IN THE HIGH COURT OF JUSTICE [2019] EWHC 1904 (QB)

HQ17P03347

QUEEN'S BENCH DIVISION

MASTER MCCLOUD

BETWEEN

ESTHER LUCY CLEMENTS SMITH

Claimant

and

(1) BERRYMANS LACE MAWER SERVICE COMPANY

(2) BERRYMANS LACE MAWER LLP

Defendants

DRAFT JUDGMENT

Laura Collignon (instructed by Blake Morgan) for the **Claimant**

David Platt Q.C. (instructed by Clyde & Co.) for the **Defendant**

1. This is an application by the Defendant to set aside judgment in default of defence for a sum to be determined. This is a procedural decision of some significance since both sides agree that issues of interpretation arise in relation to Parts 12, 13 and 3 of the CPR and as to the application (or inapplicability) of the *Denton* (relief from sanctions) case law on these facts. The claim is for damages for personal injury in excess of £3m.

2. This judgment is virtually bound to be appealed since the facts appear to be unique and arguably not directly covered by binding authority, but the situation has been carefully considered by a previous court on a technically obiter basis, and I have endeavoured here to keep the decision short and to the point given that the points are substantially points of law on the application of the CPR to applications to set aside judgment in default and the role, if any, of the *Denton* principles in such cases.

3. To pre-empt the outcome of this decision, I grant the Claimant permission to appeal[1] and subject to any order of the Court of Appeal to the contrary I direct that appeal lies to that court in view of the absence of high authority and the mixed nature of first instance

[1] And I note that Andrew Baker J in *Cunico* cited later in this judgment expressed a hope that the Court of Appeal would give a definitive ruling on the points in the case before him, which I echo in this decision. Commentary in the White Book at 12.3.1 is suggestive of the fact that a Court of Appeal decision on the issue of construction of rule 12.3 in particular and rule 3.10 is desirable. Rule 3.10 appears not to have been cited in most if not all of the cases reviewed by him, as he notes.

decisions requiring in my judgment clarification. The points here are short ones but important. I shall refrain from extensive quotation from case law but incorporate it by reference as appropriate. A CCMC has been listed for 1 week after the hearing of these arguments and hence this judgment is necessarily brief so as not to disrupt case management by leading to that hearing being adjourned or rendered ineffective.

4. The following features are the key ones in terms of the issues which arise as to application of the court rules (leaving aside wider facts going to exercise of discretion):

30/9/18	**Application for an extension of time for filing defence submitted to court** by which D sought an extension to 30 November 2018. It asked for a 25 minute phone hearing.
4/10/18	Agreed time for defence expired.
17/10/18	**Request for judgment in default**.
7/11/18	Staff refuse to issue the extension application dated 29/9/18 but return it asking for a Private Room Appointment form (PRA) to be provided.
21/11/18	**PRA form received at court** (approx.: no copy is on the court file but hearing bundle p94A has parties' copy).
26/11/18	**Court staff issue application for extension (lodged on 30/9/18).**
26/11/18	Court staff appear to produce a note eventually sent to the Master concerning the application to enter judgment and asking whether to enter judgment. The note does not refer to the application for extension having been issued but only to it having been returned unissued. It is unascertainable when that note was provided to the Master, but no later than 2/1/19.
19/12/18	Court staff list hearing date for extension of time, 25 minutes hearing to be on 15/2/19.
28/12/18	**Defence received at court** (possible that due to the Christmas vacation it was in fact at court on or after 21 December 2018). However no entry in any court record to that effect made until later nor any copy defence placed on file.
Date unknown prior to 2/1/19	Master is sent the note purporting[2] to be dated 26 November 2018 (see above) re default judgment.
2/1/19	**Master directs judgment in default, "unless this has already been disposed of by consent".** Neither the completed PRA form nor the defence were placed on the court file nor any entry made on the court computer re the defence, until February.

[2] I use the term 'purporting' because such notes not infrequently are produced in circumstances where the date in fact relates to a different case due to the same template being re-used by staff, if the need to update that field has been overlooked. It would be unrealistic to rely on the date stated in my experience.

