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The application of *Denton* to default judgments

IN BRIEF

The Court of Appeal has held that the *Denton* tests apply in their full rigour to applications to set aside default judgments.

FXF v English Karate Federation Limited and another (2023) EWCA Civ 891

This appeal dealt with a controversial procedural issue that had arisen in the wake of this court's decision on relief from sanctions in *Denton (2014).* The question was 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 were authorities that were said to point both ways.

The claimant was seeking damages for personal injury for alleged serious sexual abuse by her karate coach over an extended period between 2008 and 2014. Each of the defendants was 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.

After an order for alternative service of the proceedings had been made, the parties initially agreed extensions of time for the filing of the defence. When time ran out, no defence was filed and the claimant requested and obtained default judgment for "an amount which the court will [decide]" under CPR Part 12.4 (the Judgment).

The defendants issued an application to set aside the default judgment under CPR Part 13.3. A 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 defendants 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. The Master noted that 'the familiar criteria of *Denton* were

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'.

Having reviewed the relevant authorities in detail, the Court of Appeal held that 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.

The law as stated in *Denton* applies directly to the first category of case and 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 did not raise the question of the second category of case and "implied sanctions" more generally.

This case fell squarely into the third category and the court held that the *Denton* tests did apply to applications to set aside default judgments under CPR Part 13.3.

In the context of this appeal, the first question to consider was whether the Master applied the right tests. 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".

The Master dealt with the merits and with the delay giving rise to the judgment (relevant to *Denton* tests one and two) **and** to the delay in making the application to set aside (relevant under CPR Part 13.3(2)). Accordingly, he was applying the *Denton* tests albeit not as formally as might have been desirable.

1. There was no doubt in this case that the defendants had a real prospect of successfully defending this claim.

2. The defendants did not make its application to set aside promptly, but that factor did not inconvenience other court users, and the unexplained delay did not, in this particular case, eclipse the merits of the proposed defence.

3. The delay in filing the defence was obviously serious and significant.

4. Despite counsel for the defendants' best efforts, insurance issues and investigation of liability did not provide an adequate explanation for the delay.

5. The stage three *Denton* test allowed 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 defendants and their somewhat tenuous connection to the tortfeasor reinforced the fact that the they seemed to have a real case on the merits that deserved to be tried.

Accordingly, this court was now clearly stating that the *Denton* tests apply in their full rigour to applications to set aside default judgments.

The appeal was 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.

The full judgment may be found at: FXF v English Karate Federation Ltd & Anor [2023] EWCA Civ 891 (26 July 2023) (bailii.org)