

**EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2021/0044

BETWEEN:

The Federal Republic of Nigeria

Appellant

and

[1] Tibit Limited

First Defendant/Respondent

[2] Justin Ickonga

Second Defendant/Respondent

Before:

The Hon. Mr. Paul Webster

Justice of Appeal [Ag.]

The Hon. Mr. Sydney A. Bennett

Justice of Appeal [Ag.]

The Hon. Mr. Godfrey Smith

Justice of Appeal [Ag.]

Appearances:

Mr. Steven Thompson, KC with him Mr. Faisal Osman, Mr. Richard Brown and Mr. Paul Griffiths for the Appellant

Mr. Matthew Hardwick, KC with him Mr. Neil McLarnon and Ms. Monique Peters for the Respondent

2022: September 21

2023: March 24.

Civil appeal – Default judgment – Rule 12.9(2) of Civil Procedure Rules 2000 - Whether a claim against one defendant can be determined separately from the claim against other defendants – Whether there was

some practical reason, connected with the efficiency or expediency of the further conduct of the litigation to explain the deferral of the entry of default judgment

The Federal Republic of Nigeria (“FRN”) brought legal proceedings to recover what it claims to be the proceeds of a corrupt oil deal involving its former Minister for Petroleum Resources, Chief Dauzia Loya Etete and a Nigerian company named Malabu Oil & Gas Limited (“Malabu”). FRN alleges that Mr. Etete, abused his position as minister, to engage in corrupt transactions which saw the sum of US\$1,092,040,000 (“the Malabu Proceeds”) transferred from the Federal Republic of Nigeria to Malabu, a company which he controlled and of which he was a beneficial owner. The monies were allegedly used to fund the acquisition of a Bombardier Global Vision 6000 business jet (the “jet”). Tibit Limited (“Tibit”), a company registered in the British Virgin Islands has since April 2013 been the legal owner of the jet. It is alleged that the jet was acquired in Tibit’s name at the direction of and for the benefit of Mr. Etete. Mr. Ickonga, a Congolese national, is the registered owner of the sole issued share in Tibit. The FRN contends that Tibit and Mr. Ickonga *inter alia*, assisted Mr. Etete to acquire and then conceal Mr. Etete’s interest in Tibit and the jet, and /or by enabling and then concealing the use of the Malabu Proceeds to acquire and maintain the jet on behalf of Mr. Etete.

In the court below, FRN asserted a proprietary claim over the jet in addition to personal claims for compensation. FRN also sought an order that Tibit and Mr. Justin Ickonga account as constructive trustees to FRN and that there be equitable compensation or damages on the basis that Tibit and/or Mr. Ickonga are dishonest assistants, and interest on the amounts ordered to be paid under that claim. Tibit was served and filed an amended defence to the claim. Mr. Ickonga was also served however he has not filed an acknowledgment of service and/or a defence to the claim. As a result, FRN filed an application for default judgment against Mr. Ickonga.

The application for entry of default judgment came up for hearing before the learned judge in the Commercial Division and the learned judge in applying rule 12.9(2) of the **Civil Procedure Rules, 2000** (or “CPR”) ruled that FRN’s application for default judgment to be entered against the Second Defendant Mr. Ickonga, be adjourned until trial of the action. The formal judgment issued by the court recites that the application was adjourned pending trial on the basis that the claim against Mr. Ickonga cannot be determined separately from the claim against the First Defendant Tibit. The transcript of trial proceedings however shows that the learned judge had concluded that that the claims against the respective defendants could be determined separately but he had exercised his judicial discretion to have the application for judgment against Mr. Ickonga

dealt with at the same time as the claim against Tibit. The learned judge regarded the allegations relating to the claim of dishonest assistance against Mr. Ickonga and against Tibit as being so inextricably intertwined that it would be impracticable to dispose of the claims against each defendant separately.

The learned judge gave permission to appeal and the FRN has appealed against the decision of the learned judge pursuant to the leave so granted. FRN has filed three grounds of appeal which turns on the correct interpretation of CPR 12.9(2) and the right approach to the question of whether a claim against one defendant can be determined “separately” from the claim against other defendants.

Held: allowing the appeal, setting aside the order of the learned Judge made 2nd December 2021, ordering that judgment in default of acknowledgment of service and/or defence be entered up against Mr. Justin Ickonga pursuant to rule **12.9(2)(a)(i)** of the **Civil Procedure Rules 2000** and that the Respondent Mr. Ickonga pay the costs of FRN, such costs to be assessed by a judge of the Commercial Court if not agreed within 21 days, that:

1. CPR Rule 12.9 (2) (a) provides that if a claimant applies for a default judgment against one of two or more defendants, and the claim can be dealt with separately from the claim against the other defendants, the court may enter judgment against that defendant. The word “may” in the context of CPR 12.9(2)(a) is permissive and indicates that on an application for default judgment under CPR 12.9 the court is vested with a discretion to refuse to enter judgment in default even if case can be dealt with separately. While the court may exercise this discretion to refuse to enter judgment in default, there must be some practical reason, connected with the efficiency or expediency of the further conduct of the litigation, which will explain the deferral of the entry of such judgment.

Rule 12.9(2)(a)(i) of the **Civil Procedure Rules 2000** applied; **John Page v Champion Financial Management Limited et al** [2014] EWHC 1778 (QB) applied; **Otkritie International Investment Management Ltd v Urumov** [2012] EWHC 890 (Comm) applied; **Crown Aluminium Limited v. Northern & Western Insurance Company Limited, Cambridge Risk Advisors Limited** [2011] EWHC 277 applied

2. In the instant case the learned judge correctly determined that the claim against Mr. Ickonga was one which fell into the category of claims controlled by **CPR 12.9 (2) (a)** and could accordingly be dealt with separately from the claim against Tibit.

