Case No: HQ17P02897
SCCO reference: SC-2020-APP-000327

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Thomas More Building
Royal Courts of Justice
Strand, London WC2A 2LL

Date: 15/12/2020

Before:

MASTER LEONARD

- -

Between:

Mr Sharifah Masten	**Claimant**
- and -	
London Britannia Hotel Ltd	**Defendant**

- -
- -

Margaret McDonald (instructed by **Pennington Manches Cooper LLP**) for the **Claimant**
Stephen Innes (instructed by **QM Legal Costs Solutions Ltd**) for the **Defendant**

Hearing date: 8 October 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

Master Leonard:

1. This is an application to set aside a default costs certificate ("DCC"). I will summarise the events that led up to the making of the application.

2. The Claimant took proceedings against the Defendant for Personal Injury. It was a substantial claim, which settled at US $450,000. A consent order dated 2 August 2019, incorporating the terms of settlement, provided for the Defendant to pay the Claimant's costs of the claim and for a payment on account of costs of £100,000.

The Rules

3. Where, as in this case, the costs to be recovered by a Receiving Party are (absent agreement) to be subject to detailed assessment, CPR 47.7 requires that the Receiving Party serve a Notice of Commencement of detailed assessment proceedings, with supporting documents including a bill of costs, within 3 months after the date of the authority for assessment. In this case that was the consent order of 2 August 2019.

4. CPR 47.9 provides for the Paying Party to serve points of dispute by 21 days after the date of service of the notice of commencement, failing which (absent an agreement or order for extension) the Receiving Party will be at liberty to apply for a DCC. These are the relevant provisions:

> " 47.9
>
> (1) The paying party and any other party to the detailed assessment proceedings may dispute any item in the bill of costs by serving points of dispute on –
>
> (a) the receiving party; and
>
> (b) every other party to the detailed assessment proceedings.
>
> (2) The period for serving points of dispute is 21 days after the date of service of the notice of commencement.
>
> (3) If a party serves points of dispute after the period set out in paragraph (2), that party may not be heard further in the detailed assessment proceedings unless the court gives permission…
>
> (4) The receiving party may file a request for a default costs certificate if –
>
> (a) the period set out in paragraph (2) for serving points of dispute has expired; and
>
> (b) the receiving party has not been served with any points of dispute.
>
> (5) If any party (including the paying party) serves points of dispute before the issue of a default costs certificate the court may not issue the default costs certificate.…"

5. A Paying Party can apply for a DCC to be set aside. The criteria are set out at CPR 47.12 and Practice Direction 47 paragraph 11. CPR 47.12 reads:

> " (1) The court will set aside a default costs certificate if the receiving party was not entitled to it.
> (2) 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.
>
> (Practice Direction 47 contains further details about the procedure for setting aside a default costs certificate and the matters which the court must take into account)…"

6. Practice Direction 47, paragraph 11.2 says:

> "(1) An application for an order under rule 47.12(2) to set aside or vary a default costs certificate must be supported by evidence.
>
> (2) In deciding whether to set aside or vary a certificate under rule 47.12(2) the matters to which the court must have regard include whether the party seeking the order made the application promptly.
>
> (3) As a general rule a default costs certificate will be set aside under rule 47.12 only if the applicant shows a good reason for the court to do so and if the applicant files with the application a copy of the bill, a copy of the default costs certificate and a draft of the points of dispute the applicant proposes to serve if the application is granted.
>
> 11.3 Attention is drawn to rule 3.1(3) (which enables the court when making an order to make it subject to conditions) and to rule 44.2(8) (which enables the court to order a party whom it has ordered to pay costs to pay an amount on account before the costs are assessed). A costs judge or a District Judge may exercise the power of the court to make an order under rule 44.2(8) although he did not make the order about costs which led to the issue of the default costs certificate."

The *Denton* Test

7. One of the matters in issue on this application is whether the criteria for granting or refusing relief from sanction under CPR 3.9, as considered in *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537 and clarified in *Denton v TH White Ltd and another* [2014] EWCA Civ 906, apply on an application to set aside a DCC.

