

## The Privy Council clarifies the law on default judgments in the Eastern Caribbean

MARCH 2023

In the recent [Judicial Committee of the Privy Council \(the Privy Council or the Board\) decision in \*Lux Locations Ltd. v Yida Zhang\*\[1\]](#) the Privy Council explained the proper approach on an application for a default judgment to be entered where the Claimant is seeking a remedy other than an award of money.

The Board held that the issuing of a default judgment in these circumstances was a "judgment or order of the High Court" against which leave to appeal could be sought. The Privy Council also held that the court should refuse to enter a default judgment where it was evident that there may be good grounds for ultimately setting it aside.

### Background facts

The Appellant, Lux Locations Ltd. (**Lux**), was an estate agency that was engaged by the Respondent, Mr Yida Zhang (**Mr Yida**), a Chinese national, to assist him to purchase a piece of land in Antigua. Lux was engaged on written terms that if Mr Yida or an affiliate acquired the land, Mr Yida would pay Lux a commission equal to 9% of the purchase price.

The agency agreement also stated that Lux would be responsible for paying, out of its commission, any other commissions pre-agreed with Lux to facilitate the sale. Lux had agreed to pay such a commission, equal to 4% of the purchase price, to an architect by the name of Johann Hesse (**Mr Hesse**), in return for his assistance in lobbying the Antiguan government for approvals needed for the purchase.

### The first action

Mr Yida's company, Yida International Investment Antigua Ltd (**Yida Ltd**), bought the land in August 2014 for US\$60 million. However, Mr Yida failed to pay Lux's commission. His associate, Mr Kenneth Kwok wrote to Lux saying that foreign exchange was not available in China to pay the commission and proposed a new agreement under which Lux's right to be paid the commission would be replaced by an exclusive right for Lux to act as the estate agent for the sale of any of the land. Lux rejected this proposal and in due course commenced proceedings in Antigua against Mr Yida for the US\$5.4 million commission that was due to it under the agency agreement.

Mr Yida defended the claim and counterclaimed for rescission of the agency agreement, alleging that he had been induced to enter the agreement by various fraudulent misrepresentations. Mr Yida subsequently amended his defence and added the further allegation that around the time when the written agency agreement was made, he and Lux made a separate oral agreement that his obligation to pay Lux the commission of 9% would only take effect if Lux negotiated a purchase price of US\$30 million.

The trial of the first action was scheduled to commence on 7 March 2017 and the parties and their respective lawyers were present at court. Mr Yida's lawyer Mr Benjamin requested and was granted time for the parties to discuss a settlement. Terms of a settlement were negotiated and set out in a consent order, which was signed by both parties and their respective counsel (the **Consent Order**). The Consent Order provided for judgment to be entered for Lux against Mr Yida for US\$3 million, plus interest and legal costs (the **Settlement Sum**). Mr Yida was ordered to pay the Settlement Sum within 21 days.

Before the Settlement Sum was agreed, Mr Hesse (who was present at court) agreed to forego the share of Lux's commission that Lux had agreed to pay to him.

Mr Yida failed to pay the Settlement Sum, with the result that Lux commenced enforcement proceedings. On 4 April 2017, Lux obtained a provisional charging order over Mr Yida's shares in Yida Ltd.

On 12 May 2017, Mr Yida made a part payment of US\$705,486.39 towards the Settlement Sum but made no further payment. By an affirmation made on 18 May 2017, Mr Yida claimed that his failure to pay the Settlement Sum was due to practical difficulties in remitting funds to Antigua.

The court granted Lux a final charging order against Mr Yida, which was to take effect unless the balance of the Settlement Sum was paid within 14 days.

## The second action

Mr Yida still refused to pay the Settlement Sum but instead commenced an action on 3 July 2017 against Lux, its proprietors and two others, claiming that the defendants had conspired to raise the purchase price of the land from US\$30 million to US\$60 million. Mr Yida also claimed that Lux's proprietors made a number of representations on which Mr Yida relied. Lux successfully applied to have the second action struck out as an abuse of process on the basis that it contained allegations which were either made, or ought to have been made in the first action.

Meanwhile, the court granted Lux orders in order to facilitate the sale of Mr Yida's shares in Yida Ltd.

## The third action that is the subject of the appeal

On 23 November 2018, Mr Yida filed yet a third action (the **Third Action**). This time he claimed that the Consent Order should be set aside and for the repayment of the money that he paid to Lux under the terms of the Consent Order. He claimed that at the time he signed the Consent Order, he misunderstood the nature of the document and thought that it was a release of Mr Hesse's claim for his commission.

The Third Action was duly served on Lux on 23 November 2018, but Lux failed to file a defence within the 28-day period stipulated by the Eastern Caribbean Supreme Court Civil Procedure Rules (**CPR**).