The judge correctly appreciated that notwithstanding the reasons given in his decision, the claims could be tried together. Nonetheless he had exercised his discretion not to enter judgment against Mr. Ickonga for the reasons appealed against. The learned judge did so on the premise (a) that the claims made against Mr. Ickonga and Tibit were based on, or involved their joint liability for dishonest assistance; (b) that the entry of judgment in default against Mr. Ickonga would necessarily disadvantage Tibit by giving rise to the inference or assumption that both defendants have been involved in a corrupt transaction and that in that event the Court would have to undertake the difficult task of compartmentalising that assumption and inference in trying the claim against Tibit; and (c) that the entry of default judgment involved an undesirable risk of inconsistent judgments. However, these premises involved an erroneous analysis of the legal position, as dishonest assistance is a form of civil secondary liability whereby the assistant is held jointly and severally liable along with the trustee whose misconduct he assisted. The instant case is not one in which a finding of liability on the part of one defendant is contingent on the liability of the other. Mr. Ickonga's liability is claimed to have arisen from his personal actions in having facilitated the purchase of the jet by Mr. Etete and having procured the concealment of the purchase by the arrangement with Tibit, knowing or having reason to suspect that Mr. Etete's scheme to acquire the jet involved a fraudulent breach of trust. The learned judge's concern about the apparent claim of joint liability against the defendants and the importance of that factor in dealing with the respective claims against them is misplaced. No reason has been shown which could explain the learned judge's departure from the usual practice of entering judgment against a defaulting defendant where the claim against him could be dealt with separately from the claim against the other defendant. The learned judge therefore erred in this regard.

Byers & Ors v Samba Financial Group [2021] EWHC 60 (Ch) applied; Twinsectra Limited v Yardley [2002] 2 AC 164 applied; Martin Didier et al v Royal Caribbean Cruises Ltd SLUHCVP2017/0051 (delivered 6th June 2016, unreported applied; Lewison LJ in Broughton v Kop Football (Cayman) Ltd [2012] EWCA Civ 1743 applied.

JUDGMENT

- [1] **BENNETT JA [AG.]:** This is an appeal by the Federal Republic of Nigeria against the decision of the learned judge made 2nd December 2021 whereby he declined to enter judgment against the Second Defendant, Mr. Justin Ickonga, for failure to file an acknowledgment of service and/or defence and ordered that the application by the Federal Republic of Nigeria be adjourned until trial.

Background

- [2] The Federal Republic of Nigeria ("FRN"), a sovereign state in West Africa, has brought legal proceedings in several jurisdictions to recover what it claims to be the proceeds of a corrupt oil deal involving a Nigerian company named Malabu Oil & Gas Limited ("Malabu"). The instant case is one such proceeding. FRN alleges that Chief Dauzia Loya Etete, otherwise known as Dan Etete ("Mr. Etete"), the Minister for Petroleum Resources for the Federal Government of Nigeria between 1993 and 1998, his position as such minister by allocating to Malabu, a company which he controlled and of which he was a beneficial owner, an oil prospecting licence for Block 245, an oil field located in the Eastern Nigerian Delta in the offshore territorial waters of Nigeria ("OPL 245") at a gross undervalue. It is further alleged that as a consequence of Mr. Etete's breach of his fiduciary duties and of a series of events some of which involved allegedly corrupt transactions as set out in the Statement of Claim a sum of US\$1,092,040,000 ("the Malabu Proceeds") was wrongfully transferred from the Federal Republic of Nigeria to Malabu. The FRN claims that a substantial part of the Malabu Proceeds was paid to Rocky Top, a Nigerian company of which Mr. Etete was the ultimate beneficial owner and controller and disbursed at the direction of and for the benefit of Mr. Etete. The current

proceedings concern a claim for the recovery of monies which the FRN claims to be part of the Malabu Proceeds. The monies were allegedly used to fund the acquisition of a Bombardier Global Vision 6000 business jet with serial number 9471 and tail number M-MYNA (the “jet”). The respondent, Tibit Limited (“Tibit”), a company registered in the British Virgin Islands has since April 2013 been the legal owner of the jet. It is alleged that the jet was acquired in Tibit’s name at the direction of and for the benefit of Mr. Etete. Mr. Justin Ickonga, a Congolese national, is currently the registered owner of the sole issued share in Tibit. He was between 5th March 2019 and 27th July 2021 the sole director of Tibit. The FRN contends that Tibit and Mr. Ickonga facilitated Mr. Etete in his breach of trust by, *inter alia*, assisting Mr. Etete and Rocky Top to acquire and then conceal Mr. Etete’s interest in Tibit and the jet, and /or by enabling and then concealing the use of the Malabu Proceeds to acquire and maintain the jet on behalf of Mr. Etete and Rocky Top, and by acting as Mr. Etete’s creature and agents.

[3] By reason of the foregoing FRN asserts a proprietary claim over the jet, in addition to personal claims for compensation. Against Tibit the FRN claims-

- (a) A declaration that Tibit, as a knowing recipient, holds the jet as constructive trustee, together with orders for an account, damages, equitable compensation and/or an order that Tibit delivers up the Jet to the Claimant on the basis that Tibit is a knowing recipient and/or nominee of Etete and/or Rocky Top (defined below) (the “**Knowing Receipt Claim**”);
- (b) An order for restitution or, alternatively, an account on the basis that Tibit has been unjustly enriched (the “**Unjust Enrichment Claim**”);

[4] Against Tibit and Mr. Ickonga the FRN claims an order that Tibit and Mr. Ickonga account as constructive trustees to [FRN] and equitable compensation or damages on the basis that Tibit and/or Mr. Ickonga are dishonest assistants (**the “Dishonest Assistance Claim”**) and interest on the amounts ordered to be paid under that claim.

[5] Tibit was duly served and filed an amended defence to the amended claim on 18th September 2020. On 19th November 2020, the learned judge granted permission to serve Mr. Ickonga out of the jurisdiction. Mr. Ickonga was duly served in Brazzaville, Congo, on 7th May 2021. The deadline for Mr. Ickonga to file an Acknowledgment of Service was on 14th June 2021. No Acknowledgment of Service has been filed. The deadline for Mr. Ickonga to file a Defence was on 5th July 2021. No Defence has been filed.

The application for default judgment

[6] FRN duly filed an application for default judgment against Mr. Ickonga based on his failure to file an acknowledgment of service and/or defence to the claim within the time limited or at all.

[7] In a case where there are two or more defendants, and an application is being made for default judgment or judgments against one of them **CPR 12.9** provides.

“12.9 (1) A claimant may apply for default judgment on a claim for money or a claim for delivery of goods against one of two or more defendants and proceed with the claim against the other defendants.

(2) If a claimant applies for a default judgment against one of two or more defendants, then if the claim –

(a) can be dealt with separately from the claim against the other defendants –

(i) the court may enter judgment against that defendant; and

(ii) the claimant may continue the proceedings against the other defendants.

(b) cannot be dealt with separately from the claim against the other defendants the court –

(i) may not enter judgment against that defendant; and

(ii) must deal with the application at the same time as it disposes of the claim against the other defendants.”

