

Parties Not Obligated to Correct Each Other's Mistakes

October 21, 2024

Factual Background

In *This company Limited & Ors v Welsh & Ors* [2024] EWHC 2159 (Comm), the claimants had commenced proceedings in the London Circuit Commercial Court against several defendants for, inter alia, breaches of directors' duties and negligence. The factual background and timing of communications between the parties, although on its face routine, is significant to the issues before the Court and accordingly warrants some explanation.

The proceedings were commenced by the filing and service of a claim form, without particulars of claim (which were to follow once the defendants had filed acknowledgements of service, in accordance with CPR 59.4). The proper deadline for the filing of acknowledgements of service, pursuant to CPR 59.5(2), was 14 days from the service of the claim form. The Defendants ultimately served their acknowledgement of service approximately 8 days late, but the claimants took no steps to seek default judgment against them during that time.

After the acknowledgement of service was filed, the claimants' solicitors emailed the Defendants' solicitors to ask if they would accept service of the claimants' particulars of claim by email, as they had previously done in respect of the claim form. They received no response and chased several times by telephone and email. The Defendants' solicitors eventually responded some five days later, saying they were unable to respond to the question because they believed that the claimants were out of time for serving their particulars of claim.

The claimants' solicitors went ahead with filing and serving the particulars of claim by delivery to the offices of the Defendants' solicitors, in accordance with CPR 6.26. The claimants' solicitors then emailed the Defendants' solicitors to say that they disagreed that the particulars of claim were out of time, and asked why the Defendants' solicitors understood this to be the position. Receiving no response, the claimants' solicitors sent a further email the next day stating that they looked forward to receiving the Defendants' defence by the due date (21 May 2024).

The next day, the Defendants' solicitors emailed to say that they understood that the period for service of the particulars of claim had expired prior to the claimants effecting service, so the particulars of claim were out of time. The basis of this understanding by the Defendants' solicitors was CPR 7.4, which provides that particulars of claim must be served with the claim form or be served within 14 days after service of the claim form.

The Defendants' solicitors sent a series of follow-up emails to the claimants' solicitors in which they continued to cite the standard time limit in CPR 7.4 and asked the claimants' solicitors to explain why this rule did not apply. The claimants' solicitors, who had correctly understood that CPR 7.4 was not the applicable rule in the proceedings, did not respond to the requests for clarification.

The proper rule was in fact CPR 59.4, which replaces the standard position in CPR 7.4 in proceedings in the Circuit Commercial Court. Under CPR 59.4, the claimants were entitled to serve their particulars of claim within 28 days of the filing of an acknowledgement of service. Accordingly, the claimants' particulars of claim were served within time.

While the Defendants' solicitors continued to seek a response from the claimants' solicitors, the deadline for the filing of a defence expired. The claimants applied, without notice to the Defendants, for default judgment. Default judgment was then entered on 22 May 2024.

The Defendants applied to have default judgment set aside, and for permission to file and serve their Defences. The Defendants argued that (i) the claimants ought to have corrected the Defendants' solicitors mistake regarding the applicable CPRs, and (ii) that the claimants ought not to have made their application for default judgment without notice.

Relevant Law

In considering the Defendants' application, HHJ Cadwallader provided the following summary of the principles which apply to a defendant's application to set aside default judgment:

- Firstly, it is a threshold condition that the defendant has a "real prospect of successfully defending the claim"; and
- If that threshold is crossed, the court has a discretion as to whether to grant the application. In considering whether to exercise this discretion, the court should: (a)

assess the seriousness and significance of the breach; (b) consider why the default occurred; and (c) evaluate all the circumstances of the case.

The claimants conceded that the Defendants had a real prospect of successfully defending the claim, so HHJ Cadwallader went on to consider whether the Court should exercise its discretion.

Cooperation Between Parties and the Overriding Objective

In seeking to argue that there was a “good reason” for the default, the Defendants said that the default arose because of the claimants’ solicitors’ failure to correct the Defendants’ solicitors on a matter of procedure (namely, the time limit for filing the particulars). This, they said, amounted to a “lack of honesty and poor conduct”.

HHJ Cadwallader dismissed this argument and held that, while poor conduct and dishonesty can (in principle) be relevant to the grant of relief, they did not carry substantial weight on the current facts. The Defendants’ solicitors asked a legitimate question about the timing of the filing, but it was reasonable for the claimants’ solicitors to choose not to respond. Crucially, neither the claimants nor their solicitors did anything to mislead the Defendants or encourage them in their error.

As noted in *Barton v Wright Hassall LLP* [2018] UKSC 12, parties are under no duty to give advice to the other party about the service of court documents, and HHJ Cadwallader emphasized that CPR 1.3 creates an obligation for parties to “help *the court* (in furthering the overriding objective)”, but not an obligation for the parties to assist one another.

HHJ Cadwallader’s ruling on this point therefore serves as a salient reminder of the importance of parties having their own full and detailed understanding of the CPR and the procedural timelines contained therein.

However, the judge cautioned that parties should still endeavor to cooperate with one another (in furtherance of the overriding objective) and was critical of the use of “procedural games”.

Requirement to Give Notice

The Defendants argued that the claimants ought not to have applied for default judgment without notice.

Under CPR 23.4, an application for default judgment should be served on each respondent unless a rule, practice direction or court order permits otherwise.

The claimants sought to rely on CPR 59.7(3), which states that in Circuit Commercial Court proceedings, an application for default judgment “*may be made without notice, but the court may direct it to be served on the defendant*”. However, the court dismissed this argument and held that CPR 59.7(3) only applies in respect of the application referred to in CPR 59.7(2), namely, an application for default judgment where particulars of claim have not been served and the defendant has failed to file an acknowledgement of service.

The Court determined that given that acknowledgements of service had been filed by the Defendants in this case, CPR 59.7(3) did not apply and notice should have been provided.

Decision to Set Default Judgment Aside

HHJ Cadwallader held that failing to file a defence was, by definition, a serious and significant breach and, as outlined above, there was no good reason for this default.

However, the judge noted that the Defendants’ default had not prevented the court from conducting the litigation efficiently and at appropriate cost. Moreover, the Defendants had generally been cooperative and, if relief was refused, the Defendants would lose their opportunity to defend a claim which was otherwise defensible.

On this basis, and in light of the claimants’ failure to give notice of their application for default judgment, the court held that it was in the interests of justice and the overriding objective to set aside the default judgment and grant permission for the Defendants to file and serve their defence.

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Please do not hesitate to contact us with any questions.



Christopher Boyne
Partner, London
+ 44 20 7786 9194
cboyne@debevoise.com



Natasha McCarthy
International Counsel, London
+ 44 20 7786 5512
nmccarthy@debevoise.com



Hugo Farmer
Associate, London
+ 44 20 7786 5492
hfarmer@debevoise.com



Emma Laurie-Rhodes
Associate, London
+ 44 20 7786 3027
elaurierhodes@debevoise.com



Samuel Thomsonr
Trainee Associate, London
+ 44 20 7786 5483
sthomson@debevoise.com