Neutral Citation Number: [2017] EWHC 1223 (TCC)

Case No: HT-2016-000363

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice

Rolls Building, Fetter Lane, London, EC4A 1NL

Date: 26 May 2017

Before:

THE HON MR JUSTICE COULSON

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Between:

Redbourn Group Limited **Cla**

- and -

Fairgate Development Limited **Defe**

- -

- -

Mr Benjamin Fowler (instructed by **Taylor Walton LLP**) for the **Claimant**

Mr Simon Hale (instructed by **Debenhams Ottaway Solicitors**) for the **Defendant**

Hearing Date: 19 May 2017

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Judgment Approved

The Hon. Mr Justice Coulson :

1. INTRODUCTION

1.
On 9 March 2017, the claimant ("RGL") obtained judgment in default against the defendant ("FDL"). By an application dated 14 March 2017, FDL sought to set aside that judgment pursuant to CPR r. 13.3. The application was opposed by RGL. There are four relevant witness statements, three of which have been served in the last few days. The hearing on 19 May took the full half day that had been allowed and I was obliged to reserve judgment.

2.
I set out an outline chronology in **Section 2**. I detail the applicable principles of law in **Section 3**. I deal with whether or not FDL has demonstrated a realistic prospect of successfully defending this claim and/or whether there is some other good reason to set aside judgment in **Section 4**. I address whether the application to set aside was made promptly in **Section 5**. I then go on to analyse the

seriousness of FDL's failure and the reasons for that failure in **Section 6**. In **Section 7** I consider all the circumstances of the case. There is a short summary of my conclusions at **Section 8**.

2. OUTLINE CHRONOLOGY

3.
FDL appointed RGL to act as development and project manager in respect of a proposed development at 390-406, Wembley High Road. The proposed development involved three adjoining but distinct parcels of land: FDL's own building; the next door building, Pitman House, which FDL had bought but which was still tenanted; and the land at the back of both buildings, which was owned by Network Rail ("NWR"), but which was the subject of a proposed long lease to FDL.

4.
The contract between FDL and RGL was dated 26 February 2015, although it is common ground that RGL had performed some services prior to that date. The contract envisaged that, amongst other things, RGL would assist FDL in obtaining vacant possession of Pitman House, and negotiating the terms of the lease with NWR for the land at the back.

5.
The relevant terms of the contract included:

(a)
Clause 2, which obliged RGL to exercise the reasonable skill, care and diligence to be expected of a competent professional development manager in carrying out the services in accordance with the contract;

(b)
Clause 4, which dealt with remuneration by reference to schedule 4 of the contract;

(c)
Clause 7, which dealt with termination and gave each party the right to terminate if the other failed to remedy a material breach within 14 days of notification;

(d)
Schedule 3, which set out the services to be performed by RGL.

6.
In February 2016, the contractual relationship between the parties came to an end. Each side says that the other wrongly repudiated the contract. The complaints made by FDL about RGL's performance were set out in a letter of 24 February 2016, which I address in greater detail below.

7.
On 6 May 2016, RGL's solicitors sent a detailed letter of claim identifying specific sums due under the contract and noting that a future claim would be made for the damages caused by FDL's wrongful repudiation of the contract. FDL's solicitors replied on 17 May in relatively brief terms. RGL's solicitors sent further letters on 19 and 28 July 2016, which provided particulars of the fee claim and set out details of the damages claim. They also set out a full response to the general allegations of breach that had been made by FDL. In reply, on 29 July, FDL's solicitors said that they were still investigating FDL's own claim, and sought to dissuade RGL's solicitors from commencing adjudication proceedings. A fuller response was provided by FDL's solicitors on 28 September 2016, in which they again indicated that they were still assessing FDL's losses due to RGL's termination. This letter, the most

detailed ever provided on behalf of FDL, made no criticisms of RGL that had not already been stated in the letter of 24 February.

8.
RGL served the particulars of claim in draft on 16 November 2016. FDL's solicitors did not reply until 1 December 2016, and then merely said that they were taking instructions. Hearing nothing further, RGL's solicitors commenced these proceedings on 23 December.

9.
The particulars of claim set out the claims for unpaid invoices and also the claim for damages arising out of the repudiation. It is common ground that, pursuant to the CPR, a defence had to be served by 25 January 2017. Mr Love, FDL's solicitor, said that he became aware of the claim on 3 January, but he did not seek any extension of time for the service of the defence until 20 January. He then sought an extension of time of 28 days (i.e. up to 22 February 2017) from RGL's solicitors.

