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MITCHELL: "MISUNDERSTOOD" AND "MISAPPLIED"

LITIGATION AND DISPUTE RESOLUTION

In its latest judgment on the Jackson Reforms, the Court of Appeal has said that its earlier decision in *Mitchell v News Group Newspapers Limited* [2013] EWCA Civ 1526 has been "misunderstood" and "misapplied" and that this has led to some judges "adopting an unreasonable approach" to the rules on relief from sanctions. Therefore, it has "restated" the test to be applied to such applications. The focus will no longer be on whether or not a particular breach is "trivial" but on whether it is "serious and significant". Even where a breach is serious and significant, and there is no good reason for it, this will not automatically result in a refusal to grant relief from sanctions because the Court will consider all the circumstances of the case so as to enable it to deal justly with the application.

MITCHELL

The Jackson Reforms introduced a new rule (CPR 3.9) making it harder to obtain relief from sanctions imposed for breaches of procedural rules. In *Mitchell*, the Court of Appeal held (or was understood to have held) that relief from sanctions would not be granted unless the relevant breach was trivial or there was a good reason for it. This led to: (i) a large amount of satellite litigation as parties tried to take advantage of *Mitchell* to gain a tactical advantage; and (ii) some first instance decisions which were, in the words of the Master of the Rolls and Vos LJ, "manifestly unjust and disproportionate".

THE NEW TEST

In *Denton v White* [2014] EWCA Civ 906, handed down on 4 July 2014 in relation to three conjoined appeals, the Court of Appeal recognised that *Mitchell* has been the subject of much criticism. This was attributed to the way in which *Mitchell* had been interpreted rather than the decision itself, which remained "substantially sound". Nevertheless the Court of Appeal decided to "restate" the approach that should be taken to applications for relief from sanctions in the following three stage test:

1. **Is the relevant breach "serious or significant"?** If not, then relief will usually be granted. In assessing whether a breach is serious or significant, the Court will still consider its impact on the conduct of litigation generally, and not just the specific piece of litigation in which the application is made.

2. **The Court will consider the reason why the default or failure occurred**. The Court of Appeal gave little further guidance on this limb, saying that 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".

3. **In every case, the Court will consider "all the circumstances of the case, so as to enable it to deal justly with the application"**. The failure to apply this third limb of the test has been "an important misunderstanding" of *Mitchell*. It is not the case, and *Mitchell* did not say, that if (i) there is a non-trivial (now serious or significant) breach and (ii) there is no good reason for the breach, an application for relief from sanctions must automatically fail.

JACKSON LJ DISSENTING

The Court of Appeal did not reach a consensus on the proper application of the third limb of this three stage test. The Master of the Rolls and Vos LJ took the view that particular importance should be attached to the need: (a) for litigation to be conducted efficiently and at proportionate cost; and (b) to enforce compliance with rules, practice directions and orders (because CPR 3.9 expressly refers to these considerations). In a short dissenting judgment on the proper construction of CPR 3.9, Jackson LJ said that no more weight should be attached to these factors than to any other relevant considerations.

HEAVY COSTS SANCTIONS FOR UNREASONABLE AND OPPORTUNISTIC CONDUCT

Parties, who "opportunistically and unreasonably" oppose applications for relief from sanctions, or who refuse reasonable requests for extensions of time, are themselves wasting court time and acting in breach of the overriding objective. The Court will be more ready in the future to penalise this type of conduct and "heavy costs sanctions" will be imposed. Importantly, those costs sanctions will not be limited to paying the costs of applications for relief but could also be relevant to the judge's overall discretion on costs at the end of a case and could, at that stage, lead to the making of a costs order on the indemnity basis.

COMMENT

Denton v White is intended to be a fresh start (the Master of the Rolls and Vos LJ expressed the hope that it would not be necessary to resort to earlier authorities as a result of the guidance given in this case). However, the Court of Appeal made it clear that the decision should not be taken as heralding a return to the pre-Jackson culture of tolerance of non-compliance with rules, practice directions and orders. Litigants will still need to comply with deadlines and, if they cannot do so, they should ensure that they apply for an extension before the deadline passes.

Perhaps the most important message arising out of *Denton v White* is that the "risk-reward" analysis has changed for parties who are asked to agree to an extension of time, or to consent to an application for relief from sanctions. Before this case, it was often worth refusing such requests in the hope that the Court would impose sanctions which would confer a significant tactical advantage on the non-defaulting party and possibly even determine the outcome of the case. Now there is a risk that the Court will take the view that such an approach is unreasonably opportunistic, which will result in the imposition of a heavy costs sanction.

CONTACT DETAILS

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