusing it by application of the principles in *Denton v TH White* that it was common ground before him were to be applied.
68. Turning then to the application for judgment in default, which succeeded, at [36] Popplewell J noted Blair J’s *obiter* view in *ESR Insurance Services*, on the basis of which the application would have failed. As to that, however, at [37], he said, firstly, that “*The relief to which the claimant is entitled must be judged by reference to the date of the application*”, i.e. the second meaning ‘must be’ right, and that was “*sufficient of itself to dispose of the point*”. How, if at all, that result could be derived from the language of CPR 12.3(1) was not explained, and the apparently general proposition relied on that an application under the CPR is to be determined exclusively by reference to events as they stand when the application is issued seems to me, with respect, novel and unsound. Secondly, Popplewell J continued, there was “*much force in the argument that what is meant in [CPR 12.3(1)] by an*

acknowledgment of service is a timeous acknowledgment of service”, that is to say the argument that the third meaning is correct. But that third meaning is inconsistent with the second meaning that Popplewell J thought ‘must be’ correct.

69. There is therefore, I think, no great force in Popplewell J’s suggestion that there was much force in the third meaning; and *Taylor v Giovanni* provides to my mind no substantial support for that meaning. Yet it also does not provide any persuasive explanation of its firmly expressed support for the second meaning, a meaning I have already said I find unsatisfactory.
70. In the 2016 White Book, the comment based upon *ESR Insurance Services*, and the reference to that case, quoted in paragraph 62 above, disappeared from note 10.2.1. Instead, the view was expressed in a new sentence in that note that “*Generally, an acknowledgment filed after the expiry of the relevant period will be ineffective unless the defendant applies for and obtains an extension; see further paras 11.1.1 and 12.3.1 below*”. I take it from those cross-references that this was thought to be derived from *Taylor v Giovanni* and/or *Talos Capital*; but neither is in fact authority for the proposition stated.
71. The revised note 11.1.1 to which the amended note 10.2.1 referred cited *Taylor v Giovanni* for the proposition that a defendant making an application under CPR 11(1) who has not filed acknowledgment of service within the time limits set by CPR 10.3 must apply for an extension of time. That is almost correct – strictly, as it seems to me, such a defendant could apply for relief from the sanction imposed by CPR 11(2) rather than seeking (as such) an extension of time, but I cannot see that would ever affect the outcome of the putative jurisdiction application under CPR 11(1). The revised note 11.1.1 went on, however, incorrectly, to cite *Talos Capital* as authority for the proposition that a late acknowledgment of service for which an extension of time is refused “*must be set aside as a nullity*”. That turn of phrase does echo the language of Flaux J, but individual turns of phrase in judgments must not be treated like statutes. Careful analysis is required of what has actually been decided before a judgment is treated as a precedent for a specific proposition.
72. The revised note 12.3.1 is also difficult. It cited *Taylor v Giovanni*, in effect, as authority for both the second and the third meanings, although it is not, and could not be since they are inconsistent. In relation to the second meaning, it also cited *Almond v Medgolf*, to which I turn next, but then it failed to refer to it in relation to the third meaning even though Phillips J there cast doubt on that meaning and declined to follow Popplewell J’s suggestion that there was something to be said for it. The latter difficulty was remedied in the 2017 White Book, but it continued to treat *Taylor v Giovanni*, impossibly, as authority for both the second and the third meanings, failing to draw attention to the fact that they are inconsistent, not complementary, even though that point was noted by Phillips J in declining to adopt the third meaning.
73. Finally, as to the 2016 White Book, and inconsistently with note 12.3.1, note 15.4.2 was rewritten completely, removing the reference to *Coll v Tattum* and now simply stating in bald terms that “*Filing a defence late will prevent the claimant obtaining a default judgment (see r.12.3). However, the claimant may instead apply for an order striking out the defence under r.3.4.(2)(c) ...*”. No authority was cited, but that plainly reads CPR 12.3(1) as having the first meaning, as I also would read it, all things being equal.