10.
Mr Haider, the solicitor acting for RGL, replied on 24 January, refusing to agree to an extension of 28 days, but offering an extension of 7 days, until 4:00pm on 1 February. Mr Love then had a choice: he either had to agree to the 7 day extension offered by Mr Haider or, since time otherwise expired on 25 January, he had to make an immediate application to the court for a longer extension. In fact, he did neither. Instead he waited until 1 February 2017 (the extended date offered to him by Mr Haider which he had not accepted) and then made a formal application to the court for an extension of time until 22 February.

11.
At paragraph 16 of his second statement, Mr Love accepted that "at this point I erred in that I mistakenly thought that the application would be listed in any event without further input on my part. I now appreciate that I misunderstood how the CE Portal operated and this was my error for which I apologise." Whilst I do not criticise Mr Love for this initial error, I consider that his witness statement is disingenuous and misleading. The documents show that Mr Haider expressly warned him by letter on 13 February that he needed to be proactive in order to fix a hearing date. Mr Love makes no mention of that letter in his statement, probably because he did nothing at all about it.

12.
The period for which FDL had sought an extension expired at 4:00pm on 22 February. No defence or counterclaim was served during that period. There was no communication of any kind between Mr Love and either the court or Mr Haider (other than Mr Haider's letter of 13 February, which Mr Love ignored). Accordingly, on 23 February, RGL applied to the TCC for judgment to be entered in default. I considered that application on the papers on 9 March 2017. Because FDL had failed to file a defence in the extended period which they themselves had sought, or in the two weeks thereafter, I entered judgment in default.

13.
On 14 March 2017, FDL made an application to set aside that judgment, supported by a short statement from Mr Love. Mr Haider responded on 10 May 2017. It was not until 11 May that FDL purported to serve a defence and counterclaim. This was followed by a second, more detailed statement from Mr Love of 15 May, purporting to deal with the merits of FDL's position. Since this contained matters which had never before been raised, I permitted RGL to rely on a subsequent statement from Mr McGovern, dated 16 May 2017, in response. Mr McGovern had been closely involved in all the relevant events on behalf of RGL.

3. THE APPLICABLE PRINCIPLES

14.
In my view, two parts of the CPR are relevant to this application. They are r.3.9 (relief from sanctions) and r.13.3 (setting aside judgment).

15.
Rule 3.9 provides as follows:

"**3.9 - Relief from sanctions**

3.9 (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.

(2) An application for relief must be supported by evidence."

16.
Rule 13.3 provides as follows:

"**13.3 - 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 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 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."

17.
There was some debate in the original skeleton arguments as to whether r.3.9 was relevant to an application under r.13.3: Mr Fowler, on behalf of RGL, said that it was; Mr Hale, on behalf of FDL, said that it was not. My view, prior to being shown any authorities, was that r.3.9 was plainly relevant to any application to set aside: after 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. That initial view found some support in the notes at paragraph 13.3.5 of the White Book and the decision of HHJ Richardson QC (sitting as a High Court Judge) in **Hockley v North Lincolnshire and Goule NHS Foundation Trust**, 19 September 2014 (unreported).

18.
However, it subsequently became apparent that the relevance of r.3.9 to any application under r.13.3 has been specifically endorsed by the Court of Appeal in **Gentry v Miller**[2016] 1 WLR 2696, an

important authority not referred to in either counsel's skeleton argument and, more significantly, not referred to in the notes in the White Book under r.13.3 (an omission which should be rectified in the next edition). In **Gentry**, Vos LJ said:

"23. It is useful to start by enunciating the applicable principles. Both sides accepted that it was now established that the tests in **Denton's** case [2014] 1 WLR 3926 were to be applied to applications under CPR r.13.3: see paras 39–40 of the judgment of Christopher Clarke LJ in **Regione Piemonte v Dexia Crediop SpA**[2014] EWCA Civ. 1298, with whom Jackson and Lewison LJJ agreed. It seems to me equally clear that the same tests are relevant to an application to set aside a judgment or order under CPR r 39.3.

24. The first questions that arise, however, in dealing with an application to set aside a judgment under CPR r.13.3 are the express requirements of that rule, namely whether the defendant has a real prospect of successfully defending the claim or whether there is some other reason why the judgment should be set aside, taking into account whether the person seeking to set aside the judgment made an application to do so promptly. Since the application is one for relief from sanctions, the tests in **Denton's** case then come into play. The first test as to whether there was a serious or significant breach applies, not to the delay after the judgment was entered, but to the default in serving an acknowledgement that gave rise to the sanction of a default judgment in the first place. The second and third tests then follow, but the question of promptness in making the application arises both in considering the requirements of CPR r 13.3(2) and in considering all the circumstances under the third stage in **Denton's** case."