8. CRP 3.9 reads, insofar as pertinent:

> "(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 –
>
> (a) for litigation to be conducted efficiently and at proportionate cost; and

(b) to enforce compliance with rules, practice directions and orders…"

9. Briefly, the *Denton* test for granting relief is a three-stage test which can be summarised in this way. At the first stage the court considers whether the breach is serious or significant. If it is not, then then relief from sanctions will usually be granted and it will usually be unnecessary to spend much time on the second or third stages. If it is, then they will assume greater importance.

10. The second stage is to consider whether there is good reason for the default. At the third stage the court will consider all the circumstances of the case in order to deal with the application justly, including, by reference to CPR 3.9, (a) the need for litigation to be conducted efficiently and at proportionate cost and (b) the need to enforce compliance with rules, directions and court orders.

The Facts

11. The Claimant served a Notice of Commencement and a Bill of Costs on 3 January 2020, just over two months outside the period provided for by CPR 47.7. On 16 January the parties agreed a 21-day extension of time for service of points of dispute, to (by my calculation) 14 February 2020.

12. The way in which things then went wrong for the Defendant, as Paying Party, is explained in a witness statement from Mr Philip Gaskell, a costs draftsman and director of QM Legal Costs Solutions Ltd ("QM Costs"). Mr Gaskell had initial responsibility for the preparation of the Defendant's points of dispute. His evidence is, to my mind, as frank and clear as he can make it. He does not shrink from acknowledging failures of case management. Mr Gaskell has been unable to be entirely precise about dates, as he has been unable to locate the paper file for the relevant period, but his account of events has been filled out to some extent by copy correspondence and attendance notes supplied by his opponent.

13. Although I have no witness evidence from the Claimant and I did not see the documents supplied by the Claimant until after the hearing, there is no objection to my taking those documents into account. That is on the understanding that I have not seen all the correspondence, much of which is privileged. It would appear that throughout the period leading up to the Claimant's application for a DCC the parties were in negotiation and that Mr Gaskell's approach to time limits was to an extent influenced by his hope that costs would be agreed.

14. Mr Gaskell explains that he has combined management and work handling roles since a management buyout in March 2019. His workload in both roles had been high from the outset, but increased substantially in late January 2020 and into February 2020, due to the convergence of many important and urgent tasks. By the second week in February 2020 he found himself unable to complete his workload in accordance within the applicable time limits. This was exacerbated by the need to take three days' leave in early February to care for his two-year-old daughter, whose usual carer was unwell.

15. Mr Gaskell found it difficult to reallocate tasks, as there had been a spike in work across his organisation. In most of his cases he had already undertaken substantial

work, so that reallocation would require substantial reading-in time and duplication. He started work on the points of dispute but due to pressure of work had not completed them by the agreed date. However with a further interim payment due, he thought that there was a reasonable prospect of obtaining a further extension and of reaching agreement on the amount of costs to be paid.

16. In the final two weeks of February 2020, Mr Gaskell remained extremely busy, combining the preparation of points of dispute with client-facing management tasks and the overseeing of a Lexcel (professional quality standard) audit. By 24 February, Mr Gaskell says, the second interim payment had still not been received by the Claimant and no further extension had been offered.

17. I understand that to be offered by way of explanation for Mr Gaskell's not requesting a further extension. In fact he seems to be doing himself a disservice, because the Claimant has produced an attendance note made by Mr Gaskell's opponent, Mr Oldale, recording agreement to a second extension to 28 February. The understanding was that a second interim payment of £120,000 would be received by the Claimant by 21 February, failing which the Claimant would retain the right to interest on its costs during the two-month period of delay in serving the bill.

18. That note is consistent with a further note made by Mr Oldale, timed at 4.18 pm on 28 February and recording a conversation in which Mr Oldale advised Mr Gaskell that he would that day be filing a request for a DCC.

19. Mr Gaskell says that he had avoided missing any other deadlines but realised that he would be unable to continue to do so. By 28 February, some of his colleagues had the capacity to assist him and the decision was made for him to focus on management tasks. He reallocated several high-value files to other colleagues, including this case. His instructions in this case were to complete the points of dispute and revert to him with an application to set aside the DCC as soon as it was received. He passed the physical files, and his instructions, to his administrative department, to be reallocated.