15/1/19	**Judgment in default entered**.
15/2/19	The fact that a Defence had been filed was entered into the court system by staff. No defence actually on file.
13/2/19	(Approx.) Application to set aside judgment lodged (time estimate 2.5hrs). Returned by staff due to absence of a PRA form.
14/3/19	PRA form received at court.
5/4/19	Court staff list hearing of the application to set aside judgment, on 19th July 2019. That is subsequently brought forward to 12/7/19.
12/7/19	Hearing of the application to set aside judgment to which this judgment relates.

The relevant rules

CPR Part 12

Conditions to be satisfied

12.3

(1) The claimant may obtain judgment in default of an acknowledgment of service only if –

(a) the defendant has not filed an acknowledgment of service or a defence to the claim (or any part of the claim); and

(b) the relevant time for doing so has expired.

(2) Judgment in default of defence may be obtained only –

(a) where an acknowledgement of service has been filed but a defence has not been filed;

(b) in a counterclaim made under rule 20.4, where a defence has not been filed,

and, in either case, the relevant time limit for doing so has expired.

CPR Part 13

Cases where the court must set aside judgment entered under Part 12

13.2 The court must set aside(GL) a judgment entered under Part 12 if judgment was wrongly entered because–
…

(b) in the case of a judgment in default of a defence, any of the conditions in rule 12.3(2) and 12.3(3) was not satisfied; …

Cases where the court may set aside or vary judgment entered under Part 12

13.3

(1) In any other case, the court **may** set aside[GL] or vary a judgment entered under Part 12 if –

(a) the defendant has **a real prospect of successfully defending the claim**; or

(b) it **appears to the court that there is some other good 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[GL] 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.**

(Rule 3.1(3) provides that the court may attach conditions when it makes an order)

Defendant/applicant's arguments.

5. The issues were said to be (breaking this up from the more compact list in the Defendants' skeleton):

(1) Should the judgment in default be set aside as of right under CPR 13.2(b).

   a. In particular Is it open to the court to enter a default judgment where a Defence is in fact filed prior to judgment (albeit without the extension application having been determined)?

   b. Has the "relevant time limit for doing so expired" under the Rule when there is an outstanding application for an extension of time?

   c. Does 'failure' (using D's term) to disclose a or b above affect matters?

(2) If the answer to (1)(a-c) is "No" on all points ought the court to set aside judgment

   a. Under CPR 13.3(a) and 13.3(2) on the basis of merits and promptness?

   b. Under CPR 13.3(b) and 13.3(2) on the basis that there is 'some other good reason' to do, and promptness?

(3) Even if rule 13.3 applies and is considered is it also the case that the application to set aside judgment should be treated as an application for relief from sanctions and hence engage the evidential burdens for a decision applying the *Denton* criteria under CPR 3.9 (Denton v TH White [2014] EWCA Civ 906)?

Claimant's position.

6. The Claimant contends:

(1) that the judgment was regular and should not be set aside as of right (it was not made in time, the Claimant says).

(2) That the judgment should not be set aside discretionarily on the basis of promptness, the application was not made 'in time', the *Denton* requirements apply in addition to CPR 13.3 and are not satisfied here.

(3) Further if this is a discretionary case the court should dismiss the application, permission should be refused in accordance with the overriding objective and following Roberts v Momentum Services Ltd [2003] EWCA Civ 299.

(4) In the alternative without prejudice to the above, the court should if setting aside judgment and extending time for defence, impose conditions following Huscroft v P&O Ferries (Practice Note) [2010] 1483.

(5) A separate point is taken that the Defendants are said not to have served the application to set aside judgment (breaching CPR 23.4(1) and 23.7(1) as the Claimant reads them) and also it is said that it was a breach of the same rules not to have served the evidence in support with the application notice, but somewhat later. (Other matters said to be breaches not directly part of the setting aside application save insofar as they go to discretion are also referred to such as not following the pre-action protocol.)

Argument and decisions in detail

(1) Should the judgment in default be set aside as of right?

a. is it open to the court to enter a default judgment where prior to the request for judgment there is a live application to extend time for defence?

