Neutral Citation Number: [2023] EWCA Civ 891

Appeal No: CA-2022-002220
Case No: QB-2019-002930

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
Master Thornett

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/07/2023

Before:

SIR GEOFFREY VOS, MASTER OF THE ROLLS
LADY JUSTICE NICOLA DAVIES
and
LORD JUSTICE BIRSS

Between:

FXF	**Claimant/ Appellant**
- and -	
(1) ENGLISH KARATE FEDERATION LIMITED	**1st Defendant**
(2) DAVID JONATHAN DONOVAN (sued in his representative capacity on behalf of THE ISHINRYU KARATE ASSOCIATION an unincorporated association)	**2nd Defendant/ Respondent**

James Counsell KC and Olinga Tahzib (instructed by **Leigh Day**) for the **appellant/claimant** (FXF)

Katie Ayres (instructed by **Keoghs LLP**) for the **respondent/2nd defendant** (the IKA)

Hearing date: 13 July 2023

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JUDGMENT

Sir Geoffrey Vos, Master of the Rolls:

Introduction

1. This case highlights a controversial procedural issue that has arisen in the wake of this court's decision on relief from sanctions in *Denton v. TH White Ltd* [2014] EWCA Civ 906, [2014] 1 WLR 3926 (*Denton*). The question is whether the three-stage test described in *Denton* should be applied by the court when it is considering whether to set aside a default judgment under CPR Part 13.3. There are authorities that are said to point both ways.

2. The claimant (who is the subject of an anonymity order) seeks damages for personal injury for alleged serious sexual abuse by her karate coach over an extended period between 2008 and 2014. Each of the first defendant and the second defendant (the IKA) is said to be (a) vicariously liable for the abuse, and (b) directly liable for failing to discharge their own duty of care towards the claimant. The alleged abuser is alleged to have been a member of the IKA, to pay the IKA an annual licence fee, and to have been authorised to use the Ishinryu branding and training syllabus.

3. After an order for alternative service of the proceedings had been made, the parties initially agreed extensions of time for the filing of the IKA's defence. When time ran out, no defence was filed and the claimant requested and, on 22 September 2020, obtained default judgment for "an amount which the court will [decide]" under CPR Part 12.4 (the Judgment). On 17 November 2020, the IKA issued an application to set aside the default judgment under CPR Part 13.3. Master Thornett (the Master) set aside the Judgment after a hearing on 2 December 2021. He gave his reasons orally, but we have a note of what he said. The High Court ordered on 14 November 2022 that the appeal from the Master should come directly to this court.

4. The Master set aside the Judgment dealing specifically with the two factors mentioned in CPR Part 13.3, namely the merits and delay in applying to set aside. He held that (i) the IKA had a real prospect of successfully defending the claimant's case on vicarious liability: the defence was "arguable and sophisticated", and (ii) the application to set aside had not been made promptly and there was no good reason for the delay. In relation to *Denton*, he said in his judgment:

> However, I turn to the express primary requirements of 13.3(1). Mr Tahzib [counsel for the claimant] refers appropriately to *Denton* and its criteria. But the familiar criteria of *Denton* are qualified because of necessary incorporation into the context and the express criteria under CPR 13.3: in particular, the criterion of "real prospect of successfully defending the claim".

5. Against this background, the claimant contends that the Master was wrong to set aside the Judgment. Her sole ground of appeal is that the Master failed to "apply *Denton* to the exercise of his discretion", when I had said in *Gentry v. Miller* [2016] EWCA Civ 141, [2016] 1 WLR 2696 (*Gentry*) at [24] that "[s]ince the application is one for relief from sanctions, the *Denton* tests then [after consideration of the express requirements of CPR Part 13.3] come into play". Had the Master properly applied the *Denton* tests, the claimant contends that he would have concluded that the Judgment should stand.

6. The IKA submits that what this court said in *Gentry* is not binding authority because the parties in that case agreed that the *Denton* tests were applicable. Moreover, the other cases to a similar effect were all *obiter*. The IKA is, at first sight anyway, supported by some carefully reasoned first instance decisions and by the persuasive authority of the Privy Council in *The Attorney General for Trinidad and Tobago v. Matthews* [2011] UKPC 38 (*Matthews*). The IKA submits that: (i) the application to set aside a default judgment is in a unique procedural category and is not an application for relief from sanctions at all, and (ii) the discretion under CPR Part 13.3 is broad and unconstrained and brings in all the factors under the overriding objective including the ethos of *Denton*, even though its specific tests are not applicable. The Master, it is submitted, understood all that and exercised his discretion appropriately. This court should not, therefore, interfere.

7. I have decided, in essence, that the *Denton* tests do apply to an application to set aside judgment, but that the Master understood that and exercised his discretion appropriately. Accordingly, the appeal should be dismissed.

8. I will now proceed to explain my reasons by dealing with (i) the essential chronological background, (ii) the applicable provisions of the CPR, (iii) the Master's decision, (iv) the authorities in chronological order, and (v) a discussion of my detailed reasons for these conclusions as to, first, the law, and then the facts.

The essential chronological background

9. As I have said, the alleged grooming and serious sexual assault of the claimant took place between 2008 and 2014.

10. The claim form was issued on 15 August 2019. On 6 December 2019, an order for alternative service on the IKA was made. The IKA was difficult to serve because Mr Donovan, the only representative of the IKA, lives in Thailand. The claim form and detailed Particulars of Claim dated 12 December 2019 were duly served on the IKA, and the IKA's solicitors, Keoghs, wrote to the claimant's solicitors on 13 December 2019 saying they had been instructed for the IKA.

11. On 28 January 2020, the claim against the IKA was stayed by consent until 31 March 2020 to allow the IKA to complete the steps required by the pre-action protocol. There were then two agreed extensions of the stay terminating on 26 May 2020. A further extension of the stay until 26 June 2020 was agreed and encapsulated in a signed consent order, which was lodged at court but, for unknown reasons, never sealed by the court. No further extensions were agreed, so the IKA ought to have filed its defence by 21 July 2020 at the latest. The claimant contends that formally the defence should have been filed by 23 June 2020 because the consent order was never sealed, but it seems to me that it would be harsh to consider the delay as starting before 21 July 2020. Moreover, the Master dealt with the matter on the basis that the defence was due on 21 July 2020.

