

MITCHELL UPDATE

What Relief?

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CPR 3.9: Relief from sanctions

[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

Mitchell v News Group Papers [2013] EWCA Civ 1526

The amendment ‘does not preclude the court taking into account all of the matters listed in [the old] paragraphs (a) to (i)’ (Jackson, Final Report)

But...

‘the relationship between justice and procedure has changed’ (18th implementation lecture)

‘the achievement of justice means something different now’ (ibid.)

Mitchell v News Group Papers [2013] EWCA Civ 1526

In practice:

Was the nature of the non-compliance trivial?

If so, the the court will usually grant relief provided the application was made promptly.

If not, then the defaulting party must show a good reason for the default.

Mitchell v News Group Papers [2013] EWCA Civ 1526

What does 'trivial' mean?

'no more than an insignificant failure to comply with an order'

'a failure of form rather than substance'

'where the party has narrowly missed the deadline imposed by the order, but has otherwise fully complied with its terms'

Mitchell v News Group Papers [2013] EWCA Civ 1526

What is a ‘good reason’?

‘if [...] 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’

Mitchell v News Group Papers [2013] EWCA Civ 1526

‘merely overlooking a deadline, whether on account of overwork or otherwise, is unlikely to be a good reason’

‘good reasons are likely to arise from circumstances outside the control of the party in default’

‘well-intentioned incompetence, for which there is no good reason, should not usually attract relief from a sanction unless the breach is trivial’

Mitchell v News Group Papers [2013] EWCA Civ 1526

‘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’

‘we hope that our decision will send out a clear message’

Forstater v Python (Monty) Pictures Limited [2013] EWHC 3759 (Ch)

- C2 joined as party 24 May 2012
- C2 signed up to original CFA
- Form N251 not served on Ds
- CFA disclosed to Ds in letter 19 July 2012

‘The failure to convey the information until 19 July 2012 probably had an impact on the conduct of the action’

Forstater v Python (Monty) Pictures Limited [2013] EWHC 3759 (Ch)

‘the substance of the rule was [...] complied with’

‘This was a failure (through human error) to comply with a rule of general application; it may be contrasted with a conscious failure to comply with a specific order made in the action itself’

Forstater v Python (Monty) Pictures Limited [2013] EWHC 3759 (Ch)

A trivial breach?

Compliance was late by 2 months and the delay 'probably had an impact on the conduct of the litigation'

A good reason?

Mitchell: 'merely overlooking a deadline [...] is unlikely to be a good reason' and 'well-intentioned incompetence, for which there is no good reason, should not usually attract relief from a sanction'

Forstater v Python (Monty) Pictures Limited [2013] EWHC 3759 (Ch)

‘I have considered [*Mitchell*] but do not wish to revise my judgment which I consider proceeds upon correct principles’

Adlington and others v ELS International LLP[2013] EWHC B29 (QB)

- C cols failed to comply with ‘unless’ order to serve Particulars
- Some Cs abroad or unavailable to unable to sign Particulars

Adlington and others v ELS International LLP [2013] EWHC B29 (QB)

‘the failure in these cases was [one] of form rather than substance, and [...] can properly be regarded as trivial’

Service of the Particulars of Claim ‘only “narrowly missed the deadline”’

‘Application for relief was made promptly’

In any event there was a good reason for the non-compliance: Cs holiday arrangements were outside sols control

Adlington and others v ELS International LLP[2013] EWHC B29 (QB)

‘the “nature” of non-compliance cannot [...] be divorced from consideration of the consequences of non-compliance’

Durrant v Chief Constable of Avon & Somerset [2013] EWCA 1624

CA 'will not lightly interfere with a case management decision'

But 'decisions under CPR 3.9 which fail to follow the robust approach laid down in [*Mitchell*] should not be allowed to stand'

'Failure to follow that approach constitutes an error of principle entitling an appeal court to interfere with the discretionary decision of the first instance judge'

Durrant v Chief Constable of Avon & Somerset [2013] EWCA 1624

Even where non-compliance might in itself be characterised as trivial, it ‘becomes more significant when it is seen against the background’ of a failure to comply with previous orders and where a sanction has been specified for non-compliance

Karbhari and Karbhari v Ahmed [2013] EWHC 4042 (QB)

- Second day of trial
- D sought permission to amend Defence and serve supp. S/M
- Amended Defence wholly different to original Defence
- Supp. S/M acknowledged reason prev. S/M so brief was because D didn't want to get people in trouble for money laundering

Karbhari and Karbhari v Ahmed [2013] EWHC 4042 (QB)

D's breach was 'far from trivial'

'Omitting [...] large volumes of evidence so as to protect people guilty of [the offence of money laundering] on the unwarranted assumption that the case might not come to trial is a thoroughly bad reason'

