AN UPDATE ON SANCTION FOLLOWING THE MITCHELL DECISION

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Introduction

1. At this talk last year I spoke about the general hardening of attitude of the courts in refusing to grant relief from sanction. This followed on from the decision in *Mitchell v. News Group Newspapers Ltd* [2013] EWCA Civ 1537 where the question foe the Court of Appeal was to decide how strictly should the courts enforce compliance with rules, practice directions and orders in the light of the changes made to CPR r 3.9? The traditional approach of the civil courts on the whole was to excuse non-compliance if any prejudice caused to the other party could be remedied (usually by an appropriate order for costs). The Woolf reforms attempted to encourage the courts to adopt a less indulgent approach. In his Review of Civil Litigation Costs, Jackson LJ concluded that a still tougher and less forgiving approach was required. His recommendations were subsequently incorporated into the CPR.

2. This note will now look at the developments since last February 2014 and where we are now.

The CPR

3. The new CPR r 3.9 states:-

> "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."

The Jackson Report

4. The amendment to CPR r 3.9 followed the recommendations made in Sir Rupert Jackson's Final Report Ch 39. At para 6.5, he said:

> *"First, the courts should set realistic timetables for cases and not impossibly tough timetables in order to give an impression of firmness. Secondly, courts at all levels have become too tolerant of delays and non-compliance with orders. In doing so, they have lost sight of the damage which the culture of delay and non-compliance is inflicting upon the civil justice system. The balance therefore needs to be redressed.*

5. Whilst not advocating the extreme course that non-compliance would not be tolerated save in exceptional circumstances, he did recognise that it was necessary to put in place a stricter regime than that which had evolved under the old CPR r 3.9. He said that the new form of words:

> *"…does not preclude the court taking into account all of the matters listed in the current paragraphs (a) to (i). However, it simplifies the rule and avoids the need for judges to embark upon a lengthy recitation of factors. It also signals the change of balance which I am advocating."*

6. The explicit mention in his recommendations of the obligation to consider the need (i) for litigation to be conducted efficiently and at proportionate cost and (ii) to enforce compliance with rules, practice directions and court orders reflected a deliberate shift of emphasis. The reference to dealing with the case justly is a reference back to the

overriding objective and ensuring that the parties are on an equal footing and that cases are dealt with expeditiously and fairly as well as enforcing compliance with the CPR, practice directions and orders. There is a wider constituency to consider than the parties to the litigation, including other court users.

<u>Where we were - the Mitchell decision</u>

7. The Mitchell decision was the first opportunity for the Court of Appeal to endorse this approach, which it emphatically did, and at the same time provided guidance as to how the courts should approach applications for relief from sanction.

8. Andrew Mitchell (C) issued proceedings against News Group (D) alleging defamation. The proceedings were subject to CPR PD51D Defamation Proceedings Costs Management Scheme, which required that the parties had to exchange and lodge their costs budget not less than seven days before the date of the hearing for which the costs budget was required. D filed its costs budget within the prescribed period. However C did not file his costs budget until the day before the case management and costs budget hearing. As a result, at that hearing, the Master stated that there was insufficient time to consider C's budget. Solicitors acting for C informed the Master that the reason why the budget had not been filed until the previous day was due to pressure of litigation elsewhere in the firm. The Master held that there was a mandatory sanction that, where a party failed to file a costs budget within seven days prior to the date of the first hearing, the party was deemed to have filed a budget that was limited to court fees. Accordingly, by her first judgment, the Master made an order to that effect. The Master permitted C to apply for relief from sanctions at a further hearing. C duly applied for relief pursuant to CPR r 3.9, submitting that D had suffered no prejudice as a result of the Cs defaults and that, if relief were refused, D would receive a windfall in the form of costs protection. The Master considered the changes to CPR r 3.9, which had followed the 'Jackson report', and held that the new overriding objective and wording in CPR 3.9 highlighted the emphasis to be placed on rule compliance. The Master held that, applying the stricter approach to CPR 3.9, the application for relief from the sanction imposed in her earlier decision would be dismissed. C appealed. The Court of Appeal dismissed the appeal and in doing so laid down the following principles on applications for relief from sanction.

9. It will usually be necessary to have regard to the nature of the non-compliance. If this can properly be regarded as trivial, the court will usually grant relief provided that an application is made promptly. Thus, the court will usually grant relief if there has been no more than an insignificant failure to comply with an order: for example, where there has been a failure of form rather than substance; or where the party has narrowly missed the deadline imposed by the order, but has otherwise fully complied with its terms. This approach will inevitably lead to more contested applications, even where the breaches can be characterised as minor, with litigants seeking to gain advantage of the stricter post *Mitchell* regime.