74. In the 2017 White Book, a reference to Deputy Master Pickering's judgment in *Billington v Davies* was added to note 12.3.3 and note 15.4.2 was rewritten again in the light of it. The reference at note 12.3.3 suggested, contrary to my analysis, that Deputy Master Pickering's judgment actually decided that CPR 12.3(2) bore a meaning equivalent to the third meaning. The rewritten note 15.4.2, however, regarded the point as still controversial, and not settled by the Deputy Master's view.
75. The 2018 White Book, in its primary text, was unchanged in all these respects from the 2017 White Book. The Second Supplement (October 2018), however, made further changes, following Jefford J's decision in *McDonald*, and I consider those below (having already touched on them in passing in paragraph 26 above).
76. The importance of the White Book as the primary practitioner and courtroom source will be familiar to anyone with enough interest to be reading this judgment. I have dwelt on its relevant commentary, though none of it is authoritative, because of that importance and because of the influence the White Book therefore can have on busy practitioners or court staff seeking to operate under the CPR day by day. It is unfortunate that its commentary has not been more precise or accurate, or even consistent, and that its citation of authority has been incomplete.
77. As advertised in paragraph 72 above, I turn next to *Almond v Medgolf*. My initial analysis was that, strictly, it is not authority for or against any of the three meanings. But in his reasoning, Phillips J considered an argument by counsel for the defendant that the first meaning is correct (see at [8], [10]) and that Popplewell J's decision against the first meaning should not be followed. For his part, at [11], Phillips J was against that argument, agreeing with the first of Popplewell J's reasons against it, in other words adopting the second meaning for CPR 12.3(1). That agreement was, however, expressed baldly and so, with respect, said nothing to overcome the difficulties with the second meaning.
78. Phillips J did add that "*It would be highly unsatisfactory and would make a nonsense of the procedure if a defendant could avoid a default judgment being entered against him by way of application if he files an acknowledgment of service after the application notice but any time up to and including the moment before judgment is pronounced.*" As will already be clear, with respect, I disagree. There is nothing nonsensical, absent a successful application to set aside a late acknowledgment by reference to the specific facts of a particular case, in not disposing of a disputed claim without ever considering its merits where, before that disposal by the court, the defendant comes on the record, albeit late, to participate in the proceedings. There is no reason *a priori* why the CPR should provide for such a result, or there should be seen to be something untoward or offensive about the fact that *bona fide* participation to contest a claim should *prima facie* require a claim to be determined on its merits in due course, even where the commencement of that participation comes late (absent, again, the setting aside of the late filing).
79. At [12]-[13], Phillips J declined to adopt or follow Popplewell J's seeming willingness to countenance the third meaning, pointed out its inconsistency with the second meaning, and said that he shared Blair J's doubt expressed in *ESR Insurance Services* that default judgment could be entered where a late acknowledgment of service had been filed before the application was issued. In fact, though, as I have

noted, Blair J's *obiter* doubt was founded upon the first meaning, rejected by Phillips J, not the second meaning he preferred.

80. Phillips J's refusal to adopt the third meaning, with associated preference for Popplewell J's primary reasoning rather than his inconsistent secondary reasoning, was considered, adopted and followed by HHJ Hacon in May 2016, at [6]-[11] in *Unilever*, the *ratio* of which for judgments in default of acknowledgment of service is that CPR 12.3(1) does not have that meaning. HHJ Hacon also dismissed an application for judgment in default of defence at [12]-[15], the *ratio* for that being that CPR 12.3(2) does not have a meaning equivalent to the third meaning.
81. In July 2016, Deputy Master Pickering refused an extension of time for filing a defence in *Billington v Davies*. Although the default judgment application in the case was not being heard or determined, counsel for the defendant made the argument that CPR 12.3(2) had a meaning equivalent to the first meaning (see at [11]). None of the prior decisions I have considered was cited, except that, paradoxically, counsel for the defendant cited *Coll v Tattum* and suggested that it favoured his argument because Neuberger J said that the CPR was unclear on the point and that there were White Book footnotes pointing in different directions. Leaving that oddity aside, counsel's submission was simple and, to my mind, correct, namely that "*on a literal reading of CPR 12.3(2) by filing and serving his Defence – albeit out of time – it follows that the pre-condition in CPR 12.3(2)(a) is no longer met and that as a result default judgment can no longer be sought*" (save that I would substitute "*obtained*" for "*sought*").
82. Deputy Master Pickering disagreed, stating without further explanation or reasoning, whether by reference to the language of CPR 12.3(2) or otherwise, that "*the reference to "a defence" in CPR 12.3(2)(a) must be a reference to a Defence which has either been served within the time permitted by the Rules or in respect of which an extension of time has been granted. Where a Defence is served late, unless and until an extension has been granted, a document purporting to be a Defence is not in fact a Defence for the purposes of CPR 12.3(2)(a). To this extent, the note at 15.4.2 of the 2016 edition of the White Book is ... wrong*" (that being the note I quoted in paragraph 73 above). For the reasons I have already given, "*a defence*" in CPR 12.3(2)(a) does not have to mean a timely defence, as Deputy Master Pickering asserted; and the weight of the views expressed in the cases that ought to have been cited to the Deputy Master if he was to be asked to consider the point properly was against that meaning, *viz.* (by way of decision) *Unilever* and (by way of *obiter dictum*) *ESR Insurance Services, Taylor v Giovanni* (primary reasoning at [37]) and *Almond v Medgolf*.
83. So I come again, finally, to *McDonald v D&F Contracts*. The defendant did not appear and was not represented, but I understand it to have been an *inter partes* hearing. At [13], Jefford J raised the issue whether the defence, filed late but prior to the initial request for default judgment that the court office refused, let alone the application before Jefford J issued some 3 months later, meant that default judgment could not be entered. She stated that *Taylor v Giovanni* is authority for propositions that (i) a late acknowledgment of service does not cure the failure to serve it in time, (ii) if an application for judgment in default is made at a time when no acknowledgment of service has been filed, the court will enter judgment, and (iii) the court will consider the position at the time the application was made and the subsequent filing of an acknowledgment cannot cure the position. But *Taylor* is only

