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Case No: CH-2021-000014, SC-2020-APP-000593

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
APPEALS (ChD)

The Rolls Building
7 Rolls Buildings
London, EC4A 1NL

25 January 2022

Before:

THE HONOURABLE MR JUSTICE MARCUS SMITH

- -

Between:

SWIVEL UK LIMITED	**Appellant (Defendant below)**
- and –	
(1) TECNOLUMEN GMBH **(2) DR MEIKE NOLL-WAGENFELD**	**Respondents (Claimants below)**

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MR ANDREW LYONS of Counsel appeared for the **Appellant**
MR RUPERT COHEN of Counsel appeared for the **Respondents**

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Judgment Approved

If this Transcript is to be reported or published, there is a requirement to ensure that no reporting restriction will be breached. This is particularly important in relation to any case involving a sexual offence, where the victim is guaranteed lifetime anonymity (Sexual Offences (Amendment) Act 1992), or where an order has been made in relation to a young person.

MR JUSTICE MARCUS SMITH:

1. I have before me an appeal against a costs order made by Master Whalan on 18 December 2020. By his order sealed on that date, first, the Master set aside a default costs certificate dated 22 September 2020 on the application of the Appellant before me, Swivel UK Limited. His order made provision consequential upon that setting aside for the service of points of dispute and the Master was clearly of the view that there was merit in hearing further from the Appellant on costs.

2. Secondly, he ordered an interim payment on account of costs. This was on the application of the Respondents and he ordered that an interim payment be made in the amount of £40,000. There was no VAT payable because the

Respondents before me, Tecnolumen GmbH and Dr Meike Noll-Wagenfeld (I shall refer to them as the Respondents) are resident in Germany and no VAT was payable.

3. Finally, for the purposes of this appeal, he ordered that the appellant pay the Respondents' costs "of the said applications" summarily assessed by the Master in the amount of £10,000. Again, there was no VAT payable.

4. The Master expressed himself in fairly trenchant terms about the amount of costs that each side had incurred. His judgment, which was *ex tempore* and delivered during the course of the hearing. The reason I point this out is because there were various submissions at various points in time during the day and the Master ruled on the substance of the applications first and then dealt separately with matters like costs. The judgment therefore has a piecemeal quality, entirely understandable and appropriate given the nature of the issues before the Master.

5. What the Master said about the amount of costs is set out in [15] to [17] of the judgment. They are the last paragraphs of his judgment. At [16], the Master said:

> "Parties in this matter have spent this morning approaching £35,000 between themselves on two straightforward, bread-and-butter applications to set aside the default costs certificate and an application for a payment on account of costs, and they have done so in the context of, in due course, the assessment of a bill of costs of a comparatively modest £89,000. It seems to me that both parties' costs are disproportionate in the instance, the claimants more than the defendant, although I do not take the defendant's claim for costs as being a marker or a benchmark as to what is reasonable or proportionate vis-à-vis the claimants' costs. I think both in terms of the hourly rates, the work on documents and some of the communication, the time taken has been both unreasonable and, in turn, disproportionate."

6. It is to be observed that the Master did not, in reaching his assessment of £10,000 costs, make any kind of apportionment between the two applications that were before him. It was submitted, and the Master appears not to have resisted that submission, that the split between the two applications was an 80% – 20% split and counsel broadly accepted this as a rough and ready split as to the costs of the two applications.

7. The chronology of these applications is briefly to be stated. The application for relief from sanctions, which was the first application before the Master, is dated 5 October 2020. The application for an interim payment was made on or around 20 November 2020, the hearing for the application for relief having been fixed. The hearing itself took place on 8 December. The hearing, as I say, dealt with both of the two applications before the Master.

8. Both applications were resisted. I am going to go to the basis for the resistance of the application for relief from sanctions in some detail, but I should observe that the application for an interim payment was itself resisted both on jurisdictional grounds, which I do not need to go into, but also on grounds of quantum. The dispute between the parties was that the interim payment should be, according to the Appellant, £10,000, and according to the Respondents, £50,000. The Respondents got the better of the outcome because the Master's order ordered an interim payment in the amount of £40,000.

9. Just to add a final point to the chronology, because it is very important to bear this in mind, the solicitor instructed by the Appellant in this case, Ms Johal, suffered a bereavement on 26 August 2020 and that very sad event colours a number of the points that were made before me. It is something that I will have to return to in the course of this ruling, and I regret having to trespass into something so personal. It will only do so so far as is necessary.