19.
Denton v TH White Limited[2014] 1 WLR 3926 is the leading case on relief from sanctions, and is the source of the three stages noted by Vos LJ in **Gentry**, namely: the identification and assessment of the seriousness or significance of the failure (stage 1); the reasons why the failure or default occurred (stage 2); and all the circumstances of the case (stage 3).

20.
In the present case, therefore, it is necessary to consider, first, the two elements of r.13.3(1) and then the three stages referred to in **Denton**.

4. REALISTIC PROSPECT OF SUCCESS

4.1
Common Ground

21.
It is common ground that judgment was entered in default of service of a defence. It is also common ground that the judgment was regularly obtained. Thus, on behalf of FDL, Mr Hale accepted that the only basis for the application to set aside judgment is CPR r.13.3(1).

4.2
The Applicable Test

22.
The test is the same as that which applies on an application for summary judgment: the defendant must demonstrate that it has a "realistic" prospect of success. That means that its defence must be shown to carry some degree of conviction, and must be more than merely arguable: see **ED & F Man Liquid Products v Patel**[2003] EWCA Civ. 472.

23.
A helpful exposition of what is required when applying that test can be found in the decision of Lewison J (as he then was) in **EasyAir Limited v Opal Telecom Limited**[2009] EWHC 339 (Ch) at paragraph 15:

“15. As Ms Anderson QC rightly reminded me, the court must be careful before giving summary judgment on a claim. The correct approach on applications by defendants is, in my judgment, as follows:

i) The court must consider whether the claimant has a "realistic" as opposed to a “fanciful” prospect of success: **Swain v Hillman**[2001] 1 All ER 91;

ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: **ED & F Man Liquid Products v Patel**[2003] EWCA Civ. 472 at [8]

iii) In reaching its conclusion the court must not conduct a “mini-trial”: **Swain v Hillman**

iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: **ED & F Man Liquid Products v Patel** at [10]

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: **Royal Brompton Hospital NHS Trust v Hammond (No 5)** [2001] EWCA Civ. 550;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: **Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd**[2007] FSR 63;

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: **ICI Chemicals & Polymers Ltd v TTE Training Ltd**[2007] EWCA Civ. 725.

24.

It will be seen from this that, although the court must be careful not to embark on a detailed 'mini-trial', it ought to test the assertions being made by the party seeking, in this case, to set aside judgment, to see if they have any real substance, and/or whether they are contradicted by contemporaneous documents. It is also necessary to see whether a further opportunity to put in further evidence and/or documents would or could make any difference.

25.
Before coming to FDL's prospects of success on the specific points raised in its defence, it is necessary to deal with three general matters going to the heart of the reliability/credibility of the proposed defence: the delays; the changes in personnel; and the draft defence and counterclaim itself.

4.3
Delays

26.
I have outlined the delays above. In my view, FDL have had repeated opportunities to set out their defence and their positive case on the alleged repudiation which, even at the eleventh hour, they have failed to take. This inevitably casts doubt on the credibility of their entire defence and counterclaim.

27.
These delays also go to the question of whether or not FDL should be granted a further opportunity to put in more evidence and/or documents. Most of the potential disputes in this case turn on the circumstances in which the contract came to an end, and that is where FDL, as the employers, ought to have taken the initiative months ago. How and why they decided to dispense with RGL's services is their chosen battleground, and they have had over a year to get a coherent case together on that topic. But despite all that time to prepare, I consider that, for the reasons noted below, the material which FDL have been able to produce is wholly unpersuasive. In those circumstances, there is nothing to indicate that giving them still further time would make any difference to the outcome.

4.4
Changes in Personnel

28.
FDL also have a major problem in relation to the source of any relevant information to support their position. Mr Love's second witness statement indicated that all of the relevant personnel at FDL involved in this contract at the time are no longer there. The principal individual with any real knowledge of what happened, Simon Everett, was admitted by Mr Hale to be "a bad leaver", and is not going to be of any assistance to FDL. As a result of these defections, Mr Love said that reliance has had to be placed on FDL's CEO, Chief Labode Akindele. But it is accepted that he was not involved in the day-to-day progress of the proposed development, and it is not clear how (if at all) he has actually been able to help. On the basis of Mr Love's second witness statement, therefore, there does not appear to be anybody at FDL (or anyone willing to help them) who can provide the necessary evidence to contradict RGL's evidence and, in particular, the statement of Mr McGovern (who was involved in the detail) and the content of the contemporaneous documents.

