



**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**

CAUSE NO: FSD 293 of 2023 (DDJ)

BETWEEN:

FUSECHAIN XDB I LTD

PLAINTIFF

AND

DIGITALBITS FOUNDATION

DEFENDANT

Before: The Hon. Justice David Doyle

Appearances: Bryan Little on behalf of the Plaintiff
Spencer Vickers and Romane Duncan on behalf of the Defendant

Heard: 9 May 2024

Ex Tempore Judgment delivered: 9 May 2024

Draft transcript of Ex Tempore Judgment Circulated: 10 May 2024

Draft transcript of Ex Tempore Judgment Approved: 17 May 2024

HEADNOTE

Determination of an application for judgment in default of defence and an application for leave to file a defence out of time

EX TEMPORE JUDGMENT**Introduction**

1. I am grateful to counsel for their assistance in court. I am in a position to deliver my decisions and brief reasons for these decisions.
2. I shall now deliver a short judgment in proceedings FSD 293 of 2023 (DDJ).
3. Normally, disputed cases are dealt with on their merits after the exchange of pleadings, discovery of relevant documents and a full hearing. Sometimes when a defence is not filed in time judgment is granted in default. It is the exception rather than the norm for judgments to be granted without a hearing on the merits.

The applications before this court

4. There is before the court:
 - (1) the Plaintiff's summons dated 23 February 2024 seeking judgment in default of defence (the "Plaintiff's Summons"); and
 - (2) the Defendant's summons dated 12 April 2024 seeking leave to file its defence out of time (the "Defendant's Summons").

The documentation and submissions

5. I have considered the hearing bundle, the Plaintiff's skeleton argument dated 3 May 2024 from Bryan Little of Travers Thorp Alberga and the Defendant's skeleton argument dated 3 May 2024 from Spencer Vickers and Romane Duncan of Conyers Dill & Pearman LLP.
6. I also benefit from the oral submissions of the attorneys. I am grateful to them for their valuable and helpful assistance to the court.

The position of the parties

7. I now refer briefly to the position of the parties. Put shortly, the Plaintiff's position, relying on *Mitchell, Denton* and subsequent cases in both the Cayman Islands and England and Wales, is as follows:
 - (1) the Plaintiff has satisfied the requirements for default judgment and such should be entered;
 - (2) the Defendant should not be permitted leave to file its defence in circumstances where the breach is serious and significant; there is no good reason for the breach and it would not be in the interests of justice for leave to be granted; and
 - (3) the Defendant has admitted the debt and the Defendant's defence is wholly devoid of any real prospect of success;
8. Put shortly, the Defendant's position is as follows:
 - (1) it has an adequate explanation for the delay in filing its defence and it is "in the overall justice to both parties" for leave to file a defence to be given;
 - (2) the Defendant has a meritorious defence (which meets and exceeds the threshold of "an arguable case which carries a degree of conviction"). The crux of the defence is that the sums claimed are not due and payable as the Defendant relied on representations of the Plaintiff which turned out to be false and as a result the Defendant has suffered loss. In the alternative, the Defendant contends that the actions of the Plaintiff amounted to repudiatory

breach of the relevant purchase agreement and that the repudiation was accepted by the Defendant; and

- (3) the Defendant indicated its intention to defend and should have filed its defence on 26 October 2023 but did not file and serve it until 28 March 2024. The Defendant made an offer to settle the proceeding and invited the Plaintiff to discontinue its proceedings but the Plaintiff did not respond to such letter and instead commenced further proceedings. Without notice the Plaintiff then sought default judgment on the first set of proceedings while the parties were in the midst of agreeing procedural directions in the new proceedings.

Consideration of relevant rules and authorities

9. In addition to the evidence and submissions placed before the court I have also considered the relevant procedural rules including Grand Court Rules (“GCR”) Order 2 rule 1, Order 1 rule 5 (2), Order 18 rule 2, Order 19 rule 7, Order 3 rule 5, Practice Direction 2 of 2024 and the relevant law. I have, in particular, considered the various local authorities including *Cedrus Investments Limited v Abidin and Tata* 2019 (1) CILR 39, *Bush v Baines* 2016 (2) CILR 274, *Re New Frontier Health Corporation* (unreported, Grand Court, (FSD) Doyle J, 31 March 2023) and *Re Asia Renewable Energy (Cayman) Ltd* (unreported, Grand Court, (FSD) Doyle J, 2 May 2024), all referred to by counsel. I note also Roye on *Civil Litigation in the Cayman Islands*, Third Edition (2016) at pages 106-108.