10. The genesis of the application for relief from sanctions is a default costs certificate that was obtained by the Respondents in the amount of £89,810.39. The Master took the view that the application to have that default costs certificate set aside was a case of relief from sanction and that he had to apply the approach set out by the Court of Appeal in *Denton v. TH White Ltd*, [2014] EWCA Civ 906. As I say, in the end he decided that that application for relief should succeed and the order, as I again indicated, was that the default costs certificate that I have described should be set aside and a process put in place for the detailed assessment of the Respondents' costs.

11. There is no appeal against any part of the Master's decision, save on the question of costs. On this point, the question of costs, the Master refused permission to appeal, but permission was granted by order of Bacon J dated 15 September 2021.

12. It is trite but important to note that appealing costs orders is generally a difficult matter and that is because the court below has a wide discretion in the question of costs and it is the decision of the judge at first instance that ought, unless something had gone very badly wrong, to hold sway. There are many authorities which can be relied upon in support of this proposition and a number of them are set out in the Respondents' written submissions. Just picking a couple of the clearer cases. In *Roache v. News Group Papers*, [1998] EMLR 161 at 172, Sir Murray Stuart-Smith, referring to earlier authority, said:

> "Before the court can interfere it must be shown that the judge has either erred in principle in his approach, or has left out of account, or taken into account, some feature that he should, or should not, have considered, or that his decision is wholly wrong because the court is forced to the conclusion that he has not balanced the various factors in the scale."

More trenchantly in relation to costs particularly, Wilson LJ in *SCT Finance v. Bolton*, [2002] EWCA Civ 56 at [*] said this:

> "Appeal…in relation to costs…is overcast from start to finish by the heavy burden faced by any appellant in establishing that the judge's

> decision falls outside the discretion in relation to costs…For reasons of general policy, namely that it is undesirable for further costs to be incurred in arguing about costs, this court discourages such appeals by interpreting such discretion very widely."

13. Turning then to this case, as a matter of general principle a party that must apply to court for relief from sanction, including where a judgment in default or order in default has been obtained, is the party who ought to bear his or her own costs of that application.

14. It may be that the rule in many cases goes further than that, so that in addition to bearing his or her own costs, the party applying for relief from sanction needs also to bear the costs of the party resisting that application, even where relief from sanction is granted. (The point is clear if the application for relief from sanction fails.)

15. In a matter so discretionary as costs, there can be no hard and fast general rule, but it seems to me that that is the approach that should inform a judge in hearing such applications. Rules exist for a reason, and the relief from sanctions jurisdiction exists both to buttress those rules and to ensure that overall justice is done in those cases where the rules are breached. A party is perfectly entitled to oppose an application for relief from sanctions – and the court will often be assisted by such opposition, where it is considered, proportionate and not opportunistic. In such cases, in general terms, the costs so incurred by the respondent ought, in the usual case, be paid for by the party seeking relief, even if relief is granted in the face of the respondent's resistance.

16. That is what the Master did in this case. He ordered that the Appellant pay the Respondents' costs. At [13] and [14], the Master's judgment records:

> "13. I am satisfied that the Claimants [the Respondents before me] in these circumstances should have their costs of the application. I will assess those summarily in a second.
>
> 14. Let me say briefly, I acknowledge that the application was made by the Defendant [the Appellant before me]. It was opposed and the Claimants were unsuccessful in that opposition. Nonetheless it is an application for relief from sanction and, more particularly, one proffered under CPR 47.12(2) and not 12(1). If it was 12(1) I might take a different view as to costs because the issue would turn on the Claimants' entitlement to the default costs certificate or not. In my view, the Claimants' procedural conduct was correct. The application was necessitated by the Defendant's default. I cannot criticise the Claimants for seeking to oppose it and requiring the court to determine the outcome and in those circumstances, to my mind, the Claimants are entitled to their costs which I am going to summarily assess, assuming that I have a statement in front of me…"

17. That, it seems to me, is the outcome that one ought ordinarily expect in this kind of application. But, of course, the whole point of having a discretion is that it must be tailored to the facts of the case and I say no more than this outcome on costs is in line with what one would expect in the case of such an application, not knowing any of the background facts.

