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Interim Applications

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1. *Summary Judgment*
2. *Setting Aside Default Judgment*

Case Study 1: Responding to a Summary Judgment Application

Responding to a Summary Judgment Application



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CPR 24.2

a) “no real prospect” of success

ED & F Man Liquid Products v Patel [2003] EWCA Civ 472

- Realistic as opposed to fanciful and more than merely arguable

b) “no other compelling reason”

Case-by-case analysis

Burden of Proof

Applicant to establish that the respondent has no real prospect of success by adducing credible evidence. If successful, the respondent is to prove some real prospect of success or compelling reason – not a high burden.

A respondent’s task is to muddy the waters.

Options

Objectives?

- Withdrawal
- Strike out
- Adjournment/delay
- Dismissal

A. Formal Requirements

B. Amend your statement of case

C. Consider the evidence/issues

A. Formal Requirements

CPR 23

- Contents
- Evidence
- Service

CPR 24.4, 24.5 and Practice Direction 24

- Claimant may not apply before AoS or defence without permission.
- Defendant may apply any time after claim form.
- Note the rules on evidence in CPR 24.5.

See *Price v Flitcraft* [2020] EWCA Civ 850 at [86] per Floyd LJ:

“The application for summary judgment ... did not comply with the mandatory procedural requirements for such applications ... their **critical importance for ensuring a fair hearing** of the application. The requirement to state in the application notice (or in the evidence contained or referred to in it) that it is made because the applicant believes that on the evidence the respondent has no real prospect of successfully defending the claim is an important one. **It prevents a claimant making an application and claiming the case to be straightforward when, in truth, he knows otherwise.**”

Options

A. Formal Requirements

B. Amend your statement of case

C. Consider the evidence/issues

B. Amend your statement of case (i)

Objectives?

- Cure the alleged defect(s) in your statement of case

Formal amendments

- *Folgender Holdings Ltd v Letrax Properties Ltd* [2019] EWHC 2131 (Ch) at [28] per Chief Master Marsh:

“On the hearing of an application for summary judgment, it is incumbent on the respondent to put forward its best case and, if the statement of case does not reflect the basis upon which the defendant says it has a real prospect of defending the claim, **an application must be made for permission to amend the defence** which should be listed for hearing with the application for summary judgment.”

- CPR 17
 - Service / permission
 - Limitation
 - Promptness – (e.g. *Jones v Lydon (No. 1)* [2021] EWHC 2321 (Ch) from [236]).

B. Amend your statement of case (ii)

Objectives?

- Cure the alleged defect(s) in your statement of case

Draft amendments?

- *Shill Properties Ltd v Bunch* [2021] EWHC 2142 (Ch) at [35] per Master Clark (citing *Bhamani v Sattar* [2021] EWCA Civ 243):
 1. CPR 24.2 does not prescribe what a summary judgment judge can look at when evaluating a 'real prospect' of success
 2. Summary judgment applications can be made before a defence is pleaded, in which case D need not file a defence before the hearing
 3. If the applicant adduces credible evidence in support of the application, it is for the respondent to show a real prospect of success – this is a low burden.

“In other words, the assessment that the judge undertakes under Part 24 is one of **assessing the evidence, not the pleadings**. The question is not whether the pleaded defence has a prospect of succeeding, but whether the defendant has no real prospect of successfully defending the claim.” (at [36], quoting Nugee LJ in *Bhamani*)

“In this context, it is to be remembered that granting summary judgment deprives the defendant of a trial, and should not be granted unless the court is satisfied that the defendant has no real prospect of success, having considered **all the material before it**. The evidence being **properly** before the court, it would be wrong in principle to disregard it.” (at [39])

Options

A. Formal Requirements

B. Amend your statement of case

C. Consider the evidence/issues

C. Consider the evidence/issues (i)

Requesting further information – CPR 18

- Front foot – statement of case or witness evidence

Disclosure?

- Factual issues which require further disclosure or cross-examination at trial
- *Shill Properties* at [50]

“If disclosure is necessary for the court to fairly determine the claim, then it is unsuitable for summary judgment.”

- *Alpha Rocks Solicitors v Alade* [2015] EWCA 685 at [22] per Vos LJ:

“...it is, of course, always open to the court to strike out or grant summary judgment [in the early stages of proceedings]. ... the court should exercise caution ... because of the draconian effect of so doing and the risk that, at a trial, events may appear less clear cut than they do at an interlocutory stage”

C. Consider the evidence/issues (ii)

“Short” point of law or construction?

Commerz Real Investmentgesellschaft mbh v TFS Stores Limited [2021] EWHC 863 (Ch) at [56] per Chief Master Marsh:

“There are no compelling reasons why the claim should go to a full trial. The basis of the defence does not rely upon any new principles of law. The issues raised by the defendant are capable of being resolved by applying the well-established principles that govern the construction of contracts and the implication of terms. The context in which the claim is made does not entitle the defendant to contend that these principles are now part of an area of developing law.”

