Insurance Adviser Alert: Court of Appeal clarifies Mitchell guidance

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The Court of Appeal has set out a new three stage test to be applied by courts considering applications for relief from sanctions and attempted to draw a line under previous post *Mitchell* authorities. In doing so, and in allowing all three appeals (commented on below), it has also made clear that lack of cooperation between parties and unreasonable opposition to applications for relief from sanctions, or unreasonable refusal to grant extensions of time will not be tolerated and will be penalised with heavy costs sanctions over and above an order to pay the costs of the application.

CPR 3.91(1): Relief from Sanctions

(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.

Three appeals

The Court allowed all three appeals, noting that the first two evidenced an unduly draconian approach and the third evidenced an unduly relaxed approach to compliance which the Jackson reforms were intended to discourage.

Decadent Vapours Limited v Bevan and others

The claimant failed to comply with an unless order for payment of court fees. The initial payment was sent by cheque and would most likely have arrived one day late but was lost. The non-payment came to the attention of the parties at a later stage and the fees were then paid (three weeks late). Relief from sanctions was refused.

Court of Appeal comment: Non-payment of court fees was “serious”, but the delay in this case equally did not affect the efficient running of the litigation.

Utilise TDS Limited v Davies and others

This concerned two breaches. Firstly a delay of only 45 minutes in filing a costs budget and, secondly, being 13 days late in complying with a court order which required the party to notify the court of the outcome of mediation/negotiations. It was held that the second breach rendered the first breach, which would otherwise have been trivial, a non-trivial one and relief from sanctions was refused.

Court of Appeal comment: The first breach was clearly neither serious nor significant and therefore consideration of stages two and three under the new guidance should not have happened.

Denton v TH White Limited and another

The claimant served additional witness statements one month before trial; the judge granted relief from sanctions and permitted the claimant to rely on the evidence, which resulted in the trial being adjourned.

Court of Appeal comment: This was clearly a case where the breach was serious and significant, where the efficient running of litigation was compromised and where it was appropriate to refuse to grant relief from the sanction sought to allow the statements to be relied upon at trial.

New guidance

The Court of Appeal stated that the guidance in *Mitchell* remained substantially sound, but chose to restate the approach that should be applied by way of a three stage test:

1. Identify and assess the seriousness and significance of the failure to comply with any rule, practice direction or court order. This "serious or significant" test replaces the "trivial" test referred to in *Mitchell*, which the Court acknowledged had caused some difficulty in subsequent cases. The assessment of the seriousness or significance of the breach should not initially involve a consideration of other unrelated failures/breaches which occurred previously. However these may be considered by the court at stage three, as one of the relevant circumstances of the case. If the 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.

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 factors (a) and (b) set out in CPR 3.9(1). The majority judgments made it clear that these factors are of particular importance and should be given particular weight. All the circumstances of the case must be considered but courts must always bear in mind the need for compliance with rules, practice directions and orders, because the old lax culture of non-compliance was no longer to be tolerated. The promptness of the application will be a relevant circumstance, as will other breaches of court orders by the applicant.

Ultimately, 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, and mistakes or delay on the part of the solicitors will not normally be considered a good reason. Where there is a good reason for a serious or significant breach, relief is likely to be granted although prior breaches will be taken into account. Where the breach is not serious or significant, relief is also likely to be granted.

Satellite litigation/non-cooperation of parties

The Court noted the satellite litigation and non-cooperation between lawyers which *Mitchell* had generated and hoped that the guidance which it had given would assist in reducing the need for satellite litigation. It particularly noted that it hoped that, going forward, it would be unnecessary to refer to earlier authorities. The Court was clearly trying to draw a line under the numerous post *Mitchell* authorities that have sought to apply the test in *Mitchell*.

The Court made it clear that it was wholly inappropriate for parties to take advantage of mistakes made by their opponents in the hope that relief from sanctions will be denied and that they will obtain a windfall, and stated that it should be very much the exceptional case where a contested application for relief from sanctions is necessary. Where appropriate, parties should be willing to agree that relief from sanctions be granted without the need for further costs to be expended in satellite litigation and parties also have the ability to agree limited extensions under the new rule CPR 3.8(4).