7. The Defendant argues that the application was made in time[3] for the purposes of CPR 13.2, ie that the "the relevant time limit for doing so [*ie filing a defence*] has expired".

8. In the hearing by way of some paper-file archaeology the court was able to locate a copy of the request for default judgment, and it was established that the correct form was used and properly completed. Until the hearing this was unclear because the Claimant had not retained a copy of its own. Whilst the Defendant reserved its position given that the 'archaeology' was done in the course of the hearing, I do not understand there to be pursuit of any technical points as to the validity of the request now that it has been located. Once the parties receive this judgment in draft I shall invite any argument if there is to be any.

9. Some confusion may have been caused by the fact that when entering judgment I wrote to court staff that judgment was to be entered 'unless this has already been disposed of by consent'. Staff drew that up as an order.

[3] I shall in this section limit myself to the points directly under CPR 13.2 rather than the point made by the Claimant in relation to the application not having been made in time due to a lack of accompanying evidence, which I treat separately. Hence for the purposes of (1) I am leaving out of account the evidence point for the moment.

10. In context, the proper reading of that is that because the court administrative process had led to delays and the apparent 'crossing' of the application for an extension with the request for judgment, it was entirely possible that by the date of judgment things would have moved on such as by the filing of a defence (which, as it turned out, had occurred albeit the court file did not disclose that such was the case). The Defendants characterised my direction as a type of 'unless' order which precluded entry of judgment unless it was shown that there had been no disposal by consent.

11. On that 'disposal by consent' point in my judgment such a reading is incorrect: it was a direction to the court staff to check whether a consent order had been provided which dealt with the application for an extension, and not to enter judgment if there was such an order.

12. I should explain that using the paper filing system it is often not practicable to check the file for a consent order since they so frequently are lost, mis-filed or not filed that doing so is no guide. However the court staff would be in a position to check the very basic computer record which is kept, inaccessible to the judiciary, which records events in the case such as orders received or sealed (albeit without storing copies).

13. My direction was drawn up as an order, but even given that it was so drawn up and sealed, it does not advance the argument in this case either way because on a proper reading it permitted entry of judgment unless the contrary was shown by way of a consensual agreement (which it was not). No such consent order existed and hence this judgment was entered in accordance with my order. It is unclear why the court staff drew up an order which mentions a 'third' defendant but that alone does not invalidate the order against the First and Second Defendants.

The core of the problem on regularity of judgment in this case

14. The Defendant argued that the requirements for entry of a regular default judgment are conjunctive. Rule 13.2 requires both that the defence has not been filed and that the time limit for doing so has expired. This raises the question what is the intended application of the rule where a defence has been filed after expiry of the time limit, but judgment has not been entered.

15. I am very fortunate to be in the position that the heavy lifting in terms of reviewing the very extensive case law in this area has already been done by Andrew Baker J. in Cunico Marketing v Daskalakis [2018] EWHC 3882 (Comm), [2019] 1 WLR 2881, following on from and further considering the decision in Taylor v Giovani Developers Ltd [2015] EWHC 328 (Comm). Following the usual principles, whilst not binding on me in precedent, I should follow a decision of a judge of coordinate jurisdiction with myself if it is on point and if it is not in my judgment clearly wrong. In this instance it is a recent judgment of a very respected judge who took the time, with respect rather heroically given the volume of case law, to review the case law, where numerous authorities (whether as ratio or obiter) had addressed aspects in different ways at different times. The judge rightly expressed the hope at paragraph 54 that his summary and wider discussion would be of value in other cases.

16. It is important to remind myself, as Andrew Baker J. does in his judgment, that in strict point of law his thorough review and consideration is in certain respects obiter because it goes wider than the narrowest consideration necessary as a matter of legal logic to decide the case which presented itself to him. The facts of the case before him differed in that in that

case the failure was one of omission to file an acknowledgement of service before a judgment in default was entered. The rules relating to acknowledgement of service and defence are identical as far as relevant here.