18. It is fair to say that the Appellant before me today contends that this decision is so wrong that I must set aside the Master's exercise of his discretion and reach a fresh conclusion on the question of costs. I will turn to that point now.

19. I am not going to set out in full the *Denton* jurisdiction and the rules regarding relief from sanction. I am, however, going to refer to one paragraph in *Denton*, which is [41]:

> "We think we should make it plain that it is wholly inappropriate for litigants or their lawyers to take advantage of mistakes made by opposing parties in the hope that relief from sanctions will be denied and that they will obtain a windfall strike out or other litigation advantage. In a case where (a) the failure can be seen to be neither serious nor significant, (b) where a good reason is demonstrated, or (c) where it is otherwise obvious that relief from sanctions is appropriate, parties should agree that relief from sanctions be granted without the need for further costs to be expended in satellite litigation. The parties should in any event be ready to agree limited but reasonable extensions of time up to 28 days as envisaged by the new rule 3.8(4)."

20. Clearly, there is an interrelationship between the criteria for an application for relief from sanctions, the three-stage test that is well-known from *Denton*, and this paragraph, which is a warning against inappropriate resistance to such an application.

21. To an extent, this court expects the parties before it to cooperate in the due administration of justice. The reason I underline the words "to an extent" is because there is a self-evident limit to this proposition, in that the system by which courts in this jurisdiction do justice is fundamentally adversarial. To that extent, cooperation has got to be limited by what each advocate needs to do in order to advance, but advance properly, the case of the client instructing him or her. So there is, inevitably, a tension between the need to apply for relief from sanctions, because the rules of court matter, and the circumstances in which that application will be granted and the usual costs regime varied.

22. It seems to me clear and important that I underline that there is no immediate and inextricable correlation between succeeding in an application for relief from sanction and the party so applying getting his or her costs from the opposing side. The usual rule is quite the opposite: there must be something particular to vary the usual rule as to incidence of costs and to bring the case within [41] of *Denton*. That should occur where the opposition to the application for relief from sanction is sufficiently unreasonable that it needs to be marked by an order for costs going in the opposite to the usual direction.

23. The same point is made in another case, which I shall briefly refer to. In *Diriye v. Bojaj*, [2020] EWCA Civ 1400, the Court of Appeal said at [69]:

> "However, I should also say that, in my view, Mr Peter considerably over-stated what the court said in *Denton* about the need for restraint on the part of the innocent party. Lord Dyson MR and Vos LJ were careful to say at [41] that mistakes should not be taken advantage of in circumstances where the failure was neither serious nor significant, where a good reason was demonstrated, or where it is otherwise 'obvious that relief from sanctions is appropriate'. That is a relatively high bar. It was emphatically not designed to give *carte blanche* to a defaulting party to blame the other side for the delays caused by its own breach."

24. It is not my place to revisit any discretion exercised by the Master but to determine whether the Master so erred that I should set aside his decision and exercise the discretion anew. It is only if I conclude that the Master has erred that I can re-make the decision. The reason, it is said, that the Master erred in his finding as to costs was because, so the Appellant says, the Respondents acted unreasonably in failing to accede to the application for relief from sanction. That, in essence, is because (and I stress I am setting out the Appellant's case here) the default costs certificate was obtained in very particular circumstances, which rendered opposition to the application for relief from sanctions unreasonable.

25. Those circumstances were as follows. First, it was clear to the Respondents that the question of costs and a detailed assessment were matters in issue and the Appellant was not simply letting matters slide. In short, it was clear that there was no acquiescence on the part of the Appellant, and that the failure to engage and ensure a detailed assessment took place was, of itself, odd. Secondly, it was known to the Respondents that the Appellant's solicitor was in personal difficulties because of the bereavement that I have described already. Thirdly, there was (if I can put it this way) a degree of opportunism on the part of the Respondents in getting the default costs certificate that the Appellant then had to apply to set aside. I am going to go in a moment to the correspondence that by which the Appellant sought to make that point good. I have used the phrase "a degree of opportunism". It is fair to say that during the course of his very helpful submissions before me, Mr Lyons, who appeared for the Appellant, did put the point rather higher than that and suggested a level of misleading on the part of the Respondents and conduct that was tantamount to bad faith. That, of course, is a most serious point to advance, and one that would be likely to have implications on the question of costs. So it is important, I think, to look at the key correspondence in question and it is to that which I will now turn.