12. On 1 September 2020, the claimant filed its request for judgment in default. On 9 September 2020, Keoghs filed their notice of acting on behalf of the IKA. On 21 September 2020, Leigh Day, the claimant's solicitors, informed Keoghs that the claimant had requested a default judgment against the IKA. On 22 September 2020, the

court granted the Judgment. On 23 October 2020, Leigh Day informed Keoghs of the Judgment, and on 17 November 2020, the IKA issued its application to set aside.

The applicable provisions of the CPR

13. CPR Part 13.3 provides as follows:

> (1) In any other case, the court may set aside or vary a judgment entered under Part 12 if –
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> (a) the defendant has a real prospect of successfully defending the claim; or
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> (b) it appears to the court that there is some other reason why –
>
> (i) the judgment should be set aside or varied; or
>
> (ii) the defendant should be allowed to defend the claim
>
> (2) In considering whether to set aside or vary a judgment entered under Part 12, the matters to which the court must have regard include whether the person seeking to set aside the judgment made an application to do so promptly.

14. CPR Part 3.8 includes the following under the heading "Sanctions have effect unless defaulting party obtains relief":

> (1) Where a party has failed to comply with a rule, practice direction or court order, any sanction for failure to comply imposed by the rule, practice direction or court order has effect unless the party in default applies for and obtains relief from the sanction.
>
> (Rule 3.9 sets out the circumstances which the court will consider on an application to grant relief from a sanction)

15. CPR Part 3.9 includes the following under the heading "Relief from sanctions":

> (1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –
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> (a) for litigation to be conducted efficiently and at proportionate cost; and
>
> (b) to enforce compliance with rules, practice directions and orders.
>
> (2) An application for relief must be supported by evidence.

16. CPR Part 15.2 provides under the heading "Filing a defence" that "[a] defendant who wishes to defend all or part of a claim must file a defence".

17. CPR Part 15.3 provides under the heading "Consequence of not filing a defence" that "[i]f a defendant fails to file a defence, the claimant may obtain default judgment if Part 12 allows it".

18. CPR Part 15.4 provides under the heading "The period for filing a defence":

> (1) The general rule is that the period for filing a defence is — (a) 14 days after service of the particulars of claim; or (b) if the defendant files an acknowledgment of service under Part 10, 28 days after service of the particulars of claim.
>
> (2) The general rule is subject to rules 3.4(7), 6.12(3), 6.35, 11 and 24.4(2).

The Master's decision

19. The Master opened the hearing by saying that he had two burning questions. In essence he asked why the application to set aside had been made so late, why the hearing before him had been delayed by a year. He also asked why there was no draft defence filed. The excuses offered were that the IKA was dealing with insurance issues, was still investigating liability issues and there were difficulties in obtaining instructions from Thailand. The IKA submitted that "[t]hey acted on the erroneous and naïve assumption they wouldn't be vulnerable to default judgment".

20. Counsel for the IKA later argued that the IKA had not known about the default judgment until 23 October 2020, to which the Master responded that it was "nothing to do with the 23 October" as the IKA had had "an active application" against it.

21. Counsel for the claimant then submitted that the IKA was making a *Denton* application and, in effect, that the tests led to the conclusion that relief from sanctions should not be granted. The Master then said this about *Denton*:

> On the *Denton* point, it is not controversial to say *Denton* permeates every action relating to a breach of rules. But there is a slight qualification: CPR 13.3 has its own self-contained rules. But that doesn't mitigate *Denton*. The reason for default is central and relevant. But I also have to have regard to merit and the reasonable prospect of defence.

22. The claimant then cited *Prince Abdulaziz v. Apex Global Management Ltd* [2014] UKSC 64, [2014] 1 WLR 4495 (*Prince Abdulaziz*) at [30]-[31] to the effect that the strength of the merits is generally irrelevant in relation to relief from sanctions. The Master said that he agreed that "if the delay is so heinous and so without explanation it can eclipse prospects even where merits are seemingly compelling".

23. In the Master's short oral judgment, he started by saying that the application drew upon the two central pillars of CPR Part 13.3, namely the merits and delay. But he then referred to **both** delay giving rise to the Judgment **and** to the delay in making the application to set aside. It is worth interposing that only the latter delay was relevant under CPR Part 13.3(2).

24. The Master said that the last and final extension for service of the defence expired on 23 June 2020, and the IKA had "notice of its vulnerability to a judgment in default" from then until the court actually gave the Judgment on 22 September 2022. The 17 November 2020 application was tardy. Moreover the delay in bringing the application

on could also be taken into account "as part of the court's overall consideration", referring to *Denton* as quoted at [7] above. He concluded, as I have said above, that the IKA's case on vicarious liability was arguable and that the application had not been made promptly and there was no good reason for the delay. He held that the unexplained delay did not, however, eclipse the merits of the proposed defence.

The authorities in chronological order

25. In this section, I shall make reference to many of the cases cited. It is necessary to do so, as briefly as a thorough treatment allows, because it is submitted that it is open to the court to depart from what was said by it in *Piemonte* and *Gentry*.

Hussain v. Birmingham City Council [2005] EWCA Civ 1570 (*Hussain*)

26. In *Hussain*, the Court of Appeal considered an application to set aside a default judgment under CPR Part 13.3. Chadwick LJ (with whom Rix and Keene LJJ agreed) said at [30] that other provisions of the CPR were of relevance to the application. He referred to the overriding objective "to which the court must give effect when exercising any power given to it under the Rules (CPR 1.2)", and then referred to CPR Part 3.9 (in its old form prior to its amendment on 1 April 2013) in the following terms:

> Second, there is, by analogy, the guidance given in CPR 3.9(1) (relief from sanctions) and in CPR 39.3(5) (setting aside judgment where a party has failed to attend at trial).

Matthews (2011)

27. In *Matthews*, there were competing applications for permission to enter judgment in default and to extend time for filing a defence (see [3]-[4]). The relevant rules of the Trinidad and Tobago CPR were different from the CPR in England & Wales. Rule 13.3(1) in Trinidad and Tobago provided:

> The court may set aside a judgment entered under Part 12 if - (a) the defendant has a realistic prospect of success in the claim; and (b) the defendant acted as soon as reasonably practicable when he found out that judgment had been entered against him.