The Court clearly stated that opportunism of this nature will not be tolerated and will be penalised with heavy costs sanctions which may exceed an order to pay the costs of the application. Such unreasonable conduct could be taken into account under CPR 44.11 when costs are dealt with at the end of the case and the offending party, if successful, may be denied a substantial chunk of its costs and, if unsuccessful, be ordered to pay indemnity costs.

Jackson dissenting judgment

Jackson LJ gave a separate judgment (The Master of the Rolls and Vos LJ having given a joint judgment) and agreed that all three appeals should be allowed. He also noted that the three stage approach was helpful and agreed with the other two judges about the first and second stages. However he took a different view in relation to the third stage.

He noted that CPR 3.9 requires the court to consider all the circumstances of the case as well as factors (a) and (b), but does not require that factor (a) or (b) be given greater weight than other considerations, just that the two factors be specifically considered in every case, with the weight to be attached to those two factors being a matter for the court having regard to all the circumstances. He stated that the reason why the rule was amended to require courts to give specific consideration to factors (a) and (b) was that previously courts were not doing so.

Jackson observed that his approach to the construction of CPR 3.9 would lead to the same result in the three cases under appeal, but noted that there will be other less clear cut cases where the difference of opinion may matter.

Comment

There is good and bad news for defaulting parties in this judgment. *Mitchell* is affirmed, but the guidance should put a stop to some of the more draconian and heavily criticised decisions which have followed *Mitchell*, and encourage greater consistency of judicial decision making.

Correctly applied, this judgment means that obviously trivial breaches will no longer result in draconian orders. For example, the late filing of a court document by a few minutes or even longer, if it results in no prejudice to the other party or to the efficient running of litigation, should not be treated as anything other than trivial.

Furthermore, parties who attempt to use *Mitchell* purely for tactical advantage and who seek to characterise trivial breaches as more serious and request the court to take an unduly strict line to enforce sanctions should face heavy costs consequences, such as disallowance of some of their costs following trial.

However, we anticipate further satellite litigation over the new test for “triviality”. On the one hand, the judgement assists parties in their assessment of whether a breach is serious or significant by restricting the period of default under assessment. Parties need not consider unrelated matters which preceded the defaulting act when evaluating the seriousness or significance of the default and should instead consider the default in isolation. A party's previous conduct only becomes relevant at limbs 2 and 3 of the test. However, the lines are blurred by the court's entitlement to take into account a party's previous conduct at limb 1 if it could be regarded as a relevant circumstance under CPR 3.9. The Court of Appeal’s downplaying of the difficulty of applying this test is not convincing and we anticipate seeing decisions on the subject before its scope becomes clear.

Although the dissenting judgment of Jackson LJ is interesting, it will have little practical impact until the issues come before the Court of Appeal again. The majority judgment, as in *Mitchell*, emphasises that courts must enforce compliance with court rules and court orders, and it is clear that relief from sanction will be applied only rarely. Litigating parties must comply with court rules and court orders and expect the worst if they do not.

Compliance should therefore be the default position. While the Court of Appeal's decision demonstrates that relief is likely to be granted where a breach is not serious or significant, the Court emphasised the need to avoid satellite litigation, with compliance being "the norm" and parties cooperating in "all but the most serious cases".

As such, it is also important to remember that the courts will take a harsh line towards parties who unreasonably refuse to consent to relief from sanction. When advising a client as to whether to contest an opponent's application, legal advisers should give careful consideration to the seriousness of the breach if they are to avoid being on the wrong end of an adverse costs order.

If the worst does happen, the defaulting party should apply for relief from sanction (and seek its opponent's consent to the application) promptly. As mentioned above, the promptness of the application will be a relevant circumstance for the court in applying the third stage of the test.

Although the decision seeks to discourage parties from opportunism - seeking tactical advantages following an event of default - and encourages a common-sense approach to the assessment of seriousness and significance, we think Einstein had it right: common sense needs constant reappraisal.

Authors

Richard Highley
London - Walbrook
rhighley@dacbeachcroft.com

Ross Risby
London - Walbrook
rrisby@dacbeachcroft.com

DAC BEACHCROFT