authority for the second of those propositions; and the first and third propositions are inconsistent with each other (unless in (i), ‘late’ means after the application for default judgment was issued, but I do not think that is what Jefford J meant).

84. Jefford J at [14] referred to Phillips J in *Almond v Medgolf* as agreeing with Popplewell J in *Taylor v Giovani* and said that so did she. But that would mean, with respect, that she was agreeing with the view of Phillips J, on the basis of which the application before her should have failed. She referred to White Book note 12.3.1, which was then the version I criticised at paragraph 72 above.
85. After quoting *Taylor* at [36]-[37] and *Billington v Davies*, citing *ESR Insurance Services*, and quoting *Almond v Medgolf* at [13], Jefford J stated at [20] that her own view was that “*the approach of Popplewell J and indeed that of Deputy Master Pickering is to be preferred. If the acknowledgment of service or the defence is served after the relevant time limit has expired, the conditions for the application of CPR 12.3(1) have occurred. If a late acknowledgment of service or defence is filed then there needs to be an application for an extension of time for it to be a valid acknowledgment of service or defence within the meaning of the Rules.*” As I have said already, CPR 3.10 is inconsistent with that reasoning, yet (as throughout in these prior decisions) it was not considered. As in *Billington v Davies*, neither linguistic nor other basis was identified for construing CPR 12.3(1) as saying that which it does not expressly state. As with the then White Book note 12.3.1, with respect, Jefford J failed to grapple with the fact that Popplewell J’s approach in *Taylor* was to state that a proposition ‘must be’ correct which should have defeated the application before her, that which she described as his ‘approach’ being in fact inconsistent secondary reasoning on which Popplewell J did not rely.
86. Finally on *McDonald*, I return to the point I said was not easy (paragraph 26 above). What did Jefford J actually decide, given that although she entered judgment in default, she also stayed execution to allow the defendant to apply to set aside? At [38], Jefford J said that “*places the onus on the defendant to make the application to set aside judgment in default and to explain why they have a defence to these claims*”; however, at [23] she said it would be open to the defendant on any such application to revisit her apparent conclusion on the meaning of CPR 12.3(1). By CPR 13.2, a defendant is entitled to have a default judgment set aside where CPR 12.3(1) was not satisfied. But since this was a full *inter partes* hearing, I do not see how by making an application under CPR 13.2 the defendant could have invited a judge at first instance to reopen Jefford J’s decision as between the parties in that case, if decision it was, that CPR 12.3(1) had been satisfied.
87. I regret to say, therefore, that I do not find *McDonald* satisfactory: CPR 3.10 was not considered; *Unilever* was not referred to; the reasoning seems to me, with respect, confused and not entirely consistent; and it does not appear to have been intended as a definitive ruling even between the parties before Jefford J as to the meaning of CPR 12.3(1). That said, I can see that on a strict view (and I have otherwise been taking a strict view) it can be said that *McDonald* is a precedent for the correctness of the third meaning, since a default judgment was entered despite the filing of a defence prior to the request (let alone the later application) for default judgment. Given the difficulties with it, however, and since I am not bound by it, I would decline to follow *McDonald*.

88. To complete my discussion, before summarising and concluding, I return to the changes to the White Book introduced in October 2018 (see paragraph 75 above). Note 15.4.2 has been amended but only to cite *McDonald* as well as *Billington*. That means it continues to treat the point at issue as controversial, and thus to treat it as not settled by *McDonald*. At note 12.3.1, some sentences have been added, the last sentence of which I quoted in paragraph 26 above. Inconsistently with the treatment of the point as still controversial by note 15.4.2, the new sentences in note 12.3.1 treat *McDonald* as authority for the third meaning. As I have concluded, if it is such an authority (and there is an argument that it is), it is unsatisfactory authority, and it is inconsistent with CPR 3.10 and *Unilever* (not referred to in *McDonald* or in the White Book).

