'Game, Set-Aside and Match': Applications To Set Aside Default Judgment and the Decision in FXF v English Karate Federation Ltd

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On 26 July 2023, the Court of Appeal handed down its decision in the case of *FXF v English Karate Federation Ltd* [2023] EWCA Civ 891, regarding the correct approach to dealing with applications to set aside default judgments. Specifically, the court addressed the issue whether the well-trodden criteria from *Denton v TH White Ltd* [2014] 1 WLR 3926 regarding relief from sanctions should be applied in applications to set aside judgments in default.

The Facts

The Claimant brought a claim for personal injury arising from alleged historic sexual abuse perpetrated by her karate coach. Proceedings were issued, following which an extension of time was agreed for the Second Defendant ("IKA") to file its Defence. That deadline passed, and when no Defence was forthcoming, the Claimant requested and obtained judgment in default pursuant to CPR 12.4 for an amount to be decided by the court.

IKA subsequently applied to set aside that default judgment pursuant to CPR 13.3. That application was granted by an oral decision of Master Thornett, on the basis that IKA had a real prospect of successfully defending the claim and that the application had been made promptly. In considering *Denton*, the Master said:

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".*

Arguments on Appeal

The Claimant appealed that decision on the grounds that the Master failed to apply *Denton* in the exercise of his discretion in the set aside application. Reliance was placed on the decision in *Gentry v Miller* [2016] 1 WLR 2696 at [24] that an application to set aside default judgment is an application for relief from sanctions, and so the three questions from *Denton* come into play once CPR 13.3 has been considered.

Conversely, IKA invited the Court of Appeal to place little weight on those comments from *Gentry*, since in that case the applicability of *Denton* was agreed between the parties. It was argued that an application to set aside is its own unique, self-contained mechanism that does not engage questions of relief from sanctions.

The Decision

Giving the lead judgment, the Master of the Rolls summarised the evolution of the *Denton* criteria, as well as subsequent authorities. For instance, the court reviewed *Regione Piemonte v Dexia Crediop SpA* [2014] EWCA Civ 1298, in which Christopher Clark LJ commented at [40]:

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 considerations set out in CPR 3.9 are to be taken into account.

IKA relied upon *Piemonte* as suggesting that there is no real requirement to consider *Denton* in a set aside context, since Christopher Clark LJ's comment around the overriding objective implied a degree of discretion to be exercised in individual cases. This was rejected by the Master of the Rolls, who considered that Christopher Clark LJ clearly did support an integration of *Denton* into CPR 13.3, and that Christopher Clark LJ's later comments do not detract from that clear decision.

The Court of Appeal went onto consider *Gentry*. Whilst noting that the applicability of *Denton* had been agreed between the parties in that case, the Master of the Rolls placed weight on the fact that his end decision in *Gentry* was heavily predicated on his approach of integrating the *Denton* principles into that particular application to set aside. This, the Master of the Rolls found, provided a 'worked example' of the required process.

It was noted that the TCC in *Redbourn Group Ltd v Fairgate Development Ltd* [2017] EWHC 1223 (TCC) set out in clear terms at [17] that CPR r. 3.9 was relevant to an application to set aside, since:

[A]fter 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.

The case of *Family Channel Ltd v Fatima* [2020] 1 WLR 5104 dealt with set aside applications in a non-attendance context under CPR Part 39, finding that an application of this nature was similarly subject to the questions posed in *Denton*.

In the round, the Court of Appeal ruled that previous authority, including *Piemonte*, *Gentry* and *Family Channel*, forcefully supported applying *Denton* to applications to set aside.

As to the Rules, the court looked at the wording of CPR 13.3 itself:

(1) In any other case, the court may set aside 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 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.

Since this frames the exercise as being one of discretion ("the court may"), once the factors in CPR 13.3(1(a)-(b) have been considered, the Master of the Rolls concluded that this final exercise of discretion lends itself appropriately to applying the *Denton* criteria. This is especially so, the court found, against the backdrop of the mandatory requirement to file a Defence in CPR 15.2, and the wording of the presumption in CPR 3.8(1) that:

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.

Finally, the Court of Appeal disregarded the most recent decision in *PXC v AB College* [2022] EWHC 3571 (KB) that *Denton* did not apply to applications to set aside. A similar approach was taken by the Court of Appeal when

considering *Cunico Resources NV v Daskalakis* [2018] 1 WLR 2881. It should be remembered that *Cunico* concerned an application for default judgment itself, which was countered by an application to extend time rather than an application to set aside a judgment that had already been entered.

In overruling these two previous decisions, the Master of the Rolls found at [68] that:

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.

All of this this led the Master of the Rolls to conclude at [72] that:

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.*

Comment

First, this decision makes clear that applications to set aside default judgment must be considered with the *Denton* criteria in mind. The Court of Appeal has gone to the lengths of addressing authorities contrary to this view. This will inevitably affect applications under CPR 13.3 going forward: applicants can expect that questions around *Denton* will be asked when their applications are heard, and so we can expect applicants to bear *Denton* in mind when framing applications of this nature going forward.

Secondly, this decision has reinforced the Court of Appeal's hard line against non-compliance with the Civil Procedure Rules. It will not have escaped readers of this blog that many of the comments made by the Master of the Rolls were underpinned by the message that non-compliance is not to be tolerated.

In the round, whilst the prospects of successfully defending a claim will undoubtedly remain a key factor, going forward we can expect applications under CPR r. 13.3 to focus more on the factors around the non-compliance which gave rise to the application in the first place.

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