Setting aside a judgment/order following non-attendance at trial (Mabrouk v Murray)

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Dispute Resolution analysis: This case demonstrates the significant burden faced by a party who did not attend trial and who then seeks to apply for the resulting judgment/order to be set aside. The applicant had initially participated in the proceedings, but did not participate in the trial despite having been given notice of the trial date and the ability to attend by videolink. Over four months after the resulting judgment, he applied for permission to appeal. The court treated this as an application to set it aside under CPR 39.3, but refused the application on the basis that: (i) the application was not made promptly; (ii) there was no good reason for not attending the trial; and (iii) Mabrouk had no reasonable prospect of success on any retrial. Permission to appeal was similarly refused, and the application was also dismissed under the *Denton v White* principles. Written by Jon Felce, partner at Cooke, Young & Keidan LLP.

Mabrouk v Murray [2022] EWCA Civ 960

What are the practical implications of this case?

When making an application to set aside a judgment/order following non-attendance at trial, an applicant should consider the following:

- it must act promptly in making the set aside application once it finds out about the judgment/order. This will usually be measured in weeks rather than months, although in many cases it may mean acting more quickly than the applicable time limit for an appeal (21 days)
- it should say precisely when it found out about the judgment/order and prepare a chronology to explain what happened in the period between then and the application, and set out how and why the application was therefore made promptly
- it must satisfy the court that its inability to attend was genuine. Simply being unaware of the hearing date is insufficient. Even if physical attendance is not possible or desirable, the applicant will have to demonstrate why it could not attend by videolink
- it should address what has changed since the period around and during the original trial and the period when the retrial is anticipated to take place
- it should work through the judgment so as to explain in proper detail how and why a particular finding is wrong. There must be a real argument made, usually by reference to material unavailable to the judge, that one or more key findings was erroneous
- it should also address the requirements for obtaining relief from sanctions
- if any assertions are made in support of an application, they need to be substantiated by evidence

What was the background?

The matter relates to the murder of WPC Yvonne Fletcher outside the Libyan Embassy in 1984. The respondent (Murray) was a friend of hers and worked with her that day, and what happened that day had caused him serious health issues. The applicant (Mabrouk) was a very senior pro-Gaddafi official within the Libyan Embassy, although he was never criminally charged in relation to the events in question.

In 2018, Murray commenced civil proceedings against Mabrouk based on the tort of assault and/or battery. The claim was brought for vindicatory purposes with damages limited to £1.

Originally, Mabrouk had solicitors on the record for several months. In March 2021, Murray's solicitors informed Mabrouk (by then acting in person) that the trial had been fixed for October 2021. In October 2021, they explained how provision could be made for Mabrouk to give evidence by videolink. Mabrouk did not reply to either email.

The trial took place in the absence of Mabrouk. In late November 2021, Mabrouk was held to be liable to Murray. The time for appeal expired three weeks later. It appeared that Mabrouk was aware of the judgment before then, but only made an application for permission to appeal out of time in late March 2022.

The court considered that the application was made under CPR 39.3, which concerns the circumstances in which the court may proceed with a trial in the absence of a party and how any resulting judgment or order may be set aside.

What did the court decide?

The court refused to grant permission to appeal. The proposed appeal had no prospect of success. The CPR 39.3 application was refused for the same reasons. The court also dismissed the application under the principles in *Denton v White* [2014] EWCA Civ 906.

The court considered the three limbs of CPR 39.3(5). A set aside application may only be granted if the applicant (i) acted promptly once it had found out about the judgment/order against it; (ii) had a good reason for not attending the trial; and (iii) has a reasonable prospect of success at the trial. Dealing with each in turn:

- acting promptly: an applicant must act with all reasonable celerity in the circumstances. Mabrouk had not done so, especially as he knew about the proceedings which were not particularly document-heavy or complex. Mabrouk did not explain when he found out about the judgment, or how and why he had acted promptly during the over four months between the judgment and application. He had made bare assertions for the reasons for the delay
- good reason for non-attendance: the court confirmed no gloss was required to this phrase. Mabrouk failed to satisfy the court that he was genuinely unable to participate in the trial. Rather, the court considered that his non-attendance was deliberate. Although he had been banned from the UK, he could have attended by videolink. He had made bare allegations as to his impecuniosity
- reasonable prospect of success: there was an absence of any detailed defence, four years after the litigation had commenced. Insofar as any defence could be gleaned, it relied on bare denials and assertions

Case details

- Court: Court of Appeal, Civil Division
- Judges: Lord Justice Coulson and Lord Justice Warby
- Date of judgment: 12 July 2022

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