10. If the non-compliance cannot be characterised as trivial, then the burden is on the defaulting party to persuade the court to grant relief. The court will want to consider why the default occurred. If there is a good reason for it, the court will be likely to decide that relief should be granted. For example, if the reason why a document was not filed with the court was that the party or his solicitor suffered from a debilitating illness or was involved in an accident, then, depending on the circumstances, that may constitute a good reason. Later developments in the course of the litigation process are likely to be a good reason if they show that the period for compliance originally imposed was unreasonable, although the period seemed to be reasonable at the time and could not realistically have been the subject of an appeal.

11. However the mere overlooking a deadline, whether on account of overwork or otherwise, will rarely be a good reason. Lord Dyson in giving the leading judgment in *Mitchell* said:

> *"Solicitors cannot take on too much work and expect to be able to persuade a court that this is a good reason for their failure to meet deadlines. They should either delegate the work to others in their firm or, if they are unable to do this, they should not take on the work at all. This may seem harsh especially at a time when some solicitors are facing serious financial pressures. But the need to comply with rules, practice directions and court orders is essential if litigation is to be conducted in an efficient manner. If departures are tolerated, then the relaxed approach to civil litigation which the Jackson reforms were intended to change will continue."*

12. Applications for an extension of time made before time has expired will be looked upon more favourably than applications for relief from sanction made after the event. The new approach will have regard to a wide range of interests beyond those parties themselves, for example a factor taken into account in *Mitchell* was the inconvenience caused to other court users where a hearing had to be adjourned to accommodate the application for sanction.

Where we got to - cases following Mitchell

13. The courts initially followed the ruling assiduously.

14. In *Durrant v Chief Constable of Avon and Somerset Constabulary* [2013] All ER (D) 186 (Dec) The appellant (D) appealed against a decision granting the respondent (C) relief from sanction for non-compliance with an order requiring service of witness statements by a specified date. D had brought a claim against C alleging, amongst other things, race discrimination and false imprisonment by C's police officers. Witness statements were ordered to be exchanged by January 2013 but C failed to comply. In February 2013, a further date for exchange was set for 12 March 2013 with a sanction that C could not rely on any witness evidence that had not been served by that date. D received two witness statements from C on 13 March 2013. The trial date was set for 10 June 2013. On 10 May 2013, C made an application to the court for relief from sanction to allow him to rely on witness evidence in the claim. C's solicitor stated that she had underestimated the amount of work involved. C then served D with four further witness statements. Five days before the trial was due to start, C made a further application for relief from sanction so as to allow two more officers to be called. The judge dealt with the two applications on the first day of the trial and he granted relief on the basis that, taking into account CPR r.3.9 and all the circumstances, the officers would not otherwise have an opportunity to refute D's serious allegations. The trial was adjourned.

15. On her appeal D submitted that relief from sanction should have been refused in respect of all the witness statements as C had been given a last chance in the February order. C argued that a high threshold had to be crossed for an appeal court to interfere with a case management decision and that the judge had not erred in the factors he took into account.

16. The Court of Appeal held that it would not lightly interfere with a case management decision. However, it was vital that decisions under CPR r.3.9 which failed to follow the robust approach laid down in *Mitchell* should not be allowed to stand. Failure to follow that approach constituted an error of principle which entitled an appeal court to interfere with the first instance judge's discretionary decision and to substitute its own. Relief from sanction was refused in relation to the four witness statements served in May 2013 and the two further witness statements served in June. The two witness statements which were served a day late were also refused. That non-compliance might, taken by itself, be taken as trivial but it became more significant against the background of the failure to comply with the earlier court order and the fact that the February order saw fit to specify a sanction for non-compliance. C's application for relief had not been made promptly and D had been entitled to proceed on the basis that those statements could not be relied on by C.

17. In *Thevarajah v Riordan and others* [2014] EWCA Civ 15 the Court of Appeal overturned a decision of the High Court to grant relief from sanction where the defendants had been debarred from defending as a result of breaching disclosure obligations contained in a freezing order. Subsequent compliance with the order was insufficient and a delay of 7 weeks in making the application was a highly relevant factor and emphasised the need for any application to be made promptly.

