Fenwick Elliott
The construction & energy law specialists
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Welcome to the April edition of *Insight*, Fenwick Elliott's newsletter which provides practical information on topical issues affecting the building, engineering and energy sectors.

This issue considers the Jackson reforms and specifically the *Mitchell* case.

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The "Mitchell" Reforms

When the Jackson reforms came into force in April 2013, it was proclaimed they would bring about a substantial shift in the way in which litigation was conducted and would improve the culture of litigation for the better.

A year on, this 34th issue of Insight (i) provides a round-up of the key practice points in relation to sanctions and relief from sanctions that stem from the Jackson reforms (and specifically the Mitchell case, hence the title of this issue), (ii) considers the future of Mitchell and (iii) concludes by asking whether the Jackson reforms have delivered their stated aims as far as sanctions are concerned.

Mitchell

Mitchell v News Group Newspapers Ltd [2013] EWCA Civ 1537 (see http://www.fenwickelliott.co.uk/files/insight_issue_30.pdf for a detailed analysis of the case) dealt with the practical application of the new CPR 3.9 which emphasises the need for litigation to be conducted efficiently and at proportionate cost, and the need to ensure compliance with court rules, practice directions and orders.

In *Mitchell,* the Court of Appeal confirmed that, going forward, the relevant sanction for any breach of a court rule would be applied unless the court order or rule that had been breached was trivial, or there was a "good reason" for the breach (such as if a party or its solicitor had suddenly been taken seriously ill).

Key practice points

Trivial breach

Narrowly missing a deadline but otherwise fully complying with its terms may render a breach trivial: *Adlington & Ors v ELS International Lawyers LLP (in Administration) [2013] EWHC B29 (QB)*

The claimants were seven members of a group action. They had been required to serve and file individual Particulars of Claim by a given date and the sanction for non-compliance was that their claims would be dismissed. The claimants failed to comply with the order as they were either abroad or otherwise away from home and were not in a position to sign and return the Particulars of Claim in time to meet the court order for service.

The claimants' claims were dismissed and they applied for relief against sanctions. Oliver-Jones QC granted relief and noted that the relationship between justice and procedure had not changed so as to transform rules and rule compliance into tripwires. The claimants' solicitor was not aware of the fact that his clients were away, and their holiday arrangements were outside of his control. The Particulars of Claim were ready but had not been signed by the deadline, the deadline had only been missed narrowly, and the application for relief had been made promptly. Accordingly, neither party had suffered any adverse consequences as a result of the breach of the order.

Narrowly missing a deadline but otherwise fully complying with its terms may render a breach trivial Part 2: *Wain v Gloucester County Council & Others [2014] EWHC 1274 (TCC)*

Here HHJ Grant QC had to consider the position of the fourth defendant who was one day late in filing her costs budget, so that instead of having been served seven clear days before the Case Management Conference, it was in fact served six clear days before the CMC. The Judge said that this breach was not a trivial one. The delay was of one day in the context of a time period or frame of seven days. He said that the seven-day period, namely for filing or serving a costs budget, was usefully to be compared with the three-day period for service of an application notice before its hearing. He noted that the claimant had said that it hade not suffered any prejudice by reason of the delay of one day. Further the parties were all able to deal with the topic of costs management at the CMC, notwithstanding the fact that the fourth defendant served her costs budget with only six clear days rather than seven clear days before the hearing. Finally, unlike the position in *Mitchell*, in this case no disruption to the court's timetable had been caused by the delay.

Good reason

Always comply with the Pre-Action Protocol for Construction and

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Engineering Disputes as a "good reason" will rarely, if ever, include a failure to comply with a pre-action protocol: *Lincolnshire County Council v Mouchel Business Services Ltd & Anr [2014] EWHC 352 (TCC)*

Here, the claimant issued a claim form in July 2013 which should, pursuant to CPR 7.5, have been served within four months of the date of issue. The court subsequently ordered an extension for service of the claim form to January 2014 and then further ordered for time to be extended to April 2014. The extensions were ordered as the claimant maintained (amongst other reasons) that it needed further time to provide detailed instructions to a new expert. The defendant applied to set aside the second order extending time, which, if granted, would make the claimant's claim time barred.

Mr Justice Stuart-Smith noted the new and more robust approach to case management that should be adopted by the court and also noted that the Pre-Action Protocol for Construction and Engineering Disputes had not been complied with. He emphasised that parties who issue proceedings late are obliged to act promptly and effectively and, in the absence of sound reasons (which will seldom, if ever, include a continuing failure to comply with pre-action protocol requirements), that the proceedings should be served within four months. The claimant had not complied with the protocol and the defendant's application was therefore allowed.

