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OUT OF TIME – THE RACE BEGINS, BUT YOU AREN'T IN IT

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It is often tempting to bury your head in the sand with the prospect of Court proceedings. If you receive a letter from another person claiming money from you, it is easy to ignore it; particularly if the claim appears hugely overstated, or (in your opinion) destined to failure. Even when matters progress and formal Court proceedings issued, many people fail to take the required initial steps to deal with the claim; being filing and serving an Acknowledgement of Service and/or a Defence. This is what happened in the recent TCC case of *McDonald and McDonald v D&F Contracts Limited [2018] EWHC 1600* ("McDonald").

In debt claims, the general rule is that a Defendant will receive the pleadings (Claim Form and Particulars of Claim) and what lawyers call a "Defence pack". Save in certain exceptions, such as when the Defendant is resident abroad, the Defendant generally should file and serve an acknowledgment of the claim (an Acknowledgment of Service) within 14 days of receiving the pleadings, and then file and a Defence to the claim within 28 days of receiving the pleadings. If no Acknowledgment of Service is sent, the Defendant must file and serve a Defence within 14 days of receiving the pleadings.

In this case, a claim was issued against the Defendant, who failed to file and serve an Acknowledgment of Service or a Defence within the requisite time limit (unusually, 21 days after service of the Particulars of Claim). Despite putting a Defence in late, albeit prior to an application made by the Claimant for default judgment, the Judge decided that she had no option but to give default judgment in favour of the Claimant's claim. That meant that the Defendant had a judgment registered against it.

It is worth noting that default judgment was given even though the Judge was particularly scathing of the way that the Claimant had drafted their Particulars of Claim; making clear that they "*are defective in that they fail to comply with the Practice Direction [made under the Court rules]*". The Judge also strongly implied that an application to set aside default judgment may possibly be successful if the Defendant put in a revised (and properly drafted) Defence. However, this could not prevent default judgment from being entered (though the Judge stayed the execution of the default judgment by a period of 28 days in which the Defendant could make such an application).

It may well be that the Defendant is able to have default judgment set aside, and will be given leave by the Court to Defend the claim. No harm, no foul then?

Well, not really. There are three principal reasons why the Defendant's failure to adhere to the prescribed time limits has placed the Defendant in a more difficult position than they otherwise would have been.

The first is that, although the Judge was unimpressed by the Claimant's Particulars of Claim, there is no guarantee that the default judgment will be set aside. It is not suggested that the Judge was wrong to enter default judgment, and therefore setting the judgment aside is a matter of discretion.

To set the default judgment aside, the Defendant will have to show either that (1) it has a real prospect of successfully defending the claim, or (2) that there is some other good reason why

the judgment should be set aside or the defendant should be allowed to defend the claim. The Judge will then consider whether to exercise their discretion, having regard to the principles set out in *Denton v TH White Ltd [2014] EWCA Civ 906*, namely:

1. Assess the seriousness and significance of the breach.
2. Consider why the default occurred (and whether there was a good reason for it).
3. Consider all the circumstances of the case, so as to enable it to deal justly with the application.

In that regard, the Judge commented that the late Defence filed by the Defendant was "*not…of the nature one would expect and hope to see in litigation of this nature*". It is difficult to see how such a Defence could fit the criteria set out above, and persuade a Judge to set aside the default judgment without substantial amendment. Further, the Judge's view that the Defendant's Defence was, in essence, putting the Claimant to proof on the claim may be dealt with by the Claimant filing a witness statement that exhibits the requisite "proof".

Similarly, it is difficult to see how the *Denton* principles could be satisfied, without substantial amendment to the Defence, though the fact that the Particulars of Claim were defective may be a factor that weighs strongly in the Defendant's favour when the Judge considers the third *Denton* principle.

This uncertainty would likely have been avoided had the Defence been filed and served within time.

The second is that the Defendant was ordered to pay a minimum of £7,500 in costs; the Claimant's costs of the default judgment application. Please note that it is likely that any Defendant will be ordered to pay the Claimant's costs in responding to any application to set aside the default judgment. In addition to these costs orders, the Defendant may need to instruct solicitors to prepare the application to set aside the default judgment and pay their costs. As such, the Defendant is likely to have to spend a substantial amount of money in order to defend the claim.

What a waste! Litigation can be very expensive at the best of times, both in terms of time and in terms of money, without additional, unnecessary costs being incurred, just to get to the starting line. Had the Defendant complied with the time limits, or instructed solicitors in good time to ensure that the time limits were complied with, the vast majority of those costs, if not all, would likely have been avoided.

The third reason is that it has also likely delayed the resolution of the case. When parties file a request for default judgment, as the Claimant did on 1st November 2017 in McDonald, it is a purely administrative matter. The Court staff (who are generally not lawyers) look at the Court file and see whether there is a Defence. In this case, as there was a Defence on the file (albeit one filed late) the administrators declined to enter default judgment automatically.

The Claimant was therefore required to make an application to the Court for default judgment, which was done on 26th January 2018. The date of the hearing of the application was 19th March 2018. This was some five months after the last date on which the Defendant could have filed an Acknowledgment of Service or Defence; 10th October 2017.

The default judgment was stayed for a period of 28 days. If the Defendant made an application to set aside the default judgment within that period, it is not unthinkable that the hearing of the application would have taken place in June 2018 (if not later). Assuming the Defendant was successful, and given leave to defend the claim, it would mean that the parties are now in the position that they would have been in some 9 months earlier, had the Court deadlines been adhered to.

Had the Defence been filed and served within time, the parties would likely have been a significant way through the Court timetable by now, with (ideally) a trial date fixed for the not too distant future.

Parties who are unfamiliar with litigation should not try to blag it; those who do so risk fatally undermining their position unnecessarily. Taking prompt legal advice often helps to avoid the expense, uncertainty, waste of Court time and delays caused by a failure to adhere to Court timetables.

18th July 2018

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