[8] The application for entry of default judgment came up for hearing before the learned judge in the Commercial Division of the High Court on 2nd December 2021. At the hearing the learned judge ruled that FRN's application for default judgment to be entered against the second defendant Mr. Ickonga, be adjourned until trial of the action. The formal judgment issued by the court recites that the application was adjourned pending trial on the basis that the claim against Mr. Ickonga cannot be determined separately from the claim against the first defendant Tibit. The transcript of trial proceedings however shows that the learned judge had concluded that that the claims against the respective defendants could be determined separately but had exercised his judicial discretion to have the application for judgment against Mr. Ickonga dealt with at the same time as the claim against Tibit. In a decision given *ex tempore*, the learned judge referred to paragraphs 52 and 54 of the Amended Statement of Claim where the claim against Tibit and Mr. Ickonga for dishonest assistance is set out. paragraph 52 of the Amended Statement of Claim states-

“52. Further, Tibit acted dishonestly in relation to its receipt of trust property. The particulars of that dishonesty are as follows:

- 52.1. Tibit's knowledge is that of, inter alios, Etete, for the reasons pleaded at paragraph 44 above, such that it knew that it was in receipt of property transferred in breach of trust, and in circumstances where the Constructive Trust arose as a result of fraud , concealment and corruption by Etete and others;
- 52.2. Alternatively, as pleaded at paragraphs 49-50 above, Tibit (by its directors and/or Ickonga) knew or should have known that Tibit was in receipt of property transferred in breach of trust, and in circumstances where the Constructive Trust arose as a result of fraud, concealment and corruption by Etete and others, and that Tibit was actively complicit in the said concealment, or alternatively Tibit (by its directors) was willfully blind to those facts and matters.”

[9] Paragraph 54 of the Amended Statement of Claim states:

“Tibit and Ickonga acted dishonestly for the reasons pleaded at paragraph 52 above. In particular:

- 54.4.1. Tibit was either aware, as Etete's creature, of the said breach of trust, and/or would have been suspicious (by its directors being put on enquiry) should have made reasonable enquiries as to the probity of the circumstances in which funds were first received by and then transferred by Rocky Top, in circumstances where Etete was a PEP (politically exposed person) who had been convicted of money laundering offences; and
- 54.4.2. Tibit, having that knowledge (or wilfully failing to make reasonable enquiries), acted dishonestly in participating in Etete's scheme to acquire the Jet using the Malabu Proceeds. Any reasonable person in the position of Tibit would have recognised that Tibit was participating in and assisting a fraudulent and corrupt transaction_for the benefit of Etete; -
- 54.4.3 Ickonga knew, or could and should (being put on inquiry) on reasonable inquiry have discovered,

that Etete was acting in fraudulent breach of trust by reason of the following facts and matters:

54.4.3.1 Rocky Top, for whom Ickonga purported to be acting, was associated with Etete;

54.4.3.2 Etete was a former minister in a government which was notorious for corruption.

54.4.3.3 The payments of some US\$57 million by Rocky Top would or should have caused Ickonga to make reasonable enquiry as to the source of Rocky Top's funding; any person conducting such enquiries would have discovered the facts and matters set out in paragraph 48 above, for the reasons pleaded in paragraph 50.

54.5 Accordingly, Ickonga knew or ought to have realised that he was assisting Etete in facilitating the purchase of the Jet using the Malabu Proceeds in circumstances where the Malabu Proceeds were derived from the corrupt 2011 Deal. No honest person would have agreed to act for Etete or Rocky Top in those circumstances.

[10] In relation to the above pleadings the learned judge observed:

(a) "...the pleading here is put on the basis of a situation where Tibit and Mr. Ickonga are said to have done certain things, such as dishonestly assist in respect of, in essence, the same ultimate transaction to do with his jet. So the way it is put is on the basis of joint liability" It is also put in the Amended Statement of Claim on the basis that there was an underlying corrupt deal for which Tibit would, Tibit and Mr. Ickonga would be constructive trustees. And if I go specifically, so I am not accused of misquoting, if I go specifically to certain paragraphs in the Amended Statement of Claim. We have, for example, 54.4 where it is said that "Tibit and Ickonga acted dishonestly for the reasons pleaded in paragraph 52 above. And 52 above talks about Tibit acting dishonestly in receipt of trust property on the basis that Tibit by its directors and/or Ickonga, knew, so that is Tibit, by its directors and/or Ickonga, knew certain things, that Tibit was in receipt of property. That all ties into Tibit"¹

¹ Transcript of Proceedings page 35 lines 5 to 25 Hearing Bundle Page 110.

(b) "So, they referred to paragraph 52 which focuses on Tibit and it attributes dishonest conduct of Mr. Ickonga for that reason. And then what we have there is that Tibit was aware of certain things." In 54.4.1 and 54.4.2, Tibit with that knowledge acted dishonestly. Then at 54.4.3, we have that "Ickonga knew, or could and should, on reasonable inquiry have discovered that Etete was acting in fraudulent breach of trust by reason of the following facts and matters."²

(c) "And he goes into talking about Rocky Top associated with Etete. "Etete being a former minister in a government which was notorious for corruption. And that payments of same \$57 million by Rocky Top would or should have caused Ickonga to make reasonable inquiry as to the source of Rocky Top's funding."³

(d) "Then it concludes that: "Accordingly, Ickonga knew or ought to have realised that he was assisting Etete in facilitating the purchase of the jet using the Malabu Proceeds in circumstances where the Malabu Proceeds were derived from the corrupt 2011 Deal. No honest person would have agreed to act for Etete or Rocky Top in those circumstances."⁴

(e) "Well, what we have here, is we have two things, or three things wrapped together. One is an assumption that the 2011 Deal was corrupt. Two is that Tibit was assisting Etete dishonestly in relation to that corrupt deal. And three, that Ickonga was with Tibit also assisting."⁵

[11] It is clear from the foregoing that the learned judge regarded the allegations relating to the claim of dishonest assistance against Mr. Ickonga and against Tibit as being so inextricably intertwined that it would be impracticable to dispose of the claims against each defendant separately.

² Transcript of Proceedings page 36 lines 1 to 10 Hearing Bundle Page 111.

³ Transcript of Proceedings page 36 lines 13 to 17 Hearing Bundle Page 111.

⁴ Transcript of Proceedings page 36 lines 19 to 25 Hearing Bundle Page 111.

⁵ Transcript of Proceedings page 37 lines 3 to 8 Hearing Bundle Page 112.