28. Rule 26.6 in Trinidad and Tobago provided:

> (1) Where the court makes an order or gives directions the court must whenever practicable also specify the consequences of failure to comply.
>
> (2) Where a party has failed to comply with any of these Rules, a direction or any court order, any sanction for non-compliance imposed by the rule or the court order has effect unless the party in default applies for and obtains relief from the sanction, and rule 26.8 shall not apply.

29. Rule 26.7 in Trinidad and Tobago provided:

> (1) An application for relief from any sanction imposed for a failure to comply with any rule, court order or direction must be made promptly. …
>
> (3) The court may grant relief only if it is satisfied that – (a) the failure to comply was not intentional; (b) there is a good explanation for the breach; and (c) the party in default has generally complied with all other relevant rules, practice directions, orders and directions.
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> (4) In considering whether to grant relief, the court must have regard to (a) the interests of the administration of justice; (b) whether the failure to comply was due to the party or his attorney; (c) whether the failure to comply has been or can be remedied within a reasonable time; and (d) whether the trial date or any likely trial date can still be met if relief is granted.

30. At [10]-[13] of Lord Dyson's judgment in *Matthews*, he explained the argument in favour of what are called "implied sanctions" as follows:

> (a) a party needs or wishes to take procedural steps, (b) a mandatory time limit is prescribed by the rules for the taking of this step, (c) the time limit has expired without the party making an application for an extension of time for the taking of the step, then (d) unless a rule expressly otherwise states, the party is disabled from taking the relevant step, (e) being placed under that disability is an adverse consequence for that party which flows from that failure to observe the rule which prescribes the time limit, and (f) the adverse consequence is a sanction within the meaning of rule 26.7. …
>
> It is central to the claimant's argument that a defendant cannot file and serve a defence once the time for doing so has passed. ... If that were the case [the defendant had an unlimited right to file a defence at any time before judgment is entered], what purpose would be served by having rules which impose a time limit for the filing of a defence? … Thus an application to file a defence out of time where the agreement of the claimant has not been obtained is not merely an application under rule 10.5. It is in reality an application for relief from the automatic sanction imposed by the rules. In short, it is submitted on behalf of the claimant that rule 26.6 and 26.7 are designed to ensure compliance with all the time limits provided by the rules of court, court orders and practice directions. rule 10.5. It is in reality an application for relief from the automatic sanction imposed by the rules. …

31. The Privy Council rejected those arguments at [14]-[18] and held that: (a) an application to set aside judgment under rule 13.3 was not an application for relief from sanctions, and (b) where a defendant failed to file a defence within the period prescribed by the rule, it was not subject to an implied sanction imposed by the rules.

32. Lord Dyson's reasons can be summarised as follows: (i) there (as in England & Wales) a defence can be filed without the permission of the court and without sanction after the time for filing has expired, (ii) there is no distinction in the rule allowing extensions of time for defence between those made before and after the defined period, (iii) rules 26.6 and 26.7 had to be read together, (iv) rule 26.6(2) was aimed at rules which themselves imposed or specified the consequences of a failure to comply, (v) there was no such consequence specified for failure to file a defence, (vi) it was straining the language to say that a sanction was imposed by the court entering judgment at the

request of a claimant under rule 12.4 because the period for filing a defence had expired, (vii) the defendant being at risk of a default judgment being entered at the defendant's request was not a sanction imposed by the rules, and (viii) the draftsman cannot have intended that it would be necessary to apply under rules 13.3 **and** rule 26.7 in order to set aside a judgment, (ix) the conditions for the exercise of the court's discretion to set a judgment aside in rule 13.3 were quite different from the criteria for obtaining relief from sanctions under rule 26.7, (x) the defendant's prospects of success could not be relevant in that case to the exercise of the court's discretion, (xi) an application for relief from sanctions must fail unless all three of the conditions precedent specified in rule 26.7(3) were satisfied, (xiii) rule 13.1 (similar to CPR Part 13.1) provided the procedure for setting aside or varying a default judgment, whilst rule 26 was concerned with the court's general powers of management, (xiii) if a defendant satisfied the two conditions specified in rule 13.3, his application to set aside the judgment should succeed, and the court could not refuse it because the further conditions in rule 26.7(3) had not been, and (xiv) if the rules committee had wanted the rules to have that effect, it could say so expressly.

33. I have dealt at length with Lord Dyson's reasoning in *Matthews* because it underpins both the recent first instance cases and the IKA's argument.

Mitchell v. News Group Newspapers Ltd [2013] EWCA Civ 1537, [2014] 1 WLR 795 (*Mitchell*)

34. *Mitchell* was the first Court of Appeal case (heard in November 2013) to signify a change in the court's approach to delay arising from the amendment to CPR Part 3.9 which, as I have already said, came into force on 1 April 2013. Lord Dyson MR's judgment explained at [34]-[39] the change that had occurred. To summarise what is a crucial passage, the court endorsed a "tougher, more robust approach to rule-compliance and relief from sanctions" in support of the revised overriding objective, as explained in a lecture by Jackson LJ who had recommended the rule changes. Lord Dyson proceeded at [40]-[46] to give guidance as to the new approach to relief from sanctions. It was that guidance that proved controversial and was revisited shortly afterwards in *Denton*. Nothing in *Denton* was, however, intended to detract from the tougher more robust approach to rule compliance and relief from sanctions that the court had signalled in *Mitchell*.

Samara v. MBI Partners UK Ltd [2014] EWHC 563 (QB), [2014] 3 Costs LR 457 (*Samara*)

35. In *Samara* at [36]-[38], Silber J dealt with the submission that new regime explained in *Mitchell* did not apply to the special rules under CPR Part 13. He said that "the new regime has universal application to all rules in the CPR. Indeed, it is based on and underpinned by the changes to the overriding objectives which apply to *all* parts of the CPR".