On 12 February 2019, Mr Yida filed a request for entry of default judgment for failure to file a defence within the prescribed 28-day period, but the court office notified Mr Yida that it could not enter a default judgment, as the remedy sought was one other than for a sum of money, citing CPR12.10(4)<sup>[2]</sup> and 12.10(5).<sup>[3]</sup>

On 20 February 2019, Mr Yida made an application for the court to determine the terms of the default judgment under CPR12.10(4). While Mr Yida's application was pending, Lux filed a defence to the Third Action on 7 March 2019 and on 8 March 2019 applied for an extension of time for filing a defence and an order striking out the Third Action, or alternatively an order for summary judgment dismissing the same.

On 20 March 2020, Robertson J gave judgment on Mr Yida's application, deciding that (1) the statement of claim in the Third Action disclosed a valid claim and ought not to be struck out; (2) default judgment should be entered for the remedy which Mr Yida claimed; and (3) it was unnecessary for the court to consider Lux's applications to extend the time to file a defence or for summary judgment.

Robertson J gave Lux leave to appeal her decision to the Court of Appeal. Lux duly filed its appeal while Mr Yida applied to have the order granting leave to appeal set aside and the ensuing notice of appeal struck out, on the ground that the Court of Appeal had no basis to hear an appeal from a default judgment. Mr Yida contended that the defendant's only recourse in those circumstances was to apply under Part 13 of the CPR for the default judgment to be set aside.

The Court of Appeal struck out Lux's notice of appeal, holding that a default judgment was not a "judgment or order of the High Court" within the meaning of section 31(1)(b) of the Eastern Caribbean Supreme Court Act<sup>[4]</sup> and as a result, was not one which could be subject to an appeal. The Court of Appeal further held that the grant of a default judgment, even where the court determines the terms of the default judgment under CPR12.10(4), is an administrative act performed by the court office and not a judicial decision. The Court of Appeal also noted that in assessing damages or determining the remedy to be granted, the court does not in any way examine the merits of the claim.

## The Privy Council decision

However, on Lux's further appeal to the Privy Council, the Board allowed Lux's appeal, set aside the decision of Robertson J and the Court of Appeal and determined that:-

1. The Court of Appeal was wrong to hold that a judge's determination under CPR12.10(4) was not a "judgment or order of the High Court" as she was acting in her capacity as a judge of the High Court and taking a step which could not have been taken by a member of the court staff. As such, an order granted under CPR12.10(4) is a "judgment or order of the High Court" in relation to which leave may be granted to appeal to the Court of Appeal. Consequently, the Court of Appeal was wrong to strike out Lux's notice of appeal and ought to have ruled on Lux's appeal from Robertson J's decision.
2. While the aim of a default judgment procedure is to provide a speedy, inexpensive and efficient way of dealing with claims that are uncontested, those objectives do not justify a court in entering judgment on a claim which is manifestly bad or an abuse of the court's process, even if the defendant has failed to file a defence.
3. It does not automatically follow that where an application to the court is required under CPR12.10(4) and (5), the defendant files a defence after that application has been issued (but before default judgment has been entered) and applies for an order extending the time to file a defence, that the court should ignore the defence and the cross-application. Rather, if at the hearing of the CPR12.10(4) application, it is evident that

there may be grounds for a default judgment to be set aside, it would be wrong in principle to enter a default judgment.

In light of those determinations, the Board considered the Third Action against the background of the previous history of the litigation and concluded that the statement of claim in the Third Action was an abuse of the court's process on which Mr Yida was not entitled to a judgment.

The Board considered that had Mr Yida signed the Consent Order mistakenly or believed at the time that he started the second action that he had any ground for denying that he had settled the first action, he would have made that allegation in the second action where it would have been directly relevant.

Furthermore, Mr Yida's history of non-payment and disregard of court orders demonstrated the lengths that he was prepared to go to avoid paying the Settlement Sum. The Board found that the fact that Mr Yida's claim that he did not understand the nature of the Consent Order was made when he had run out of other delaying tactics and his shares in Yida Ltd were about to be sold was a further powerful reason to be satisfied that the Third Action was a fabrication.

Consequently, the Privy Council ordered that Lux's appeal should be allowed, the orders of the High Court and Court of Appeal set aside, the statement of claim in the Third Action struck out and Mr Yida's claim dismissed.

Please do not hesitate to contact a member our Dispute Resolution team if you need any support.

[1] [2023] UKPC 3.

[2] CPR 12.10(4) says that "Default judgment where the claim is for some other remedy shall be in such form as the court considers the claimant to be entitled to on the statement of claim."

[3] CPR 12.10(5) says that "An application for the court to determine the terms of the judgment under paragraph (4) need not be on notice but must be supported by evidence on affidavit..."

[4] This section provides that "(1) Subject to the provisions of this Act or any other enactment...(b) an appeal shall lie to the Court of Appeal and the Court of Appeal shall have jurisdiction to hear and determine the appeal, from any judgment or order of the High Court..."

**For more information please contact:**



**Ellie Crespi**

BVI Managing Partner | BVI

**t:** +1 284 852 6335 | **e:** [ellie.crespi@collascrill.com](mailto:ellie.crespi@collascrill.com)



**Rocco Cecere**

Partner | Cayman

**t:** +1 345 914 9630 | **e:** [rocco.cecere@collascrill.com](mailto:rocco.cecere@collascrill.com)