

Relief from Sanctions post the Mitchell Appeal

Further decisions giving guidance with regard to the Courts' approach to applications for relief from sanctions have been coming through following the stern conclusions reached by Master Victoria McCloud and the Court of Appeal in the Mitchell case.

The importance of 'Mitchell' as the starting point in considering conduct and relief from sanction appears to be reinforced by the decisions made below.

As ever there do appear to be some mixed messages coming through though.

Durrant v The Chief Constable of Avon and Somerset Constabulary [2013] EWCA Civ 1624

The Defendants failed to serve witness statements on time and applied for relief. Subsequently a further application was made and the Defendants sought to serve further witness statements.

Relief was granted with the Defendant being allowed to rely on all of the statements.

This decision was overturned by the Court of Appeal (Richards LJ) who considered the Mitchell case in detail before reaching a decision. It was concluded that the initial judge had granted relief from sanctions in circumstances which did not justify relief on any proper application of CPR 3.9.

Adlington & 133 Others v Els International Lawyers LLP

(Based on an article by Legal Futures)

A case where relief was sought as a result of eight claimants failing to sign their statements of case within the required timetable.

In all the circumstances the Judge concluded that the breach was 'trivial', that the application for relief had been made in good time and that the nature of the non compliance could not be divorced from the consequences of the non compliance. He also concluded that the breach was one of 'form rather than substance'.

Relief was granted and some pertinent comments were made with regard to Sir Rupert Jackson's thinking during the preparation of his final report and conclusions reached regarding relief from sanction.

SG DR Petrol SRL V VITOL SA [EWHC] 3920

The Claimant failed to comply with an order for security for costs. Its subsequent application for relief from sanction was refused, the Judge having reviewed Mitchell and reiterated the points made in the Court of Appeal's judgment.

The Judge went on to make some general observations.

Norseman Holdings Ltd v Warwick Court (Harold Hill) Management Company Ltd [2013] EWHC 3868 (QB)

Warwick Court had obtained default judgment in respect of unpaid service charges but had then realised that proceedings had been served at the wrong address. Default judgment was set aside with Warwick Court to pay NHL's costs. NHL obtained a default costs certificate, however Warwick Court argued that this had been obtained irregularly. An order was later made that NHL undertook not to enforce the costs order. NHL subsequently appealed the order.

The appeal was dismissed and reference was made by Coulson LJ to Norseman's conduct of the litigation generally. He went on to say that 'it provides a salutary lesson to those who continue to complain about the changes to the CPR brought about by Sir Rupert Jackson's Review of Costs and, in particular, the new emphasis on proportionate costs...'

It is precisely the sort of disproportionate incurring of costs that the Costs Review, and the subsequent changes to the CPR, were designed to address.

The recent judgment of the Court of Appeal in *Mitchell v Newsgroup* [2013] EWCA Civ. 1537 makes plain that parties to civil litigation need to conduct their case in accordance with the rules of court, so that these expensive interlocutory skirmishes (which almost always have their roots in a failure to comply with the rules in the first place, or some other form of error) become a thing of the past.

Mark Forstater and Mark Forstater Productions Ltd v Python (Monty) Pictures Ltd and Freeway Cam (UK) Ltd (2013)

[2013] EWHC 3759 (Ch)

The successful Claimant, who was on a CFA, sought relief from sanction post trial for failure to serve an N251.

Inter alia Mr Justice Norris considered that the failure to serve was an oversight and due to 'human error and that the Defendant was aware that the Claimant was funded by way of a CFA from 19/7/12. The Judge contrasted the instant case with a 'conscious failure to comply with a specific order made in the action itself'.

This decision was made before the *Mitchell* Appeal was heard, however, the Judge having had sight of the Court of Appeal's judgment in *Mitchell*, maintained his stance in granting relief to the Claimant from 19/7/12.

The decision also appears to agree with the decision to grant relief from strike out of a defence made by Mr Justice Walker in the pre *Mitchell* Appeal case of *Wyche v Careforce Group plc* (unreported QBD, 25/7/13). Here Walker J expressed the view that an inadvertent failure was different to a deliberate failure and that the steps taken by the party in breach upon finding out about the breach were also relevant. He also stated that 'the Court is not a martinet' and that 'it does not apply the rules unthinkingly'.

While this common sense approach would appear to offer some comfort it does not appear to be reflected in the majority of decisions now being made.

Each case, of course, relies on its own circumstances and, no doubt, more are to follow.

With thanks and acknowledgement to the Civil Litigation Brief 12/12/13.