Permission refused

Defence struck out and judgment for C

Karbhari and Karbhari v Ahmed [2013] EWHC 4042 (QB)

‘There will be other cases in which there are evidential developments which postdate the time at which earlier witness statements have been served’

In such cases ‘this ought to be anticipated in the orders of the court’

Two orders may be made for service of witness statements, inc. a ‘backstop date’ limited to matters arising or discoverable only after the first date, so avoiding the need for applications

Consolidation

R on the application of Royal Free London NHS Foundation Trust v Secretary of State for the Home Department and others [2013] EWHC 4101 (Admin)

Chambers v Buckinghamshire Healthcare NHS Foundation Trust December 18th 2013 (QBD)

Harrison and Harrison v Black Horse [2013] EWHC B28 (Costs)

Long v Value Properties and Ocean Trade January 1st 2014 (Costs)

Consolidation

Thevarajah v Riordan and others [2014] EWCA Civ 14

Webb Resolutions v E Surv [2014] EWHC 49 (QB)

MA Lloyd and Sons v PPC International [2014] EWHC 41 (QB)

Consolidation

Prejudice is no longer a reason for allowing or disallowing an application for relief (*Royal Free London*)

Mitchell isn't a Defendants' charter (*Chambers*)

Mitchell principles can apply even where no sanction is specified and so the application is not technically for relief under CPR 3.9 (*Webb Resolutions*)

Lakatamia Shipping v Nobu Su and others [2014] EWHC 275 (Comm)

- D disclosure 46 mins late
- Could have been 15 mins late if C had agreed to exchange
- Court order was silent on time of day by which disclosure was to be made
- Relevant para. of Commercial Court Guide stated time (1630) if not inc. in order

Lakatamia Shipping v Nobu Su and others [2014] EWHC 275 (Comm)

D's delay was 'measured in minutes not hours', it had "narrowly missed the deadline" (as per *Mitchell*): that rendered it trivial

'That the non-compliance is trivial is also borne out by its effect. It has caused no prejudice'

D's error was 'understandable' given the silence of the order as to the time of day by which disclosure should be made, but that did not constitute a good reason

Summit Navigation and another v various [2014] EWHC 398 (Comm)

- C failed to provide signature for security for costs by deadline (4pm 5 December)
- Signature obtained by 10.01am 6 December
- Stay arose on lapse of deadline
- C applied for stay to be lifted

Summit Navigation and another v various [2014] EWHC 398 (Comm)

Stay constituted a sanction: the latter ‘[includes] any consequence adverse to the party to whom it applies

‘It does not follow [...] that all sanctions are equal and to be treated as equivalent to one another for the purposes of CPR 3.9’

‘The broad language of CPR 3.9 is quite capable of accommodating more than one approach to applications for relief from sanction taking account of the nature of the sanction and the nature of the relief sought’

Summit Navigation and another v various [2014] EWHC 398 (Comm)

The non-compliance was trivial since C had “narrowly missed the deadline” but had otherwise fully complied with the terms of the order (as per *Mitchell* and *Durrant*)

The failure was one of ‘form rather than substance’ (as per *Mitchell*)

In any event there was a good reason since the delay was not due to C or his solicitors

Summit Navigation and another v various [2014] EWHC 398 (Comm)

Further the missed deadline ‘did not in itself have any impact on the efficient conduct of [the] proceedings, nor on the public interest of ensuring that litigants can obtain justice efficiently and proportionately’

Further developments

Even where the non-compliance is trivial, e.g., where a party has narrowly missed a deadline, it might become more significant when seen against the background of other matters (*McTear and Williams v Englehard and others* [2014] EWHC 722 (Ch))

The guidelines in *Mitchell* do not apply to an ‘in-time’ application for an extension of time; such an application should be decided by reference to the overriding objective (*Kaneria v Kaneria and others* [2014] EWHC 1165 (Ch) and *Hallam Estates and Stainer v Baker* [2014] EWCA Civ 661)

Further developments

Even if a party's non-compliance is not trivial and no good reason is forthcoming relief may be granted having regard to all the circumstances of the case (*Chartwell Estate Agents v Fergies Properties and another* [2014] EWCA Civ 506)

In *Chartwell* those circumstances included: both parties were in default, the trial date would not be lost, no significant extra cost would be occasioned, refusal of relief would have amounted to the end of the action

Further developments

‘It is an unfortunate – although it is to be hoped temporary – by-product of the new rule that satellite litigation thus far seems not to have been avoided but if anything seems to have been promoted.’ (*Chartwell*)

Clarification?

Lord Dyson MR heard 3 appeals re. *Mitchell* on 16-17 June:

Utilise TDS Ltd v Davies

Decadent Vapours Ltd v Bevan & others

Denton & others v TH White Ltd and another

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