"Finality is a good thing, justice is better."[1] –

A critique of the judgement in *Samara v MBI & Partners UK Limited [2016] EWHC 44 (QB)*

The case of **Samara** is authority for the proposition that a decision made by a Judge under Part 13.3 of the Civil Procedure Rules 1998 (CPR) is a final decision and cannot be the subject of a second application to set aside a default judgment or a further challenge by way of Part 3.1(7) of the CPR to vary or revoke the order.

In the course of this article I shall attempt to demonstrate that the Court perhaps has missed an excellent opportunity to bring the unique, self-contained regime for setting aside default judgments in line with the applicable principles relating to successive applications based on the same facts such as summary judgment and strike-out applications: **DG Finance Ltd v Scott [1995] (unreported)** per Hobhouse LJ: "*A second application may be entertained where, since the previous unsuccessful application, there has been some change in the proceedings which has given rise to a new situation, not covered by the decision on the earlier application, sufficiently cogent to justify the further application."* This case was cited more recently in **Munroe v Northern Rock Asset Management Plc [2015] 943 (QB).** Similar considerations were expressed by Lord Neuberger, the President of the Supreme Court, in **Thevarajah v Riordan [2016] 1 WLR 76 SC** [18] when he cited with approval the passage by Buckley LJ in **Chanel Ltd v FW Woolworth & Co Ltd [1981] 1 WLR 485 CA @ 492-3:**
"*Even in interlocutory matters a party cannot fight over again a battle which has already been fought unless there is some significant change of circumstances, or*

[1] Atkin LJ (as he then was) **Ras Behari Lal v King Emperor [1933] 60 Indian Appeals 354,361**

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a party has become aware of facts which he could not reasonably have known, or found out, in time for the first encounter."

I shall also consider, as an alternative course, whether it is logical or just for the Higher Appellate Courts or indeed, the Civil Procedure Rule Committee to distinguish between the merits of successive applications to set aside a Default Judgment which are regarded as final decisions: **Rajval Construction Ltd v Bestville Properties Ltd [2010] EWCA Civ 1621** [17] and successive applications for Summary Judgment which, although also considered on their merits, are regarded as not final. The consequences for an unsuccessful applicant following a final decision can be severe.

The Court's decision on Jurisdiction in Samara

The Court found, among other things as follows:

- The order of an appellate court upholding the decision of the Master below in refusing to set aside the Default Judgment "*was a final order thereby finally determining between [the parties] the question whether the default judgment…should be set aside…".*
- *"While [the rule in CPR 13.3] does not expressly prohibit a second application, the principle of finality requires, in the interests of justice and of litigants generally, that a final order between the parties remains a final order…".* Accordingly, a party may not make a second application under CPR 13.3 if the position has changed since the issue was determined on appeal. The party's only remedy would be to challenge such final order by seeking permission to bring a second appeal out of time under CPR 52.13 or to re-open a final appeal under CPR 52.17,both of which are very onerous applications indeed.
- If it was always possible for a party to make a second application to set aside a default order the principle of finality would be eroded and the

protections offered to litigants by the appeal provisions under CPR 52 would be circumvented.

- CPR 3.1(7) did not apply to final orders: **Roult v North West Strategic Health Authority [2010] 1 WLR 487 CA**.
- It agreed with the observations of Warby J in **S v Beach [2015] 1 WLR 2701** to the effect that CPR 12 and 13 constituted a self-contained regime for the grant, variation, or setting aside of a default judgment and it was not necessary for a party to invoke CPR 1.3(7) in seeking to set aside a default judgment which was accompanied by another final order. In **Samara** the Court potentially went further than **Beach** in suggesting that MBI could not use CPR 3.1(7) in an attempt to support a second application under CPR 13.3.