Mid-East Sales Ltd v. United Engineering and Trading Co (PVT) Ltd [2014] EWHC 1457 (Comm), [2014] 2 All ER (Comm) 623 (*Mid-East Sales*)

36. In *Mid-East Sales*, Burton J tackled head-on the reasoning of Lord Dyson in *Matthews* and in *Mitchell* in a case concerning the setting aside of a default judgment. He started by saying at [84] that he did not need to decide whether *Matthews* was binding or

persuasive, because "in this case there was a sanction, which has been imposed subsequently, namely the judgment in default". I interpose that this too is just such a case. He then said this at [85] and [88]:

> 85. I am accordingly considering CPR Rule 3.9 but … also Rule 13.3 as in *Hussain*. I am satisfied, as was Silber J in *Samara*, that the new approach described by [Jackson LJ's] Implementation Lecture and exemplified in *Mitchell* is intended to be of universal effect, i.e. across the board in relation to the CPR, by reference at least to the amended Overriding Objective … it was considered that the introduction of the CPR itself would and should have an accelerating effect. …
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> 88. It seems to me clear that, although applications under CPR 13.3 do fall to be considered by reference to the new approach, there needs to be, and here I differ from Silber J, a somewhat different approach from that in relation to a case, as in *Mitchell*, falling within CPR 3.8. A sanction set out by the Rule itself for breach may be said to be pre-estimated as the appropriate course, absent good reason. But a sanction imposed pursuant to CPR 3.9, or an application by reference to CPR 3.9 and 13.3, may allow different or wider considerations to be taken into account, or more than trivial delays to be addressed.

37. In two subsequent first instance cases before *Denton*, Simon Picken QC (as he then was) endorsed Burton J's approach in *Mid-East Sales*. See *Dalton v. Gough Cooper & Company Ltd* [2014] EWHC 1556 (QB) at [62], and *Page v. Champion Financial Management Ltd* [2014] EWHC 1778 (QB) at [94]-[97].

Denton (2014)

38. *Denton* was concerned with relief from sanctions in three cases where either the rules or the court orders themselves specified the sanctions that were to be imposed for non-compliance. Lord Dyson MR and I said this at [23]-[24] and [31]:

> 23. In understanding the correct approach to the grant of relief from sanctions, it is necessary to start with an examination of the text of rule 3.9(1) itself. The rule contains three elements … First, it states when the rule is engaged by providing that it applies "[o]n an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order". This makes it clear that the court's first task is to identify the "failure to comply with any rule, practice direction or court order", which has triggered the operation of the rule in the first place. Secondly, it provides that, in such a case, "the court will consider all the circumstances of the case, so as to enable it to deal justly with the application". Thirdly, it provides that the exercise directed by the second element of the rule shall include a consideration of factors (a) and (b) [see [15] above].
>
> Guidance
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> 24. We consider that the guidance given at paras 40 and 41 of *Mitchell* remains substantially sound. However, in view of the way in which it has been interpreted, we propose to restate the approach that should be applied in a little more detail. A judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the "failure to comply with any rule, practice direction or court order" which engages rule

> 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate "all the circumstances of the case, so as to enable [the court] to deal justly with the application including [factors (a) and (b)]. … We recognise that hard-pressed first instance judges need a clear exposition of how the provisions of rule 3.9(1) should be given effect. We hope that what follows will avoid the need in future to resort to the earlier authorities. …
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> 31. The important misunderstanding that has occurred is that, if (i) there is a non-trivial (now serious or significant) breach and (ii) there is no good reason for the breach, the application for relief from sanctions will automatically fail. That is not so and is not what the court said in the *Mitchell* case: see para 37. Rule 3.9(1) requires that, in every case, the court will consider "all the circumstances of the case, so as to enable it to deal justly with the application". We regard this as the third stage.

Hockley v. North Lincolnshire and Goole NHS Foundation Trust, 19 September 2014) (*Hockley*)

39. In *Hockley*, HHJ Jeremy Richardson QC considered once again the applicability of the new sanctions regime to applications to set aside a default judgment, saying at [35] that *Mitchell* and *Denton* had profound importance to such applications. At [45], he suggested that:

> … the three stage approach has considerable relevance to an application to set aside a default judgment when considering the *Good Reason Ground* in CPR Part 13.3(1)(b). There has to be a good reason and that must embrace scrutiny of the seriousness of the default and why it occurred. Plainly, the court would wish to consider all the circumstances of the case. The discipline of the three stage approach is entirely apposite to an application to set aside a default judgment when considering whether there are good reasons for doing so.

Regione Piemonte v. Dexia Crediop SpA [2014] EWCA Civ 1298 (*Piemonte*)

40. *Piemonte* was a case in which the court was considering whether to set aside a default judgment. *Denton* was, however, decided after the argument was concluded, and drawn to the attention of the court in subsequent written argument. It is possible, as it seems to me, that the part of the judgment dealing with *Denton* has been added to a pre-existing draft. It may be for that reason that the decision is not as easy to understand as might otherwise be the case.

41. Christopher Clark LJ dealt with the effect of *Mitchell* at [38]-[40] and [126] in *Piemonte*. It is to be noted that Lewison and Jackson LJJ agreed with him. Jackson LJ had just sat as the third judge in *Denton* giving a separate judgment agreeing with everything save the treatment by the majority of the third stage of the test. Christopher Clark LJ said this:

> 38. A question arose at the hearing of the appeal as to the extent to which the principles laid down in [*Mitchell*] applied to applications to set aside a default judgement. …
>
> 39. In essence Piedmont submits that the *Mitchell/Denton* principles do not apply to an application to set aside a default judgment. The majority in *Denton* considered that the *Mitchell* decision was correct to attribute a particular importance to [factors (a) and (b) Part 3.9(1)] because the Civil Procedure Rule Committee had rejected a recommendation in the Review of Civil Litigation Costs Final Report that CPR 3.9.1 should be reworded so that 3.9.1 (b) read "the interests of justice in the particular case". But the Final Report did not propose any amendment to CPR 13.3 so that the reasoning of the majority in *Denton* does not apply to it. There is thus, it is submitted, no reason to conclude that the *Mitchell/Denton* principles apply to an application under CPR 13.3 or that promptness under CPR 13.3 should be regarded as anything more than a factor. I disagree.
>
> 40. In my judgment the matter stands thus. CPR 13.3 requires an applicant to show that he has real prospects of a successful defence or some other good reason to set the judgement aside. If he does, the court's discretion is to be exercised in the light of all the circumstances and the overriding objective. The Court must have regard to all the factors it considers relevant of which promptness is both a mandatory and an important consideration. Since the overriding objective of the Rules is to enable the court to deal with cases justly and at proportionate cost, and since under the new CPR 1.1(2)(f) the latter includes enforcing compliance with rules, practice directions and orders, the considerations set out in CPR 3.9 are to be taken into account: see [*Hussein*] at [30]; [*Mid-East Sales*] at [85]. So also is the approach to CPR 3.9 in *Mitchell/Denton*. The fact that the Court's judgment in *Denton* was reinforced by the fact that CPR 3.9 was not reworded in the manner proposed by Jackson LJ does not detract from the relevance of CPR 3.9, and what was said about it in *Denton*, to applications under CPR 13. …
>
> 126. … I do not regard Piedmont as having established that the judge's refusal to set aside the default judgment or his grant of summary judgment on the monetary claims were in error. Whilst in limited respects I have found that there was a realistic prospect of establishing non-compliance with Italian law that is not sufficient to justify setting aside the judgment. In my view the extent and character of the delay alone afforded, in this case, good grounds to refuse to set the judgment aside even if the defence had a real prospect of success.

42. In anticipation of the discussion of this case at [62] and [64] below, I would comment that Christopher Clark LJ made clear at the end of [39] that he had concluded that the *Mitchell/Denton* principles applied to an application under CPR Part 13.3. It is true that he said in [40] that "the court's discretion [under CPR Part 13.3] is to be exercised in the light of all the circumstances and the overriding objective", where defendants show they have real prospects of a successful defence. That sentence cannot possibly have been detracting from what he had just said about the applicability of the *Mitchell/Denton* principles to an application to set aside a default judgment.

Prince Abdulaziz (2014)

43. I mention Lord Neuberger's decision in *Prince Abdulaziz* here, even though it did not concern setting aside a default judgment. Lord Neuberger made clear at [40] that nothing he had said was "intended to impinge on the decisions or reasoning of the Court of Appeal" in *Mitchell* or *Denton*. The point that Lord Neuberger was making at [30]-[31] was simply that it was that the strength of a party's case should not normally affect either the case management directions that were made or the sanctions that were imposed for non-compliance with them. He was saying nothing about the importance of the merits to an application to set aside a default judgment under CPR Part 13.3.

R (Hysaj) v. Secretary of State for the Home Department [2014] EWCA Civ 1633, [2015] 1 WLR 2472 (*Hysaj*)

44. Three cases were heard together in *Hysaj* in order to enable the court to give guidance on the approach that should be taken to applications for extensions of time for filing a notice of appeal following *Mitchell* and *Denton*. The rule in question was CPR Part 52.4(2) (now 52.12(2)), which prescribes a time for the filing of an appellant's notice without stating any sanction that is to apply if the time limit is not complied with.

45. Moore-Bick LJ (with whom Tomlinson and King LJJ agreed) explained at [24]-[25] in *Hysaj* that guidance on the proper approach to relief from sanctions was to be found in *Mitchell* and *Denton*. He said that the applicants argued that applications for an extension of time to file a notice of appeal were neither applications for relief from sanctions nor were they analogous to such applications. They argued that the court should "simply make whatever order it considers just in all the circumstances", relying on *Matthews* and submitting that the discretion was untrammelled by *Denton*. At [26], Moore-Bick LJ said that he had considerable sympathy for the submission that CPR 52.4(2) imposed no sanction, so there was no need to apply for relief from a sanction. He said that the submission "seems to me to reflect the natural meaning of the words used in [CPR Parts] 3.8 and 3.9". He thought that the Privy Council's reasoning on rules 26.6(2) and 26.7 of Trinidad and Tobago's CPR applied "with equal cogency to CPR 3.8 and 3.9". Nonetheless, he noted that the matter was not free from authority. Moore-Bick LJ referred to [27]-[28] and [36] of his own judgment in *Altomart Ltd v. Salford Estates (No. 2) Ltd* [2014] EWCA Civ 1408 (*Altomart*), where similar arguments had been advanced. [27] of *Altomart* had referred to *Sayers v. Clarke Walker* [2002] EWCA Civ 645, [2002] 1 WLR 3095 (*Sayers*), where the Court of Appeal had applied the check list of 9 factors in the old version of CPR Part 3.9 to an application to extend time for filing a notice of appeal "in order to promote consistency of approach". Brooke LJ, with whom Kay LJ and Sir Christopher Staughton agreed, had said this at [21] in *Sayers*:

> … it is equally appropriate to have regard to the check-list in CPR 3.9 when a court is considering an application for an extension of time for appealing in a case of any complexity. The reason for this is that the applicant has not complied with CPR 52.4(2), and if the court is unwilling to grant him relief from his failure to comply through the extension of time he is seeking, the consequence will be that the order of the lower court will stand and he cannot appeal it. Even though this may not be a sanction expressly "imposed" by the rule, the consequence will be exactly the same as if it had been, and it would be far better for courts to follow the check-list contained in CPR 3.9 on this occasion, too, than for judges to make their own check-lists for cases where sanctions are implied and not expressly imposed.

46. At [28] in *Hysaj*, Moore-Bick LJ said that it was possible that that passage was the source of the "implied sanction" doctrine that was disapproved in *Matthews*. He said that *Sayers* had been treated as authority for the proposition that a person who was out of time for filing a notice of appeal was subject to an implied sanction, so that an application for an extension of time was to be regarded as analogous to an application under CPR Part 3.9 for relief from a sanction.