4.5
The Draft Defence and Counterclaim

29.

Related concerns affect the draft defence and counterclaim (which was not drafted by Mr Hale). Although a few positive averments are made there, it mainly consists of bare denials and non-admissions. There is no pleading of any factual framework beyond that identified by RGL in the particulars of claim, and some important parts of RGL's claim are not even addressed. The source of the few positive averments is nowhere identified. In my view, a defendant in FDL's position is required to do much more than is apparent from this evasive defence and counterclaim if it wants to persuade the court to set aside judgment.

30.
Thus the delays and the absence of any detailed evidence from those involved at FDL (the effect of which is apparent on the face of the draft defence and counterclaim) strongly suggest that FDL does not have a defence with a realistic prospect of success. In my view, that is then borne out by a consideration of the individual issues.

4.6
Individual Issues

4.6.1
Issue 1: The Claim for Unpaid Fees

31.
RGL claim £84,012 odd by way of unpaid fees. There was a dispute about whether or not the Scheme for Construction Contracts applied to this claim for the purposes of regulating instalments, but Mr Fowler properly accepted that the argument does not have a realistic prospect of success. In any event, given that the contract came to an end over a year ago, it seemed to me that the instalment debate was entirely academic. The real issue is whether or not there is a defence to RGL's claim for the fees which they say had accumulated at the time the contract was terminated.

32.
All but one of the invoices relate to stages 3 and 4 of the work, identified in schedule 4 of the contract. These invoices are for a part of what is described in that schedule as "a fixed fee of £200,000 to be paid monthly over the planning and initial design for tender periods. The approximate timeline for this is anticipated to be August 2014-April 2016." At paragraph 24(c)(i) of the defence and counterclaim, the claim is denied because planning permission for the proposed development had not been obtained. I deal separately, at **Section 4.6.3** below, with whether or not FDL has any prospect of sustaining the criticism of RGL in relation to the absence of planning permission.

33.
But irrespective of that point, I find that paragraph 24(c)(i) could not be a defence to this claim in any event. The entitlement to the fixed fee of £200,000, in respect of which these invoices arise, had nothing whatsoever to do with the obtaining of planning consent. It was simply a monthly fee. Schedule 4 stated that there was a separate entitlement to a further £200,000 which was payable on the granting of full planning consent, but that entitlement is not the basis of the claimed invoices.

34.
Thus the only pleaded defence to this claim in principle is bound to fail. It is based on an irrelevance. In those circumstances, I find that there is no realistic prospect of defending the claim underlying these invoices. Moreover, since judgment has been entered on liability only, with damages and quantum to be assessed, any particular points that FDL might wish to take about the individual sums that have been invoiced can be dealt with at that stage.

35.
That leaves the claim in relation to invoice 2135. That relates to the work done by RGL obtaining the surrender of the leases at Pitman House. The only pleaded defence to this claim is that, at the time that the invoice was issued, not all the leases had been surrendered. That is in dispute. However, Mr Hale fairly conceded that, whatever the position at the time of the invoice, all the leases have now been surrendered. Thus it seems to me that there is a prima facie entitlement to the sum claimed on invoice 2135. Again, the pleaded defence to that claim does not have any realistic prospect of success.

4.6.2
Issue 2: RGL's Case on Repudiation

36.
RGL's case as to the repudiatory breach on the part of FDL is set out at paragraphs 35-42 of the particulars of claim. In essence, they rely on four matters which meant that, by the end of February 2016, FDL had evinced an intention to abandon or not perform the contract. They were:

(a)
The failure to respond to RGL's communications prior to 24 February 2016;

(b)
The instruction of Hamilton Associates to replace RGL;

(c)
A meeting on 19 February 2016 between FDL and the architects to discuss the planning issues, from which RGL were excluded;

(d)
The letter of 24 February 2016 which, for the very first time, made allegations about RGL's performance of the contract and which, on analysis, were unsustainable.

I deal with each allegation in turn below.

37.
The allegation that FDL stopped communicating with RGL in 2016 is not denied by FDL in the draft defence and counterclaim. That document purports to take a point that RGL's pleading is embarrassing for want of particularity, but that is an absurd suggestion in circumstances where what is being alleged is FDL's wholesale failure to communicate with RGL. That is not capable of further particularisation. No communications are pleaded or relied on by FDL as part of any positive case in response.

38.
On the other hand, the contemporaneous material attached to Mr McGovern's witness statement makes clear that RGL were chasing Mr Everett at this time without success: see for example the email of 16 February 2016. This is important because, at that stage, FDL had made no criticism of RGL's performance. I consider, therefore, that this first element of the repudiation case relied on by RGL has been made out and there is no realistic prospect of any other result.