Bad weather, the holiday season and operational commitments would also not be regarded as being "good reasons": *Durrant v Chief Constable of Avon & Somerset Constabulary [2013] EWCA Civ 1624*

The defendant was granted an order extending time for service of witness evidence until 12 March 2013, after which time no further evidence would be able to be relied upon. Two witness statements were served a day late, four were served two months late and two were served just before trial. Shortly before trial, the defendant applied for relief from sanctions. Mr Justice Birtles granted the relief sought at first instance which meant that the original trial date was lost. The claimant appealed.

The Court of Appeal allowed the appeal and held that the defendant would not be able to rely upon the late witness statements at trial. The Court of Appeal emphasised that the starting point was that the court would assume the sanction had been properly applied at first instance, unless it had been appealed, or an application had been issued to vary or revoke it. Any application for relief against sanctions had to be made promptly, and this was not the case here.

The Court of Appeal acknowledged that the court should not interfere lightly with a case management decision, but it further acknowledged that Mr Justice Birtles did not have the benefit of the *Mitchell* guidance as *Mitchell* was handed down after his first instance decision. That said, the Court of Appeal held that Mr Justice Birtles' decision was plainly wrong and any decision which failed to follow the robust approach set out in the new CPR 3.9 should not be allowed to stand. Any failure to follow that robust approach would constitute an error of principle that would entitle an appeal to interfere with the discretion that is usually afforded to first instance judges.

The Court of Appeal reviewed the first instance judgment and commented that the service of two witness statements a day late might have been viewed as a trivial breach by the court. However, here the defendant did not comply with the original order requiring service, and the original order made clear what the sanction would be for any non-compliance. The reasons for the delay of professional and operational commitments, the holiday season and bad weather, were dismissed out of hand. There was no evidence the delays were caused by anything other than incompetence.

Problems in obtaining a suitable expert may not constitute a good enough reason to delay a trial: *Scriven v Scriven & Ors [2013] EWHC 4223 (Ch)*

The defendants sought to delay the trial date shortly before the trial was due to commence because (i) they needed more time to consider amendments to the Particulars of Claim that had been made in the preceding few months and (ii) they had not been able to find an expert witness who was in a position to prepare a report in advance of the trial. It was noteworthy that the defendants had represented themselves for most of the proceedings and so they asked for, and expected, the court to grant them indulgence.

Mr Edward Murray (sitting as District Judge) noted the defendants were not represented, and further noted that the lack of expert evidence at trial would prejudice them. That said, they had been aware of the trial date for some time and they should have acted earlier. They were the authors of their own misfortune and Mr Murray accordingly dismissed their application to delay the trial date.

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Non-deliberate delay (i.e. human error) will not constitute a "good reason": ***Thevarajah v Riordan & Ors [2014] EWCA Civ 15***

The defendants were subject to an unless order which required them to disclose certain information, failing which their defence would be struck out. The defendants failed to comply as a result of human error. Mr Justice Hidyard struck out their defence and refused to grant relief from sanctions.

The defendants made a further application for relief that was listed before Andrew Sutcliffe, a Deputy Judge. He allowed their application and varied the order made by Mr Justice Hidyard so they could defend the action on the basis that the defendants had remedied their breach by providing the information that was required pursuant to the unless order. In varying the strike out order, Mr Sutcliffe was of the view that the new CPR 3.9 was intended to punish deliberate delay, which was not present here. The claimant appealed to the Court of Appeal.

The Court of Appeal granted the appeal, holding that the Deputy Judge did not have jurisdiction to deal with the second application for relief that came before him. The Court of Appeal considered that the Deputy Judge was not sufficiently robust and had failed to enforce the letter of CPR 3.9.

If you miss a deadline because you are waiting for documents or information held by a third party and have taken reasonable steps to obtain the documents or information from that third party then this may constitute a "good reason": ***Nelson v Circle Thirty Three Housing Trust Ltd [2014] EWCA Civ 106***

Here, the Court of Appeal granted the appellant relief from sanctions for her failure to comply with an unless order that required specific disclosure of credit card statements that were held by a third party. The Court of Appeal held there was a good reason for the non-compliance as the appellant had taken reasonable steps to obtain the documents from the third party but the third party was not forthcoming and this was outside of the appellant's control.

