

JERSEY / JUDGMENT

# Itkin v Golden Sphinx Limited

## 20-Apr-2021 [2021] JRC 117 (20 April 2021)

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### judgment

the commissioner:

### Introduction

1. On 2 nd December 2016, judgment was given in favour of the Plaintiff by the Royal Court (Le Cocq Deputy Bailiff, sitting with Jurats Ramsden and Pitman) against the Defendant in the sum of £505,000 which the Plaintiff claimed to be due in respect of unpaid director's fees, interest and costs. It was a default judgment, the Defendant not having appeared. The present application arises out of a summons by the Defendant to have the judgment set aside, the action placed on the pending list with the Plaintiff filing particulars of claim within 21 days. 2. There is no dispute that the summons, in respect of which judgment was given on 2 nd December 2016, was properly served on the Defendant in Jersey. Advocate Pallot submitted that, notwithstanding that it was properly served, the summons could not have come to the attention of the Defendant, but there is no evidence before us to this effect and we have to assume that the company would have made arrangements to ensure that details of the litigation were brought to the attention of those who needed to know them. The more cogent arguments of Advocate Pallot in this respect, however, are that the judgment is fatally flawed because, at the time the summons was served, the Plaintiff was the only director of the Defendant, and it is said that he deliberately acted for his own benefit to the detriment of the company in failing to take steps to mitigate the impact of his conflict of interest by not causing the company to be independently advised and/or represented at the hearing. Accordingly, the Defendant was prevented from advancing any defence to its claim. As to the substance of the claim, it is said that the Plaintiff was the sole director of the Defendant as at 21 st August 2015 when it is said he entered into an employment agreement, that agreement being made between him as an individual and also as agent for the Defendant. The Defendant complains that the Plaintiff purported to hold a meeting of the Board of Directors at which he was the sole attendee, the chairman and the secretary, and that at that meeting as director, he purported to resolve on behalf of the company to acknowledge a debt said to be owed to him personally, authorising the company to enter into a Promissory Note to secure that debt owed to him, and then on behalf of the

company purported to resolve to hold himself as Plaintiff harmless in almost any circumstances notwithstanding any breaches of duty. 3. In oral submissions before us, Advocate Pallot went rather further. He said that the Plaintiff had perpetrated a massive fraud on the Defendant, and it was unconscionable that the Royal Court should assist the Plaintiff by allowing the default judgment to stand. In the particulars accompanying the Defendant's summons, the Defendant claims that the agreement was not one which ought to be enforced as a matter of public policy because it was entered by the Plaintiff, as sole director of the Defendant, acting in breach of duty, and/or because it arose from a purported agreement between the Plaintiff and the Defendant which was made without the knowledge or consent of the shareholders in the Defendant and/or because the liability was said to arise in respect of a contract of employment dated 21 st August 2015 which included sums which had arisen prior to that date for which there was no legal liability. In the written materials accompanying the present application were extracts from the Companies (Jersey) Law 1991

- in particular Articles 74 dealing with the duties of directors, and Article 74ZA dealing with persons connected with a director for the purposes of Article 74; also Article 74A dealing with contracts with sole members who are also directors, and Article 75 dealing with the duty of directors to disclose interests. 4. The Court had before it two affidavits from Mr Piotr Szymanski, who was appointed as director of the Defendant on 28 th February 2017 on the Plaintiff being removed as sole director by resolution of the members of the Defendant; and an affidavit from Advocate Garrood dated 23 rd January 2021, to which we will refer in more detail later. The Court has also had regard to three affidavits sworn by the Plaintiff, supported by an affidavit from Mr William Buck, an English barrister representing the Plaintiff in the Isle of Man, and a declaration of Mr Whitney Ackerman, a US attorney-at-law in California. We have also had the advantage of reading some correspondence between the advocates and other papers presented to the Court by both parties. 5. The Royal Court has power to set aside judgments by default as set out in Rule 11/2 of the Royal Court Rules 2004:- "1. Any judgment by default may be set aside by the Court on such terms as to costs or otherwise as it thinks fit. 2. An application under paragraph (1) must be made by summons supported by an affidavit stating the circumstances under which the default has arisen..." 6. The test to be applied by this Court is set out in *Strata Surveys Limited v Flaherty and Company Limited*