39.
This conclusion is supported by the second element of RGL's repudiation case, namely the appointment of Hamilton Associates. FDL admit that they appointed Hamilton and that they were doing the work which RGL had been contracted to do. Although it is suggested that they were

appointed because of RGL's poor performance, there can be no realistic prospect of that allegation succeeding in circumstances where, at the time that Hamilton Associates were appointed, it had never even been suggested to RGL that, in some way, they were not performing properly.

40.
On the third element, the response to RGL's allegations about the meeting with the architects to which RGL were not invited (paragraphs 28 and 29 of the defence and counterclaim) is evasive and elliptical. It appears that the fact that such a meeting took place is agreed, but there may be an issue about the date. Again, the essence of RGL's complaint does not appear to be denied.

41.
As to the fourth element of RGL's case, it appears to be common ground that the first time a complaint was made by FDL was in their letter of 24 February 2016. That was some time after the appointment of Hamilton Associates (albeit that FDL have carefully declined to give the precise date of their appointment) and not later than the meeting from which RGL had been excluded. The letter of 24 February 2016 is the only contemporaneous complaint that FDL made, and it is RGL's case that the points made in the letter are unsustainable. If I conclude that FDL has no realistic prospect of maintaining any of the allegations in the letter (as modified by the draft defence and counterclaim), then FDL's application to set aside judgment must fail. I turn to address that crucial issue.

4.6.3
FDL's Case on Repudiation

42.
FDL's case on repudiation is based entirely on the letter of 24 February 2016, although they do seek to put some of those allegations in the defence and counterclaim in a slightly different way. I bear in mind both documents when dealing with the four elements of FDL's repudiation case.

43.
As set out in the letter of 24 February, the first allegation was that RGL were in breach of contract because they had failed to obtain planning permission by December 2015. That allegation is no longer pursued because it is accepted that there was no contractual obligation to achieve planning permission by that date. That of course already raises a difficulty for FDL because it means that, on their own case, they brought the contract to an end by relying on an allegation which they now admit was unsustainable.

44.
FDL now say that the criticism is that RGL were in breach for failing to make a planning application in respect of the proposed development by December 2015. There is no pleaded explanation, and no evidence, as to how and why an application should have been made by that time and what RGL failed to do in the months beforehand which led to this alleged breach. Such particulars are necessary if an allegation of professional negligence is to have a realistic prospect of success. Moreover, this allegation has been comprehensively dealt with by Mr Fowler in his submissions and rejected by Mr McGovern in his witness statement. Mr McGovern's evidence is supported by the contemporaneous emails.

45.
The position as to planning was that, in May 2015, new architects were appointed to design the proposed development. The emails make plain that, at this time, RGL were dealing with Brent, the relevant local council. RGL advised the new architects that they would have to set up a meeting with

Brent Council so that the planning aspects of the proposed development could be progressed. No criticisms were made of RGL's conduct in respect of the planning process at that point, or at any time prior to the contract coming to an end in February 2016.

46.
RGL expressly plead that the advice they gave the architects about liaising with Brent Council was precisely the same as the advice which FDL later gave the architects at the meeting in February 2016 from which RGL were excluded. That averment is not addressed at all in the defence and counterclaim. Again it supports the proposition that RGL had done all they reasonably could do in respect of the planning issue.

47.
Furthermore, it is plain on the face of the evidence that it would have been wholly impossible for an application for planning permission to have been made in December 2015 (the unexplained date alleged by FDL) because of the state of the negotiations with NWR about the lease of the land at the back of the site. That leads on to a consideration of the second element of FDL's repudiation case.

48.
FDL's second argument is that RGL failed to obtain a satisfactory long lease with NWR. FDL allege that there was an implied term that the lease should have been obtained timeously and it is said that RGL were in breach of that term because there was no such lease in place by February 2016. Again, as with the preceding allegation, the date relied on by FDL appears to have been plucked out of the air.

49.
In my view this allegation fails at every level. First, there was no such obligation under the terms of the contract. Schedule 3, the list of services to be provided by RGL, described the relevant obligation as:

"Meet with and negotiate with Network Rail and its representatives to secure arrangements for a new 150 year lease to be granted on the rear Network Rail land car park."

Accordingly, an implied term imposing any particular deadline by which the lease had to be obtained is inconsistent with the general nature of RGL's express obligation. If it is said that the failure was one to take reasonable care, then proper particulars of what RGL failed to do, when and why, must be set out if the allegation is to have a realistic prospect of success. Again, no such particulars are provided.