Summary

89. This full review of the authorities (assuming there are no others I should have considered) leads me to the following summary, leaving aside which of these views were or were not part of the *ratio* for any actual decision, namely that:-
- i) the first meaning has the support of Blair J in *ESR Insurance Services* and (all things being equal) would have had my own support;
 - ii) the second meaning has the support of Popplewell J, Phillips J and HHJ Hacon;
 - iii) the third meaning has the support of Neuberger J (as he was at the time) and Morison J, but in circumstances where I wonder whether their support for that meaning would subsist today;
 - iv) the third meaning also has the apparent, but not definitive, support of Popplewell J, but that support for the third meaning is inconsistent with his firm support for the second meaning and was expressly not followed by Phillips J and HHJ Hacon;
 - v) the third meaning has the more unequivocal support of Deputy Master Pickering and Jefford J, both of whom declined to follow Phillips J's view but were unaware of HHJ Hacon's, but in my respectful view Deputy Master Pickering and Jefford J's views are unpersuasive and unsatisfactory.
90. As my initial summary of the cases showed, only *Unilever* and (possibly) *McDonald* set any precedent for the correctness or incorrectness of the third meaning that Marketing needs to be correct. *Unilever* decides that it is not correct. There is an argument for reading *McDonald* as deciding that it is correct, but if that is how *McDonald* is to be read I do not find it a satisfactory decision and *Unilever* was not considered. In those circumstances, I do not regard *McDonald* as a reason to refuse to follow *Unilever*.
91. For the reasons I have given in the detailed discussion, my own view is that the third meaning is not correct. I acknowledge that if deciding the matter entirely *de novo*, I would also say that the second meaning is incorrect, yet that meaning was preferred in *Unilever*, albeit no decision was called for there as between the first and second

meanings. That does not cause me to refuse to follow *Unilever* in rejecting the third meaning, however.

92. Rejecting the third meaning, and following *Unilever*, had it then been necessary to decide between the first and second meanings, and since I would not have been making that decision *de novo*, on balance, I would not have adopted the first meaning, in that regard following *Boeing Capital* and *Taylor v Giovani* (which actually decided against the first meaning), and (to that extent only) *McDonald* if it is read as setting a precedent, and recognising also that the preponderance of views previously expressed has been against the first meaning. I would have done so, however, (a) with a real sense of concern (i) that those decisions and preponderant views are wrong to reject the first meaning, and (ii) that by default rather than by design I would be upholding the second meaning, a meaning I do not find in the language of CPR 12.3(1), and (b) in the hope that the question might reach the Court of Appeal for a definitive ruling (whether or not this case affords that opportunity). Indeed, that last is a hope I express in any event.

Conclusion

93. In conclusion on the default judgment application in the 2018 Claim, following *Unilever* and declining to follow *McDonald* (if it is to be read as a precedent to the contrary), the conditions for judgment in default under CPR 12.3(1) were not satisfied in this case, because Mr Daskalakis filed an acknowledgment of service, late but (just) prior to the default judgment application, and there is no application to set aside that acknowledgment of service. The default judgment application in the 2018 Claim will therefore be dismissed.

Extension of Time / Relief from Sanctions

94. I have already said I agree with, and so I am happy to follow, *Taylor v Giovani* in deciding that under CPR 11(2) it is a procedural requirement of an application under CPR 11(1) to challenge jurisdiction that the defendant first file a timely acknowledgment of service. That means filing either within the time period set under CPR Part 10 or within an extended period fixed by the court on a successful application (prospective or retrospective) for an extension.
95. Therefore, Mr Daskalakis is not entitled to challenge jurisdiction in the 2018 Claim unless he is granted either a retrospective extension of 28 days for filing acknowledgment of service, to cover his lateness in doing so, or relief from sanctions by a waiver of CPR 11(2).
96. In the context of seeking judgment in default, Marketing made it clear throughout that it did not wish to prevent Mr Daskalakis from challenging jurisdiction in the 2018 Claim, assuming as Marketing did that he would wish to do so on the same grounds as he had raised in the 2017 Claim. That was not at all times quite the unequivocal or unconditional concession it might sound. Thus, it seems to me that when Marketing filed its application for judgment in default, not knowing that a late acknowledgment of service had just been filed, it intended to have it dealt with *ex parte*, without reference to or argument upon the evidence filed in the 2017 Claim. It served the application on Mr Daskalakis (treating his acknowledgment of service as valid for that purpose, so as to entitle it to serve him at the address for service nominated therein)

only when it learned that an acknowledgment of service had been filed on the same day as the application. Having done so, it sought initially to insist upon the application being heard and determined, albeit now *inter partes*, on Friday 13 July 2018, the date it had obtained for the application, even though the jurisdiction application in the 2017 Claim was then listed for the 2-day argument in early November 2018 that in the event came before me and will be the subject of a separate judgment.

