Bullish approach to default judgment and strike out applications criticised (Red Bull GmbH v Big Horn UK Limited & Ors)

20/11/2018

Dispute Resolution analysis: In dismissing applications for default judgment, summary judgment and strike out, the court examined the form, content, formalities and service of statements of case. While a timely reminder of the need for discipline in this regard, it also highlights the thresholds required in such applications, and the criticism with which arguments advancing 'procedural points of little or no merit' may be met. Written by Danielle Carr, senior associate at SCA ONTIER LLP.

Red Bull GmbH v Big Horn UK Ltd & Ors [2018] EWHC 2794 (Ch)

What are the practical implications of this case?

The case demonstrates the high bar which must be met to obtain orders for default judgment, summary judgment or strike out. In dismissing a default judgment application, Master Clark found that a retrospective order for service by alternative means (ie that steps taken be deemed good and sufficient service) could not deprive a defendant of its right to defend the claim. Further, the court considered various alleged instances of non-compliance with rules and practice directions. It found certain breaches (where occurring) not to be significant; and although failure to serve a defence was significant, it could not, in the particular circumstances, justify striking out the defence.

The judgment highlights the need carefully to consider the bases for, and pursuit of, such applications. Master Clark concluded by 'noting the regrettable extent to which this judgment has been lengthened by the determination of the procedural points of little or no merit advanced by [Red Bull] in support of its strike out application.'

It also shows the challenges which may arise, and the court's approach, where parties are not legally represented. The defendants (save for a brief period) acted in person in defending the claims. Only two of the three defendants appeared at the hearing, with certain assistance from a person acting as interpreter and/or by a McKenzie friend, and they 'were significantly disadvantaged in opposing the applications'. Master Clark was thus conscious to 'ensure the parties are on an equal footing, while also ensuring compliance with rules, practice directions and orders'.

What was the background?

Red Bull GmbH (Red Bull) issued its claim under the Shorter Trials Scheme, against Big Horn UK Limited (Big Horn), Voltino Eood (Voltino) and Lyubomir Enchev (Enchev). Big Horn and Enchev were duly served. On 16 April 2018 the claim form and particulars of claim were delivered to Voltino's former registered address (this had changed since the claim was issued).

Big Horn and Enchev: (i) filed defences in March 2018, and (ii) on 11 April 2018 filed and served further (in substance, identical) defences, bearing the earlier date, but with re-signed statements of truth. On 19 July 2018, solicitors briefly appointed for all defendants filed and sent (but did not serve) the 'Briffa Defence.' It denied Voltino had been validly served; sought—in effect, to file a valid defence for Big Horn and Enchev for the first time (rather than seeking permission to amend)—and contained a statement of truth appropriate for a witness statement. On 30 July 2018 the defendants' solicitors sent to Red Bull's solicitors (but did not file or serve) a revised draft amended defence, now with an appropriate statement of truth. On 2 August 2018 Red Bull applied, and on 6 August 2018 obtained, an order providing for (retrospective) service on Voltino by alternative means (ie such that service on the former registered address shall be deemed good and sufficient service).

Red Bull sought: (i) judgment in default against Voltino (which had not filed an acknowledgment of service), and (ii) to strike out and/or summary judgment in respect of the defendants' relevant defences.

What did the court decide?

The application for default judgment was dismissed. Master Clark stated that if (in seeking a retrospective service order) Red Bull would seek to rely on Voltino's (retrospective) default in seeking default judgment, it ought to have highlighted this in its evidence on the 'without notice' application. Rather, the retrospective service order was made on the basis that it would not prejudice Voltino's opportunity to defend itself and it was implicit that the deemed service provided for in it would not prejudice any rights then accrued. In any event, when Red Bull made, and issued, its application, Voltino had not been served. While the most important purpose of service is to ensure the contents of the claim form are brought to the defendant's attention, it is also that which engages the court's jurisdiction over the recipient and from which important time consequences flow (*Barton v Wright Hassall LLP* [2018] UKSC 12). The retrospective service order cannot have the effect of depriving Voltino of its right to defend the claim, by reason of having filed the *Briffa* defence before an order had been made obliging it to do so.

Master Clark also dismissed the applications to strike out the defences and/or for summary judgment (CPR 3.4(2) and 24.2). As to certain alleged procedural failings:

- while the 'defence' document did not contain a statement of truth, this was unnecessary since it was verified by the statement of truth in the form N9D (which expressly incorporated, and was filed with, the defence)
- it was 'misconceived' to suggest that a statement of truth must state that the person signing it was authorised to do so, and there is no such requirement
- although failure to serve defences (as required in Practice Direction 51N for the Shorter and Flexible Trials Pilot Schemes) was a serious or significant breach, the default arose from instructions on the form N9D in the Response Pack; the breach had been remedied by good service; and Red Bull could (and did) access the court's e-file to obtain copies of the documents. As such, it would be wholly disproportionate to strike out the defence
- failure to comply with paragraph 2.30 of Practice Direction 51N (ie include in the defence a summary of the dispute/issues and whether it is agreed the Shorter Trials Scheme is appropriate) was not a serious or significant breach
- there was nothing sinister or misleading in Big Horn/Enchev's re-signing defences containing the date of its (earlier) defences; it did not falsify them or prevent them from being defences
- the inappropriate verification of the Briffa Defence was an obvious error and not a serious or significant breach. Further, an argument that it contained 'bare denials' was rejected
- while Voltino's failure to serve its defence was a significant breach, it was not one which, in the circumstances, would justify striking it out

Further, Master Clark was not satisfied the defendants have no real prospect of defending the claims.

Case details:

- Court: High Court, Business and Property Courts, Intellectual Property (ChD)
- Judge: Master Clark
- Date of judgment: 12 November 2018

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