C. Consider the evidence/issues (iii)

A further warning

- *Foglia v Family Officer Ltd* [2021] EWHC 650
 - Complex issues (fraud, knowing receipt, dishonest assistance, unjust enrichment) and high-value claim (€3.5m)
 - Summary judgment granted

“I bear very much in mind that it is highly unusual for such a claim to be decided summarily.” (Cockerill J at [102])

“Taken together [issues not explained by the respondent] provide a body of evidence which I consider does justify the preliminary conclusion that any innocent explanation is fanciful.” (Cockerill J at [105])

Case Study 2: Default Judgment

Setting Aside Default Judgment



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Legal Framework (i)

Mandatory grounds where judgment wrongly entered – CPR 13.2

Default judgment must be set aside:

- a) If granted in default of an AoS
 - i. an AoS or defence had actually been filed in time,
 - ii. the time for doing so had not expired,
 - iii. D had applied for summary judgment or strike out,
 - iv. D had satisfied the whole claim, or
 - v. C's claim was for money and D and has admitted it.

- b) If granted in default of a defence
 - i. A defence had been filed in time,
 - ii. D had applied for summary judgment or strike out,
 - iii. D had satisfied the whole claim, or
 - iv. C's claim was for money and D and has admitted it.

Legal framework (ii)

Discretionary grounds where judgment may be set aside – CPR 13.3

Default judgment may be set aside if:

- a) real prospect of successfully defending the claim; or
- b) Good reason why
 - i. the judgment should be set aside; or
 - ii. D should be allowed to defend the claim.

In either case, the application to set aside must be made promptly.

Relief from Sanctions

If D can satisfy those criteria, the court will consider its discretion according to the test from *Denton v TH White Ltd* [2014] EWCA Civ 906:

1. Is the breach serious or significant?
2. What reasons were there for the default?
3. In all the circumstances of the case, should there be relief from sanctions?

Legal Framework (iii)

Difference between this test and summary judgment?

ED&F Man Liquid Products v Patel [2003] EWCA Civ 472 at [9] per Potter LJ:

“[for summary judgment] the overall burden of proof rests upon the claimant to establish that there are grounds for his belief that the respondent has no real prospect of success whereas, [for setting aside default judgment], the burden rests upon the defendant to satisfy the court that there is good reason why a judgment regularly obtained should be set aside. ”

Options

A. Mandatory set aside

B. Consider service and notice of proceedings

C. Consider the substance of any defence

A. Mandatory set aside

Mandatory grounds where judgment wrongly entered – CPR 13.2

- No assessment of D's prospects of success – could be a hopeless case on the merits.
- No requirement that the application be made promptly.
- No discretion.

Also note the situation where there is found to be no valid service of the claim form e.g. *YA II PN Ltd v Frontera Resources Corp* [2021] EWHC 1380 (Comm) at [60] per Butcher J:

“the default judgment must be set aside under CPR 13.2, because it was entered at a point when the time for acknowledgment of service had not expired. I will set a time in which there should be acknowledgment of service, which will be 7 days from the date on which this judgment is handed down.”

Options

A. Mandatory set aside

B. Consider service and notice of proceedings

C. Consider the substance of any defence

B. Service and Notice

Where D has not actually received the claim form

- Common argument.
- This can be a particularly persuasive “good reason” depending on the nature of the allegations (e.g. *Berezhovsky v Russian Television and Radio Broadcasting Co* [2009] EWHC 1733 (QB) (serious allegations of fraud, threatening and drugging of witnesses)).
- But, a Defendant who has not received the claim form must be in a position to explain in more detail why an AoS or defence was not filed – e.g. *Fathi v Mohamed* [2021] EWHC 2231 (Comm) at [22] per HHJ Pelling QC (sitting as a Judge of the High Court):

“there is no satisfactory explanation as to why the breach occurred.”

Options

A. Mandatory set aside

B. Consider service and notice of proceedings

C. Consider the substance of any defence

C. Substance of Defence

- “real prospect” of successfully defending the claim: not fanciful and more than merely arguable
- Important to settle a draft defence as quickly as possible, preferably in advance of the hearing – e.g. *Alli-Balogun v On the Beach & ors* [2021] EWHC 1702 (QB) at [57]-[59] per Jacobs J:

“there is no requirement to [file a draft defence but a] draft defence is potentially important, however, because it would enable the court to see clearly what, if any, facts are relied upon by a party in support of its defence...

... the absence of a draft defence in the present case reflects, at least in part, the fact that the 4th/ 5th Defendants have not been able to set out a factual case as to what happened...

Although I do not accept that the absence of a draft defence is fatal ...the 5th Defendant has failed to show that a real prospect of a defence”