97. That equivocation, however, was short-lived, and it became clear following firm objection on Mr Daskalakis' behalf to that procedural course that in fact Marketing agreed (to quote from its skeleton argument) "*that the outcome of the Jurisdiction Challenge [in the 2017 Claim] will be determinative on the question of the Court's jurisdiction to hear the 2018 Proceedings*", and therefore that it could not obtain judgment in default if the challenge to jurisdiction in the 2017 Claim succeeded.
98. Had the application for default judgment not failed for other reasons, therefore, I could not have disposed of it prior to giving judgment on that jurisdiction challenge.
99. One effect or implication of Marketing's agreement, however, is that it has consented to Mr Daskalakis' entitlement to challenge jurisdiction in the 2018 Claim notwithstanding the lateness of his acknowledgment of service. Its agreement was not conditional upon Mr Daskalakis obtaining an extension of time. To the contrary, it was an agreement reached whilst at the same time not consenting to any extension of time. Indeed, though professing to adopt the stance that the question of extension / relief from sanctions was primarily a matter between Mr Daskalakis and the court, Marketing actively opposed any extension of time and presented a vigorous argument against it. It was hardly a disinterested observer, after all, since on its case as to the meaning of CPR 12.3(1) it was entitled to and wished to obtain default judgment for c.US\$74 million (so long as it could establish jurisdiction), and an extension of time would sidestep that default judgment application if (contrary to my conclusion above) it could otherwise have succeeded.
100. In *Denton v TH White* at [41]-[43], the Court of Appeal emphasised the need for parties to behave reasonably, and not to use the court's proper concern to enforce compliance with the rules as a means for trying to take advantage of mistakes so as to obtain windfalls or refuse reasonable requests for limited extensions of time or relief from sanctions. As it seems to me, putting aside any concern I might have had about the initial approach (paragraph 96 above), had it been maintained, Marketing's final stance accords with that emphasis. There were, at its lowest, substantial reasons for resisting an extension of time, so long as that was not an opportunistic attempt to try to prevent Mr Daskalakis from challenging jurisdiction in the 2018 Claim by reference to the grounds already raised against the 2017 Claim.
101. The fair and just way to give effect to Marketing's agreement, and in my judgment a fair and just outcome whether or not, in addition, an extension of time for acknowledging service is granted, is to waive CPR 11(2) so as to entitle Mr Daskalakis to challenge jurisdiction in the 2018 Claim under CPR 11(1) notwithstanding that his acknowledgment of service was filed out of time. To that extent, I shall grant relief from sanctions come what may.
102. The question of extension of time then does not in fact arise. If the challenge to jurisdiction as against Marketing in the 2017 Claim succeeds, then by agreement the

2018 Claim will also fall to be set aside for want of jurisdiction. If it fails, then under CPR 11(7) the acknowledgment of service filed by Mr Daskalakis on 4 July will cease to have effect and he will have time, in the normal way, to file a fresh acknowledgment of service and then a defence, if he wishes to accept jurisdiction and defend on the merits.