26. By an email dated 16 September 2020, timed at 16.48, the solicitor instructed by the Appellant, Ms Johal, emailed Mr Blackburn of the Respondents' solicitors. What she said was:

> "Please accept my apologies for the delay in replying. I have suffered a close family bereavement. In the circumstances, I would be grateful if you would consent to a 14 day extension of time for filing points of

> dispute. I would also hope that within that time we could also engage in negotiations to seek to resolve the issue of costs without having to progress to assessment. To that end, I attach an email from the fee earner with conduct at Gunnercooke which confirms that they would make a counter offer to our previous settlement proposal once the bill of costs have been prepared and it was understood on this basis you would not immediately proceed with notice of assessment."

27. The next email in this chain is Mr Blackburn's response to Ms Johal. In an email timed the next day, 17 September 2020, at 09.13, he said:

> "Dear Ms Johal, I am sorry to hear of your recent loss. I am speaking to my client today at 2.30pm to take instructions and I will come back to you before the end of today."

28. The next communication, which is dated the same date, takes the matter very little further. What Mr Blackburn says is this:

> "Good afternoon, Ms Johal. As per my earlier email, I have spoken with my client who is taking instructions on your request below. As soon as I have instructions I will come back to you by email."

29. It is important that one identifies who Mr Blackburn is regarding as his client. Without going into undue detail, there was a chain of professional advisors which meant that Mr Blackburn was at the end of the chain. The lay client at the other end of the chain had a professional advisor in the middle, interposed between Mr Blackburn and the lay client. It is the professional adviser – the intermediary – to whom Mr Blackburn is referring when he says "my client". So it was not perhaps as straightforward as one might think to get instructions in this case. This was all well understood by the Master when he looked at this correspondence.

30. The next document that I need to refer to timed at 12.20 on 18 September 2020, and is from Ms Johal to Mr Blackburn:

> "Dear Tom, thank you for your emails. Could you please confirm that no steps will be taken to obtain a default costs certificate pending reverting to me."

It is important to understand, because Mr Lyons placed some stress on this, that in fact the Respondents had <u>already</u> taken steps to obtain a default costs certificate. The reference in the email to "no steps will be taken" implied a degree of sloth on the part of the Respondents' solicitors that was misjudged on the part of the Appellant's solicitors, to say the least. The fact is that such an application was already underway.

31. It is important that I stress that it is common ground between the parties that there is no obligation on the Respondents, or any other party in that position, to notify the other side that an application for a default costs certificate was being made. That was common ground and is a reflection of the adversarial

nature of the litigation that goes on in these courts. It may be that a solicitor considers it appropriate to say that such an application is being made in a given case, but it may not be. In any event, it is not a matter of professional obligation.

32. Moving on, it is quite clear that Ms Johal was alive to the dangers of a default order because she followed her email up with a further email on 21 September 2020, timed at 15.07:

> "Dear Tom, further to my email I should be grateful if you could provide me with the confirmation requested."

33. That email was then followed by an email timed at 11.50 on 22 September 2020. Mr Blackburn emailed Ms Johal in the following terms:

> "Dear Louise, today is my first day back in the office after a long weekend. However, by way of an update: (1) our client instructed us to file a request for a default costs certificate, DCC, on Thursday in the event that PoDs were served; (2) a request for a DCC was filed at 4.01pm on Friday [that is a typo, and the day should read "Thursday"] before your email was received. I advised my client as per my previous emails and I understand that Gunnercooke were still awaiting instructions from Germany as of 11.30am this morning; (4) I have just spoken to the SCCO and they have confirmed that a DCC was sealed earlier this morning. I have been advised that they have uploaded the same to the CE-file and will send out a copy by first class post. As the DCC now supersedes your request and the request for the same was filed before your request was received, my client's instructions are now to stand by the same."

Thus, the requests made by Ms Johal for assurances were redundant because a default costs certification had already been obtained.

34. That was an expanded description of the third point (summarised in paragraph 25 above) that was advanced by the Appellant as to why relief from sanctions was not just right to be granted but, if I may be colloquial, was a "no-brainer". I am going to come back to the allegation of professional impropriety arising out of this exchange, because that is how it was put before me, in due course, but before I do so I am going to complete the picture of the points that were articulated by the Appellant regarding the application for relief from sanctions.

