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Relief from sanctions

from Mitchell to Denton

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'at the heart of human rights'

Chronology of events

- 1st April 2013 – changes to the CPR
- 27th November 2013 – *Mitchell v Newsgroup*
- June 2014 – introduced new CPR r3.8(4) – permitting 28 day extensions on all matters by consent without involvement of the Court
- 4th July 2014 – *Denton v TH White*
- 31 weeks of mayhem in between the two

CPR 1 – Overriding objective – pre 1/4/13

- CPR 1.1
- (2) Dealing with a case justly includes, so far as is practicable:
- (a) ensuring that the parties are on an equal footing
- (b) saving expense
- (c) dealing with the case in ways which are proportionate:
  - (i) the amount of money involved
  - (ii) to the importance of the case
  - (iii) the complexity of the issues and
  - (iv) to the financial position of each party
- (d) ensuring that it is dealt with expeditiously and fairly
- (e) allotting to it an appropriate share of the court's resources ...

CPR 1 – Overriding objective – post 1/4/13

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- (e) allotting to it an appropriate share of the court's resources ...
- **(f) enforcing compliance with rules, practice directions and orders**

CPR 3.9 – Relief from sanctions – pre 1/4/14

- (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, including–

- (a) the interests of the administration of justice
- (b) whether the application for relief has been made promptly
- (c) whether the failure to comply was intentional
- (d) whether there is a good explanation for the failure
- (e) the extent to which the party in default has complied with other rules ...

CPR 3.9 – Relief from sanctions – pre 1/4/14

- (f) whether the failure to comply was caused by the party or his legal representative
- (g) whether the trial date or the likely trial date can still be met if relief is granted
- (h) the effect which the failure to comply had on each party; and
- (i) the effect which the granting of relief would have on each party

CPR 3.9 – Relief from sanctions – post 1/4/14

- (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.

When is relief from sanctions required ?

- CPR note 3.9.1 – r3.9 comes into play , not merely where a party has failed to comply with any rule etc, but where a sanction is imposed as a result of that failure. No sanction is imposed where a party simply fails to comply with a provision imposing a time limit.

- As regards breach of directions, an unless order is required for r3.9 to apply

- When seeking a simple extension of a time limit, the Overriding objective will come into play. Further, the court retains a refuse the extension under r3.1 or strike out any claim under r3.4(2)(c)

*"any **rule**, practice direction or court order"*

- CPR rules imposing sanctions:
  - CPR 3.14 Failure to file a costs budget
  - CPR 32.10 Consequence of failure to serve witness statement

- **Failure to file a budget**
- **3.14** Unless 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.

- **Consequence of failure to serve witness statement or summary**
- **32.10** If a witness statement or a witness summary for use at trial is not served in respect of an intended witness within the time specified by the court, then the witness may not be called to give oral evidence unless the court gives permission.

Mitchell v Newsgroup – 27 November 2013

- Involved breach of a defamation practice direction (CPR PD51D) predating introduction of 3.14
- Costs budget filed 6 days late
- Court ordered that C restricted to court fees only as this was the sanction imposed by the rules for the breach.
- Relief from sanctions refused by the Court of Appeal

Mitchell v Newsgroup – 27 November 2013

- Master of the Rolls gave guidance as follows:
- Para 40 - It will usually be appropriate to start by considering the nature of the non-compliance with the relevant rule, practice direction or court order. If this can properly be regarded as **trivial**, the court will usually grant relief provided that an application is made promptly. ...

Mitchell v Newsgroup – 27 November 2013

- Para 41 - 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. ... But mere overlooking a deadline, whether on account of overwork or otherwise, is unlikely to be a good reason.

Mitchell v Newsgroup – 27 November 2013

- 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. We should add that 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.

Mitchell v Newsgroup – 27 November 2013

- Para 46. The new more robust approach that we have outlined above will mean that from now on relief from sanctions should be granted more sparingly than previously.
- Para 58 ... The merit of the rule is that it sets out a stark and simple default sanction. The expectation is that the sanction **will usually apply** unless (i) the breach is trivial or (ii) there is a good reason for it. It is true that the court has the power to grant relief, but the expectation is that, unless (i) or (ii) is satisfied, the two factors mentioned in the rule will usually **trump** other circumstances.

What followed ?