20. Mr Gaskell says that he had assumed that a DCC would be issued within a few days of the request made by the Claimant and that he was aware that points of dispute would not be capable of being served until the DCC was set aside. However, for reasons unknown to him, the DCC took over three months to be processed. There was no further contact from the Claimant until after it had been issued, in the sum of £363,695.28, on 16 June 2020 (I take that date from the court file).

21. In the meantime, the Defendant's file had not been properly allocated within QM Costs. Mr Gaskell had not been aware of this because, in early March 2020, he had been moving from one urgent task to the next and this case was no longer on his task list. Under normal circumstances he believes that the reallocation error would have been identified by late March, but QM Costs went into lockdown on 17 March. QM Costs continued to be busy, and as a small business had to cope with moving from having 5% of work undertaken by staff working from home to 95%. That was particularly difficult because 70% of the files worked on were paper files. QM Costs experienced decreased working hours and increased levels of work throughout the lockdown period. He himself, and his spouse, both continued to work through lockdown but also had to care for their daughter an additional 3 ½ days a week. At the

start of lockdown he had already been working long hours and it had not been possible to maintain pre-lockdown levels of productivity. That made the lockdown extremely busy and stressful.

22. As a result, the reallocation error which led to points of dispute not being prepared was not discovered until the DCC was issued. Mr Gaskell's evidence is that the certificate was received by the Defendant's representatives on 16 June 2020, but in fact it appears to have been sent to them by DX, under cover of a letter dated 18 June. It was then that Mr Gaskell found that the paper file could not be located and that the file on the case management system had not been transferred to a new file handler.

23. I should interrupt the narrative at this point to say that I have reviewed the court's electronic CE-File. It would appear that a first attempt was made to request a DCC, dated 8 June 2020, on 10 June 2020. The DCC actually sealed is a slightly amended version of the 8 June draft. It is dated 10 June. It has a seal bearing that date but was, judging from the court file and a "date received" stamp on my paper copy of the certificate, was actually filed on 16 June.

24. After receiving the DCC and realising what had happened, Mr Gaskell recommenced preparation of the Point of Dispute, making it necessary for him to reread four boxes of papers. Access to the papers was itself restricted due to QM Costs' lockdown policy of allowing only one person to attend its offices per day. Mr Gaskell experienced some difficulty in finalising the points of dispute, finding (in his view) that the way in which the Claimant had divided the bill did not accurately reflect the differences between budgeted and billed costs. There were also some technical difficulties with typing. Attempts, in the meantime, to settle were unsuccessful.

25. In a letter of 6 July 2019 to the Claimant's representatives, QM Costs set out a number of arguments in support of the proposition that there is a good reason why the detailed assessment proceedings should continue and requested that the Claimant consent to setting aside the Default Cost Certificate on the basis that the Defendant would pay the fixed costs and court fees attendant upon obtaining it. In the absence of a response by 10 July 2020, the Defendant indicated that an application would be made to set aside. The Claimant did not agree.

26. Mr Gaskell prepared the application on 15th July and attempted to file it electronically, in accordance with the SCCO's Practice Note on Electronic Working. This was the first application he had filed electronically, and he undertook multiple searches of the HMCTS CE-Filing Service for details of the DCC using the parties' details and the SCCO reference for the DCC, which was the only document that had been received from the SCCO. Having spent several hours trying all available searches and possible ways of locating details of the application without success and researching how to file the application online, he could find no obvious way in which to file the application, even with the help of several discussions with SCCO court staff. He was advised that only cases with an 'SC-2020' reference could be filed at the SCCO and he could not identify any such reference in this case.

27. Accordingly, Mr Gaskell prepared a hard copy of the application on 17 July 2020. It was posted to the SCCO on that date. The papers were subsequently rejected and

returned, no doubt because of the requirement for electronic filing. It was received by QM Costs on 3rd August 2020.