35. So the <u>fourth</u> point was that allegations of negligence were made after the event by the Respondents against Ms Johal and her firm. This is an after the event matter. It was adverted to before the Master, and is relied upon before me to indicate that the conduct of the Respondents or their lawyers was such that it ought to be reflected in the ruling that the Master made and in the order that he made. Pausing there, of course the order that the judge made was to grant relief from sanctions. The Appellant's case is is that although the Master reached the right result on the application for relief, he made (if I can say this) heavy weather of it and treated as much more difficult what was, in fact, a "no-brainer". The effect of this was that although he reached the right result and did grant relief from sanctions, his errors in analysing the application for

relief were carried through into the costs ruling that he made, such that that discretion was improperly exercised such that I ought to intervene.

36. The fifth point in that argument is that regular requests were made by the Appellant inviting the Respondents to consent to the application. I accept (I will not read them into the record) that many such requests were made after the default costs certificate was obtained and after the application for relief from sanctions was launched.

37. Let me say at once that I accept that these were relevant factors to go into consideration both for the application for relief from sanctions and, subsequently, the exercise of the Master's costs discretion. I am not going to traverse how relevant they each are because it seems to me that that is not the question that is properly before me today. I am not hearing *de novo* an application for relief from sanctions and I am not hearing an application for costs.

38. What I am doing is reviewing the Master's decision on both points, because given the way I have described them, they are clearly closely connected. I am reviewing the Master's decision on those points, and the question is not, as I have said before in this judgment, whether the Master got them right or wrong. The question is whether the Master got things so far wrong that he strayed outside the range of decisions that he could properly make. In short, were his findings, both on the detail of the *Denton* jurisdiction, and consequently the costs, findings that no judge properly directed could reach. That is the prism through which I consider I must view these particular questions.

39. So with that introduction as to how the Appellant framed the case for relief from sanctions, and conscious that relief from sanctions were indeed granted, I turn to the Master's judgment. I am going to begin with [2] of the Master's judgment which sets out the brief background:

> "The brief background is as follows. The notice of commencement is dated 21 August 2020. It is common ground that it was served on the Defendant shortly thereafter and that the deadline for serving points of dispute was 16 September 2020. The file has been dealt with by Ms Johal of the Defendant's solicitors and, very sadly, at or about this time, Ms Johal suffered a distressing family bereavement which, understandably, distracted her and meant that, in the first instance, she overlooked the date for compliance. In any event, on 16 September 2020, realising that the deadline was imminent, she filed a written request by email to the Claimants' solicitor for an extension of time. That request was refused by the Claimant. The refusal was conveyed from the Claimants' solicitor, Mr Blackburn, to the Defendant on the morning of 22 September 2020. From about that point onwards, of course, Ms Johal appreciated that the Defendant was in breach and that as the DCC had been issued that day, the only option available to the defendant was to issue an application to set it aside. The application was issued on 8 October 2020."

40. Jumping then to [6] of the judgment, and the paragraphs that follow, the Master set out his findings. He did so by reference to the *Denton* jurisdiction:

"6. My brief findings are as follows. First, I am satisfied in this case that the Defendant made their application to set aside the default costs certificate promptly. I have gone through the timetable. The application was issued, broadly speaking, 14 days or two weeks or so after the Defendants were put on notice of their breach. Prompt, to my mind, does not mean issued at the first available opportunity. What it means, of course, is that the Applicant engages in reasonable expedition in the context of the particular issue, namely the failure to serve points of dispute within a 21-day deadline period. The relevant period thereafter is from the point when the paying party reasonably knows that it is in breach of that requirement. Fourteen days is not, as Mr Blackburn would point out, as swiftly as an anxious party might act, but it is, in my experience, a fairly common turnaround period for these applications. We are certainly not talking about many weeks or indeed months which is a delay that is not wholly unheard of, as illustrated by the case of *Masten v London Britannia*, Master Leonard's case of this week which has been cited to me in argument. In any event, I am satisfied that, on the facts of this case, the Defendant's application was made promptly and it is common ground that the application exhibits draft points of dispute which, although undated, were clearly produced at or about 22 September 2020, or shortly thereafter.