Determination

10. In my determination of the applications before the court I have focused on the overriding objective in the preamble to the GCR and the particular circumstances of this case.
11. Mr Little focused on the English authorities on relief from sanctions including *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537, [2014] 1 WLR 795 and *Denton v TH White Ltd* [2014] EWCA Civ 906, [2014] 1 WLR 3926. He accepts however that there is no equivalent to English CPR Rule 3.9 in the GCR. I note Order 19 rule 7 of the GCR, I note the English White Book 1999 Order 19 rule 7 and the commentary at 19/7/4 and the Hong Kong Civil Procedure 2024 at page 580 19/7/4 and Order 2 rule 4. It is common ground that the GCR do not contain any equivalent to the English relief from sanctions provisions.

12. Insofar as the English authorities may assist when considering the overriding objective in our rules I have considered the 3 stage approach. In particular, I note that the failure to file a defence on time is serious and significant. The defence should have been available on 26 October 2023. It was not made available until 28 March 2024. That is a long delay but it is not the most serious or significant failure to come before a court. For example, a trial date has not been set and does not need to be vacated. The proceedings have not otherwise been seriously disrupted. I note also the reasons for the failure as outlined in the evidence and in particular I have considered the correspondence, the failure to respond to the offer and enquiry about discontinuance and the distraction of the second set of proceedings.
13. I note all that has been said and written about the merits, or as Mr Little would have it the complete lack of merit of the defence. Mr Little has, with all his eloquence and persuasiveness, sought to drive the court to the conclusion that the defence has no merit whatsoever. As the authorities make plain, today is not the day for a mini-trial on the merits. Mr Vickers referred to the defence as now filed and I note the contents of the defence. Mr Vickers also referred to some of the earlier correspondence. Again I note the contents of the correspondence. Mr Vickers submitted that looking at the prejudice to both sides, the prejudice to the Defendant if judgment was granted in default of defence would far outweigh any prejudice to the Plaintiff.
14. I have considered all the circumstances of the case in order to arrive at a just and proportionate conclusion as to the appropriate determination of the two summonses before the court. Trying to balance all the relevant factors I have concluded that justice, fairness and the overriding objective requires that the court grants leave to the Defendant to file and serve the defence out of time and does not grant judgment in default in the particular circumstances of this case. It would not be just or proportionate to grant judgment in default in this case.
15. I therefore grant leave to the Defendant to file and serve the Defence dated 28 March 2024 and the Defendant is granted an extension of time in that respect. I am minded to order that the Defendant pay the Plaintiff the costs of and incidental to the Defendant's Summons, to be taxed on the standard basis in default of agreement.
16. I do not make an order, belatedly suggested by Mr Little, that the Defendant should pay the amount claimed into court as a condition for filing its defence late. Such a condition is not appropriate in the circumstances of this case.

17. I dismiss the Plaintiff's Summons for judgment in default of defence. I am minded, however, to make an order for costs against the Defendant in that respect. The Plaintiff has been unsuccessful in respect of the Plaintiff's Summons but the Defendant should have filed its defence on time and the Plaintiff's Summons was necessitated by the Defendant's failure.
18. I take care in what I say about the merits as I do not wish to pre-judge any application the Plaintiff may make for summary judgment, as canvassed by Mr Little in his oral submissions.
19. That is my judgment in respect of the two summonses.
20. Are there any submissions seeking to persuade me to make the costs orders other than those that I have proposed? [The court heard submissions on costs.]
21. In the judgment I delivered earlier I indicated the costs orders I was minded to make subject to consideration of any submissions to the contrary. I have now heard further submissions from Mr Vickers who seeks to persuade me to the contrary in connection with the Plaintiff's summons and I have also heard from Mr Little. I am not persuaded to make any costs orders other than those I indicated I was minded to make. I make the costs orders I previously indicated I was minded to make.
22. In relation to the Defendant's Summons, the Defendant to pay the Plaintiff's costs to be taxed on the standard basis. In relation to the Plaintiff's Summons, the Defendant to pay the Plaintiff's costs, again to be taxed on the standard basis in default of agreement.
23. Counsel should liaise with each other and agree a draft order as to form and content, reflecting my determinations, and if possible file that by email to my PA before 2pm tomorrow just so I can finalise the orders.
24. That is my judgment.

David Doyle

The Hon. Justice David Doyle
Judge of the Grand Court