103. In case this matter should go further, though, I shall indicate how I would have exercised my discretion had it arisen for exercise:
- i) Firstly, I would have assumed for the purpose that the court had jurisdiction in the 2018 Claim, since if it does not, the 2018 Claim will fall away by agreement; in other words, whether an extension of time should be granted would only matter in this case if Marketing in due course did establish jurisdiction.
 - ii) Secondly, I would have recalled that the substantial purpose of the extension of time sought (since it was not being proposed that Mr Daskalakis should not be allowed to challenge jurisdiction without it) was to avoid the default judgment application. But that application has failed without reference to the question of extending time.
 - iii) Thirdly, then, I would have considered, for completeness, whether it would have been right to extend time, on the assumption of jurisdiction in the 2018 Claim, if, contrary to my actual disposal of Marketing's application, judgment in default could in those circumstances have been entered regularly. For the reasons given below, my conclusion would have been that an extension should not be granted in that case.
104. It is important to start by repeating the consequence. Without an extension of time, a default judgment regularly entered would not be the end of the 2018 Claim at first instance for Mr Daskalakis. He would have his right to apply under CPR 13.3 for that judgment to be set aside by showing that he has a real prospect of success on the merits, or that there is other good reason to allow the claims against him in the 2018 Claim to proceed to trial.
105. I said in the introduction to this judgment (paragraph 7 above) that I am sure all of Marketing's claims are disputed by Mr Daskalakis. But all it takes for a claim to be disputed is a refusal to acknowledge liability. That a claim is disputed, and that a defendant would like to (try to) contest it, says nothing as to the prospects of success for any defence. Mr Daskalakis wishes to say nothing about the merits at this stage, since in the first place he is challenging jurisdiction. That is understandable, up to a point. But the way to achieve that wish cleanly was to acknowledge service on time. Where acknowledgment of service has been filed in accordance with CPR Part 10 and a timely application under CPR 11(1) is pending, CPR 11(9)(a) provides that no defence need be filed. So there can be no judgment in default of defence prior to determination of an application timely made under CPR 11(1).
106. The particular context in which the request for an extension of time arises here is, first and foremost, that the parties were already actively litigating the 2017 Claim. Absent possible time bar considerations, Marketing's further claims in the 2018 Claim would naturally have fallen to be added to the 2017 Claim by amendment, to which there

could have been no objection so long as it was clear that allowing the amendment was without prejudice to the application to challenge jurisdiction and Mr Daskalakis was allowed then to amend that application to take account of the additional claims.

107. Marketing did not commence a separate claim, therefore, to vex or oppress. Nor did it keep the 2018 Claim up its sleeve. By its solicitors, it sent a copy of the 2018 Claim Form and Particulars of Claim to Mr Daskalakis' solicitors, who were on the record for him in the 2017 Claim, and asked for agreement for service to be effected on them, but on the basis that such agreement would not be allowed to prejudice Mr Daskalakis' jurisdictional objection. Mr Daskalakis chose to stand on his strict right not to be helpful – he refused to instruct his solicitors to accept service, taking the view that there was “*no incentive (or basis)*” for him to assist Marketing in getting the 2018 Claim fully under way by service.
108. That stance was unhelpful and misconceived, as later events proved. It was unhelpful deliberately – a choice to insist on being unhelpful because there was no legal obligation to help. It was misconceived because Mr Daskalakis must have known that there was no difficulty about finding him and effecting service on him in Switzerland. In that respect, and to his credit, at no stage has Mr Daskalakis sought to avoid service of proceedings or arrange his personal circumstances in such a way as to make it unlikely that service will be possible. But in a sense, that is the point. All Mr Daskalakis can have thought he was doing by choosing to be unhelpful is to put Marketing to trouble and expense effecting service formally via official channels in Switzerland, as is well known to be required for service there of foreign legal process, and to create delay. That is, with respect, entirely unattractive on his part. More than that, however, it meant he was choosing not to do the one obvious, reasonable thing he could do to ensure he did not slip up procedurally in responding to the 2018 Claim, namely have the Claim served on his English solicitors so all that would be down to him personally, very busy international businessman that he is, would be to remain contactable by his solicitors to confirm an instruction whether to acknowledge service.
109. Having chosen that path, Mr Daskalakis must have realised that the 2018 Claim would be on its way to him in Switzerland for service via official channels, that it might take some months to get to him, that he now had no control over when precisely it would get to him, and that, after whatever might be a minimum realistic time had passed, it could get to him any day. He ought to have been on high alert to check thoroughly anything that reached him that could conceivably be the 2018 Claim, so he could inform his English solicitors and get them to respond in proper time to protect his interests.
110. In the event, the 2018 Claim Form was served on Mr Daskalakis on 16 May 2018 under the Hague Convention, when he personally collected the service copy of the Claim Form, Particulars of Claim and Response Pack at a police station in Zug, signing a receipt, after receiving notice from the police that there were documents for him to collect. As it happens, on that occasion he also collected, and signed for, documents thereby served on him in the Dutch proceedings relating to the Cunico group. Those Dutch documents did not require immediate attention, whereas of course the 2018 Claim did, now it was served.