7. Turning at this point to *Denton*, this is, to my mind, a serious and significant breach. It has to be. It is a straightforward question of deadline, a relatively tight deadline of 21 days and, more particularly, a deadline imposed by the CPR. It is axiomatic that the Defendant is in breach of that and in breach of that by a not insignificant period of time when compared to the relatively short period required for initial compliance. Mr Lyons urged me to conclude that there is a sliding scale and this is at the bottom end of that scale but I do not think that can be right in circumstances where it is a bright line issue. There is a deadline, the Defendant is in breach of it and in the context of these assessment proceedings that breach is, by definition, serious and significant.

8. I am not at all unsympathetic to the recent and necessarily unhappy experiences of Ms Johal. I am quite satisfied as a matter of fact, that she sustained a very distressing family bereavement and I can see again, almost inevitably, the way in which that would have affected her ability to perform during the relevant period of time. That, though, is not a good reason for the breach. It is simply an understandable explanation for the surrounding circumstances for that omission. It is conceded by Ms Johal in her witness statement that she overlooked the requirement in the context of her situation until the very last date of potential compliance, 16 September, when she asked for an extension.

9. I am satisfied that the Defendants are forced effectively to rely on the third stage of *Denton*, all the circumstances of the case which, to my mind, in an application like this, effectively dovetails with the requirement of 47.12(2), good reason for detailed assessment proceedings to continue. All the circumstances of the case, to my mind, refers to the case in question which is the detailed assessment proceedings, as distinct from the substantive litigation between the

> parties. I received quite lengthy submissions, although put pithily I have to say, by Mr Blackburn as to the alleged inefficiencies and the Defendant's conduct of the substantive litigation, which criticisms may or may not be right. But the relevance of those points is peripheral at best, as what I am concerned with is the conduct of the detailed assessment and whether or not there are good reasons for that assessment to continue.
>
> 10. In my judgment, there are good reasons on the facts of this case for the detailed assessment to continue and for that reason I will be allowing the defendant's application to set aside the default costs certificate."

I will end the quote there, but it is important to note that, in [11], the Master sets out the points of dispute and why he considered it was right, in this case, for the process to continue. He considered that I was pointful to have a detailed assessment.

41. It is important to make a number of points in relation to these parts of the judgment. First of all, it is quite clear that the costs jurisdiction is a specialist jurisdiction and it is the Master and not this court that is best able to assess the significance of defaults or otherwise. In this case, the Master considered that the default was a serious one. He not only took the view that if one has a deadline of a certain amount of time, that deadline ought to be complied with. He also had well in mind the point, which is particular to the costs jurisdiction, that the default of the Appellant meant that, unless a judgment or a costs order in default was obtained, it would not be possible to set down the matter for trial or for detailed assessment. So it is quite clear that his view of the seriousness of the breach which he found in this case by definition to be serious and significant, is one that is coloured by factors that he was perfectly entitled to take into account.

42. The second point to make is that the Master reached a view about the conduct of the Respondents' solicitor that is not in any way, shape or form consistent with the submission that was made both before him and before me as to the impropriety of the conduct of the solicitor in question. The Master did not go through the correspondence in any great detail, but he does refer to it at the beginning of his judgment and it is quite clear that he concluded that there was no impropriety at all. He did not make a finding that the Respondents' solicitors were playing "hardball" or anything like that. He did not have to. The fact is that the significance of the conduct of the Respondents was really only significant if it could properly be said that they had behaved in such a way as to trigger the costs jurisdiction adverse to a respondent resisting an application for relief from sanctions that I have referred to in *Denton* at [41].

43. The Master took the view that although the bereavement was unfortunate, and although the conduct of the Respondents' solicitors may have been "hardball", these were not matters that took this case into the "no-brainer" category. It seems to me that the Master took a balanced and appropriate view to the questions before him and reached conclusions on those facts that he was entitled to reach. It seems to me that it is a complete stretch to suggest that the Master's decision on the question of relief from sanctions was so far off-beam

that his findings in the paragraphs that I have read out are findings that he could not reach, properly directed. Indeed, my view is very much to the contrary.

44. The Master has reached conclusions that were certainly open to him, and quite probably correct. I am not going to go further than that because I do not have to. The correctness or otherwise of the Master's reasoning is not a matter before me today. This is an appeal and what is before me today is whether the reasoning of the Master can be so criticised that it impugns his costs order on the application, which I will come to in a moment, but which is self-evidently closely tied to the reasoning that he applied on the application for relief from sanctions under the *Denton* jurisdiction. I reject the point made by the Appellant that the Master erred in his reasoning and only by happy coincidence got the right result on the Appellant's application for relief from sanction.