[12] The position taken by the learned judge in that regard is summarised in the following passage:⁶

"Now what are we going to have if I enter a judgment in default against Mr. Ickonga? We are going to have assumptions, inferences, that yes it was a corrupt deal; Malabu was entirely corrupt as pleaded. That Mr. Ickonga dishonestly assisted. We are going to have all that without a trial. We are going to have administratively deemed to have been the case. And at the same time, Tibit who has put in a defence will be standing there saying none of this happened. We will have a trial whether or not the underlying deal was corrupt or not, whether Malabu was tainted with corruption or not, or whether Tibit was, through Mr. Ickonga its underlying beneficial owner, was dishonestly assisting or not.

Basically, where this would take us would be that we would have one, potentially one legal state of affairs established in relation to Tibit, which could be completely different from the legal state of affairs which would be procedurally inferred and deemed against Mr. Ickonga. And there is a scope, naturally, that the matters which Mr. Ickonga would be deemed to be adjudged liable for, they would affect Tibit, it stands to reason I suppose, because it's all tied in with the same pleading and it's all the same set of facts.

So, if you go then to Otkritie, then the words of Justice Flaux as he then was at paragraph 25 take on significance. There he said in that case:

"The judgment in default has no effect whatsoever against any of the other defendants, either current defendants or defendants soon to be joined to the proceedings."

Well in this case, that's not true. What we will be required to do is we would be required. to carve out somehow, or mentally compartmentalize Mr. Ickonga's position and the underlying position that would necessarily flow from it, namely, that Malabu was a corrupt deal, and the 2011 transaction was also corrupt. Compartmentalize all that out and deal with Tibit separately, it's unrealistic on the pleadings.

And it's particularly unrealistic in circumstances where it has been specifically pleaded that not just in relation to discrete

⁶ Transcript of Proceedings page 37 lines 9 to page 39, line 3 Hearing Bundle Pages 112-113.

acts, but both together Mr. Ickonga. and Tibit are both jointly liable for various things.”

[13] Bearing in mind the concerns abovementioned the learned judge felt constrained to exercise his discretion to decline to enter judgment in default against Mr. Ickonga. In so doing his Lordship explained that “...in those circumstances, I think I am bound to hold that the Court cannot sensibly, it can insensibly, but it cannot sensibly deal separately with the claim against Mr. Ickonga as the claim against Tibit. It can't sensibly do that on the pleadings... I think that this is one of those situations where the Court can enter judgment against Mr. Ickonga. It has a discretion to do so. But on the pleadings, it would not be sensible to do it.”⁷

[14] The learned judge readily gave permission to appeal and the FRN now appeals against the decision pursuant to the leave so granted.

The Appeal

[15] Mr. Steven Thompson, KC for the FRN submitted that in arriving at his decision the learned judge erred in principle in two fundamental ways. The primary error was in the judge's analysis of the case against Tibit and Mr. Ickonga. The judge had erroneously concluded that the case against them involved joint liability. The case was not one in which both or none of the defendants must be found liable as in a case involving joint liability. Further this is not a case where the defendants were sued in the alternative, in which case one or the other but not both might be found liable. The case as shown on the pleadings was one in which one or the other or both or neither of the defendants could be found liable that is to say,

⁷ Transcript of Proceedings page 39 lines 4 to 13 Hearing Bundle Page 114.

that they are sued as being severally liable. The only case against Mr. Ickongo is for dishonest assistance. He is not a knowing recipient because it was Tibit, and not he who received the jet. There is no claim against him for unjust enrichment. Mr. Thompson stated that there was some overlap between the cases against the respective defendants as Mr. Ickongo's knowledge of the trust on which the Malabu proceeds had been held by Mr. Etete and acts taken in breach of it could be attributed to Tibit since he was the directing mind of Tibit. He is not, however, the only person through whom such knowledge could be sought to be established- There is for instance Mr. Etete and also its other directors and executives during the material period. There is nothing to prevent the trial of the claim against Tibit only. There was simply no reason why the claim against Tibit could not be dealt with separately from the claim against Mr. Ickonga.

- [16] In Mr. Thompson KC's submission, the second error made by the learned judge was his conclusion that the entering up of default judgment against Mr. Ickongo would somehow prejudice Tibit in its defence and leave the somewhat contradictory position that one of two defendants alleged to have been involved the same fraud had been administratively deemed liable on claims of fraudulent conduct and the other left to mount a defence to the allegations notwithstanding the judgment. In this regard the learned Judge had failed to recognise that the entry of default judgment is the procedural consequence of a defendant's failure to comply with the rules that has nothing to do with the merits of a claim. The risk that a defendant takes in ignoring the process of the court is that he may be found liable regardless of the merits. The only evidential outcome of default judgment is that a defendant has failed to participate in the proceedings; however, his reasons for failing to do

so are not subjected to any analysis. Since there has been no decision on the merits of the allegations in the claim there are no factual ‘assumptions’ or ‘inferences’ that may be made or relied upon at trial. Thus, the learned judge erred in principle by considering that the matters he identified were in some way “administratively deemed” by the entry of default judgment.

[17] Mr. Thompson KC submitted that the learned Judge ought to have followed the approach of Flaux J in **Otkritie International Investment Management Ltd v Urumov**⁸ in relation to (England and Wales) CPR 12.8(2)(b) a provision that was materially identical **CPR 12.9(2)**. The provision is directed to circumstances in which the entry of default judgment against a defaulting defendant makes it untenable to try the case against the non-defaulting defendant. The classical example of such a circumstance is where claims against the defendants are brought in the alternative so that the entry of judgment against one necessarily concludes the case against the other. The default judgment is not a judgment on the merits but rather, a procedural judgment which the claimant is entitled to ask for if it has served regularly on the relevant defendant because that defendant has failed to comply with the rules. Because it is not a judgment on the merits the effect of such a default judgment is against the defaulting defendant only.

[18] This approach had been endorsed by Simon Picken QC sitting as a Deputy Judge of the High Court in **Page v Champion Financial Management Ltd**.⁹ There he endorsed the views expressed by Flaux, J in **Otkritie International Investment Management Ltd v Urumov** and concluded firmly at paragraph 69 of the judgment that

⁸ [2012] EWHC 890 (Comm).

⁹ [2014] EWHC 1778.

it was open to the non-defaulting defendant to advance by way of defence to a claim against it a case which is inconsistent with a default judgment obtained against another defendant.

- [19] The same approach had been taken by Ramdhani, J in the Eastern Caribbean Supreme Court in the case of **Development Bank of St Kitts and Nevis v Browne et al.**¹⁰ There the judge posited at paragraph [50] of his judgment that **CPR 12.9**:

“...expects and requires that the court should make a determination in any case where there are two or more defendants, and an application is being made for default judgment or judgments against one or more but not against all. In this exercise it must be determined whether the claims against each of the defendants can be dealt with separately or whether a default judgment against one will effectively extinguish the claim against the other, or otherwise adversely affect the interests of the remaining defendant(s) on the trial.”