General practice points

If both parties fail to comply with the same court order, then relief from sanctions may be granted: ***Chartwell Estate Agents Ltd v Fergies Properties SA and another [2014] EWHC 438***

In this case, the claimant failed to serve witness statements on time, as did the defendant. The failure to serve witness statements was not considered to be trivial and there was no good reason for it. However, the defendant was also in breach of the order to serve witness evidence and the trial date was not at risk.

Mr Justice Globe therefore distinguished the case from Durrant on the basis that a robust application of CPR 3.9 would deprive the claimant of its claim which would be unjust in the circumstances and relief from sanctions was therefore granted.

The court may no longer endorse extensions of time that are agreed by parties: ***MA Lloyd & Sons Ltd v PPC International Ltd [2014] EWHC 41 (QB)***

The defendant agreed an extension of time with the claimant and subsequently failed to oppose the sanctions that were imposed due to the fact that an extension had been agreed.

Mr Justice Turner commented that it was incorrect of the defendant to have failed to have applied for relief from sanctions. He emphasised that even if the parties had purported to reach a concluded agreement in relation to an extension of time, any agreement would not be effective unless the court was persuaded to formally endorse it by making the agreement the subject of a court order. Mr Justice Turner pointed to the court's duty under CPR 1.4 not to adjudicate passively upon applications or to rubber-stamp parties' agreements, but to actively manage cases.

If you consider further time is required, an application should be made before the existing deadline runs out: ***Kaneria v Kaneria & Others [2014] EWHC 1165 (Ch)***

The *Mitchell* case was an application for relief from sanctions. The Kaneria case was one where there was an in-time application for an extension of time (i.e. one made before the deadline expired). In such a case the court should exercise its discretion in accordance with the overriding objective and not the terms of CPR 3.9. Indeed, in *Mitchell* the Court of Appeal had said that such an in-time application would be looked at more favourably than an application made after the event.

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Whilst the first aim of the overriding objective is to enable the Court to deal with the case justly, the Judge here was quick to point out that the Court will still look carefully at the reasons why an extension is sought. And this means that the Court will still take into account the impact on the Court and other court cases, as per *Mitchell*. Here the Judge "weighed up" the desirability of reinforcing the new-*Mitchell* approach and culture against the substantial prejudice to the respondent in not being able to serve their defence. Accordingly an extension of time was granted.

Mitchell – the future

Ever since the Court of Appeal's decision in *Mitchell* was handed down, the courts have been inundated with applications to extend time that would previously have been dealt with by agreement between the parties, and also with applications for relief from sanctions for missing court deadlines.

In answer to this, and in an effort to restore some control to the parties, in February 2014, the President of the Queen's Bench division approved a new model order for clinical negligence and mesothelioma cases which allowed the parties to agree a 28-day extension of time without the court's prior approval.

Under the model order, in cases where an extension of more than 28 days is required, parties are asked to submit an email request to the court containing reasons for the need for the extension, confirmation that the trial date will not be affected, and a draft consent order. The court will either then grant the extension on paper or call the parties in for a hearing.

The model order only applies to clinical negligence actions at present, but the Civil Procedure Rules Committee is currently considering whether to incorporate it into the standard directions that apply to all cases, and a decision is expected soon. If the model order does, in due course, apply across the board, there will be a hiatus limited to the agreed extension period, after which the full force of *Mitchell* will continue to apply.

Conclusion

In the main, the courts have been applying *Mitchell* with vigour, and procedural discipline and compliance with the court timetable, court rules and orders is now key. The difficulty with *Mitchell* is that parties can no longer agree extensions of time freely, and if court orders or rules are not complied with, sanctions will apply. Parties are then forced to make applications for extensions of time or for relief from sanctions. Whether relief from sanctions will be granted in each case depends upon the particular facts and circumstances of the case, which creates uncertainty.

If it is made widespread, the new model order will avoid the need for a formal application to extend time in the majority of cases, and will enable the court to retain overall control whilst still allowing the parties some latitude to deal with unforeseen events that have a knock-on effect on the timetable of the case.

As noted above, even if the model order is introduced on a widespread basis, *Mitchell* will still apply once the initial extension of time has passed, and the current uncertainty surrounding the circumstances under which relief from sanctions will be granted will therefore remain. We are, however, very much still in a Jackson/*Mitchell* transitional period, and it is hoped that the Court of Appeal will be asked to provide more detailed guidance on how the rules should apply in different factual circumstances, which would reduce the current uncertainty about the circumstances in which relief from sanctions will be granted.

Should you wish to receive further information in relation to this briefing note or the source material referred to, then please contact Lisa Kingston.
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