45. With that broad, and essentially determinative, finding, I move to the ruling on costs itself, which I have read into the record earlier on in this ruling. The Appellant makes a number of criticisms of these two paragraphs, [13] and [14], but I do not consider them to be in any way well founded. First of all, it is suggested that inadequate reasons were given. Now, there are two answers to this point. First, this was an *ex tempore* judgment and even reserved judgments can only be criticised in narrow circumstances for their wording or the way in which they have been framed. In *Camertown Timber v. Sidhu* [2011] EWCA Civ 1041 at [35], the Court of Appeal said this:

> "The exigencies of daily court room life are such that reasons for judgment will always will be capable of having been better expressed. This is particularly true of an unreserved judgment such as the judge gave in this case but also of a reserved judgment based upon notes, such as was given by the District Judge. These reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account. This is particularly true when the matters in question are so well known… An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself."

Similarly in *Excelsior Commercial & Industrial Holdings v. Salisbury Hamer Aspden*, [2002] EWCA Civ 879 Lord Woolf said at [20]:

> "A judge is not expected to give a detailed decision as to why he is making an order. However, if he is going to make an order for costs which is not the normal order expected under the particular provisions of the CPR, then the parties are entitled to know the basis of that order and the judge is required to explain that so far as is necessary to do."

46. As I indicated earlier, the costs decision in this case is entirely in line with what one would expect and it seems to me unsurprising that the Master

expressed himself in the short way that he did: the "usual" order will require little by way of justification. I do not consider that even that short form of reasoning was in any way insufficient. It seems to me that one has got to read [13] and [14] in light of the substantive ruling on the application for relief from sanction that precede those paragraphs. It seems to me that it is inevitable that the points and conclusions that the Master reached in determining the application for relief from sanction will have informed his discretion on costs as articulated in [13] and [14].

47. If the Master had, for instance, concluded that there had been gross professional impropriety on the part of the Respondents or their lawyers and that, in effect, there had been a misrepresentation or a duping of the Appellant, then I am fully prepared to accept that his costs order would require rather more justification than it does in this case. But that is precisely the point. The Master did not conclude that there had been any form of impropriety. What he considered was that there had been a default by the Appellant or the Appellant's lawyers which required justification and explanation but which was, as it has turned out, justified and explained in this case.

48. So it seems to me that reading the judgment as a whole and reading it in the way that one should, these paragraphs are unexceptionable and entirely clear as to why the judge was making the order he did. The Appellant's criticisms of these paragraphs, both in terms of their substance and in terms of their brevity, are entirely unsubstantiated and ought to be rejected, which I do.

49. There is a further point on the appeal which is a suggested error of law on the part of the Master. What the Master said in the middle of [14] of his judgment was that his approach might have been different if this had been an application for relief from sanctions under CPR 47.12(1) rather than 12(2). Turning to the CPR, CPR 47.12(1) states that:

> "The court will set aside a default costs certificate if the receiving party was not entitled to it."

This provision is dealing with a case where a default costs certificate has been obtained irregularly and is to be set aside *ex debito justitiae*. That was not this case and it seems to me quite clear that if one has a got a default costs certificate that is obtained in some way irregularly, the usual costs regime is likely to be that the party who obtained it should pay the costs of the other party having to set it aside. But that is not this case.

50. CPR 47.12(2) says this:

> "In any other case, the court may set aside or vary a default costs certificate if it appears to the court that there is some good reason why the detailed assessment proceedings should continue."

That is the jurisdiction that the Master rightly was working under and it seems to me that he was entirely right to consider that the general rule as regards the costs discretion in such a case should be exercised in the way that he articulated. Of course, it is just a general rule, as I said at the beginning of this

ruling, but it is a general rule that whilst it will be coloured by the facts of the individual case, is worth stating as such.

51. So for all those reasons, it seems to me that this appeal has got to be dismissed. I was for a period intrigued by the notion that a further ground for refusing the appeal and dismissing it was that the costs order made, some £10,000, was a costs order both in respect of the application to set aside and the application for interim payment. It seems to me that that raises interesting questions about justifying the costs order on different grounds, but because there is no Respondents' notice and because I have dealt with the matter in the way that I have, it seems to me that I do not need to consider this question any further and I do not.

52. For the reasons that I have given, I dismiss the appeal.