47. Moore-Bick LJ then set out the history of the cases decided after *Sayers* before concluding at [35]-[36] that it was not open to the Court of Appeal to say that *Altomart* was wrong, nor to hold that "applications for extensions of time to file a notice of appeal should not be approached in the same way as applications for relief from sanctions". It had been consistently understood for the 12 years since *Sayers* that the Court of Appeal "deliberately equated applications for extensions of time for filing a notice of appeal with applications for relief from sanctions because in its view the implied sanction of the loss of the right to pursue an appeal meant that the two were analogous". Moreover, following the decision in *Mitchell* the courts had "continued to proceed on the basis that [those] applications … should be approached in the same way as applications for relief from sanctions under CPR 3.9 and should attract the same rigorous approach". He then said that: "[i]t might even be said that the decision in *Mitchell* has provided an independent basis for a similar approach to applications of that kind", and concluded:

> Whatever one may think of the doctrine of implied sanctions, therefore, particularly in the light of the views expressed by the Privy Council in *Matthews*, I think that the approach to be taken to applications of the kind now under consideration is now too well established to be overturned. It follows that in my view the principles to be derived from *Mitchell* and *Denton* do apply to these applications.

48. I am conscious that *Hysaj* applied to a question of "implied sanctions" as opposed to an application for default judgment under CPR Part 13.3. I will deal with that question at [60] below.

Blakemores LDP (In Administration) v. Scott [2015] EWCA Civ 999, [2016] CP Rep 1 (*Blakemores*)

49. *Blakemores* was a limitation case. Nonetheless in my judgment in that case (with which Moore-Bick and Underhill LJ agreed) at [58], I said that "[i]t was common ground that the principles enunciated in [*Mitchell* and *Denton*] in relation to relief from sanctions are properly applicable to an application to set aside a default judgment".

Gentry (2016)

50. In *Gentry*, there were two applications before the Court of Appeal: an application to set aside a default judgment and an application under CPR Part 39.3(3) to set aside the order made when a party does not attend a trial. It may be noted here that CPR Part 39.3(5) provides that the court may grant the application only if three specific conditions are satisfied. I recorded at [19] that the insurers accepted that both applications were applications for relief from sanctions. I then set out the applicable principles at [23]-[25] as follows:

> 23. … Both sides accepted that it was now established that the tests in [*Denton*] were to be applied to applications under CPR r 13.3: see paras 39–40 of the

> judgment of Christopher Clarke LJ in [*Piemonte*]. It seems to me equally clear that the same tests are relevant to an application to set aside a judgment or order under CPR r 39.3.
>
> 24. The first questions that arise, however, in dealing with an application to set aside a judgment under CPR r 13.3 are the express requirements of that rule, namely whether the defendant has a real prospect of successfully defending the claim or whether there is some other reason why the judgment should be set aside, taking into account whether the person seeking to set aside the judgment made an application to do so promptly. Since the application is one for relief from sanctions, the tests in [*Denton*] then come into play. The first test as to whether there was a serious or significant breach applies, not to the delay after the judgment was entered, but to the default in serving an acknowledgement that gave rise to the sanction of a default judgment in the first place. The second and third tests then follow, but the question of promptness in making the application arises both in considering the requirements of CPR r 13.3(2) and in considering all the circumstances under the third stage in [*Denton*].
>
> 25. I do not think that any different analysis applies under CPR r 39.3. …

51. Again, anticipating the discussion below at [64]-[67], it is worth pointing out that at [28]-[38] in *Gentry*, I actually performed the exercise of applying CPR Part 13.3 and the *Denton* tests to the application to set aside the default judgment that was before the court. Accordingly, even if the applicability of the *Denton* principles was agreed, my methodology was undoubtedly part of the reasoning that led to the result of the case – a refusal to set aside the default judgment. It is clear from [36] that I specifically considered the delay that preceded the application to set aside the default judgment under CPR Part 13.3(2), and the quite separate delay (in failing to file an acknowledgement of service) that gave rise to the application for the default judgment under the *Denton* analysis.

Redbourn Group Ltd v. Fairgate Development Ltd [2017] EWHC 1223 (TCC) (*Redbourn*)

52. I note at this stage in the chronology that Coulson J said at [17] in *Redbourn* that the issue in this case had been debated before him, and that "[m]y view, prior to being shown any authorities, was that r.3.9 was plainly relevant to any application to set aside: after all, there is no greater sanction than judgment being entered in default of a defence, and no more important relief from sanction than being allowed to set aside that judgment, so as to be able to put forward a defence". He then referred to *Hockley*.

Cunico Resources NV v. Daskalakis [2018] EWHC 3382 (Comm), [2019] 1 WLR 2881 (*Cunico*)

53. *Cunico* concerned cross-applications for default judgment and for an extension of time for service of the acknowledgment of service. That latter application did, therefore, concern an "implied sanction" as discussed in *Matthews* and *Hysaj*. Andrew Baker J considered the question as a matter of construction of the then version of CPR Part 12.3(1) which laid down 2 conditions for obtaining default judgment: (i) no acknowledgment or defence has been filed, and (ii) the relevant time for doing so has expired. He concluded that CPR Part 12.3(1) only allowed the court to grant default

judgment where, at the time of judgment, there was no acknowledgment of service (whenever filed) and the time for acknowledging service had expired. Since a late acknowledgement had been filed in that case, Andrew Baker J refused the application for default judgment. The meaning preferred by Andrew Baker J has since been made clear by an amendment to CPR Part 12.3(1) to make it read: "[t]he claimant may obtain judgment in default of an acknowledgment of service only if *at the date on which judgment is entered*" (italicised words added on 6 April 2020).

54. In the course of his judgment, Andrew Baker J asked at [38] whether an application to set aside a default judgment amounted to seeking relief "against the availability of a judgment under CPR 12.3 as a sanction for the defendant's original procedural default". At [39], he expressed the view that it did not. He then referred to (i) *Piemonte* as having decided the contrary *obiter*, (ii) *Gentry* as being a case in which the parties had agreed the contrary, (iii) other first instance cases referred to above. At [41], he concluded there was no authority binding on him to decide that the *Denton* tests applied to an application under CPR Part 13.3, but decided not to resolve the question. Master McCloud agreed with his analysis in *Smith v. Berrymans Lace Mawer Service Co* [2019] EWHC 1904 (QB) at [15], [19], and [35]-[36].

Family Channel Ltd v. Fatima [2020] EWCA Civ 824, [2020] 1 WLR 5104 (*Family Channel*)

55. In *Family Channel*, Carr LJ (with whom Lewison and Popplewell LJJ agreed) applied *Gentry* to an application to set aside judgment for non-attendance under CPR Part 39.3(5). Carr LJ concluded that CPR Part 39.3(3)–(5) provided "for a specific procedural remedy with its own self-contained code of applicable principles, albeit subject, on the question of ultimate discretion, to a consideration of CPR r 3.9 (which reflects the overriding objective) and the *Denton* principles".