28. Again, Mr Gaskell spoke to several clerks at the SCCO and was advised that paper applications were not accepted. Following several further calls he obtained confirmation that the case did have an appropriate reference and, having been given that reference, file the application electronically. It was rejected again, on the basis it did not contain the Claimant's representatives' details, although he believes that it did, and in any case their details are included on the DCC, which is on the SCCO's CE-File.

29. Mr Gaskell filed the application again on 26 August 2020, this time successfully.

The Defendant's Submissions

30. Mr Innes for the Defendant submits that there is uncertainty over whether the *Mitchell* and *Denton* principles apply. The authorities relied upon by those seeking to apply that test are often taken from decisions on setting aside default judgments under CPR 13.3, because of the similarity between the language in that rule and the provisions for setting aside DCCs. CPR 13.3 provides that the court may set aside or vary a valid default judgment if the defendant has a real prospect of successfully defending the claim or it appears to the court that there is "some other good reason" why the judgment should be set aside. The court must have regard, as with applications to set aside DCCs, to whether the application was made promptly.

31. In *Tideland v Westminster City Council* [2015] EWHC 2710 (TCC), at paragraph 16, Edwards Stuart J, on an application to set aside a default judgment, recorded that the parties were agreed that the court should adopt the approach appropriate to an application for relief from sanction.

32. In *Kavuma v Hunt* [2018] 12 WLUK 119 Mr Mark Cawson QC, sitting as a Deputy High Court Judge, applied the *Denton* test for relief from sanction. Mr Innes, who appeared for the applicant in that case, tells me that the applicant accepted, on the basis of *Tideland*, that the *Denton* principles applied.

33. However in *Cunico Marketing FZE v Daskalakis* [2019] 1 WLR 2881, Andrew Baker J considered, at paragraphs 38 to 41, whether the approach to relief from sanctions under *Denton* was applicable to an application to set aside judgment. He considered that there was no authority binding him on that it was, and that it would be open to him to take the opposite view, for the reasons that he set out in paragraph 39:

> "… because the availability of a judgment under Part 12 carries with it the availability of an order under Part 13 setting such judgment aside. That is to say, the burden, by way of sanction upon the defendant, of a default judgment regularly entered, is the obligation to persuade the court that there is a real prospect of successfully defending the claim (or other good reason for there not to be summary disposal), and that the just result is therefore that the default judgment be set aside. In the latter respect, the discretion is unfettered, except (if this be a fetter) that CPR r 13.3(2) enjoins the court to

> consider as one relevant factor whether the application to set aside was made promptly. To make an application to set aside under CPR r 13.3, accepting and seeking to discharge that burden, to my mind is to accept and operate under the CPR sanction for the original procedural default, not to ask for relief from it."

34. On that basis the Defendant submits that the test for relief from sanctions is not applicable, although it also submits that the DCC should be set aside even if that test is applied.

35. Applying the tests at CPR 47.12 and Practice Direction 47 paragraph 11, Mr Innes submits that there is good reason to set aside the default judgment because the draft points of dispute accompanying the Defendant's application show that a substantial reduction could be achieved on the Bill in the detailed assessment.

36. The Bill claims £363,549.28. Points of principle taken by the points of dispute include these:

> (a) in the first budgeted period of 10 November 2017 – 5 February 2019 the Claimant exceeded the budgeted costs of £56,143.67 by £27,102.04. Further, the Defendant submits that there is good reason to depart downwards from the costs budget in some phases because a significant element of the budgeted work had not actually been undertaken;
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> (b) in the second budgeted period, the Defendant submits that the Clamant is 127% over budget for the ADR phase, as the Claimant has incorrectly excluded from that phase £18,599.32 for a Joint Settlement Meeting. It follows that there is good reason to depart downwards from the budget because very little of the budgeted work was undertaken;
>
> (c) the Claimant instructed solicitors in the City of London; this was not City work and the rates of up to £476 for a partner were excessive;
>
> (d) the costs claimed incorporate significant irrecoverable duplication between a US attorney and the Claimant's UK solicitors;
>
> (e) the bill includes costs of travel to the United States of approximately £29,000. A costs management order of Master Thornett of 15 February 2019 recorded that the court was not persuaded as to the need for attendance on the Claimant in the United States by legal advisers in this jurisdiction but noted that this was a matter for detailed assessment.

