
Covid-19 no excuse when seeking relief from sanction

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In *Fathi v Mohamed* [2021] EWHC 2231 (Comm) an application to set aside a Judgment obtained in default of an acknowledgement of service being served was refused. The Court found that despite the application being issued promptly after Judgment had been entered the application had not been served, and progressed promptly and the Defendant's reliance on Covid as an explanation for the delay was not sufficient for relief from sanction to be granted.

Background

The Defendant applied to set aside a Judgment obtained against him. Judgment was entered on 6 September 2020. On 11 September 2020 the Defendant issued an application to set aside that Judgment. The Defendant failed to serve the application on the Claimant until May 2021.

The (unrepresented) Defendant's explanation for failing to progress the application to set aside the Judgment was that he was living in Turkey, caring for his mother and was precluded from travelling as a result of the pandemic.

In determining the Defendant's application the Court considered whether the Defendant was able to demonstrate that he satisfied the *Denton v TH White Ltd* [2014] EWCA Civ 906 test, i.e. of whether the breach was serious or significant; what reason was given for the default; and, whether in all the circumstances the defendant should be granted relief.

It was held that the Defendant had acted promptly in issuing the application to set aside the Judgment five days after it had been entered. However, the Defendant was unable to demonstrate that he had then taken steps to progress the application or even to bring the application to the Claimant's immediate attention.

The Defendant's explanation that he was unable to travel to the UK to progress matters due to the travel restrictions imposed as a result of Covid-19 was not a good enough reason for the default. The Court held that the Defendant could have progressed the application adequately by email. Similarly, the Defendant could, and should, have made arrangements for mail left at his address in the UK to be dealt with in his absence whilst he was situated in Turkey.

The Court found that the reason given for the default was inadequate and relief from sanction was not granted.

Commentary

There have been few decisions where Covid excuses have been given by a party seeking relief from sanction and there is no clear guidance on how Courts will approach these. In this case the Court was not prepared to entertain the Defendant's explanation in circumstances where he was still able to progress his application despite being prevented from travelling due to Covid.

Cases where Covid is put forward as a basis on which relief from sanction should be granted are likely to be fact specific however, based on this case, courts are likely to look at whether the party in breach has taken all reasonable steps to remedy the breach.

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