THE JACKSON REFORMS AND THE MITCHELL DECISION

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Introduction

1. Over the past few months there has been a game changing swing in the way that courts treat applications for relief from sanction for failing to comply with the rules, practice directions and orders of the court. This will not only touch upon those involved in insolvency litigation and may well be reflected in any application to the court to extend time limits contained within the Insolvency Act 1986. Further the general hardening of attitudes may well be reflected in applications such as retrospective sanction.

2. In *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537 the question that the Court of Appeal had to decide was 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.

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:
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> (a) for litigation to be conducted efficiently and at proportionate cost; and
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> (b) to enforce compliance with rules, practice directions and orders."

4. This should be contrasted with the previous version of CPR r 3.9(2), which provided a checklist, which the court had to apply in deciding whether to grant relief from sanction.

> "On an application for relief from any sanction imposed for failure to comply with any rule, practice direction or court order the court will consider all the circumstances including:
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> (a) the interests of the administration of justice;
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> (b) whether the application for relief has been made promptly;
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> (c) whether the failure to comply was intentional;
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> (d) whether there is a good explanation for the failure;
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> (e) the extent to which the party in default has complied with other rules, practice directions, court orders and any relevant pre-action protocol;
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> (f) whether the failure to comply was caused by the party or his legal representatives;
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> (g) whether the trial date or the likely trial date can still be met if relief is granted;
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> (h) the effect which the failure to comply had on each party; and
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> (i) the effect which the granting of relief would have on each party."

The Jackson Report

5. 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.*

6. 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."*

7. 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.

Implementing the changes

8. In *Fred Perry (Holdings) Ltd v Brands Trading Plaza Ltd* [2012] EWCA Civ 224; [2012] F.S.R. 807, CA, at paras 48 and 49). Jackson LJ stressed that the culture of toleration of delay and non-compliance with court orders must stop and that it is vital for the Court of Appeal to uphold robust fair case management decisions made by first instance judges.

9. Lord Dyson MR, in the 18th Lecture in the Jackson Implementation Programme on 22 March 2013, said:

> *"25. In order to achieve this, the Woolf reforms and now the Jackson reforms were and are not intended to render the overriding objective, or rule 3.9, subject to an overarching consideration of securing justice in the individual case. If that had been the intention, a tough application to compliance would have been difficult to justify and even more problematic to apply in practice. The fact that since 1999 the tough rules to which Brooke LJ referred have not been applied with sufficient rigour is testament to a failure to understand that that was not the intention.*
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> *26. The revisions to the overriding objective and to rule 3.9, and particularly the fact that rule 3.9 now expressly refers back to the revised overriding objective, are intended to make clear that the relationship between justice and procedure has changed. It has changed not by transforming rules and rule compliance into trip wires. Nor has it changed it by turning the rules and rule compliance into the mistress rather than the handmaid of justice. If that were the case then we would have, quite impermissibly, rendered compliance an end in itself and one superior to doing justice in any case. It has changed because doing justice is not something distinct from, and superior to, the overriding objective. Doing justice in each set of proceedings is to ensure that*

proceedings are dealt with justly and at proportionate cost. Justice in the individual case is now only achievable through the proper application of the CPR consistently with the overriding objective.

27. The tougher, more robust approach to rule-compliance and relief from sanctions is intended to ensure that justice can be done in the majority of cases. This requires an acknowledgement that the achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations. Those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure their own costs are kept within proportionate bounds. But more importantly they serve the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the court enables them to do so."

The Mitchell decision

10. 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.

11. 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.

12. 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.

13. 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.

14. 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."*

15. 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.

Cases following Mitchell

16. The courts have followed the ruling assiduously.

17. 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.

18. 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.

19. 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.

20. 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.

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

    21.1. *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.

    21.2. *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.

22. There is no doubt that now the Courts will take a far harder approach to breaches of rules, orders and practice direction. In order to maximise the chances of success of any application:

    22.1. If it is clear that a deadline cannot be met make an application for extension of time before the time limit has expired;

    22.2. If possible also get the hearing listed before the time limit has expired (it may be worthwhile considering an application in an urgent list);

    22.3. Consider the wider public interest and try to avoid a hearing already listed being adjourned;

    22.4. At all times try to be realistic about deadlines, build in time to enable reasonable compliance and take contingencies into account;

    22.5. If the court imposes unreasonable deadlines, put a marker down and consider an appeal.

23. Overlooking a deadline whether inadvertently or by reason of pressure of work will rarely justify relief from sanction. There appears to be little, if any room, for human error.

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