111. It is Mr Daskalakis' evidence that he did not realise he had collected and signed for two separate sets of documents, one for the (English) 2018 Claim and one for the Dutch proceedings. I am not in a position to find that to be untrue. It is corroborated by the fact that Mr Daskalakis did nothing although I am sure he understood the need to react quickly to the 2018 Claim if and when it arrived and intended to participate (challenging jurisdiction in the first instance, then taking a view whether to participate on the merits if that challenge went against him) just as he was participating in the 2017 Claim. In other words, he did nothing even though the last thing he intended was for the 2018 Claim to be ignored and (possibly) go against him in some way by default. I therefore believe, and accept, that Mr Daskalakis indeed made the honest error he says he made.
112. However, it is an extraordinary error. It is explicable only on the basis that Mr Daskalakis paid no sensible attention at all to what he had just signed for. He cannot have looked even cursorily at the 2018 Claim documentation. Even if (which itself seems reckless) Mr Daskalakis decided upon a cursory glance at some of the Dutch documentation that it could definitely be ignored, that does not begin to explain failing to look also, even if only cursorily, at the English claim documentation. I am not satisfied by his evidence so as to be able to find that he was handed only a single bundle of documents, yet asked to sign two receipts. Even if he was, in the context I have taken pains to emphasise, it is inexcusable that he did not take even 10 minutes to look through the bundle properly at least to satisfy himself he knew what he had just been served with.
113. I accept Mr Daskalakis' further evidence as to his circumstances at the time, and the sequence of events, namely:
- i) His mother in law died on 2 May 2018.
 - ii) He was then away on business (from when exactly I am not clear) in Greece, Macedonia and Geneva in the days running up to 16 May 2018.
 - iii) He briefly returned to his home in Zug on the morning of 16 May 2018, but was scheduled to travel abroad again later that day on a flight to Athens departing at 4.25 pm.
 - iv) Having received notice to collect papers at the police station, he went there at around 12 noon, returning home directly after collecting the papers and signing the receipts.
 - v) He left the package at home, having briefly glanced only at a few pages that were in Dutch, when he then departed for the airport.
 - vi) Thereafter, he was on business away from home until early July 2018, in Greece, Macedonia, the Dominican Republic, Turkey, Spain, the Ivory Coast, Burkina Faso and Zimbabwe.
 - vii) His English solicitors notified him that what had been served on him was or included the 2018 Claim on 3 July 2018 when, upon checking the court file, they saw a certificate of service that had been filed by Marketing's solicitors on 18 June 2018. (They thought to check the court file then because

correspondence they were having as solicitors to Mr Mundhra about difficulties with serving him caused them to wonder whether Mr Daskalakis had been served.)

- viii) The acknowledgment of service was then filed promptly the following day, as it happens just before Marketing filed its application for default judgment.
114. That evidence and sequence of events, however, just reinforces how unhelpful and mistaken it was for Mr Daskalakis to adopt the stance he did that he had no interest in or basis for co-operating in a smooth commencement of the 2018 Claim by instructing his solicitors to accept service on terms preserving his right to challenge jurisdiction. The more Mr Choo Choy QC emphasised, as naturally he did, that given all those commitments on Mr Daskalakis' part it was credible that his procedural default resulted from an honest mistake, the more he thereby emphasised how unreasonable and procedurally risky to Mr Daskalakis was his insistence on being served directly in Switzerland rather than via his solicitors.
115. Mr Choo Choy QC accepted that pursuant to the 'implied sanction' doctrine, an out of time application for an extension of time for filing acknowledgment of service is to be determined by reference to relief from sanctions principles under CPR 3.9 and *Denton v TH White*. Moreover, in the present case, since there is agreement that Mr Daskalakis should be allowed to challenge jurisdiction despite the lateness of his acknowledgment of service (so that I shall be granting relief from sanctions to that extent come what may), the substance of the application for an extension of time is for relief from an express sanction, viz. the availability of judgment in default had I decided that CPR 12.3(1) has the third meaning. In other words, this is not a matter only of an 'implied sanction'.
116. Applying *Denton v TH White* in those circumstances:
- i) Mr Daskalakis' procedural default was substantial – he was in default by 28 days in respect of the key, basic procedural step he was required to take (since he wished to challenge jurisdiction), a step he had only 21 days to take and that in truth he needed only 1 day to take. Mr Choo Choy QC suggested that under CPR 3.8(4) it would have been reasonable for Marketing to have agreed a prospective extension of up to 28 days, so that a delay of 28 days should not be seen as serious or significant. I disagree. Assuming Mr Daskalakis had taken a moment's care on 16 May 2018, he would have had more than ample time to acknowledge service, and would have done so in timely fashion (though I strongly suspect he would have chosen to do so only on the 21st day). Had he instructed his solicitors to ask for a 28-day extension of time, Marketing would have been acting entirely reasonably to refuse. Mr Daskalakis' procedural default has not materially delayed the resolution of the substantial first stage of this litigation, namely his (and Mr Mundhra's) challenge to the jurisdiction. However, it has generated a substantial further interlocutory process, no doubt at significant cost, including irrecoverable cost.
 - ii) It is entirely Mr Daskalakis' fault that he did not file a timely acknowledge service. In that regard, he is guilty of a high degree of fault, even though his mistake was an honest one and he did not intend to be in default. He has the court's condolences for the loss of his mother in law at the beginning of May;