[1994] JLR 69 , a decision of the Court of Appeal. The Court was considering the interpretation of the comparable rule in the Royal Court Rules 1992: these have been superseded by the 2004 Rules but the former Rule is substantially to the same effect as the Rule which we are now applying. At page 71, line 23, Southwell JA, delivering the judgment of the Court, said this:- "Paragraph (1) provides the Royal Court with a broad power to set aside default judgments on appropriate terms. This is a discretionary but not an unfettered power. It is a power to be exercised judicially. The essential requirement to be met in its exercise is the requirement to do justice between the parties. In the present case, that means justice to the plaintiff and justice to Strata. The Court has always to keep in mind that judgments obtained where there is default by a defendant have not been preceded by any trial or

other consideration of the merits of the claim, nor of any arguable defence to the claim which the defendant may have. In the well-known case in the English jurisdiction of *Evans v Bartlam*

[1937] AC 473, the House of Lords considered the power of the Court to set aside default judgments. In the course of his speech in that case, Lord Atkin said this (at 480): "The principle obviously is that unless and until the Court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure." Rule 9/3(1) is similar in terms to O.13, R9 of the English Rules of the Supreme Court. In Jersey, just as as much as in England, the power is to be exercised having regard to what is fair and just, keeping always in mind the principle as stated by Lord Atkin." 7. Advocate Pallot relied upon this extract in his trenchant submissions that the Court had to have regard to where the overall balance of justice lay. In his submission it was obvious that the Court should not allow a judgment based upon a fraud practiced on his client to stand. 8. In *Strata*, it was plain that there are a number of factors which the Court, hearing an application to set aside a default judgment, should take into account:- (1) Was there a reasonably arguable defence on the merits? A failure to show this could result in a default judgment being allowed to stand without injustice to the defendant. (2) What were the reasons for the default judgment to have been permitted by the defendant - was it the fault of the advocate or was there a fault on the part of the defendant? (3) Was there a delay in making an application to set the judgment aside? (4) Would injustice be done to the defendant if the judgment were to stand; and (5) Would there be no injustice caused to the plaintiff if the action were to proceed because the judgment was set aside? 9. We have applied these principles to the exercise of our discretion in the present case. We have also had regard to Rule 1/6 of the Royal Court Rules 2004, which provide for the overriding objective. That Rule is expressed in these terms:- "(1) The overriding objective of the Court in proceedings is to deal with cases justly and at proportionate cost. (2) Dealing with a case justly and at proportionate cost includes, so far as is practicable - ..... (b) saving expense; (c) dealing with the case in ways which are proportionate - ( i ) to the amount of money involved, (ii) to the importance of the case, (iii) to the complexity of the issues, and (iv) to the financial position of each party; (d) ensuring that it is dealt with expeditiously and fairly; ..... (f) enforcing compliance with Rules, Practice Directions and orders; (3) The Court must seek to give effect to the overriding objective when it - (a) exercises any power given to it by these Rules; or (b) interprets any Rules. ...." 10. It is clear that these considerations can often pull in different directions, and this case is no exception. Nonetheless, the introduction of these provisions in the Royal Court Rules was the result of judicial experience that parties were formerly inclined to play procedural games which delayed and sometimes frustrated a fair hearing of the case; and which allowed parties with the more substantial means to avoid or establish liability by the depth of their pockets rather than the merits of their case. 11. The Plaintiff accepts that he was the sole director of the Defendant company at the material time. It does not appear from the Articles of