56. Hugh Sims QC adopted a similar approach to setting aside a default judgment in *Ince Gordon Dadds LLP v. Mellitah Oil and Gas BV* [2022] EWHC 997 (Ch) (*Ince*) at [6]-[8]. That brings me to the most recent case on this subject.

PXC v. AB College [2022] EWHC 3571 (KB) (*PXC*)

57. *PXC* was an application to set aside a default judgment. Dexter Dias QC concluded, after a review of some of the authorities, that the *Denton* tests did not apply to an application to set aside a default judgment. I shall not deal in detail with Mr Dias's reasoning. In short, however, he decided to follow *Cunico* and *Matthews* in preference to *Ince*, taking the same view about *Piemonte* and *Gentry* as Andrew Baker J had done in *Cunico*. At [32]-[33], he considered the matter from first principles expressing views about there having been "an existential question about the nature and function of a regime under Part 13.3", and the purpose of CPR Part 13.3 being "to promote justice". It may suffice if I say that I think Mr Dias somewhat lost sight of his task, as a first instance deputy judge, to interpret and apply decisions that were binding authority upon him.

58. As will appear below at [59]-[68], I have concluded that *PXC* was wrongly decided on the law and should be overruled.

Discussion of the law

59. I hope that I have now dealt with all the truly relevant authorities. I have done so at some length, because they show a difference of approach that requires resolution by this court. As Birss LJ explained in argument, there are really three categories of case: (i) cases where the rule or order expressly provides for the sanction that will apply on non-compliance (e.g. failure to file witness statements on time), (ii) cases where the rule does not expressly state the sanction which applies for non-compliance, but permission of the court is needed to proceed (e.g. failure to file a notice of appeal on time), and (iii) cases where a further step is taken in consequence of the non-compliance, such as the entry of a default judgment (as in this case) or the striking out of a claim for non-attendance at trial.

60. The law as stated in *Denton* applies directly to the first category of case. *Sayers, Altomart* and *Hysaj* make clear that, despite *Matthews*, applications for extensions of time to file a notice of appeal (an instance of so-called "implied sanctions") should be approached in the same way as applications for relief from sanctions and should attract the same rigorous approach. This case does not raise the question of the second category of case and "implied sanctions" more generally and I propose to say no more about it.

61. This case falls squarely into Birss LJ's third category, and I shall, therefore, concentrate on that category, and particularly on applications to set aside default judgments.

62. In reality, the area of dispute between the parties is rather narrower than might at first appear. The IKA does not submit that the matters reflected generally in the *Denton* tests are not relevant to an application to set aside a default judgment. It accepts they may be. The IKA argues instead that there is a general discretion in the court imported by the words "the court may" at the start of CPR Part 13.3, and that that discretion must be exercised at large taking into account all the requirements of the overriding objective. The IKA relies strongly on Christopher Clarke LJ's single sentence at [40] in *Piemonte* where he said that "the court's discretion [under CPR Part 13.3] is to be exercised in the light of all the circumstances and the overriding objective". The IKA baulks only at the application of the full rigour of the *Denton* tests suggesting that they are inappropriate to CPR Part 13.3.

63. In my judgment, the *Denton* tests do, as I have said, apply to applications to set aside default judgments under CPR Part 13.3. There are a number of reasons for this.

64. First, just as Moore-Bick LJ held analogously in *Hysaj*, it is now far too late to depart from the position enunciated clearly by the Court of Appeal in *Hussain*, *Piemonte*, *Gentry*, and *Family Channel*. *Piemonte* was a default judgment case and decided expressly that the *Denton* tests applied. The words at [40] in *Piemonte* that I have just mentioned did not detract from that decision. "All the circumstances" and the overriding objective are directly relevant at the third stage of the *Denton* analysis.

65. Secondly, *Matthews* was not a case about setting aside a default judgment. Rule 26.7 of the Trinidad and Tobago CPR is in a different form from our CPR Part 3.9, in that it provides that the court may "grant relief only if it is satisfied" of three prescriptive matters: (a) the failure to comply was not intentional, (b) there is a good explanation for the breach, and (c) the party in default has generally complied with all other relevant rules, practice directions, orders and directions. Lord Dyson's reasoning that I have summarised at [32(ix)] above drew attention to the difference between these conditions and the requirements of rule 13.3. It may be, as Lord Dyson said in *Matthews*, and

Moore-Bick LJ accepted in *Hysaj*, that the reasoning on rules 26.6(2) and 26.7 of Trinidad and Tobago's CPR applied "with equal cogency to CPR 3.8 and 3.9". To spell it out, rule 26.7(2) and CPR Part 3.9 provide expressly that "where a party has failed to comply with" rules or court orders, "any sanction for non-compliance imposed by the rule or the court order has effect" unless relief from the sanction is obtained. This formulation contemplates the sanction in question being imposed by the same rule or court order with which the party has failed to comply. In the case of a default judgment, the "sanction" is imposed by a subsequent court order made when the default judgment is obtained. Like Moore-Bick LJ, however, I do not think that this logic is conclusive. CPR Part 3.9 was amended for the reasons and in the manner explained in *Denton* and *Mitchell*. It was intended to send a general signal to the legal community that there would be a "tougher, more robust approach to rule-compliance and relief from sanctions" in support of the revised overriding objective. This was the origin of the *Denton* tests deriving, as they do, from the express words of CPR Part 3.9. Accordingly, I do not think that this court would now be justified in preferring the reasoning in *Matthews* to that, taken together, in the 6 forceful decisions of this court in *Hussain*, *Mitchell*, *Denton*, *Piemonte*, *Gentry*, and *Family Channel*.