50.
Moreover, the evidence in Mr McGovern's statement, again supported by the contemporaneous documents, is that at the outset it looked as if an agreement with NWR could be reached fairly promptly (see the email of 26 January 2015). But thereafter, NWR became involved in a strategic review of their position, and the negotiations became more protracted, through no fault of RGL. Mr McGovern emailed NWR's surveyors in October 2015 to note "the huge frustration" arising from NWR's delays.

51.
Accordingly, on any view of the contemporaneous material, RGL were doing their best, but the difficulties being created by NWR's change of approach made the negotiations of the lease a much slower exercise than had been envisaged. RGL cannot in law be responsible for the duration of negotiations with a third party over which it had no control.

52.
That conclusion is supported by other contemporaneous documents which indicate that the delays in these negotiations were also the responsibility of FDL. Mr McGovern referred to an email from Mr Everett of 20 November 2015 in which Mr Everett identified his detailed concerns with the latest version of the lease being proposed by NWR. The hardening of FDL's own position was subsequently confirmed by Mr McGovern's subsequent email of 16 February 2016 in which he referred to the possibility that "the Chief [the CEO of FDL] has decided not to do a deal with NWR".

53.
Accordingly, FDL have no realistic prospect of being able to demonstrate that there was either a relevant term of the contract, or that RGL were in breach of that term, relating to the progress of the negotiations with NWR concerning a new lease. That of course also affects the preceding allegation, concerned with the alleged delay in obtaining planning permission, because it is self-evident that, if FDL were not in possession of the whole site, they could not seek or obtain planning permission for a development relating to that whole site. That was the view that both RGL and FDL apparently had at the time. Indeed, that is why, at one point, a smaller scheme – confined to the FDL building and Pitman House, both owned by FDL – was mooted. That goes to the third allegation relied on by FDL in support of their repudiation case.

54.
The third allegation is that this lesser scheme was commercially unviable. It is said that therefore RGL were in breach of an implied term that they were obliged only to produce a scheme that was commercially viable.

55.
There are a series of insurmountable problems with this allegation. First, the smaller scheme was put forward at the request of FDL: the email from Mr McGovern to Mr Everett of 18 November 2015 makes that crystal clear. FDL have no real prospect of being able to argue that RGL were in breach of contract for producing a scheme which they themselves had requested.

56.
Second, there is no evidence whatsoever to suggest that the lesser scheme was not commercially viable. That is an assertion on the face of the defence and counterclaim with no supporting particulars at all. Given the length of time that has expired since this allegation was first made, I am not prepared to accept this bare assertion in the absence of any other particulars or evidence to support it.

57.
Moreover, as Mr Fowler pointed out, the only evidence on this point was that the scheme was commercial viable. The letter sent by FDL's solicitors on 28 September 2016 said that the smaller scheme would generate a profit of £8 million. On the face of it, therefore, it was commercially viable.

58.
There was a suggestion that, in some way, this scheme was being advanced by RGL as a replacement of the more detailed scheme based on the entirety of the site. The contemporaneous documents make it plain that this was not so: for example, RGL's email of 19 January 2016 emphasises that, in addition to the lesser scheme, RGL were still working and attempting to progress the principal scheme, including the NWR land.

59.

Further and in any event, I accept Mr Fowler's submission that this alleged breach could have caused no loss. The lesser scheme was never ultimately progressed.

60.
For all these reasons, I conclude that the third element of FDL's case on repudiation has no realistic prospect of success.

61.
The final limb of FDL's case on repudiation is that, although RGL obtained surrenders of the leases on Pitman House, they obtained them too early, in circumstances which caused FDL loss. As I pointed out to Mr Hale, not entirely in jest, it is rare in the TCC for a complaint to be made that something happened too soon.

62.
In my view the allegation is hopeless. First, the surrenders were obtained early on, pursuant to the contract. At the time that the surrenders were obtained, no criticism was made of RGL. That is the best possible evidence that FDL were happy with what had happened.

63.
Secondly, on the question of timing, the surrenders were obtained at a time when, because of the initial progress in the negotiations with NWR, the development was on track and could well have started relatively promptly. Thus, even if there was some sort of implied term that the surrenders would be obtained in accordance with the development timeline, the leases were surrendered in accordance with that timeline as it then was. It was only as a result of the subsequent delays (which were not RGL's responsibility, for the reasons set out above) that the timeline changed.

64.
Finally, I note that the particulars of claim expressly justified the time at which the surrenders were achieved, on the basis that otherwise the tenants would have found out about the development and been less easy to negotiate with as a result. On its face, that is a good point, yet it is entirely ignored in the defence and counterclaim. I can only assume that FDL have no answer to it.