Association exhibited by Mr Szymanski in July 2018 that there is any objection to there being a sole director because Article 61 provides expressly that the company may in general meeting fix the maximum and/or minimum number of directors, but unless so fixed the number of directors shall be one for any period in which the company is a private company. The quorum for a meeting of directors is one, when only one director is in office because Article 86 expressly provides that in those circumstances the director shall have and may exercise all the powers in and over the affairs of the company as are conferred by the articles upon the directors, provided the company is a private company. There are a number of provisions in the articles between Article 80 and Article 92 which deal with director's appointments, interests and disclosure obligations. What is apparent from both the Articles of Association and Article 74 of the Law is that there is room for the members of the company to authorise what would otherwise be a breach of duty by a director having a conflict of interest in his personal dealings with the company. It is therefore right to say that the Plaintiff's approach to the current dispute is to indicate that it forms part of a much larger factual dispute between him and a Mr Sabadash , with whom the Plaintiff asserts that he was in partnership and that one of the assets of the partnership was the beneficial shareholding in the Defendant. The Court has no information from Mr Sabadash who is apparently currently incarcerated in Russia, but reference has been made by the Plaintiff to documents allegedly agreed by Mr Sabadash approving an arrangement giving the Plaintiff a guarantee by the Defendant of all the underlying obligations due to the Plaintiff by Mr Sabadash . We are informed by the Plaintiff that these and other claims are before the California State Court in proceedings commenced by AFB Trading One Inc, the Defendant and others against the Plaintiff. In two Californian complaints, there are cross-complaints which have been issued by the Plaintiff in the same proceedings. 12. At the outset of the hearing, we asked Advocate Jones whether he conceded that the Defendant would have an arguable defence if the judgment were to be set aside and the matter proceed to trial, and he readily agreed that that was so. He was clearly right to do so. We do not accept at face value the allegations of fraud made by Advocate Pallot, noting as we do that there are cross-allegations of fraud against Mr Sabadash and others in the California proceedings. We think the right construction to be placed on the facts presented to us at present is that both sides have an arguable case, and a decision as to which was correct could only be reached following evidence being given at trial. The first part of the Strata test is therefore satisfied. 13. We next consider the arrangements which led to judgment being taken. Central to this part of the argument, as it is to some of the argument on the question of delay, is the role of Advocate Garrood , at the time a partner in Messrs Carey Olsen. The Plaintiff indicates in his affidavit evidence that, before acting against him, Advocate Garrood was engaged by the Plaintiff and provided him with various pieces of legal advice. It is said that Advocate Garrood knew precisely the basis upon which the Plaintiff sought judgment. In his first affidavit the Plaintiff says he does not recall speaking to Advocate Garrood on 1 st December 2016, the day before the default judgment was taken, and he believes that the email exchange accurately reflected the limits of the exchanges he had with Advocate Garrood on that day. The email exchange to

which he refers goes as follows:- 1. 1 December 2016, 7.51 am, Garrood to Plaintiff: "Dear Garry I note from the published Court list that the matter of Itkin v Golden Sphinx Limited has been listed for tomorrow. At the date hereof I understand that you remain the sole director of Golden Sphinx and it is unclear to me how the action can be quorate. [sic] Without seeking to ask you to reveal any privileged information, could you confirm how you expect the action to proceed? Regards, Jerry." 14. The response from the Plaintiff was sent the same day at 16.32 and is in these terms:- "Dear Jerry As plaintiff I would like to adjudicate amounts owed me pursuant documents [sic] related to my employment by the Company, contained in Company files. All documents that will be presented to Court tomorrow have been provided to you previously. As a sole director of defendant I do not have any defenses against these claims and absolutely agree with amounts owed. Not being in position to argue I neither plan to attend this hearing myself, nor instruct anyone to attend on behalf of Company. I am happy to discuss on the phone if you would like. Please feel free to call me at ....." 15. Advocate Garrood has not given evidence on this particular point. However, in his evidence addressing a different question, to which we will come shortly, he confirmed that at the relevant time his firm was receiving instructions from the Plaintiff as the purported director of the company AFB Holdings Limited, and that the Plaintiff was seeking to have a company called Diesel Limited restored to the company's register. In that context, Advocate Garrood received some correspondence from the Plaintiff in January 2017. The various companies in respect of which the Plaintiff was then purporting to give Advocate Garrood instructions are all lined up against the Plaintiff in the different jurisdictions in which litigation continues. We obviously do not have access to privileged information, but what does seem to be clear, as indeed Advocate Pallot seemed to accept, is that when the dispute between the Plaintiff and those on the other side arose towards the end of 2016, Advocate Garrood lined up with Plaintiff's opponents. 16. What are we to make of this in relation to the default judgment obtained on 2 nd December 2016? On the one hand, the Plaintiff, acting as sole director of the Defendant, procured that a summons be delivered to the company's registered office in Jersey with a return date on which the company was advised that a default judgment would be taken if it did not appear. We do not know what, if any, steps were taken to bring this action to the attention of Mr Sabadash or his colleagues. We can anticipate that if it had been brought to their attention, arrangements would have been made for the company to appear in Court to place the action on the pending list. On the other hand, Advocate Garrood , who, as has been said, was lined up with the Plaintiff's opponents, spotted the action on the Court list the day before it was called, and was in correspondence by email with the Plaintiff. Although we do not have evidence from Advocate Garrood on this point, it is obvious from that exchange of emails that he must have appreciated that judgment would be taken in default. It seems to us to be likely, given that Advocate Garrood took the step of contacting the Plaintiff in the first place, that he brought the proceedings to the attention of those hostile to the interests of the Plaintiff. He may not have done so; but on the balance of probabilities we think it is likely that he did and there is no evidence to the contrary. Equally, we take the view that the probability is