- [20] In **Albesh v Ryan**¹¹ an action essentially for fraud had been brought against three defendants on the basis of deceit or unlawful means conspiracy. One defendant had been regularly served but had failed to file an acknowledgement of service. On application for default judgment against that Defendant it was urged that by virtue of the fact that this is, essentially, a fraud made jointly by all three defendants, which in turn depends upon a conspiracy, the case fell within (England and Wales) **CPR12.8(2)(b)** in that the claim against the defaulting defendant could not be dealt with separately from the claim against the other defendants. Judge Wacksman QC rejected the proposition that the case fell within (England and Wales) **CPR12.8(2)(b)** He observed that:

“...It is plain from the authorities, and it is also mentioned in the notes that where a default judgment is entered against one defendant in those circumstances, it has no effect

¹⁰ SKBHCV2012/0084 (delivered 8th April 2014, unreported).

¹¹ [2015] EWHC 3058 (Comm).

whatsoever against any of the other defendants: either the current defendants or new defendants. So, if I enter judgment against the second defendant, it does not automatically mean that is any kind of evidence in relation to the conspiracy claims which have yet to be pursued against the first and the third defendants. If that matter goes to trial and the conspiracy is established, well, then that is consistent with a default judgment. If the matter goes to trial and they are acquitted of a conspiracy, there is no liability on their part. The default judgement would, unless set aside, remain on the part of the second defendant but that is because no acknowledgement of service was filed. That is my present reading of this matter on the limited materials and argument I have before me.”

[21] Mr. Matthew Hardwick, KC appeared for Tibit, and not for the defaulting defendant Mr. Ickonga. Mr Thompson, KC maintained that Tibit has no status in the current appeal but did not object to Mr. Hardwick, KC appearing and making submissions.

[22] Mr. Hardwick did not dispute the principle that a judgment in default is not one which is made on the merits. He allowed that on the facts as pleaded the case fell within **CPR 12.9 (2) (a)** in that the claim could be dealt with separately from the claim against the other defendants and that had the judge found otherwise he would have fallen into error. His position is that on its true construction, **CPR 12.9 (2)** provides for 2 situations, one being (a) where a claim can be dealt with separately (which he described as “ a possible case”) and the other being (b) where claim cannot be dealt with separately (described as “an impossible case”). In a case falling within **CPR 12.9 (2) (a)** i.e., a possible case. the rule provides that the Court *may* enter judgment against the defaulting defendant and the claimant may continue the proceedings against the other defendants. In a case falling within **CPR 12.9 (2) (b)** however the Court may not enter judgment against the defaulting defendant but must deal with the application at the same time as it disposes of the

claim against the other defendants. The word “*may*” in the context of **CPR 12.9 (2) (a)** he argues, is permissive and indicates that on an application for default judgment under **CPR 12.9** the Court is vested with a discretion to refuse to enter judgment in default even if case can be dealt with separately. In this connection Mr. Hardwick made reference to the judgment of Ramdhani, J in the case of **Development Bank of St Kitts and Nevis v Browne et al** at paragraph 52 that it would be inappropriate to grant judgment against one defendant where the case against the remaining defendant could not be disposed of on the merits without an examination of the case against the defaulting defendant.

- [23] Mr. Hardwick pointed out that in his decision the learned judge explained that:

“...I think that this is one of those situations where the Court can enter judgment against Mr. Ickonga. It has a discretion to do so. But on the pleadings, it would not be sensible to do it.”

- [24] He submitted that the learned Judge had found that the case fell within **CPR 12.9 (2) (a)** and could be dealt with separately from the claim against the other defendants. Notwithstanding this conclusion the judge had exercised his discretion under **CPR 12.9 (2) (a)** to decline to enter judgment against the defaulting defendant Mr. Ickonga. He had exercised his discretion in that way because.

(a) The judge had come to the conclusion that the case was one of akin to joint liability rather than of several liability. Here Mr. Hardwick argued that the case of **Otkritie International Investment Management Ltd v Urumov** was a classic case of several liability because the parties would be liable for different amounts. Several liability is

one where each obligor is liable for his portion of a specified obligation. In the instant case, however there was no differentiation between the liabilities of the respective defendant;

(b) The judge was concerned at a practical level for the mental gymnastics that the court would have to go through in a case where a sole shareholder of a company is already liable by default but the company, whose only human actor was Mr. Ickonga would be denying liability.

(c) The possibility had been raised in argument before the learned judge that if default judgment was entered against Mr. Ickonga, it was likely that receivers would be appointed over Mr. Ickonga's shares in Tibit and FRN would take control of Tibit through that route and would therefore be able to prevent or to deprive Tibit of its right to have its defence tried and considered by the Court.

Discussion

[25] There is no apparent dispute as to the applicable principles and indeed, none that the claim against Tibit can be tried separately from that of Mr. Ickonga. The learned judge purported to exercise his discretion under **CPR 12.9(2)(a)** to decline to grant judgment in default against a defaulting defendant notwithstanding the fact that the claim against him could have been dealt with separately from the case against the other defendant. This raises questions as to as to the scope of the court's discretion under **CPR 12.9**.

The court's discretion under CPR 12.9

[26] **CPR Rule 12.9 (2) (a)** provides that “If a claimant applies for a default judgment against one of two or more defendants, then if the claim –(a) can be dealt with separately from the claim against the other defendants – (i) the court *may* enter judgment against that defendant”.

[27] I agree with Mr. Hardwick that the word “may” in the context of **CPR 12.9 (2) (a)** is permissive and indicates that on an application for default judgment under **CPR 12.9** the Court is vested with a discretion to refuse to enter judgment in default even if the case can be dealt with separately. I note also that in **John Page v Champion Financial Management Limited et al**,¹² Deputy High Court Judge Simon Picken QC posited at paragraph 82 that-

“82. ... CPR 12.8(2)(a) enables the Court, in the exercise of its discretion (the word “may” is used, as opposed to “will” in CPR 12.8(2)(b)), not to grant the default judgment sought, but to require that all claims are dealt with at the same time. It seems to me that this covers a situation where, although the claim against the defaulting defendant (here, the First Defendant) “can” be dealt with separately from the claims brought against other defendants (here, the Fifth Defendant), it nevertheless makes better sense for all claims to be dealt with at the same time.”

