

# Pre-action conduct and the question of promptness when making an application to set aside a default judgment under CPR 13.3 (Core-Export v Yang Ming)

13/03/2020

**Dispute Resolution analysis:** This case considers the question of pre-action conduct in respect of an application to set aside a default judgment. While finding that the delay of 23 days since the defendant became aware of the judgment was not prompt, the judge also considered that it was necessary to view the speed in which the application had been made in the context of what had gone before it; in this case, including pre-action conduct. On the face of it, this appears to sit uneasily in light of the Court of Appeal authority in the case of *Macdonald v Thorn*, in which the court held that it was not appropriate to consider pre-action conduct in such an application, as the 'default' (ie failure to file an acknowledgment/defence) was the trigger for such an application. However, the distinction is arguably that pre-action conduct will be taken into consideration where it is relevant to an evaluation of the explanation for any delay in making the application to set aside. Written by Georgia Whiting, barrister, 4 King's Bench Walk.

*Core-Export SpA and other companies v Yang Ming Marine Transportation Corp and another company* [\[2020\] EWHC 425 \(Comm\)](#) (07 February 2020)

## What are the practical implications of this case?

This case is of particular interest, as it appears at first blush to depart from the Court of Appeal authority of *Macdonald v Thorn* [\[1999\] Lexis Citation 2848](#) (noting that this was decided under a previous version of the CPR). In *Macdonald*, the court held that the 'default' under consideration in an application to set aside default judgment was the failure to file a defence within the relevant period and, as such, courts were not entitled to consider pre-action conduct. However, the instant case makes it tolerably clear that, depending on the circumstances, pre-issue conduct may be taken into consideration when evaluating the explanation for any delay. In particular, the judge expressly took into consideration the period of nine months since Yang Ming was aware that a claim would likely be brought, including the pre-issue stage of proceedings.

Thus, parties should ensure that they act promptly at all stages and be wary of any lengthy delay, even where this occurred pre-issue. While the relevant period when considering the question of promptness remains from the time when the defendant actually received the default judgment (or could have with reasonable diligence learnt of it), pre-action delay may seemingly be taken into consideration by the court in considering the reasonableness of the explanation for that delay. In the instant case, the period of 23 days in bringing the application to set aside on the grounds that the defendant needed to investigate the position was a poor explanation in light of the nine months it had been aware of the nature of the claim pre-issue.

## What was the background?

This was an application by the second defendant, Yang Ming (UK) Limited to set aside default judgment entered on 19 September 2019 in accordance with [CPR 13](#). The underlying claim was a low value cargo claim quantified in the region of £25,000 brought by Core-Export and two other claimants for breach of contract as against the two defendants and/or negligence in respect of the handling of a consignment of kiwi fruit loaded upon various vessels. Judgment was entered against Yang Ming (UK) Limited in default of an acknowledgement of service.

It was uncontentionous that, in accordance with [CPR 13.3](#), the defendant applying to set aside default judgment must show that it has a real prospect of successfully defending the claim and, in deciding whether to set aside the judgment, the court must have regard to whether the person seeking to set aside the judgment made the application promptly. It was also common ground between the parties that the application engaged the *Denton* three-stage process, which involved the court considering:

- whether the failure that gave rise to the judgment was serious or significant
- whether there was a good reason for the default or failure, and
- whether in all the circumstances of the case, the default judgment ought to be set aside

### What did the court decide?

His Honour Judge Pelling QC, sitting as a judge of the High Court, held that he could not say that Yang Ming's defence had no real prospect of success at trial, although there were a number of factual issues which could only be fully determined after testing the evidence. The first hurdle pursuant to [CPR 13](#) was accordingly met.

The judge then turned to the question of whether the application to set aside judgment had been made promptly. In deciding this question, he considered that it was necessary to view the speed with which the application had been made in the context of what had gone before. What may have been prompt where there was no history of earlier delay may not be so where there has been such delay, citing *Regency Rolls Limited & Anor v Carnall* [\[2000\] Lexis Citation 23](#) (at para [45]) and *Redbourn Group Ltd v Fairgate Development Ltd* [\[2017\] EWHC 1223 \(TCC\)](#) (at para [69]).

The judge considered that the delay between Yang Ming (UK) Limited being notified of the judgment on 30 September 2019 and the application being issued on 23 October 2019 was, in itself, not prompt (being 23 days). The only explanation given was a need to investigate the claim. The background to this was found to be instructive; the claim was presented to the defendants as long ago as 20 January 2019. Unless the claim was simply ignored from that point until judgment was entered, Yang Ming had the opportunity to investigate what on any view was a straightforward claim for a period of nine months. This was also coupled with frequent chasing emails from the claimants.

The judge accordingly held that the application had not been made promptly, the failure to file an acknowledgement of service was both serious and significant (even more so given what happened prior to the issue of proceedings), and that there was no good reason offered for the failure. In terms of a consideration of all the circumstances of the case, while there was an arguable defence raised, Yang Ming (UK) Limited had deliberately failed to engage. The need for compliance with rules and the need for efficient disposal of proceedings meant that the application to set aside the default judgment must accordingly fail.

### Case details

- Court: Queen's Bench Division (Commercial Court)
- Judge: Judge Pelling QC (sitting as a High Court judge)
- Date of judgment: 07 March 2020

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