that Advocate Garrood contacted the Judicial Greffe after the return date to ascertain whether a default judgment had been taken. On the assumption that he did so, he would have been informed that judgment had been taken and, we think it more likely than not, that he would have been in contact with those hostile to the Plaintiff to inform them that the judgment had been taken. 17. In this analysis we emphasise that these are provisional views expressed on the balance of probability as to what is likely to have been the case. If it were the case, then of course the Defendant cannot attribute blame for the default judgment to any default on the part of its lawyers. The fact is that neither the Defendant nor Advocate Garrood has provided any evidence one way or the other. This Court is therefore left with making the best it can of the information which has been provided. In those circumstances, we find it more likely than not that the taking of the default judgment was permitted by the Defendant company because it would have been quite straightforward to instruct Advocate Garrood to attend the Court to place the matter on the pending list, or, at the very least, to attend on behalf of the members of the company to indicate that there was a real conflict between the Plaintiff acting in his individual capacity and the Plaintiff as sole director of the Defendant company, and for that reason judgment ought not to be given. Indeed, we are sure that had he done so, the Court would not have given such a judgment. 18. We have taken this into account in the exercise of our discretion. Delay 19. We now come to the question of delay. Assuming we are wrong in our assumptions mentioned above as to whether the Defendant was informed of the existence of the judgment shortly after it had been given, we are left with a conflict of evidence between Mr Ackerman and the Plaintiff on the one hand and Advocate Garrood on the other as to when the judgment was brought to the attention of the Defendant. Mr Itkin says that in January 2017, he procured the delivery of a copy of the judgment to the offices of Messrs Carey Olsen in a Fedex registered package sent from California. This package contained not only the Act of Court in respect of the default judgment of 2 nd December 2016, but also the Annual Returns of Shareholders to be submitted to the Jersey Financial Services Commission in relation to Diesel Limited and Golden Sphinx Limited. Advocate Garrood says that the Carey Olsen document management system does not disclose that a copy of the judgment was received, and he asserts that the Plaintiff has been untruthful in his second affidavit when he says that the judgment was sent at that time. 20. This evidence is regarded by the Plaintiff as astonishing. He accepts that he may have been mistaken, but he does not think he was; he is satisfied that he did enclose the judgment with the January 13 th Fedex package and in support of that, he has the declaration from Mr Ackerman who saw him with a small stack of documents on top of a Fedex envelope on the day in question. He was consulting the Plaintiff on an unrelated business matter, but he noticed that the documents in question included a judgment issued by the Royal Court of Jersey. Because he is a lawyer, and as he described it 'out of tangential professional interest' he asked to look at it. Having done so, he noted that it was a judgment dated 2 nd December 2016 in favour of the Plaintiff, and he says in his affidavit that the Plaintiff sealed the envelope in his presence and indeed that he dropped off the sealed and labelled Fedex envelope for the Plaintiff as he, Ackerman, had a package of his own to deliver,