37. As for whether the present application was made promptly, the court should consider only the period from the date that the Defendant learned of the DCC. Earlier inactivity is the same default which led to the DCC being issued. Taking that into account would entail penalising the Defendant twice for the same default (*Tideland* at paragraphs 17 to 20 and 31 to 34).

38. Mr Innes submits the Defendant did act promptly once aware of the DCC. The court should proceed on the basis that the application was made on 17 July 2020, since that

was the date when the application was sent to the court. In relation to the period between 15 July and the application being accepted by the court on 26 August 2020, the court should exercise its powers under CPR 3.10 to determine that any error of procedure does not invalidate any step taken in the proceedings, given the efforts which Mr Gaskell was making.

39. If the court does apply the *Denton* criteria, Mr Innes submits that relief should be granted here. It is accepted that the breach was significant and serious, and that the explanations for it do not amount to a good reason. The Defendant therefore relies on the third stage of the test in *Denton v TH White* [2014] 1 WLR. It is submitted that it would be just to grant relief in all the circumstances. The breach was inadvertent. There is no other history of default by the Defendant and no hearing date has been affected. The Claimant delayed commencing detailed assessment by a good two months. The delay for 3 months in the Default Certificate being granted was not the fault of the Defendant. The effect of refusing relief would be to deprive the Defendant of the opportunity of challenging and potentially achieving a substantial reduction in the costs claimed by the Claimant.

40. The Defendant has not ignored its liability, but has made payments on account of £220,000; if the detailed assessment proceeds but the Bill is assessed in a greater sum, the Claimant will be compensated for any delay by the receipt of interest.

The Claimant's Submissions

41. Ms McDonald for the Claimant argues that as the application to set aside the DCC neither mentions nor specifically addresses CPR 3.9, there is no application for relief from sanction before me and it follows that the application must be dismissed.

42. That aside, the default was she says serious, significant and inexcusable. QM Costs is a national firm of Costs Lawyers who advertise their ability to deal with costs claims of any complexity, quantum and volume. They had almost two months to prepare the points of dispute and they were specifically notified, at the end of that period, of the Claimant's intention to apply for a DCC.

43. Nonetheless they did not apply to set aside until 17 July 2020, and even then the application was deficient and returned by the court. It was not made promptly, and it was not served until 20 August.

44. There is no good reason for the default. Work pressure, family commitments and administrative failures cannot furnish a good reason.

45. It would not be just to grant relief. The Claimant has had the benefit of a DCC since 10 June 2020. The Claimant cannot be compensated for losing that benefit. There have been multiple breaches of the rules by a national firm of costs lawyers. The technical issues raised by the Point of Dispute are insufficient to merit setting aside the DCC. They do not outweigh the significant delay.

46. Ms McDonald refers me to the facts of *Kavuma v Hunt*, of which only a summary is available to me. In that case the applicants, a husband and wife and their son, applied to set aside a DCC obtained by the respondent trustee in bankruptcy. On 15 December

2017 the trustee had served on the applicants a notice of commencement for the assessment of the costs of the proceedings. points of dispute were due by 8 January 2018. Around that time, another son of the husband and wife was dangerously ill in a Scottish hospital with leukaemia and the applicants were granted an extension of time for serving points of dispute to 2 March. The applicants failed to serve points of dispute and on 6 April the respondent obtained a DCC for the full amount claimed. On 1 June the son died from leukaemia.

47. An application to set aside the DCC was not made until 26 October, notwithstanding that the applicants had, on 8 August, obtained a stay of other proceedings on the basis that they would make such an application by 22 August.