18. The following High Court cases have also demonstrated the hardening of attitudes:

    18.1. *SC DG Petrol SRL v Vitol Broking Ltd* and others [2013] EWHC 3920 (Comm). The claimant applied for relief from sanction in the context of failures to comply with orders for security for costs in the Commercial Court. The court, in refusing the applications, held that, overall, taking account of all the circumstances of the case, so as to deal justly with the application, and including the need for litigation to be conducted efficiently and to enforce compliance with orders, it was not an appropriate case in which to extend time further or grant relief from the sanction.

    18.2. *Adlington and others v ELS International Lawyers LLP.* The claimants issued proceedings against the defendant Spanish solicitors' firm for providing professionally negligent legal advice. Eleven claimants out of 184 in total sought relief from sanction for non-compliance with the court's order to file particulars of claim by specified dates. The Queen's Bench Division, in granting the application, held that the failure had been trivial and there had been no adverse consequences. This is a rare case of relief from sanction where the court found that the reasons were outside the control of the claimant’s solicitor, but nonetheless criticised his management of the litigation.

<u>Where we are now</u>

19. It became clear that there was dissent between the High Court judges as to the application of the strict approach adopted by the Court of Appeal, nonetheless the courts did apply the Mitchell decision strictly in the vast majority of cases. This led to parties refusing to co-operate through agreement on the basis that the strict approach to the relief from sanctions by the courts could see them gain considerably from their opponents failure to comply.

20. The matter came back before the Court of Appeal in, *Denton and others v TH White Ltd and another* and 2 joined cases:

    20.1. *Denton* was a case in which the parties had served all their witness statements for use at trial by 27 July 2012, yet the claimant served six further statements in December 2013 one month before the date fixed for a 10 day trial. The further statements were said to be in response to a change of circumstances that had occurred in August 2013. The judge granted the claimant relief from the automatic sanctions in CPR rule 32.10, which provides that: “[i]f a witness statement ...for use at trial is not served ... within the time specified by the court, then the witness may not be called to give oral evidence unless the court gives permission”. As a result the trial had to be adjourned.

    20.2. In *Decadent*, the claimant failed to comply with an order which provided that, unless it paid certain court fees by 4.00 pm on 19 December 2013, its claim would be struck out. A cheque for the full fees was sent to the court on the due date by document exchange, so that it could have been expected to arrive only one day late. In fact, the cheque was lost either in the DX or at court, and the non-payment only came to the attention of the parties when the judge mentioned it at a pre-trial review on 7 January 2014. They were paid on 9 January 2014. The judge refused relief from sanctions on 18 February 2014 and permission to appeal was granted by Davis LJ.

    20.3. *Utilise* is a slightly more complicated case in that two breaches were under consideration. First, the claimant filed a costs budget some 45 minutes late

in breach of an order which specifically made reference to the automatic sanctions in CPR rule 3.14 which provides that: “[u]nless the court otherwise orders, any party which fails to file a budget despite being required to do so will be treated as having filed a budget comprising only the applicable court fees”. Secondly, the claimant was 13 days late in complying with an order requiring it to notify the court of the outcome of negotiations. The District Judge declined to grant relief from the sanctions in rule 3.14, holding that the second breach rendered the first breach, which would otherwise have been trivial, a non-trivial one. The judge on the first appeal held that, despite the fact that the District Judge had been wrong to think that there had been a previous default in filing a costs budget, there was no good reason for him to interfere with the exercise of her case management discretion. Accordingly, the judge dismissed the appeal. Lewison LJ granted permission for a second appeal to be brought.

21. The Master of the Rolls gave the majority judgment. They noted that there had been 3 main criticisms of the *Mitchell* as follows:-

    21.1. The trivial test amounted to an “exceptionality” test which was too narrow:

    21.2. That describing the requirements in r. 3.9(1) CPR as “paramount considerations” downplayed the obligation to consider all the circumstances of the case;

    21.3. The sanction was disproportionate where the breaches would have little practical effect on the course of the litigation. The result was that the defaulting party was left to sue its own solicitors with increased PI costs;

    21.4. Finally it encouraged satellite litigation, discouraged co-operation between parties and led to inconsistent approaches by the courts.

22. The Court laid down a 3 part test:-

    22.1. The first stage is to identify and assess the seriousness or significance of the “failure to comply with any rule, practice direction or court order”. The focus of the enquiry at the first stage should not be on whether the breach has been trivial. Rather, it should be on whether the breach has been serious or significant;

    22.2. The second stage cannot be derived from the express wording of rule 3.9(1), but it is nonetheless important particularly where the breach is serious or significant. The court should consider why the failure or default occurred. This is not a hard-edged concept and will be fact dependent in each case. The court will take into account the impact upon the parties and on other court users.