which he did on his way back to his office. 21. There is therefore a direct conflict of evidence as to whether the judgment was sent to Advocate Garrood in January 2017. It seems to us that it is a conflict which is impossible to resolve on affidavit evidence alone. Advocate Pallot attempted to suggest that we could accept Advocate Garrood's affidavit evidence because he was an officer of the Court, and, as it were, was one of 'ours' rather than, as he put it, a random lawyer in California. We do not accept that is the right way to approach it. In our judgment, this evidence must be seen in the round with the other evidence which has been produced in order to identify the date on which the existence of the judgment came to the attention of the Defendant (by which we mean, those now in charge of the Defendant, hostile to the interests of the Plaintiff). 22. On the most favourable case for the Defendant, it received notice of the default judgment on 18 th December 2017 when a cross-complaint in California was served on it, in which a reference to the default judgment appears. The Plaintiff has deposed in his affidavit to the reasons for the delay in serving this cross-complaint. He describes how he deliberately did not file the Californian complaints for over a year after he obtained the judgment in Jersey, the reason for which was to ascertain whether the Defendant would bring an application to set aside the

## judgment.

He regarded it as prudent and responsible to allow a reasonable passage of time before taking steps in America to rely upon it. If the Defendant is right that it did not have notice of the judgment until this time, then of course the delay between taking judgment and December 2017 does not count against it; on the other hand, if on the balance of probability Advocate Garrood was aware of the judgment at an earlier stage, and, in the absence of other evidence, can be taken to have informed his clients of its existence, then the delay would weigh against the Defendant. 23. Some two and a half months later, on 28 th February 2018, Advocate Garrood wrote to Advocate Blakeley, then acting for the Plaintiff, to assert that the judgment obtained on 2 nd December 2016 was procured in breach of fiduciary and other duties, and that an application would be made to set the judgment aside. The letter was sent to Advocate Blakeley notwithstanding that Advocate Garrood was aware that Preston Law had been instructed; the letter to Advocate Blakeley had been sent because he was on the record as acting for the Plaintiff. Seven days later, no reply having been received, Advocate Garrood advised that he was instructed to apply to the Royal Court for setting aside the judgment. He received an email response the same day to the effect that Advocate Blakeley was away on leave, and, given the urgency, although they had not been instructed, the Plaintiff had been advised that Advocate Blakeley would not be able to assist him. The same day, a letter was sent by Advocate Garrood to Advocate Preston at Preston Law advising him of the correspondence. Thus it was that a summons was issued with a return date of 24 th July 2018 for setting aside the default judgment. Affidavits from Mr Szymanski and the Plaintiff were provided; but it is clear that the information available to the Court was deemed insufficient because the matter was then adjourned for further consideration on 10 th December 2018. Further affidavits were made available to the Court on that occasion; and

because it was thought that it would be helpful to ascertain the date on which the Defendant became aware of the existence of the default judgment, which was in dispute, Advocate Garrood appearing for the Defendant, the Court then ordered a further adjournment on the basis that Advocate Garrood should file an affidavit confirming the contents of a package delivered to his firm on Tuesday 17 th January 2017 as confirmed by email correspondence; and the Plaintiff should file his affidavit in reply twenty-one days after receipt of Advocate Garrood's affidavit. The parties should then attend on the Judicial Secretary within seven days of the Plaintiff's affidavit being filed to fix a date for the hearing of the application to set aside the default judgment. It is clear that by making those orders, the Court identified that Advocate Garrood was in a hopeless position as counsel; he had material evidence to give personally, and he could not be both advocate and witness. 24. In the event, nothing happened for nearly twelve months. In November 2020, the Plaintiff, through his advocate, gave notice of a date fix appointment with the Judicial Secretary for the purposes of hearing an application that the summons to set aside the default judgment be struck out for failure to comply with the order of the Court of 10 th December 2019. Advocate Pallot indicated that he was not instructed, and a date was fixed for the hearing of the Plaintiff's application on 22 nd January 2021. On 20 th January 2021, a copy of Advocate Garrood's affidavit of the same day was provided to the Plaintiff. This led to the adjournment and/or withdrawal of the Plaintiff's summons and the fixing of 30 th March as the date upon which the Defendant's application to set aside the default judgment would be heard. There is no doubt that the Defendant, which received notice of the default judgment no later than December 2017 (and we think on the balance of probabilities in fact received that notice no later than January 2017) is responsible for the delay in taking forward the application to set aside the default judgment from December 2017. In his submissions, Advocate Pallot suggested that the Plaintiff was also at fault - he put it that it was, as it were, a score draw. The basis for this submission was that the Plaintiff could have taken steps earlier to bring on the Defendant's summons for hearing. We reject that submission. It is clear to us that if the Plaintiff had not fixed a date for the hearing of his summons to strike out the Defendant's summons to have the default judgment set aside, no steps would have been taken by the Defendant in this case. Advocate Garrood had by this stage left Messrs Carey Olsen, and no one else in that firm had been instructed. 25. The delay in applying to set aside the default judgment is in our view entirely down to the Defendant, probably from January 2017 but at least from December 2017, and furthermore the delay from December 2018 is down to the failure of the Defendant to comply with an order of the Court. We have taken this issue of delay very much into account for the purposes of exercising our discretion. Prejudice 26. We turn next to the question of prejudice to Defendant and Plaintiff depending on whether we set aside the default judgment or not. As far as the Defendant is concerned, there is clearly the prejudice that a judgment in the sum of £505,000 with interest and costs has been awarded against it. That is a prejudice, and it stands alongside the contention of Advocate Pallot that the merits of the claim to that sum of money have never been adjudicated because it was a default