48. The application was refused. It had not been made promptly. The court had regard to CPR r.3.9 and the three-stage relief from sanctions test in *Denton v TH White Ltd*. The failure to serve points of dispute was a serious and significant breach. The applicants had relied on their personal circumstances, particularly the son's illness and death, as providing a good reason for the failure to comply. However the applicants had obtained a two-month extension for serving points of dispute but had then failed to comply with it. While there was a good reason for the delay until July or August, none existed beyond then and no explanation had been given. The court also found it difficult to see, even giving due credit to the applicants' acting as litigants in person for significant parts of the litigation, why no application had been made within a few weeks of the 8 August order. Rather than prepare the application within the time allowed, the applicants had made other applications.

49. In considering all the circumstances of the case, the court also had regard to the fact that there had been previous delays and other procedural failings by the applicants in the course of the proceedings. A case for setting aside the DCC had not been made out.

Conclusions: Some Points of Principle

50. I should address first the proposition that this application must be dismissed because it is not framed as an application for relief from sanction. It seems to me that that is plainly wrong. CPR 47.12 and the accompanying Practice Direction set out the procedure for an application to set aside a DCC and the criteria to be applied upon such application. They have not been abolished and replaced with CPR 3.9. The application must be made under CPR 47.12 and the extent to which the criteria for relief from sanctions apply to it is, as Mr Innes points out, open to argument.

51. In any case one looks at the substance of the application, not the way in which it is worded. Mr Innes has also referred me to *Cutler v Barnet LBC* [2014] EWHC 4445 (QB): the court could grant relief from sanctions of its own motion if the overriding objective justifies it.

52. Equally, it seems to me to be obviously wrong to measure the promptness of the application to set aside by reference to the fact that points of dispute were due by 28 February. This is to confuse the period of default with the promptness of the application, as Edwards-Stuart J put it in *Tideland*, to "visit the defendant with a sanction twice over for the same offence".

53. An application to set aside a DCC, self-evidently, cannot be made until a DCC has been issued. On the evidence the Claimant did not apply for this DCC until 10 June. That aside, basic fairness requires that the promptness of the application be measured by reference to the point at which the paying party knew, or should have known, that the certificate had been issued. In this case that would have been within one or two days after it was sent to QM Costs by DX on 18 June.

54. Nor is it appropriate to refer to the agreed extended time for serving points of dispute as a factor that weighs against the application to set aside. Evidently the Claimant's representatives thought it reasonable that the Claimant should have until 28 February to serve, or they would not have agreed to it. That agreement was made as part of a bargaining process in which the Claimant's own delays were taken into account. It is not open to the Claimant to reopen the agreement now.

Conclusions on the Application of Practice Direction 47 Paragraph 11.2

55. Turning to the criteria set out at Practice Direction 47 paragraph 11.2, I start with whether this application was made promptly, measuring that from the date upon which the Defendant became aware that an application needed to be made.

56. Practice Direction 47 paragraph 11.2 expressly requires that an applicant file with the application a copy a draft of the points of dispute. Between about 19 June and 17 July 2020 Mr Gaskell had to obtain the papers, re-familiarise himself with a substantial case and complete the exercise of drafting points of dispute with which, plainly, he had not got to grips in February.

57. I agree with Mr Innes that it would be inappropriate to overlook Mr Gaskell's attempts to file the application from 15 July 2020. The SCCO's CE-filing system is still relatively new and as I know from experience, does not always function perfectly. Mr Gaskell's difficulty in obtaining the right reference to allow him to file his application (because the DCC reference and the CE-File reference do not match) is a fairly typical example of the sort of problem that arises with a new system. He should have been able to obtain the correct file reference without difficulty or delay but, through no fault of his own, he could not. Had he been able to do so, the application would have been filed on 15 July. I accept that it was made as promptly as he could reasonably manage.

58. As for whether there is good reason that a detailed assessment should proceed, the points of dispute are not, as Ms McDonald describes them, "technical". There are substantial challenges to a very substantial bill, and on many applications to set aside a DCC that would be decisive. I must bear in mind, however, that I have never seen a bill as drawn by a receiving party that is not, at least on a standard basis assessment, open to substantial challenge. Whether that furnishes sufficient reason for the detailed assessment to continue will, in my view, depend on the circumstances.