    22.3. The third stage required the court to consider all the circumstances of the case. A serious breach for no reason was not automatically prevented from attracting relief. Factors (a) and (b) in r.3.9 remained of particular importance and were to be given particular weight at the third stage. Therefore, if the effect of a breach was to prevent the efficient and proportionate conduct of litigation, that would weigh against relief being granted. Likewise, the old lax culture of non-compliance with rules, practice directions and orders was no longer to be tolerated, and compliance had to be considered in every case. However, other relevant factors would also be relevant and would vary on a case-by-case basis. Litigation could not be conducted efficiently and proportionately without fostering a culture of compliance and co-operation. CPR r.1.3 required parties to help the court to further the overriding objective and those who opportunistically and unreasonably oppose applications for relief from sanctions breach that obligation. Where the failure was neither serious nor significant, where a good reason was demonstrated, and where it was otherwise obvious that relief from sanctions should be granted, parties ought to agree that relief should be granted. In any event, extensions of time of up to 28 days ought readily to be given. Contested applications for relief ought to arise only in exceptional cases.

23. The decisions in the 3 cases amply demonstrate the approach to be adopted:-

 23.1. In *Denton* the decision to allow in statements some 1 – 2 months before the trial and leading to the adjournment of that 10 day trial was overturned. The judge's first task was to consider the seriousness and significance of the claimants' breach in filing new witness statements so long after they had been ordered to do so. This was a significant breach, because it caused the trial date to be vacated and therefore disrupted the conduct of the litigation. The next question was whether there was good reason for the breach. There was not. Further the third stage analysis of all the circumstance of the case ought to have weighed heavily in favour of refusing relief from sanctions.
 23.2. In *Decadent* there had been various slippages on both sides. The Court ordered the filing of pre-trial questionnaires and associated fees by 19 December 2013. The checklists were filed on times, but the fees were not paid until 19 December 2013 and were lost. The default came to light on 7 January 2014 and a second cheque was also lost in the post and on 9 January 2014, a partner in *Decadent's* solicitors paid the hearing fee using his credit card. The Court of Appeal found that the failure to pay fees was serious (although near the bottom end of seriousness). However at the third stage, however, the judge should have concluded that factor (a) pointed in favour of relief, since the late payment of the fees did not prevent the litigation being conducted efficiently and at proportionate cost. Factor (b) also pointed in favour of the grant of relief since the breach was near the bottom of the range of seriousness: there was a delay of only one day in sending the cheque and the breach was promptly remedied when the loss of the cheque came to light. Further the defendants ought to have consented to relief being granted so the case could proceed without the need for satellite litigation and delay. The appeal was allowed.
 23.3. In *Utilise* both the filing of the costs budget 45 minutes late (to which sanction applies) and the failure to notify the court of the outcome of settlement negotiations (to which no sanction applied) until 13 days after the date required by the order. At the first stage, the district judge ought to have considered that the delay in filing the costs budget in breach of the October order was neither serious nor significant. On any view, the 45 minute delay was trivial. The breach did not imperil any future hearing date or otherwise disrupt the conduct of this case or of other litigation. Therefore the order was struck out.

24. There was a striking difference between the view of the majority and that of Jackson LJ, dissenting, as to the importance in the third stage of the two factors in r.3.9(1) CPR. Jackson LJ considered that the only requirement is to consider those factors but they have no more importance than any of the circumstances of the case. The majority, quoting back to him passages from his own report that had led to the adoption of the new rule, took the view that those two factors must be given particular weight.

Lessons

25. What is clear is that there is not going to be a return to the pre-*Mitchell* relaxed approach to breaches, but neither will the extreme post-*Mitchell* of nit accepting event the most technical breach be applied. However the following point are worth bearing in mind:-

 25.1. Ensure that a realistic timetable is set at the outset;
 25.2. Make an application for any extension in the period set for compliance;
 25.3. Applications for relief should only be contested in the most exceptional cases, firstly because compliance should become the norm and secondly because parties should avoid satellite litigation. The requirement of stricter compliance is not a trip wire. Opposition could be costly.

25.4. The nearer you are to a trial the less likely relief will be granted and the Court will take into account the hidden costs of adjourning a trial;

25.5. Make an application for relief quickly and as soon as the party becomes aware of the breach – delay will still be a reason for refusing.

26. So whilst there has not be a return to the pre-*Mitchell* days and r.3.9 CPR will be more strictly applied, the current approach will lead to a more just and uniform approach to such applications.

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February 2015

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