**judgment.**

We do not accept the claim of Advocate Pallot that the Plaintiff has taken \$34 million, approximately, to which he is not entitled. There is no sufficient evidence of that contention, and we disregard it. The purpose of making that submission was, we think, to suggest that one of the reasons for the delay was that all assets had been removed from the Defendant. However, there is no financial information provided by the Defendant to enable us to reach that

**conclusion.**

Furthermore, we accepted the submission of Advocate Jones that the absence of funds did not apparently mean that the Defendant could not continue litigating in California, and indeed possibly in the Isle of Man. Accordingly, we take the prejudice of the Defendant to be the existence of the default judgment. 27. The prejudice to the Plaintiff does not directly lie in the removal of a judgment in his favour when there has never been any trial on the merits, albeit that any litigation carries with it pressure and stress for the litigants, especially individual litigants. The prejudice which is asserted here however is that in the interval between the taking of the default judgment and the hearing of the application to have it set aside, steps have been taken elsewhere in reliance upon the existence of that judgment. Those steps respectively have been taken in California and in the Isle of Man. 28. We are not convinced that the Isle of Man proceedings would be adversely affected by the setting aside of the default judgment in Jersey. We have read the affidavit of Mr Buck carefully, but it is not obvious to us that there is a connection between the setting aside of the default judgment and any downside in the Plaintiff's proceedings in the Isle of Man. 29. On the other hand, there is in our judgment a serious potential downside in relation to the proceedings in California. Since December 2017, these have proceeded on the pleaded basis of a judgment obtained by the Plaintiff against the Defendant in Jersey. This is part of the factual matrix which, so he claims, led the Plaintiff to determine it necessary to dissolve the alleged partnership between him and Mr Sabadash and apply its assets towards its debts, including the sums due to the Plaintiff. As Advocate Jones put it, the ship has sailed for the purposes of setting aside a judgment and it no longer lies in the Defendant's mouth to criticise what has happened to date, because that judgment has been deployed in proceedings elsewhere. 30. We have a discretion to exercise and we have considered all the material which has been put before us. In our judgment, the Defendant comes far too late to bring this application to Court. It has not brought the application soon enough and, having brought it, has not proceeded with it expeditiously. It is said by Advocate Pallot that the Plaintiff has made no attempt to enforce the judgment in the meantime, but we do not think that is necessarily the case - there may have been no enforcement in Jersey, but in practice the judgment appears to have been part of the case taken by the Plaintiff in California over the last two years. Looking at the overall justice of the position, which we are required to do, we think it is impossible to say that it is necessarily unjust to the Defendant to allow the default judgment to stand. It may be difficult to say where the merits of the Plaintiff's substantive claim against the Defendant in Jersey lie. We think it is right to describe the Defendant as having an arguable defence, but there is no knock out blow with it. On the other hand, it has prevaricated for years and defaulted on performance

of an order of the Court for over a year. In those circumstances, given the prejudice to the Plaintiff which we accept in relation to the Californian proceedings, we think it is right to refuse the application to set aside the default judgment and that application accordingly is dismissed. Authorities Companies (Jersey) Law 1991. Royal Court Rules 2004. Strata Surveys Limited v Flaherty and Company Limited

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