Conclusions on the Application of the *Denton* Criteria

59. In exercising any power conferred by the Civil Procedure Rules, including the power to set aside a DCC, CPR 1.2 requires the court to give effect to the overriding

objective at CPR 1.1, which requires that cases be dealt with justly and at proportionate cost. That expressly, includes ensuring that cases are dealt with expeditiously and fairly, and enforcing compliance with rules, practice directions and orders.

60. It seems to me that this is the primary reason why (although this is not, strictly speaking, an application for relief from sanctions) the *Denton* criteria must have a bearing on this application. CPR 3.9, in referring to the need for litigation to be conducted efficiently, and the need to enforce compliance with rules, practice directions and orders, repeats key provisions of the overriding objective. *Denton* offers essential guidance on how those provisions are to be applied.

61. I also bear in mind that CPR 47.9(3) does impose a sanction on a paying party that serves points of dispute late, albeit in time to prevent the issue of a default costs certificate. That party may not be heard further in the detailed assessment proceedings unless the court gives permission.

62. As I read it, that rule does not prevent reliance on the points of dispute themselves: otherwise, CPR 47.9(5) would not prevent the issue of a default costs certificate in those circumstances. Nor do I believe that CPR 47.9(3) is meant to have any application once a DCC has been issued: in such circumstances, points of dispute cannot be served until the DCC has been set aside, and if that happens the court will provide for the points of dispute to be served and for the detailed assessment to proceed in the usual way.

63. The rule does, nonetheless, impose an automatic sanction, and where it applies the late-serving party will have to meet the *Denton* criteria in order to be heard. Even given that the penalty imposed by CPR 47.9(3) is less than that represented by a DCC, it seems to me that a party who serves points of dispute in time to prevent the issue of a DCC should not, on order to obtain relief, have to meet a stricter test than a party who fails to do so.

Conclusions on Setting-Aside

64. It is accepted that the Defendant's default was serious and significant, nor does the Defendant attempt to argue that there was good reason for it. The remaining question is whether it would be just, bearing in mind all the circumstances of the case, to set the DCC aside.

65. I do not think that it is entirely fair to attempt to equate this case with *Kavuma v Hunt.* In that case, the applicants had been given a clear opportunity by the court to make an application to set aside within a specified period, and had simply failed to do it until well over two months later. In this case, Mr Gaskell got to work on the problem as soon as he became aware of it.

66. The facts of this case nonetheless bring to mind paragraph 34 of the judgment of The Master of the Rolls and Lord Justice Vos in *Denton*, and in particular the court's consideration of the rationale behind CPR 3.9, which was introduced in 2013 (following Sir Rupert Jackson's December 2009 report) in order to address a "culture of non-compliance", Referring to (a) the need for litigation to be conducted efficiently

and at proportionate cost and (b) the need to enforce compliance with rules, directions and court orders, they observed:

> "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. What troubles me about this particular case is that, between mid-February and mid-March 2020 when lockdown started, it was allowed to drift into default without any effective action being taken either to avoid default or to remedy it at the earliest possible time.

68. Mr Gaskell does not say that he had overlooked the need to serve points of dispute within the agreed period of extension. Evidently he was overworked, but equally evidently he felt obliged, as a matter of practice management, to give other matters priority: there is a certain irony in his citing the need to oversee a professional standards audit as an explanation for allowing a crucial time limit to expire.

69. I do not mean to underestimate the difficulties faced by Mr Gaskell, but he was not without options in February and March 2020. Given that agreement to a further extension after 28 February was not likely to be forthcoming then if he were simply unable to prepare points of dispute in time, the obvious step would I suggest have been to apply to the court for an extension, making arrangements in the meantime for them to be prepared before the application was heard. I appreciate that Mr Gaskell's workload was heavy, but the application in itself need not have been a very time-consuming exercise. Making it before the extension period had expired would also have put paid to any argument about relief from sanction.

70. I do not say that the application would necessarily have been successful, but if the court had been presented with an explanation of the difficulties and a timeframe within which points of dispute would be forthcoming, I think it probably would. It would at least have set a timeframe to focus minds and to allow something effective to be done. More to the point, it would have put the matter in the hands of the court, rather than accepting default, and in consequence the likely issue of a DCC, as a fait accompli.