17. Furthermore in *Cunico,* the First Defendant filed a late Acknowledgement of Service, one hour *before* the Claimant filed the request for judgment in default. The First Defendant *then* applied for an extension of time retrospectively and insofar as required, relief from sanctions. It is not clear whether in *Cunico* the defence was filed before or after the request for judgment was actioned by the court.

18. In this case but not in *Cunico*, the application for an extension was made *before* the request for judgment was filed[4], and the late defence was filed *after* the request for judgment but *before* judgment was actioned by the court.

19. Having thus directed myself, I do however stand in complete agreement with the analysis of Andrew Baker J as to the correct approach and respectfully adopt his reasoning in terms of the approach to interpreting both CPR 12's provisions as to the circumstances in which default judgment can be entered, and the question of whether an application of this general sort ought to be treated as 'relief from sanctions' subject to the *Denton* requirements. I shall not complicate the reported case law by seeking to go over the ground which he so carefully considered. I have not been told of any appeal against his decision but I note that it was only reported in the WLR in 2019, after what I believe was handing down in December 2018 so it is recent authority.

20. At p2885 in the WLR report, at paragraphs 13-14, Andrew Baker J. sets out what appear to him, correctly in my judgment, to be three alternative interpretations of CPR 12.3 and its setting out of the *court's powers to enter a regular default judgment:*

> ***The Three Meanings***
>
> ***…***
>
> *13. … whether an acknowledgment of service filed late, but before a request or application for judgment in default under CPR 12.3(1), precludes the grant of such a judgment, is an important issue of principle. It is the subject of conflicting first instance decisions and obiter dicta.*
>
> *14. The issue is one of the proper construction of the conditions fixed by CPR 12.3(1) for the obtaining of judgment in default. Three suggested constructions emerge from the prior decisions ('the three meanings'):*
>
> *i) firstly, that CPR 12.3(1) only allows the court to grant default judgment where, at the time of judgment, there is no acknowledgment of service and the time for acknowledging service has expired ('the first meaning');*
>
> *ii) secondly, that CPR 12.3(1) allows the court to grant default judgment so long as,*

[4] as noted I am leaving out of account for the moment the separate point made by C as to whether it was a rule-compliant application

at the time the request or application for default judgment is filed, there was no acknowledgment of service and the time for acknowledging service has expired ('the second meaning').

iii) thirdly, that CPR 12.3(1) allows the court to grant default judgment where timely acknowledgment of service was not filed, irrespective of any acknowledgment of service later filed, ex hypothesi after expiry of the time period set under CPR Part 10 ('the third meaning').

21. The decision in *Cunico* on its strict ratio rules out the third meaning for the reason the learned judge gives, and as noted, I agree in terms of its analogous application to late defences. As between the first and second meanings we enter the factual territory which applies to the case before me.

22. Reminding myself of the words of rule 12.3, that rule states that a claimant may obtain judgment 'only if the defendant has not filed' the defence AND that the time for doing so has expired.

23. Whereas strictly Andrew Baker J. did not have, on his facts, to decide whether that wording was suggestive of meaning (i) or meaning (ii), I do have to so decide, it seems to me that his observations at paragraphs 43-45 are entirely correct, now that I have to consider them in a case to which the facts make the point relevant. The language of CPR 12.3(1) naturally conveys the first meaning, and to say that the claimant may obtain judgment 'only if the defendant has not filed' naturally conveys that the court may not enter judgment if filing has taken place prior to entry of judgment. The way in which the rule is structured means that it is not relevant when the time for doing so expired, if the court finds (as is the case here) that a defence was filed. Further, I note, as did the court in *Cunico*, that CPR 3.10 provides that an error of procedure does not invalidate any step in the proceedings unless the court so orders. A late filed defence is in my judgment not by reason of its lateness alone fall to be treated as if not validly filed. A defence, within rule 12.3, does not have to be a timely defence.