In my view, the analysis of the Court in **Samara** on the issue of jurisdiction, should not necessarily discourage any successive applications to set aside default judgments in the future, for the following reasons:

- The Court accepted without qualification that the content of CPR 13.3, which prescribes the requirements for setting aside a default judgment, does not expressly prohibit a second application. Such a finding will support to a significant extent any applicant seeking to advance a positive argument as to whether on a proper construction of the rule it would permit a second application.
- The fact that an order has been appealed does not, without more, determine whether a default judgment or an order refusing to set aside a default judgment becomes a final decision.
- Neither default judgments nor orders refusing applications to set aside default judgments properly fall within the definition of a “final decision” found in 52APD.3.6*: ”….a decision of a court that would finally determine*

(subject to any possible appeal or detailed assessment of costs) the entire proceedings whichever way the court decided the issues before it .": **Civil Procedure Rules 2016, vol. 1,p1727** or within the examples of final and non-final decisions in 52APD.3.7-3.8

- Briggs J (as he then was) in **Kojima v HSBC Bank [2011] EWHC 611** [21] when considering whether the Court's power under CPR 3.1(7) had any application to a final order, described such order as: "*an order of the type whereby, otherwise than purely by default, the court finally disposes either of a claim, or of some part of a claim, subject only to an appeal to a higher court."* (emphasis added).
- In paragraphs 32 and 33 of **Kojima,** while Briggs J acknowledged the finality of a default judgment he nevertheless found that the Court had a distinct power to set aside under CPR 13. Moreover when addressing the differences between instances where revocation might be sought of non-final orders but not of final orders because of the public interest in finality, he expressly excluded default judgments from his analysis of those two types of orders due to their distinct, self-contained regime for setting aside. The Court of Appeal in **Kojima [2011] EWCA CIV 1709** did not in any way qualify or criticise the findings made by Briggs J as to the nature and effect of default judgments.
- In **Rajval Construction Ltd**, Longmore LJ, with the agreement of Ward and Patten LJJ held that a decision not to set aside a default judgment, subject to any appeal, was a final decision. There is no indication from the judgment in that case as to whether he was referred to the definition of final decisions in 52APD and to the examples contained therein and whether he considered to what extent there appeared to be an inconsistency in approach between orders setting aside default judgments and orders on, say, applications for summary judgment. This decision is distinguishable from Briggs J's approach as the matter in **Rajval** was

limited to comparing an application to set aside a default judgment with a case management decision. It did not touch upon the unique, self-contained nature of the regime prescribed by CPR 13.3 for setting aside irrespective of the finality of the relevant decision.

- In **Samara** the Court appeared to adopt a policy that unless it applied a stringent test of finality, it would always be possible for a party to make successive applications to set aside a default judgment. Such a view, perhaps, has not taken into account the need for exceptional circumstances to exist before any second application to set aside can have any real prospect of success or for there to be another good reason to vary or set aside the default judgment. Moreover, the **Samara** decision is inconsistent with the settled practice of successive applications for summary judgment or striking out nor is it consonant with the overriding objective enshrined in CPR 1.1 enabling the court to deal with cases justly and at proportionate cost, particularly where, on entering judgment in default of an acknowledgement of service or a defence, the merits are rarely considered.
- In **Beach** the Court expressly held that in setting aside a default judgment it was not necessary to invoke CPR 3.1(7) in cases where there was also in existence a final order. Such a finding is generally helpful to any litigant seeking to make successive applications. However, in light of the broad discretion given to a Judge under CPR 13.3 there is and can be no objection to a Judge adopting by analogy the criteria set out and applied in CPR 3.1(7). In my view, to suggest otherwise, might well have the effect of fettering a Judge's discretion within a regime that is self-contained and not in any way restricted by the application of CPR 3.1(7).

In essence therefore, the approach of Briggs J (as he then was) in **Kojima** and the adoption by analogy of the principles in CPR 3.1(7) and **Thevarajah**, are most likely to be the means by which the Courts at first instance will deal with second applications to set aside, in the future.

Alternatively, if it is the intention of the Courts to follow the restrictive basis imposed in **Samara** on second applications, then it may be necessary on any appeal from the County Court or High Court to seek an order for the Court of Appeal to hear it. In my view, it would be extremely helpful if the Court of Appeal would provide future guidance on the making of any second application. It is hoped that in considering the matter, it takes into account: the distinctive nature of a Default Judgment, the wide discretion enjoyed by Judges, the self-contained regime for setting aside and that on a practical level, virtually no difference exists to distinguish between the option, in certain circumstances, to make successive applications for summary judgment and successive applications to set aside a default judgment. Summary judgment applications are expressly stated as non-final in 52APD. In the absence of any reference in the definitions in 52APD to Default Judgments there should be considerable doubt as to why Default Judgments and orders refusing an application to set aside should automatically be categorised as final decisions. It is also hoped that the Civil procedure Rule Committee will consider amending the Rules to reflect such need for change.

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