but I do not think that lessens his fault in failing to pay any or any sensible attention to the obviously important documents he signed for at the police station on 16 May. To be fair to him, I am not sure it was submitted on his behalf that it did. Mr Daskalakis' serious fault in turn only mattered, or rather he only created the opportunity to fail so badly to do what he should have done under the CPR, because of his unreasonable and unhelpful insistence on service via official channels in Switzerland, on the misconceived basis that it was not in his interest to co-operate.

- iii) Mr Daskalakis has apologised for his mistake. I accept that apology so far as it goes. But I do not detect in his evidence any real insight into how unhelpful his stance in all of this was from the off, or how that is the underlying, basic problem. Mr Choo Choy QC contended that there is an element of opportunism in the default judgment application, given that (a) Marketing's solicitors did not mention to Mr Daskalakis' solicitors, when corresponding with them in their capacity as Mr Mundhra's solicitors, that the 2018 Claim had been served on Mr Daskalakis on 16 May, and (b) it was always likely that there should be a co-ordinated resolution of the question of jurisdiction in both Claims. I disagree. As to (a), Mr Daskalakis was the one who refused to instruct his solicitors to act for him in the 2018 Claim *vis-à-vis* Marketing. As to (b), subject perhaps to the short-lived wrinkle (paragraph 96 above), Marketing has adopted what I think is a reasonable stance, namely that in the particular circumstances of this case the challenge to the jurisdiction and the propriety of seeking judgment in default, if that challenge fails, can and should be seen as separate issues.
- iv) Finally, Mr Choo Choy QC submitted that "*the entry of default judgment against [Mr Daskalakis] in the staggering sum of US\$74 million as a result of an inadvertent failure [to appreciate he had been served with the 2018 Claim] would be sanction ... overwhelmingly out of proportion to his mistake. Such a ruinous result would be a wholly undeserved windfall to [Marketing] in circumstances where it has (rightly) known and expected throughout that [Mr Daskalakis] would be contesting ... jurisdiction.*" Again, the reference to Marketing's appreciation that Mr Daskalakis would wish to challenge jurisdiction is a red herring. He is to be entitled to do so, and to the extent he needs relief from sanctions for that (as I have concluded he does), he shall have it. Whether the entry of judgment in default for US\$74m or thereabouts is a disproportionate sanction, or an undeserved ruinous result for him or windfall to Marketing, is not established merely by being asserted. For all the court knows, or Mr Daskalakis is willing to vouchsafe at this stage, there may be no substance to any defence that Mr Daskalakis has in mind to attempt on the merits, if his challenge to jurisdiction in the 2018 Claim fails and he then chooses to participate on the merits.

117. In those circumstances, if the court has jurisdiction in the 2018 Claim, and judgment in default could have been entered in the face of the late acknowledgment of service filed prior to the default judgment application, in my judgment the fair outcome would have been to allow that application, enter judgment in default and leave Mr Daskalakis to apply, if so advised, to set it aside under CPR 13.3 upon a showing, if he can make it, that he has a real prospect of successfully defending Marketing's

claims in the 2018 Claim on the merits (or other good reason for setting aside), after the determination (if it went against him) of his challenge to jurisdiction. The question I touched on in paragraphs 38-41 above would have arisen; but even if it were concluded then that an application under CPR 13.3 is an application for relief from sanctions in respect of the original procedural default, that would be a new and different application for relief than the application I have considered, because the court would be in a position to assess the reality and potential viability of any defences to be asserted on the merits if the judgment were set aside, and it could not properly be held against Mr Daskalakis that he had saved that interim defence on the merits until after his challenge to jurisdiction had been resolved, since to have raised it earlier could well have destroyed that challenge independently of its merits.

118. In conclusion on Mr Daskalakis' applications in the 2018 Claim presently arising for determination, then, there will be relief from sanctions limited to waiving CPR 11(2) so as to entitle Mr Daskalakis to challenge jurisdiction in the 2018 Claim under CPR 11(1) notwithstanding that his acknowledgment of service was filed out of time, but otherwise those applications will be dismissed. What happens next in the 2018 Claim will now turn on the outcome of the jurisdiction application in the 2017 Claim, on which there will be a separate judgment (see paragraph 102 above).