65.
For those reasons, I consider that the fourth and final element of FDL's repudiation claim is hopeless.

4.7
Summary

66.
For the reasons set out above, I consider that FDL has no realistic prospect of defending this claim in principle or making any counterclaim on its own behalf. The most I am prepared to do is to accept that there may be arguments about quantum, both in relation to RGL's fee claim, and their claim for damages for wrongful repudiation. Those can be dealt with at a quantum hearing. They are not reasons to set aside the judgment entered in default.

4.8
Some Other Good Reason

67.
On the face of the application, FDL also seek to set aside the judgment on the basis that there is some other goods reason for that. Paragraph 11 of Mr Hale's skeleton argument makes plain that this is not

FDL's primary argument but stressed that it is not withdrawn or abandoned. The difficulty with this, as he fairly accepted at the outset of his oral submissions, is that no separate argument or issue has been identified as arising under this head. The only issue raised is whether or not FDL have a realistic prospect of successfully defending the claim. There is nothing else.

5. DID FDL ACT PROMPTLY?

68.
In accordance with r.13.3(2), the next issue is whether FDL applied promptly to set aside judgment.

69.
In my view, no criticism can be made of FDL on the narrow issue as to the timing of their application to set aside judgment. Judgment was entered on 9 March 2017 and their application to set aside was dated 14 March 2017. But it is artificial simply to consider that time period only: after all, it costs very little to make an application to set aside judgment. Moreover, in this case, Mr Love's supporting statement was so devoid of detail that, if the application to set aside could have been accommodated immediately by the court, it would have failed.

70.
In my view, the real issue is whether FDL acted promptly after judgment was entered, up until the hearing on 19 May. In my view, on a proper analysis, they did not.

71.
FDL said that they needed until 22 February 2017 to serve a defence and counterclaim. They did not serve the document during that period, with the result that judgment was entered in default. When they applied to set that judgment aside on 14 March, 3 weeks after the date they had originally asked for, they should have attached the draft defence and counterclaim to the application to set aside. No reason has been advanced as to why they did not do so, or why the draft defence and counterclaim was not in fact provided until 11 May 2017.

72.
FDL's lack of promptness can be tested in this way. According to the CPR they should have served a defence on 25 January 2017, in respect of events which are now between one and two years old, by reference to a claim made in some detail in the correspondence almost a year ago. So, if judgment is now set aside then it means that, without advancing any explanation, reason or apology (save for the irrelevant apology noted at paragraph 11 above), FDL will have obtained a de facto extension of over three and a half months, from 25 January until 11 May 2017. No such extension would have been granted to them if they had applied for it in the ordinary way. FDL cannot now be in a better position because of their wholesale failure to comply with the CPR.

73.
Similarly, as already noted, the application to set aside would have failed if the application could have been accommodated by the court at the end of March. So FDL are relying on the state of the court lists in order to provide material, such as the draft defence and counterclaim and the second statement of Mr Love, at the very last gasp before the hearing. Both these aspects of FDL's conduct lead me to conclude that they have not acted promptly under r.13.3(2).

74.
It follows that, for the reasons set out in **Sections 4 and 5** above, I will exercise my discretion in RGL's favour under r.13.3, and I will not set aside the judgment in default. However, in case I am

wrong on either of the two elements in r.13.3(1) and (2), I go on to address the three stages of **Denton** (seriousness of failure, the reason for it, and all the circumstances of the case).

6. SERIOUSNESS OF FAILURE AND REASONS FOR IT

75.
In my view, FDL's failure in allowing judgment in default to be entered was serious. They knew they had to serve a defence and counterclaim by 25 January 2017. They did not even seek an extension until 20 January and then, when they were offered an extension which they did not consider long enough, they did not make any application to the court until after the time for service had expired (1 February).

76.
More seriously still, they did not serve a defence and counterclaim during the period which they themselves had indicated was long enough to allow them to prepare the document. The 22 February 2017 date came and went without any communication from FDL at all. Indeed, such remained the position on 9 March, when the absence of any defence and counterclaim, or any other communication from FDL or their solicitors, caused judgment in default to be entered. As already noted, the draft defence and counterclaim was not served until 11 May.

