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DISPUTE RESOLUTION FOR BUSINESSES

How do I set aside a default judgment?

There may be instances where a Claimant obtains a default judgment against a Defendant in relation to a claim bought by them. This usually occurs where a Defendant fails to respond to a claim, either at all or in the correct timeframe. In such instances, the Court has power to issue default judgment in the absence of a formal hearing.

In such circumstances, where a Defendant believes the Court has incorrectly entered default judgment against them, they may challenge the default judgment by making an application to set aside the default judgment.

Paragraphs 13.2 and 13.3 of the Civil Procedure Rules govern applications to set aside a default judgment:

- Paragraph 13.2 states that a Court must set aside the default judgment if that judgment has been 'wrongly entered'.
- Paragraph 13.3 states that, in other circumstances not covered by paragraph 13.2, the Court has a discretion and may set aside the default judgment.

CIRCUMSTANCES WHERE A COURT MUST SET ASIDE THE DEFAULT JUDGMENT

If a default judgment was entered in the belief that the Defendant did not file an acknowledgment of service to the claim on time, but it is later noted that the acknowledgment was filed within the prescribed time limits (within 14 days of the date of service of the Particulars of Claim), then the Court must set aside the wrongly entered default judgment.

Similarly, if the Court entered default judgment in the belief that the Defendant did not file a defence within the prescribed time limits, then again, the Court must set aside the default judgment if it is found that the defence was filed within time or was filed before the default judgment application.

For both of the above, it is important that a Defendant keeps a note of when they were served with the claim and Particulars of Claim, and also a note of how and when they served and filed either their Acknowledgment of Service or Defence, or both. The Defendant will need to be able to provide proof of these in order to be successful for an application under paragraph 13.2.

Although there is no set time frame for a Defendant to make an application under paragraph 13.2, it should be made once the Defendant becomes aware of the default judgment against them and prior to any enforcement action.

CIRCUMSTANCES WHERE THE COURT MAY SET ASIDE THE DEFAULT JUDGMENT

In these instances, the Court has a discretion to set aside the default judgment. It is not however mandatory as with applications under paragraph 13.2 above. As such, it will be up to the Defendant to persuade the Court that the default judgment should be set aside.

The Court may set aside the default judgment if the Defendant can show they have a real prospect of successfully defending the claim, or if there is some other good reason as to why the default judgment be set aside, or the Defendant allowed to defend the claim. The burden of proof is on the Defendant to demonstrate why the default judgment should be set aside.

Applications under paragraph 13.3 must be made promptly. The Court may refuse to set aside the default judgment if the Defendant has delayed in making their application. Evidence needs to be provided to the Court in the application as to the promptness of the application. If the application has not been made promptly, an explanation for the delay needs to be provided for the Court to consider.

Further, the Defendant needs to set out the nature of its defence to the Court, so that the Court can properly determine whether such a defence is likely to succeed, if allowed. This is often done by providing a draft Defence to the Court as part of the application.

Applications under both paragraph 13.2 and 13.3 need to be made by submitting an application notice and supporting evidence, usually to the Court that issued the default judgment. There is also an application fee to pay.

The evidence in support should set out the details of how and when the Claim Form and Particulars of Claim were served and why it was not responded to on time (or in the case of when an Acknowledgement of Service or Defence has been served), details of how and when they were served. The evidence should highlight that the application has been made promptly or provide any explanation for delays, and should also set out the details of why the Defendant has a good chance of successfully defending the

claim or some other good reason as to why the default judgment should be set aside.

If the Claimant refuses to agree to the Defendant's application by consent, then a hearing date will be set for the Court to consider the application. The Claimant will be given an opportunity to file and serve their own evidence in opposition to the Defendant's application.

The Court will then hear the application at a hearing an determine whether to set aside the default judgment. If the Court does so, they will usually set directions for further case management, such as setting a date by when the Defendant needs to file their defence or listing a case management conference.

If the Defendant is successful in their application, they would usually be awarded the costs of the application, especially if the Claimant has been given the opportunity to consent but refused to do so.

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> The lawyers have incomparable client service skills. They are very clear and always make sure they understand the picture, even if it is a complicated one.

CHAMBERS AND PARTNERS 2022

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