[28] In my view the discretion not to grant the default judgment sought even in circumstances where the claim against the defaulting defendant can be dealt with separately from the claims brought against other defendants, may be exercised in any case where the entering up of judgment in default against one of two or more defendants will render impracticable or adversely affect the conduct of the trial against the non-defaulting defendants. In my judgment, however, in so doing the court must not lose sight of the imperative for the existence of the power to enter up judgments in default in

¹² [2014] EWHC 1778 (QB).

the first place: it is an essential measure by which the court ensures compliance with its rules and processes. Where one of two or more defendants, having been regularly served has failed to comply with the rules as to response to a claim, the claimant has applied for judgment in default and the court has determined that the claim can be dealt with separately from the claim against the other defendants, the usual order will be for default judgment to be entered up against the defaulting defendant. As I see it there must be some practical reason, connected with the efficiency or expediency of the further conduct of the litigation, which will explain the deferral of the entry of such judgment.

The reasons for the decision

- [29] In the instant case the learned judge, in arriving at his decision not to grant the default judgment sought but to adjourn the application with a view to having the claims against both defendants dealt with at the same time, made extensive reference to the Amended Statement of Claim filed in the matter. The learned judge read the Amended Statement of Claim as having alleged that there was an underlying corrupt deal for which Tibit and Mr. Ickonga dishonestly assisted Mr. Etete in a fraudulent breach of trust by acting as his agent and creature to acquire, maintain and conceal his interest in the jet. It was there asserted that the jet was purchased using monies which were part of the proceeds of Mr. Etete's breach of fiduciary duty to the FRN, and which monies he held on constructive trust for the Government of the FRN. In assisting Mr. Etete in facilitating the purchase of the jet Mr. Ickongo knew or ought to have realised that the purchase was being affected using funds derived from a corrupt deal and that Mr. Etete was acting in fraudulent breach of trust. Tibit by being the nominal owner of the jet was a knowing recipient of trust property because the

knowledge of Mr. Ickonga, its directing mind, could be attributed to it.

- [30] From his analysis of the pleadings the learned judge formed the view that the allegations of dishonest behavior constituting the basis of the claims against Mr. Ickonga and Tibit were so inextricably bound up together as to amount to claims based on their joint liability. Further, the learned judge felt that the entry of judgment in default against Mr. Ickonga would necessarily establish a basis for the underlying inference or assumption that the transaction was corrupt, and the participants tainted with corruption and that this state of affairs would place the defendant Tibit at a disadvantage because the Court would have the difficult task of mentally compartmentalizing the assumptions and inferences flowing from that default judgment. Moreover, the Court was concerned with the risk of inconsistent judgments as to liability, since "...we would have one, potentially one legal state of affairs established in relation to Tibit, which could be completely different from the legal state of affairs which would be procedurally inferred and deemed against Mr. Ickonga." In summary the learned judge exercised his discretion on the premise (a) that the claims made against Mr. Ickonga and Tibit were based on, or involved their joint liability for dishonest assistance; (b) that the entry of judgment in default against Mr. Ickonga would necessarily disadvantage Tibit by giving rise to the inference or assumption that both defendants been involved in a corrupt transaction and that in that event the Court would have to undertake the difficult task (referred to by Mr. Hardwick KC as the "mental gymnastics") of compartmentalizing that assumption and inference in trying the claim against Tibit; and (c) that the entry of default judgment involved an undesirable risk of inconsistent judgments.

[31] In my view each of those premises involved an erroneous analysis of the legal position. Dishonest assistance is a form of civil secondary liability whereby the assistant is held jointly and severally liable along with the trustee (in this case Mr. Etete and Rocky Top) whose misconduct he assisted. The liability of a dishonest assistant is truly fault-based. It arises from the dishonesty of the defendant in assisting a trustee to commit a breach of trust (or assisting a fiduciary to commit a breach of fiduciary duty) **Byers & Ors v Samba Financial Group**.¹³ In **Twinsectra Limited v Yardley**,¹⁴ Lord Millett stated at paragraph 137 that:

"The gravamen of the charge against the accessory is not that he is handling stolen property, but that he is assisting a person who has been entrusted with the control of a fund to dispose of the fund in an unauthorised manner. He should be liable if he knows that the arrangement by which that person obtained control of the money and that his authority to deal with the money was limited and participates in a dealing with the money in a manner which he knows is unauthorised ..."

[32] A defendant is only liable if he acts dishonestly, which is judged according to the standards of an ordinary honest person, rather than the defendant's own standards. In the United Kingdom Supreme Court case of **Ivey v Genting Casinos**,¹⁵ Lord Hughes set out the position at paragraph 74 as follows:

"The test of dishonesty is as set out by Lord Nicholls in *Royal Brunei Airlines Sdn Bhd v Tan* and by Lord Hoffmann in *Barlow Clowes*: see paragraph 62 above. When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be

¹³ [2021] EWHC 60 (Ch).

¹⁴ [2002] 2 AC 164.

¹⁵ [2017] UKSC 67.

reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct is honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest."

[33] It follows that the fact that the liability of alleged dishonest assistants is dependent upon their actions and the inferences which may be drawn therefrom, the evidence against each as to his or its knowledge or belief as to the facts and the genuineness or otherwise of that belief. Ultimately, a determination is made on the question as to whether his or its conduct was honest or dishonest applying the standards of ordinary decent people.

[34] The circumstance that the defendants are alleged to have participated in the same fraud does not affect the position. In the Amended Statement of Claim both Tibit and Mr. Ickongo were sued for dishonestly assisting in the complained of breach of trust. Mr. Ickonga's liability is claimed to have arisen from his personal actions in having facilitated the purchase of the jet by Etete's creature Rocky Top and having procured the concealment of the purchase by the arrangement with Tibit, knowing or having reason to suspect that Mr. Etete's scheme to acquire the jet involved a fraudulent breach of trust. Tibit's liability is claimed to have arisen because it had knowingly assisted Mr. Mr. Etete in carrying out a fraudulent breach of trust. For that purpose its knowledge was that of Mr. Etete, and/or alternatively that of Mr. Ickongo and/or of its other directors or officers who ought to have known or suspected that the acquisition of the jet by Rocky Top, a company associated with Mr. Etete and for whom Mr. Ickonga purported to be acting, involved a fraudulent breach of trust by Mr. Etete .Additionally

against Tibit it is claimed that in holding legal title to the jet it was in receipt of property which it knew or ought to have known had been transferred to it in breach of trust. There is also a further claim that it was unjustly enriched thereby.