24. I agree that the case of Almond v Medgolf Properties Ltd [2015] EWHC3280 (Communication) which was distinguished by Andrew Baker J, can similarly be distinguished in this case for the reasons he gave at paragraph 77, and also because I, too, see nothing nonsensical in the notion that a defendant can file a defence and escape entry of default judgment provided the judgment has not already been entered and that the fundamental role of the courts is to resolve disputes on their merits where claims are properly disputed. Default judgment can be a useful and proper device where claims are not disputed, but in my judgment an overly strict reading which would tend to shut out genuinely defended cases simply for lateness of defence would be disproportionate if it was relied on as a species of 'encouragement' to comply with court rules (as was an interpretation effectively urged on me by the Claimant).

25. The cases cited by the Claimant to me, including Coll v Tatum (2002) 99(3) LSG 26, Boeing Capital Corporation v Wells Fargo Bank Northwest and Anor. [2003] EWHC 1364 (Comm.) and others (paras. 18 onwards of the Claimant's skeleton) can all I think be said to be of limited assistance for the same reasons given by Andrew Baker J. where he addresses the detailed basis for distinguishing the various cases and also his emphasis on the oft-

overlooked r. 3.10, seldom cited in the reported cases. I shall not extend this judgment by repeating his analysis since I agree with it and can add nothing useful. The cases cited to me were all considered by him save for the Privy Council case on a different point (*AG-Trinidad and Tobago v Matthews*) which I deal with later outside the strict ratio of this decision.

26. My decision therefore is that meaning (i) in Andrew Baker J.'s terms prevails and that where as here a defence was filed prior to the point at which the court came to apply rule 12.3, the court did not have jurisdiction to enter default judgment. Judgment must be set aside as of right.

27. It follows that strictly I do not need to decide the other arguments but I shall express a view briefly.

    Issue (1) b. Would it have made any difference if the Claimant (as D says) failed to disclose relevant facts such as the existence of an application to extent time or the fact that a defence had been filed?

28. In my judgment no, unless the circumstances meant that there was some positive deception.

29. The court in this instance was aware of the application for an extension, but that it had been returned unissued. The court was *unaware* of the fact that a defence had been filed, but so were court staff. It is very doubtful that had this Master known there was a defence on file, judgment would have been allowed to be entered.

30. It does not seem to me that there is a duty on a claimant constantly to monitor the court's own files so as to ensure that when a request for judgment in default eventually reaches the Master, on some unknown date depending on the state of delays in the court administration, the court has the most up to date filing information. The court system ought to be taken to know the state of its own files, albeit that until the very recent advent of electronic filling in the Queen's Bench Division thanks to the sterling work of the senior judiciary, such was seldom in fact the case in reality. One hopes that will now be a thing of the past.

31. **As to issue (2)** I do not think it would assist for me to expound on a hypothetical exercise of discretion given my decision on (1).

32. **As to issue (3)** I shall express a brief view on the point of law, which is whether in considering the setting aside of default judgment on discretionary grounds if they had applied, the *Denton* criteria and rule 3.9 apply in addition to CPR 13.3 requiring an application for relief from sanctions. It is sensible for me to express a view because in the event of a successful appeal against my decision on (1), a decision as to this point will enable the question of the exercise of the discretionary power to be dealt with on a factual basis knowing, either way, whether *Denton* is to be applied and if so how and whether a formal relief application is required. Nonetheless I am conscious that what I say is *obiter*.

33. I return to CPR 3.10. An error in procedure does not invalidate a procedural step – including filing a defence, in my judgment, unless the court so orders. It seems to me that such is the seldom quoted underpinning of what I respectfully suggest, generally agreeing with Andrew Baker J, that a breach of a rule which includes a time limit does not bring with it a notional 'sanction' to the effect that it is not valid absent an order for relief. Rather if a step is taken late, and a rule does not impose a sanction, it is open to the court to impose such a sanction

and then to consider relief: but relief is not in my judgment required if the rule provides no sanction. Per Andrew Baker J at paragraph 34, and bearing in mind that he also was faced with the question whether the *Denton* criteria applied on the facts of his case:

"There is a clear and important difference between, firstly, whether some effect or consequence obtains under the CPR only upon some step being taken in a timely fashion and, secondly, whether a step not taken in timely fashion may be set aside, undoing the consequence it otherwise had or would have had

34. In my judgment there is no basis for holding that the *Denton* line of authority applies so as to require an application for relief from sanctions under rule 3.9 where there is no provision or order which provides for a sanction consequent upon a breach.