66. Thirdly, the *Denton* tests are actually peculiarly appropriate to the exercise of the discretion required once the two specific matters mentioned in CPR Part 13.3 (merits and delay in making the application to set aside) have been considered. The first two tests focus attention on the delay in complying with the requirements of CPR Part 15.2, which provides that "[a] defendant who wishes to defend all or part of a claim **must** file a defence", and the third test brings into consideration all the circumstances of the case including the two critically important stated factors. What we said at [34] in *Denton* bears repetition:

> Factor (a) makes it clear that the court must consider the effect of the breach in every case. If the breach has prevented the court or the parties from conducting the litigation (or other litigation) efficiently and at proportionate cost, that will be a factor weighing in favour of refusing relief. Factor (b) emphasises the importance of complying with rules, practice directions and orders. This aspect received insufficient attention in the past. The court must always bear in mind the need for compliance with rules, practice directions and orders, because the old lax culture of non-compliance is no longer tolerated.

67. Fourthly, as I indicated at [51] above, *Gentry* actually provides an example of how the exercise under CPR Part 13.3 and the application of the *Denton* tests ought to be undertaken. The merits are dealt with first at [28]. Next, the delay in making the application to set aside is dealt with at [29]-[35]. I turned then to consider the *Denton* tests, dealing with the pre-judgment delay and the excuses for it at [36], and "all the circumstances of the case, so as to enable [the court] to deal justly with the application, including [factors (a) and (b)]" at [37]. In some – perhaps many - cases, additional factors included in the overriding objective (or even other relevant factors) will need to be considered at this stage when the court is exercising its discretion. The relevant factors are not closed. What is critical, however, I can repeat once again for yet further emphasis, is the need to focus on whether the breach has prevented the court or the parties from conducting the litigation (or other litigation) efficiently and at proportionate cost, and the need to enforce compliance with rules and orders.

68. My fifth reason must be stated without it being meant to be unduly critical. The judges in *Cunico* and *PXC* seem to me to have adopted an unduly academic approach to the problem with which they were faced. The default judgment entered under CPR Parts 15.3 and 12.3 is obviously a sanction "imposed for any failure to comply with any rule", in the sense that it would not have been granted if the defendant had filed its defence in compliance with the mandatory provisions of CPR Part 15.2. These decisions took an unduly nit-picking approach to what has been deliberately intended to change the culture of civil litigation. Parties to civil proceedings and their solicitors need fully to understand that flouting rules and court orders will simply not be tolerated.

Discussion of the facts

69. The first question to consider is whether the Master applied the right tests. I think he did. He may not have spent time going through the *Denton* tests in detail, but he mentioned *Denton* in his judgment, saying that *Denton* permeated every action relating to a breach of rules, pointing out correctly that CPR Part 13.3 had its own self-contained rules: "[b]ut that doesn't mitigate *Denton*". He also said correctly that "[t]he reason for default is central and relevant", and that he had "to have regard to merit and the reasonable prospect of defence".

70. The Master dealt, as I explained at [23] above, with the merits and with the delay giving rise to the Judgment (relevant to *Denton* tests 1 and 2) **and** to the delay in making the application to set aside (relevant under CPR Part 13.3(2)). Accordingly he was, as it seems to me, applying the *Denton* tests albeit not as formally as might have been desirable. We should bear in mind that this was an ordinary Master's appointment at which some things can properly be taken for granted when understood by all present. I am sure that nobody expected the Master's judgment to have been, as it has, the subject of minute analysis by this court. I should say also that, although the Master does not mention his overall discretion or all the circumstances of the case or the need to deal justly with the application or even factors (a) and factor (b), I think that can, perhaps just, be excused when the shorthand of "*Denton*" has been clearly stated. That said, it would have been preferable if he had gone through the exercise expressly.

71. I am fortified in this conclusion by the fact that, in my judgment, approaching the matter as I did in *Gentry*, I would have reached the same conclusion. Dealing with the matter briefly: (i) there is and was no doubt in this case that the IKA has a real prospect of successfully defending this claim, (ii) the IKA did not make its application to set aside promptly, but that factor did not inconvenience other court users, and I agree with the Master that the unexplained delay did not, in this particular case, eclipse the merits of the proposed defence, (iii) the delay in filing the defence was obviously serious and significant, (iv) despite counsel for the IKA's best efforts, the insurance issues and investigation of liability did not provide an adequate explanation for the delay, (v) the stage 3 *Denton* test allows the court to consider the justice of the case and the effect of the case on other court users, including the need to enforce compliance with the rules; whilst these factors, alongside the unexplained delay militate against setting aside the Judgment, the unusual situation of the IKA itself and its somewhat tenuous connection to the tortfeasor reinforce the fact that the IKA seems to have a real case on the merits that deserves to be tried. This is a very serious claim as I pointed out at the start, and it merits the court's proper attention.

Conclusions

72. For the reasons I have given, this court is now clearly stating that the *Denton* tests apply in their full rigour to applications to set aside default judgments. *PXC* is overruled and the *dicta* in *Cunico* are no longer to be relied upon.

73. The appeal will be dismissed on the facts because the Master was applying the right legal tests, even if he did not do so as expressly as he would preferably have done. Moreover, I agree with his conclusion that the default judgment should be set aside. That said, the IKA should regard itself as extremely fortunate that its solicitors' serious delay has not, in the result, led to judgment against it without consideration of the merits of its case. In future, parties would be well advised to make absolutely sure that they comply with the rules in the CPR. They may expect no indulgence from the court if they do not.

Lady Justice Nicola Davies:

74. I agree

Lord Justice Birss:

75. I agree.

76. I will add only the following. In this case there is a real contest between two views of how applications to set aside default judgment are to be decided. The fact that the respondent's submission includes an acknowledgement that what is described as the "ethos" of *Denton* still comes into play as part of the overriding objective does not mean there is nothing at stake. In dispute is whether an application under r13.3 is or is not an application for relief from sanction, and the consequences which flow from that. That question is fundamental to the relevance of *Denton* itself in this context. Whatever may have been the status in terms of binding precedent of previous authorities (and just to be clear at the risk of repetition I agree with what my lord the Master of the Rolls has said about them) even if previous binding authority such as *Gentry* had not already decided the issue, in my judgment looking at the matter afresh based on the rules in the form they have stood since 2014 when *Denton* was decided, an application to set aside a default judgment under r13.3 is an application for relief from sanction to which r3.9 also applies. Therefore the right approach to deciding these applications is the one described by the Master of the Rolls above, applying *Denton* once the two specific matters in r13.3 have been considered.