- [35] The claims if proven would render the respective defendants severally liable for their own wrongful acts. The instant case is not one in which a finding of liability on the part of one defendant is contingent on the liability of the other. To the extent that it could be shown that the defendants were sufficiently bound up in each other's acts as to give rise to an inference that they were acting in pursuit of a common design. In **Albeshar v Ryan** where default judgment was entered up against one of three defendants to a claim for unlawful means conspiracy, Judge Wacksman QC rejected the proposition that the case fell within (England and Wales) CPR12.8(2)(b) because the case involved an alleged fraud made jointly by all three defendants. There is some overlap between the cases of the defendants in the present case as it is alleged that at some material times Mr. Ickonga was the sole director and directing mind of Tibit. It seems to me however, that since Mr. Ickonga has so far declined to participate (at least directly) in the proceedings as matters presently stand the issue as to his state of mind and the extent to which is to be imputed to Tibit will have to be contested between FRN and Tibit without any input from him. In that respect Tibit's position will not be affected by deferral of the entry of default judgment against Mr. Ickonga. In my respectful opinion the learned judge's concern about the apparent claim of joint liability against the defendants and the importance of that factor in dealing with the respective claims against them is misplaced.

The applicable principles

[36] I would summarise the principles applicable upon the hearing of an application for judgment in default under **CPR 12.9** as follows:

- (1) The primary issue to be determined by the judge upon the hearing of an application for judgment in default against one of two or more defendants is whether the claim against the relevant defendant can or cannot be dealt with separately from the claim against the other defendants.
- (2) **CPR 12.9 (2) (b)** is directed to circumstances in which the entry of default judgment against a defaulting defendant makes it untenable to try the case against the non-defaulting defendant. “The claim” in both **CPR 12.9(2)(a) and (b)** refers to the claim against the defaulting defendant in contrast to “the claim against the other defendants” The question is whether the claim against the defaulting defendant can or cannot be dealt with separately from the claim against the other defendants. The claim against the defaulting defendant cannot be dealt with separately from that against the other defendants if it has been brought in the alternative against the defaulting defendant and another defendant because the effect of entering a default judgment against the defaulting defendant would be to extinguish the claim against that other defendant. This concept extends to any situation in which the effect of entering default judgment against a defaulting

defendant would be to prevent the claim being pursued against another defendant.¹⁶

(3) The word “may” in the context of **CPR 12.9 (2) (a)** is permissive and indicates that on an application for default judgment under **CPR 12.9** the Court is vested with a discretion to refuse to enter judgment in default even if case can be dealt with separately.

(4) A default judgment is not a judgment on the merits. It is a procedural judgment which the claimant is entitled to ask for if the claimant has served regularly on the defendant and the Defendant has failed to comply with the rules by responding within the time limited by the rules for such response.¹⁷

(5) Since it is not a judgment on the merits a default judgment the effect of the default judgment is simply against the defaulting defendant; It has no effect whatsoever against any of the other defendants.¹⁸

(6) A default judgment obtained against one defendant (Defendant A) does not preclude another defendant in the same proceedings (Defendant B) from advancing, by way of defence to a claim against it(Defendant B), a case which is inconsistent with the default judgment which has been obtained (against defendant A) .¹⁹

¹⁶ Crown Aluminium Limited v. Northern & Western Insurance Company Limited, Cambridge Risk Advisors Limited [2011] EWHC 277 per Edwards-Stuart J at [32]

¹⁷ Otkritie International Investment Management Ltd v Urumov (supra) per Flaux, J at [24].

¹⁸ Ibid at [25].

¹⁹ Page v Champion Financial Management Ltd [2014] EWHC 1778 (QB); [2014] 6 WLUK 185 (QBD) per Simon Picken QC sitting as a Deputy Judge of the High Court at [69].

(7) The fact that subsequent to the entering up of a judgment in default against one defendant another defendant is permitted to advance a case which is inconsistent with the default judgment entered up gives rise to the possibility of inconsistent judgments. However, the public policy interest in the consistency of judgments is outweighed by the overriding need to ensure that a co-defendant was able to defend itself by advancing a case of its choosing to the extent that it is not precluded from doing so by *res judicata*.²⁰

[37] It follows from the foregoing that I respectfully disagree with the view expressed by the learned judge that the entry of judgment in default against Mr. Ickonga would necessarily disadvantage Tibit by reason of the negative inferences or assumption that would flow from that fact. Mr. Hardwick alluded to the learned judge's concern at a practical level for the mental gymnastics that the court would have to go through in a case where a defendant company was denying liability in connection with a claim for dishonest assistance in circumstances where its sole shareholder and directing mind had prior to trial been found liable by default for the same wrongdoing. In my respectful opinion no mental gymnastics are required. The learned judge is simply required to determine the claim on the evidence before him. Treating the default judgment as having no evidential value or significance as far as the defendant company is concerned.

[38] As to the possibility, raised in argument before the learned judge that if default judgment was entered against Mr. Ickonga, it was likely that receivers would be appointed over Mr. Ickonga's share in Tibit and FRN would thereby take control of Tibit, I do not see this

²⁰ Ibid at [62] to [64].

as an important factor to be taken into account in deciding whether the claims against the defendants ought to be disposed separately or at the same time. The fact that a default judgment might be obtained against a defaulting defendant and enforced by execution upon his property is the predictable consequence of his failure to defend the claim. In **Global Torch Ltd v Apex Global Management Ltd (No 2) (SC(E))**²¹ it was urged upon the UK Supreme Court that an unacceptable consequence of debarring the defendant from defending the claim would be that the issue which had been administratively resolved against him might be determined against the claimant in the in the very proceedings which the defendant had been debarred from defending. Lord Neuberger noted at [37] that such an outcome “... simply represents, ..., a relatively extreme example of what happens if the court orders that a default judgment be entered against a defendant. It is inherent in such an order that the claimants will obtain judgment for relief to which it may subsequently be shown that they were not entitled.” Moreover, it seems to me to be unlikely that Tibit would be defending the claims made against it in the instant action without the approval and support of its sole shareholder. The possibility of receivers being appointed over his share in Tibit should default judgment be entered against him must surely have been contemplated by Tibit’s sole shareholder and may well have been taken into account by him in deciding upon his course of action in relation to the current litigation.

Whether the judge’s exercise of discretion may be reviewed

- [39] Mr. Hardwick pointed out that the grounds of appeal were all concerned with an alleged error of the learned judge in holding that the claim against Mr. Ickonga could not be dealt with separately

²¹ [2014] 1 WLR.

from the claim against Tibit and therefore fell into the category of claims controlled by **CPR 12.9 (2) (b)** for which judgment in default may not be entered. This was a mischaracterisation of the true import of the decision. In fact, the judge had correctly determined that the claim against Mr. Ickongo was one which fell into the category of claims controlled by **CPR 12.9 (2) (a)** and could accordingly be dealt with separately from the claim against Tibit. He had exercised his judicial discretion under **CPR 12.9 (2) (a)** to decline to enter judgment in default and instead to require that all claims are dealt with at the same time. The appellants did not appeal on the basis that there had been a wrongful exercise of discretion and it was no longer open to them to do so.

