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# Say what?!

# Gentry v Miller & UKI [2016] EWCA Civ 141, or How the Court of Appeal learned to stop worrying about allegations of fraud and love the Rules


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### Introduction

In a recent decision the Court of Appeal has brought into stark relief the consequences of failing to comply with the Rules. Even where fraud is alleged. Even where there is a lot of money involved. And, just so we are clear, the Mitchell/Denton criteria apply to CPR 13.3 applications to set aside default judgment and CPR 39.3 applications to set aside judgment or order where a party failed to attend.

### Facts

On 17 March 2013 the Claimant/Appellant and Defendant driver collided. The Claimant's Range Rover was written off. Storage and credit hire charges began to accrue. Portal proceedings were issued. On 02 April the Defendant Insurer – UKI – admitted liability and paid Stage 1 costs. On 08 April the Claimant sent UKI a letter asking for PAV of £16,000 and drawing attention to hire charges. Numerous chasers followed. UKI did… effectively nothing, though did on 02 July query the Claimant's notice of intention to issue proceedings.

On 03 July proceedings were issued and served on the Defendant driver only. On 08 August judgment in default of acknowledgment of service was obtained. In late August UKI voluntarily paid £14,000 and made a part 36 offer in respect of general damages. On 26 September, following application by the Claimant for an interim payment, the Defendant was ordered to pay a further £2,000 damages plus costs, which UKI duly paid on 15 October.

On 17 October, at a disposal hearing, the Claimant was awarded £75,089 and costs of £12,945. The Defendant driver did not attend.

Having been sent the disposal order UKI instructed solicitors, Keoghs.

A number of applications were made. On 25 November Keoghs, then for the Defendant driver, filed a 13.3 application to set aside the judgment in default. On 10 February 2014 Keoghs made a further application to cease to act for the Defendant driver and join in UKI. Fraud was alleged between the Claimant and Defendant driver, now putative First Defendant. On 26 February, UKI, now Second Defendant having been joined as a party, applied under 13.3 to set aside the default judgment of 08 August 2013 and under 39.3 to set aside the damages order of 26 September 2013.

UKI were successful, before a district then circuit judge. The matter came before the Court of Appeal.

**Judgment**
First, the Court of Appeal stated clearly that, on application under either 13.3 or 39.3, the 3-stage Denton test is required in combination with and following the requirements of those rules. They are, in essence, applications for relief from sanctions.

Second, the Court of Appeal considered the correct approach on applications to set aside where fraud is alleged. The decision is clear: There must be finality in litigation and rules must be obeyed. A default judgment cannot be set aside as a matter of course just because an arguable fraud is alleged long after judgment.

Quite how long is too long was formally left open. In *Gentry* the Court of Appeal effectively gave UKI its two best dates – 19 September 2013, the date upon which UKI received costs schedules for the then upcoming disposal hearing, and 25 November 2013 when the first application was made to set aside. This period, of more than 2 months, in the context of the overall history, was not prompt.

There is a further point. The Court of Appeal held it could not "*ignore that insurers are professional litigants, who can properly be held responsible for any blatant disregard for their own commercial interests*" [at paragraph 34].

Then this, at paragraph 42; "*Mitchell and Denton represented a turning point in the need for litigation to be undertaken efficiently and at proportionate cost, and for the rules and orders of the court to be obeyed. Professional litigants are particularly qualified to respect this change and must do so. Allegations of fraud may in some cases excuse an insurer from taking steps to protect itself, but here this insurer missed every opportunity to do so. It admitted liability before satisfying itself that the claim was genuine, perhaps because it mistakenly thought the claim was a small one. That does not excuse the months of delay that then followed. The insurer must in these circumstances face the consequences of its own actions.*"

**Comment**
This is strong stuff.

First, it is helpful to have clarity over the use of the Denton criteria in other elements of the CPR.

Second, it might be thought that this decision is favourable for claimants. The question of set aside is more usually one for defendants. The application of the Denton tests to such applications will probably make claimants slower to acquiesce to defendant requests absent good reason and promptness.

Particularly since, if not in this case, then when? Keep in mind the Court of Appeal accepted UKI had an arguable case for the fraud allegation, in respect of a £75,000 hire claim and £16,000 PAV.
Third, it is the notion of the "professional litigator" which will probably do most mischief. Of course each claimant is lay. But claimant solicitors are not. No special rule or opprobrium was carved out for insurers here. We all have to get better at complying with rules and court orders. We have known this now for several years.

Finally then; *Gentry* at first sight might seem astonishing. It should be no such thing.

**Andrew Perfect**

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