35. Insofar as the case of Regione Piemonte v Dexia Crediop Spa [2014] EWCA Civ 1298 was referred to, and is mentioned in the White Book at 13.3.5 (inconsistently with the editors' view at 13.1.1) as authority that the *Denton* approach applies, my reading of *Piemonte* at 38 onwards is to the effect that *Denton* analysis (of rule 3.9) is similarly relevant to an application under rule 13.3, and not that *Piemonte* is to be understood as meaning that in a literal sense an application under CPR 13.3 has to be pursued together with an application under CPR 3.9 when there is a question of discretionary setting aside. Much the same factors apply, in other words, when considering CPR 13.3 but it is not a strict case of 'application for relief from sanctions'.

36. Andrew Baker J. regarded *Piemonte* as not binding on him on the facts of his case, and counsel for D in this case also treated the discussion of *Denton* in *Piemonte* as obiter. Given my decision above it is also not applicable here. However I read it as requiring a consideration of the *Denton* principles in the context of the discretionary exercise of having regard to 'all the circumstances' under rule 13.3 and not as requiring (in a case to which it applies at all) a separate application for relief from sanctions under rule 3.9. The passage at paragraph 40 in *Piemonte* starting "*If he does ….*" and ending *"… taken into account*" seems to me to be supportive of that approach.

37. I accept however that there is considerable dispute on this issue. However my approach is supported by the Privy Council decision in AG-Trinidad and Tobago v Matthews [2011] UKPC 38 (cited at 13.1.1 in the White Book) considering an identical rule to CPR 13.3, which reached the clear conclusion that no separate application for relief was required (not cited to Andrew Baker J but consistent with his decision).

38. Lastly on the question of whether the application was made 'in time', based on the requirement in CPR 23 that evidence must be filed with an application and not somewhat after it, this in my judgment tends to elevate CPR 23 to a status which it does not have: CPR 13 in my judgment is a code which exists to govern applications to set aside judgment in default and that approach is consistent and I think required by CPR 13.1 which does not state that evidence must be filed with the application, only that the application must be supported by evidence. That is a difference in the drafting of the provisions of CPR 23.7 and 13.4 which must be given effect. It would in any event have been a disproportionate approach to deem the application ineffective for such a relatively technical breach if it had been a breach.

39. Should I impose conditions? The Claimant urged me to do so under rule 3.1 and cited *Huscroft v P&O Ferries* supra. Various incidents of what were said to be shortcomings in the conduct of the Defendant were referred to, (such as alleged shortcomings in service of the set aside application) but it seems to me that where I have held that the default judgment ought to be set aside as of right, whilst I do not doubt that I have jurisdiction to attach conditions, the circumstances do not warrant it and it would be disproportionate to do more than to simply set aside the order and retrospectively extend time to the date of actual filing of the Defence.

40. I invite the parties to agree a consequential order. This matter is next before me in a few days' time for case management and hence my judgment has been produced speedily in an attempt to set out my reasons without delaying that hearing.

41. I shall hear any applications for permission to appeal and will deal with any corrections to judgment, or any points which require to be decided but which I have overlooked (rather than points which are not strictly required to be decided given my first decision on setting aside as of right), at that CCMC.

Postscript

42. After supplying a draft of this judgment to counsel, I was informed by a QB Master who sits on the Civil Procedure Rules Committee (CPRC), to whom I had mentioned my draft judgment, that changes to rule 12 had been approved and will come into effect in October 2019 which have the same effect as this judgment. However on further research and after contacting the CPRC I understand that no Statutory Instrument has been passed containing such a rule change and that the proper approach in the view of the CPRC is that one should in those circumstances proceed without any assumption that such a rule change will take place at all.

43. In the light of the information initially received I was minded to reconsider the question of permission to appeal and the proper destination for an appeal but since any such rule change is said by the CPRC to be only a potential one at this point, and subject to last minute argument at handing down, I am minded not to alter the course directed above.

MASTER VICTORIA MCCLOUD

18/7/19