[40] I agree that in declining to enter judgment in default against Mr. Ickonga the learned judge had indeed acted in exercise of his judicial discretion under **CPR 12.9 (2) (a)**. The principles applicable to the review of a judge's exercise of a judicial discretion are set out by Webster JA [Ag.] in the case of **Dr. Martin Didier et al v Royal Caribbean Cruises Ltd**²² where he stated:

"[25] This is an appeal against the exercise of the master's discretion in refusing the appellants' application for security for costs. The principles for reviewing the exercise of the judge's discretion are well-known. The case that is most frequently cited is *Dufour and others v Helenair Corporation Ltd and Others*. where Chief Justice Floissac said-

'We are thus here concerned with an appeal against a judgment given by a trial judge in the exercise of a judicial discretion. Such an appeal will not be allowed unless the appellate Court is satisfied (1) that in exercising his or her judicial discretion, the learned judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations or by taking into account or being influenced by irrelevant factors and considerations and (2) that as a

²² SLUHC VAP2017/0051 (delivered 6th June 2016, unreported).

result of the error or the degree of the error in principle, the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong.”

[41] Given that it was a case management decision the observations of Lewison LJ in **Broughton v Kop Football (Cayman) Ltd**²³ are pertinent. There he explained at paragraph [51]:

“51. Case management decisions are discretionary decisions. They often involve an attempt to find the least bad solution where parties have diametrically opposed interests. The discretion involved is entrusted to the first instance judge. An appellate court does not exercise the discretion for itself. It can interfere with the exercise of the discretion by a first instance judge where he has misdirected himself in law, has failed to take relevant factors into account, has taken into account irrelevant factors or has come to a decision that is plainly wrong in the sense of being outside the generous ambit where reasonable decision makers may disagree. So the question is not whether we would have made the same decisions as the judge. The question is whether the judge's decision was wrong in the sense that I have explained”.

[42] When it comes to challenging paragraph 2 of the order made by the learned judge on 2nd December 2021 the essential question is whether it was a decision which was open to the judge to make on the material before him. Mr. Hardwick allows that had the judge, on the basis of the reasons given in his decision, declined to enter default judgment against Mr. Ickonga on the ground that the claims against Tibit and Mr. Ickonga fell within the ambit of **CPR 12.9 (2) (b)** and could not be tried separately he would have fallen into error. The judge had however correctly appreciated that notwithstanding the reasons given in his decision the claims could be tried together. Nonetheless he had exercised his discretion not to enter judgment against Mr. Ickonga for the reasons appealed against. Mr. Hardwick's point is that FRN should not have challenged the

²³ [2012] EWCA Civ 1743.

decision on the basis that the reasons given to support it were wrong in law but might have do so on the basis that there has been a wrongful exercise of judicial discretion given the reasons stated for the decision: this the Appellant has failed to do. I consider this argument to be semantic rather than substantive. As I see it the validity of the reasons given by the judge for exercising his discretion in the way that he did was fully argued before the court.

[43] **CPR 62.4 (9)** provides that -

“(9) The court is not confined to the grounds set out in the notice of appeal but may not make its decision on any ground not set out in the notice of appeal unless the respondent has had sufficient opportunity to contest such ground.”

[44] In my judgment the learned judge misdirected himself in law in that he made his decision on the erroneous premises that (a) Tibit and Mr. Ickonga had been sued based on their joint liability for dishonest assistance; (b) that this fact made it untenable or at least undesirable for their cases to be heard separately; and (c) that the fact that a default judgment had been entered up against Mr. Ickonga would necessarily give rise to negative inferences and assumptions against Tibit, and render it difficult for a court to fairly adjudicate the claim against Tibit given those inferences and assumptions. In so doing the learned judge took into account and was influenced by irrelevant factors. Other than the reasons given by the judge and which were the subject of the appeal no reason has been shown which could explain the court's departure from the usual practice of entering judgment against a defaulting defendant where the claim against him could be dealt with separately from the claim against the other defendant.

Conclusion and Disposition

[45] For the reasons I have given I would allow the appeal, set aside the order of the learned judge made 2nd December 2021 and further order that pursuant to **CPR 12.9(2)(a)(i)** judgment in default of acknowledgment of service and/or defence for an amount to be decided by the court be entered up against the Respondent Mr. Justin Ickonga.

Costs

[46] At the delivery of the judgment herein the parties were invited to make submissions in writing on costs. The appeal had been against the decision whereby the Court declined to enter judgment against Mr. Ickonga and chose instead to delay the hearing of the application for such judgment until after the hearing of the claim against Tibit. This was, on the face of it not a matter which directly affected Tibit and Tibit was not formally made a respondent to the appeal. Notwithstanding this circumstance, Tibit filed a Notice of Opposition pursuant to **CPR 62. 10 (3)** and issued a cross appeal opposing the appeal. At the hearing of the appeal. Mr. Thompson, KC for the Appellant FRN maintained that Tibit has no locus standi to oppose the appeal but did not object to the Court of Appeal hearing Mr. Hardwick KC. There was no indication that a costs order would have been sought against Tibit. The Appellant now seeks an order that its costs should be paid jointly by both Mr. Ickonga, as respondent, and Tibit Limited, which was not a respondent, but which actively opposed the appeal.

[47] I bear in mind that by **CPR 64.10(1)** where an application is made for an order that a person who is not a party to the proceedings should pay the costs of some other person the application must be

on notice to the person against whom the costs order is sought **CPR 64.10 (2)**; the notice must state a date, time and place at which that person may attend to show cause why the order should not be made **CPR 64.10 (5)**; and the person against whom the costs order is sought and all parties to the proceedings must be given 14 days' notice of the hearing of that application **CPR 64.10 (6)**. No application compliant with the mandated procedure has been made to date.

[48] In the circumstances, I would order that the Respondent Mr. Ickonga pay the costs of the Appellant FRN, in an amount to be agreed between them within 21 days of the date hereof or, failing agreement within that period, to be assessed by a judge of the Commercial Court.

I concur.
Paul Webster
Justice of Appeal [Ag.]

I concur.
Godfrey Smith
Justice of Appeal [Ag.]

By the Court

Chief Registrar