- Directions orders imposing unless orders from the start
- Struck out witness evidence and schedules of loss
- Refusals of expert evidence
- Struck out cases for trivial failures where relief was not sought promptly
- Endless CMCs and applications
- Contradictory decisions
- Statements from the Court of a determination to see this through

Denton v TH White - 4th July 2014

- Master of the Rolls again but complete about turn
- Guidance in Mitchell paras 40 and 41 said to have been "misunderstood and misapplied" and caused by "a failure to apply *Mitchell* correctly"
- Some judges "unduly draconian"
- Use of the word "trivial" not part of the test
- New 3 stage test

Denton v TH White

- Problems with *Mitchell* were:
  - "triviality" test applied too narrowly
  - Two factors in r3.9 were given too much weight and "all the circumstances of the case" were not being applied
  - Penalties applied in a disproportionate fashion
  - Encouraged uncooperative behaviour and increased costs

New 3 stage test

- 1. Identify and assess the *"seriousness and significance"* of the failure to comply
- 2. Consider why the default occurred
- 3. Evaluate "*all the circumstances of the case"* so as to enable the court to deal justly with the application, including 3.9 factors

1st stage - assess the *"seriousness and significance"*

- para 25. 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" ...

- para 26. Triviality is **not** part of the test described in the rule. It is a useful concept in the context of the first stage because it requires the judge to focus on the question whether a breach is **serious or significant**. ...

1st stage - assess the *"seriousness and significance"*

- 27. The assessment of the **seriousness or significance** of the breach should not, initially at least, involve a consideration of other unrelated failures that may have occurred in the past. At the first stage, the court should concentrate on an assessment of the **seriousness and significance** of the very breach in respect of which relief from sanctions is sought. ...

- 28. If a judge concludes that a breach is not **serious or significant**, then relief from sanctions will usually be granted and it will usually be unnecessary to spend much time on the second or third stages. ...

2nd stage - Consider why the default occurred

- 29. 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. ...

- 30. It would be inappropriate to produce an encyclopaedia of good and bad reasons for a failure to comply with rules, practice directions or court orders. ...

3rd stage – apply r3.9

- 31. The important misunderstanding that has occurred is that, if (i) there is a non-trivial (now serious or significant) breach and (ii) there is no good reason for the breach, the application for relief from sanctions will automatically fail. That is not so and is not what the court said in *Mitchell [err ... see para 58 of Mitchell – yes it was]*

3rd stage – apply r 3.9

- 32. We can see that the use of the phrase "**paramount importance**" in para 36 of *Mitchell* has encouraged the idea that the factors other than factors (a) and (b) are of little weight. ... the court merely said that the other circumstances should be given "less weight" than the two considerations specifically mentioned. ... Although the two factors may not be of **paramount importance**, we reassert that they are of **particular importance** and should be given particular weight at the third stage when all the circumstances of the case are considered.

3rd stage - apply r 3.9

- 35. Thus, the court must, in considering **all the circumstances of the case** so as to enable it to deal with the application justly, give particular weight to these two important factors. In doing so, it will take account of the **seriousness and significance** of the breach (first stage) and **any explanation** (second stage). The more **serious or significant** the breach the less likely it is that relief will be granted unless there is a good reason for it. Where there is a good reason for a serious or significant breach, relief is **likely** to be granted. Where the breach is not serious or significant, relief is also **likely** to be granted.

3rd stage - apply r 3.9

- 36 . ... The **promptness of the application** will be a relevant circumstance to be weighed in the balance along with all the circumstances. Likewise, **other past or current breaches** of the rules, practice directions and court orders by the parties may also be taken into account as a relevant circumstance.

3rd stage - apply r 3.9

- 38. It seems that some judges are approaching applications for relief on the basis that, unless a default can be characterised as trivial or there is a good reason for it, they are bound to refuse relief. This is leading to decisions which are manifestly unjust and disproportionate. It is not the correct approach and is not mandated by what the court said in *Mitchell.* A more nuanced approach is required as we have explained.

Expectations and Warnings

- 40. Litigation cannot be conducted efficiently and at proportionate cost without (a) fostering a culture of compliance with rules, practice directions and court orders, and (b) cooperation between the parties and their lawyers.

- 41. We think we should make it plain that it is wholly inappropriate for litigants or their lawyers to take advantage of mistakes made by opposing parties in the hope that relief from sanctions will be denied and that they will obtain a windfall strike out or other litigation advantage

Expectations and Warnings

- 42. It should be very much the **exceptional** case where a contested application for relief from sanctions is necessary. This is for two reasons: first because compliance should become the norm, rather than the exception as it was in the past, and secondly, because the **parties should work together** to make sure that, in all but the most serious cases, satellite litigation is avoided even where a breach has occurred.

Expectations and Warnings

- 43. The court will be more ready in the future to penalise opportunism. ... **Heavy costs sanctions** should, therefore, be imposed on parties who behave unreasonably in refusing to agree extensions of time or unreasonably oppose applications for relief from sanctions. An order to pay the costs of the application under rule 3.9 may not always be sufficient.

The future ?

- *Mitchell* has gone but we are not returning to the old rules
- Dozens of cases lined up for appeal having been struck out under *Mitchell* and lots more decisions will follow
- Threat of costs sanctions may reduce significantly the number of future contested sanctions proceedings

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