77.
Turning to stage 2 as identified in **Denton**, what are the reasons for these serious failures? The short answer is that there are none. Neither of Mr Love's witness statements provide any explanation at all for:

(a)
Why he did not indicate that he required any extension of time prior to 20 January 2017, having become aware of the claims 17 days before;

(b)
Why he did not make an application to the court immediately on receipt of Mr Haider's offer of a 7 day extension only;

(c)
Why he waited until 1 February 2017 before making an application to the court;

(d)
The basis on which he believed he could produce the defence and counterclaim by 22 February;

(e)
Why the defence and counterclaim was not served on 22 February: in other words, what went wrong which meant that Mr Love's own date could not be met;

(f)
Why he did not communicate with either Mr Haider or the court between 1 February 2017 and 9 March 2017, when judgment was entered;

(g)
Why a draft defence and counterclaim was not served until 11 May 2017, 11 weeks after the extended date which he himself had sought.

78.

The only points raised by Mr Love in addressing delay can be found at paragraphs 5-10 of his second witness statement. These paragraphs detail the various personnel that have left FDL overt he last year or so. I have already dealt with this, because of the difficulties that it creates for FDL in terms of the overall reliability of their defence, at paragraphs 28-29 above.

79.
But these paragraphs do not explain the delays between January and May 2017. Mr Love makes plain that the two critical personnel who knew about the detail of the case, Mr Everett and Mr Howes, both left FDL in March-April 2016. Thus their departure can have nothing to do with the delays over the last few months and, in particular, FDL's failure to meet its own requested extension of 22 February 2017. Although there is a reference to Mr Pervez leaving in February 2017, Mr Love accepts that he was the financial controller and did not have any detailed knowledge of the construction aspects of the project.

80.
Given the seriousness of the delays, the court is bound to take a very adverse view of Mr Love's wholesale failure to explain each of the matters noted in paragraph 77 above. It is always incumbent upon a solicitor seeking relief from sanctions to explain why something is late or why a proffered date could not in fact be met. On that topic, an analogy can be drawn with the recent trend in cases concerned with late amendments, such as **Su-Ling v Goldman Sachs International**[2015] EWHC 759 (Comm), where Carr J made plain that, on the recent authorities, the absence of a proper explanation for delay will often, without more, lead to the application to amend being refused.

81.
I then turn to consider all the circumstances of the case, having reached adverse conclusions to FDL on stages 1 and 2 as identified in **Denton**.

7. ALL THE CIRCUMSTANCES OF THE CASE

82.
I have already dealt with the delays since the commencement of the proceedings and whether FDL acted promptly in applying to set aside judgment. As to the other delays, there was a good deal of evidence about the parties' respective conduct in the lead-up to these proceedings which I have summarised in paragraphs 7 and 8 above. In essence, I consider that proper notification of the fee claim was given in May 2016 and the damages claim in July 2016. I consider that no substantive response was provided by FDL until September 2016, and that even then important information, such as the alleged losses said to flow from RGL's breaches, was not identified, although it had been repeatedly promised.

83.
In those circumstances, RGL were quite entitled to commence proceedings in December 2016. Those proceedings have of course been marked by the serious and significant delay on the part of FDL, leading to judgment in default. I note that the defence and counterclaim contained no particulars of any kind of FDL's damages claim for repudiation, despite the repeated promises that such information would be provided last year. Thus a consideration of all the circumstances of the case leads to a conclusion adverse to FDL.

84.

Accordingly, even if I was wrong on either of the elements of CPR r.13.3, I would conclude that, in accordance with **Denton**, FDL have not made out a case to be granted relief from sanctions. So the application to set aside judgment would still fail.

8. CONCLUSIONS

85.
For the reasons set out in **Section 4** above, I conclude that FDL have no realistic prospect of defending this claim in principle or advancing their own counterclaim. I accept that the calculation of the precise fees due and the assessment of any damages as a result of FDL's repudiation of the contract is a separate matter to be addressed at any quantum hearing.

86.
For the reasons set out in **Section 5** above, I accept that the application to set aside was made promptly. But I find that that application was inadequate on its face and was only rendered even arguable by the material provided from 11 May onwards. In those circumstances, I do not consider that FDL acted promptly.

87.
That is sufficient to resolve this application against FDL. But in case I am wrong on either of the elements of CPR 13.3, I have addressed the elements relevant to relief from sanctions under CPR 3.9. For the reasons set out in **Section 6** and **7** above, I find that each of the three stages identified in **Denton** and **Gentry** lead to conclusions adverse to FDL. I am particularly struck by the complete absence of any explanation – let alone excuse – for any of the relevant delays. Those would separately lead me to exercise my discretion against FDL and to refuse to set aside judgment.

88.
For all those reasons, therefore, I decline to set aside the judgment in default. I will deal with all consequential matters at a date convenient to counsel.