Enquiry of the Month

Can a client set aside a default judgment on the basis they would have paid if they had known about the claim?

We have recently been asked to advise on the merit of several set aside applications on the ground the client would have paid if they had known about the claim. Clients in these situations have only just become aware of the judgment and are concerned by the impact on their credit report and employment.

To establish whether a set aside application would be appropriate, advisers will need to explore service of the claim and the client's reasons for not responding.

Set aside applications on mandatory grounds - claim form improperly served

Often clients will state they have not received the claim form and therefore, did not have opportunity to respond.

The claim form must be served in accordance with Part 6 of the Civil Procedure Rules (CPR). In most cases, the client will have not been in contact with the creditor and will not have provided an address for the claim to be served at. Where the client has not provided an address for the purpose of being served with the proceedings, CPR 6.9(2) details where the claim should be served. For individuals, the claim must be served at their usual or last known address.

Where the client has moved address since accruing the debt, they will be responsible for updating their creditors. If the client has not updated their creditor and the claim form has been served to a previous address, then the client will not be able to argue that service was defective and an application to set aside may not be appropriate.

However, if the client can evidence they updated their address details or the creditor was aware the client no longer lived at the address, they may be able to argue CPR 6.9(3) applies –

(3) Where a claimant has reason to believe that the address of the defendant referred to in entries 1, 2 or 3 in the table in paragraph (2) is an address at which the defendant no longer resides or carries on business, the claimant must take reasonable steps to ascertain the address of the defendant's current residence or place of business ('current address').

If the client can evidence the creditor was aware the address was incorrect and they have not taken reasonable steps to obtain the correct address, then the claim will have been improperly served.

Pursuant to CPR 13.2, a judgment that has been improperly served **must** be set aside. This is because the time limit for filing the acknowledgment of service or a defence will not have expired as proceedings were not effectively served.

Therefore, if your client can evidence the claim was sent to the wrong address and the claimant knew this, the client's application will be on a mandatory ground and court must agree to set aside the judgment. The claim will then revert back to its original stages and the judgment will be removed from their credit report. The client will need to pay whole claim (including any costs) to avoid judgment being entered again.

Set aside applications on discretionary grounds - claim form served effectively but client had no knowledge of the claim

CPR 13.3(1)(b) provides that the court can exercise its discretion to set aside a default judgment if there is 'some other good reason'. Applications which are relying on the court's discretion should be made with reference to the *Denton* test, you can read about application of the 3-part test in our 'Dealing with Judgment Debts' resource. In practice, this means answering the following questions fully and with evidence, where appropriate:

• Why didn't the defendant defend the claim in the first place?

• Was the application made promptly once the defendant found out about the default judgment?

• Would the defendant have had a reasonable prospect of defending the claim?

It will not be necessary to address the last question in cases where the client is relying on 'some other good reason', instead they will need to explain this.

The Court of Appeal in *Godwin v Swindon Borough Council* [2001] EWCA Civ 1478 held that the court's power to set aside default judgment under CPR 13.3(1)(b) can apply to circumstances where service has been technically effective but the defendant can show they had no knowledge of the claim (para 49) –

"Rule 13.3(1)(b) has a disjunctive alternative, so that the court may set aside or vary judgment entered in default if it appears to the court that there is some other good reason why the judgment should be set aside or varied or the defendant should be allowed to defend the claim. In my view, this is plainly capable of extending to circumstances where the defendant has not received the claim form and particulars of claim before judgment was entered against him. It is not an absolute right, but does not have to depend on the defendant having a real prospect of successfully defending the claim. The court therefore has sufficient power to do justice in these cases and will, no doubt, normally exercise this discretion in favour of a defendant who establishes that he had no knowledge of the claim before judgment in default was entered unless it is pointless to do so. The defendant, for instance, may have no defence to the claim, but may justifiably want to have the judgment set aside on the

basis that, had he known about the claim, he would have satisfied it immediately without having an embarrassing judgment recorded against him."

As you can see, although a client may not have a defence, this does not prevent them from applying to set aside the judgment. The client must be prepared to evidence why they were not aware of the proceedings. The client will also need to explain what impact the judgment will have on their circumstances if this remains in place.

As the decision to set aside a judgment under CPR 13.3(1)(b) is discretionary, you will not be able to guarantee the outcome for your client. Clients should be advised that if their application is unsuccessful, they may incur additional costs.

Promptness

In addition to the above, the client will also have to demonstrate that an application has been made promptly. The law relating to whether an applicant has acted promptly or not is quite complex and takes into account a number of factors. What amounts to 'promptly' will depend upon the circumstances of each case and each defendant.

Our resource 'Dealing with Judgment Debts' discusses in detail the case law around promptness and will be useful when assessing this against your client's application.

If you would like to discuss the merit of your client's set aside application, please do not hesitate to contact us.