71. In the event no such application was made, but action could still have been taken to remedy the default at the earliest possible time. This case was, on Mr Gaskell's evidence, the only case handled by QM Costs on which default had arisen and he had been given fair warning that application would be made for a DCC. One would expect therefore that this case would have been treated as exceptionally urgent, with a view to ensuring that, even if points of dispute could not be served in time to prevent issue of a DCC, at least an application to set aside could be made within the shortest practicable period. If that had been done, then substantial progress should have been

made towards completion of the points of dispute by the time QM locked down on 17 March, with the work continuing during lockdown, at least with sufficient speed to prevent issue of the DCC in mid-June. Instead, the case was allowed to go entirely adrift. Lockdown then exacerbated the effect of failures that had already occurred.

72. I appreciate that the issue of a DCC in early March, rather than mid-June, might well have brought the case back into focus for QM, although (as Mr Oldale had already given fair warning of his intention to apply) it is not evident to me that it necessarily would have done. In any case, it was not the Claimant's responsibility to remind the Defendant of its own default.

73. In summary, default and the issue of a DCC seems to have been accepted as a fait accompli and the application to set aside treated as a routine administrative matter, rather than being prioritised sufficiently to prevent its going astray, as it did. It was partly the result of subsequent unfortunate circumstances that the default extended as long as it did, but all of that was preventable, and not enough was done to prevent it.

74. Had the Claimant received the Points of Dispute by the end of February, as agreed, she would have been in a position to request a detailed assessment hearing with a view to the assessment being completed within about 6 months. I appreciate that it is possible that this might not have been done promptly: the timing of the DCC suggests that the Claimant's representatives were having their own problems. It is not, however, for me to speculate on that. The Claimant would have had a right to expect that her representatives would request a hearing with reasonable speed, and I have no good reason to suppose that they would not have done so.

75. By the time Mr Gaskell contacted the Claimant's representatives to invite them to agree to setting aside the DCC, over four months had passed. The Claimant was not only being asked to relinquish the DCC but to accept an avoidable delay of over four months to a process that should have been completed in six. One can hardly be surprised that she refused. That avoidable delay, and the way in which it was allowed to come about, have led me to the conclusion that I should refuse this application.

76. It is not an answer to that to say that the Claimant will be compensated by receiving interest on the unpaid part of her costs. She should not be kept out of her money for any longer than is necessary and she is entitled to a hearing as soon as reasonably possible. A delay of over four months is not, in all the circumstances, acceptable given the prejudice to the Defendant and the need for the expeditious administration of justice.

77. I have given some thought to whether it is fair to count against the Defendant the fact that even had the application been filed on 15 July, it would have been unlikely to come before me for hearing until the six months in which the Claimant might have hoped for a hearing had passed (I leave out of the reckoning both the delay in filing the application after 15 July, which is not the Defendant's fault, and the time it has taken me to prepare this judgment). I tend to treat the period needed to list and hear a set-aside application as neutral, even where, as here, the application has been reasonably resisted. In the circumstances of this case I think that it is fair to take it into account, because the conduct of the case on the Defendant's behalf made the

issue of an application, and the attendant delay, inevitable. Certainly from the Claimant's point of view it adds to the prejudice.

78. I appreciate that refusal to set aside will almost certainly result in the Claimant recovering more than would have been the case had there been a detailed assessment, but as I have observed that may not be decisive. One must look at all the circumstances. Both the failure to serve points of dispute within the agreed period and the subsequent mismanagement of the file were, by an objective standard, negligent. The loss of the opportunity to challenge the bill is the result of that negligence. DCCs are often entered as a result of negligent omission, and that in itself need by no means be fatal to an application to set aside, but in my view there are cases in which the application of the overriding objective and the balance of fairness require that the consequences of negligence must be borne by the negligent party. This is one of them.

79. It seems to me that if I am to place appropriate weight on the importance of dealing with cases expeditiously, of complying with rules, practice directions and orders, and of the inevitable prejudice to the Claimant on setting aside the DCC, this application must be refused.