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Client Alert Commentary

Latham & Watkins Litigation Practice

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English Court of Appeal Signals Less Draconian Sanctions for Non-compliant Litigants

Litigants must comply with rules and orders, yet must not seek to penalise opponents for immaterial breaches

Overview

The Court of Appeal has allowed three consolidated appeals[1] and provided guidance on when the English court should grant relief from sanctions for breaches of civil procedure rules and court orders. The case is important because it clarifies guidance in an earlier Court of Appeal case[2] (widely seen as encouraging draconian sanctions for breaches) and signals a more lenient, yet still robust, regime.

The Court of Appeal set out a three-stage approach for a court to follow when considering an application for relief from sanctions:

1. Identify whether the failure to comply with a rule, practice direction or court order was serious or significant

2. Consider why the failure or default occurred

3. Evaluate all the circumstances of the case, so as to enable the court to deal justly with the application

The judgment is an important development in an area of case law which has caused much concern amongst litigants and practitioners. Key points of significance are:

1. Litigants must comply with court deadlines in order for litigation to be conducted efficiently and at proportionate cost. Litigants will risk significant sanctions for non-compliance.

2. However, litigants must liaise constructively with their opponent, and agree to short time extensions, where appropriate, in order to avoid non-compliance.

3. The court will generally grant relief from sanctions where non-compliance is not serious or significant, or where there is good reason for non-compliance.

4. Parties should not use their opponent's non-compliance as a weapon to gain an illegitimate litigation advantage. Parties risk being penalised themselves for refusing to agree to applications for relief from sanctions.

5. Litigants should choose their battles wisely where breaches either are foreseeable, or have occurred. The court remains fully willing to apply sanctions on both sides, and will consider all the circumstances of cases so as to enable it to deal with them justly (in accordance with the CPR's "overriding objective").

Legal background

The three consolidated appeals (*Denton, Decadent* and *Utilise*) all concerned the application of Civil Procedure Rules (CPR) r3.9 on relief from sanctions. CPR r3.9 provides:

"***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.

(2) An application for relief must be supported by evidence."

The Court of Appeal had previously given guidance on CPR r3.9 in its decision in *Mitchell*, which was perceived as encouraging a draconian application of CPR r3.9. Subsequent cases have applied *Mitchell* with various degrees of severity, and have been subject to criticism from practitioners.

Factual background

The present cases came before the Court of Appeal in June 2014. A brief summary of each is as follows:

Denton

By June 2012, the parties had served all their witness statements for use at trial, later fixed for January 2014. In November and December 2013 the claimant served six further statements, said to be in response to a charge of circumstances four months earlier. The judge granted the claimant relief from sanctions, and adjourned the trial. The defendants appealed.

Decadent

The claimant was subject to an 'unless order' which required the claimant to pay certain court fees by a specified time and date, failing which the claim would be struck out. The claimant sent a cheque to the court by document exchange on the due date, meaning the cheque would arrive at least one day late. In addition, the cheque was lost in the post, and the non-payment came to the attention of the parties some three weeks later only at a pre-trial review. The claimants made the payment two days later. The judge refused relief from sanctions and the claim was struck out. The claimant appealed.

Utilise

The claimant filed a costs budget 45 minutes late, in breach of an 'unless order' which required the claimant to file the costs budget by a specified time and date, failing which the claimant would be barred from recovering its costs. The claimant was also 13 days late in complying with an order requiring it to

notify the court of the outcome of negotiations. The District Judge refused relief from sanctions. The judge on the first appeal dismissed the appeal. The claimant brought a second appeal.

Criticisms of *Mitchell*

The Court of Appeal identified criticisms of its own earlier judgment in *Mitchell*, in particular the concern that "*it has led to the imposition of disproportionate penalties on parties for breaches which have little practical effect on the court of litigation… [O]ne party gets a windfall, while the other party is left to sue its own solicitors. This is unsatisfactory and adds to the cost of litigation through increases in insurance premiums… [T]he consequences of this unduly strict approach have been to encourage (i) uncooperative behaviour by litigants; (ii) excessive and unreasonable satellite litigation; and (iii) inconsistent approaches by the courts*."[3]

The Court of Appeal reviewed decisions which had applied *Mitchell*[4], and the decisions in the present appeals, and concluded that some judges were adopting an unreasonable approach to CPR 3.9, some "*unduly draconian*" (*Decadent* and *Utilise*), some "unduly relaxed" (*Denton*). Some judges, believing they were bound to refuse relief unless a non-compliance was "trivial" or for a good reason, had made decisions which were manifestly unjust and disproportionate.

The Court of Appeal concluded that the court had misunderstood and misapplied *Mitchell* in some cases, leading to unjust and disproportionate decisions, and therefore *Mitchell* required clarification and amplification.

Clarification of *Mitchell*: a new three-stage approach

The Court of Appeal analysed prior decisions which it considered incorrect and set out a three-stage approach for the court to follow when considering an application for relief from sanctions:

1. Identify and assess the seriousness or significance of the failure to comply with any rule, practice direction or court order. A useful concept is to assess materiality, *i.e.* whether the breach "*neither imperils future hearing dates nor otherwise disrupts the conduct of litigation*". If a court finds that a breach is **not** serious or significant, then relief from sanctions will usually be granted.

2. The court should consider why the failure or default occurred. The Court of Appeal declined to produce a list of "*good and bad reasons*".

3. If there is a serious or significant breach, and there is no good reason for the breach, the application for relief from sanctions will **not** fail automatically. CPR r3.9(1) requires that, in every case, the court will consider "*all the circumstances of the case, so as to enable it to deal justly with the application*".

When applying the third stage, the Court of Appeal emphasised that the two factors in CPR r3.9(1)(a) "*the requirements that litigation should be conducted efficiently and at proportionate cost*" and r3.9(1)(b) "*the interests of justice in the particular case*" are of particular importance. The court must always consider the effect of the breach in the case, and bear in mind the need for compliance: "*the old lax culture of non-compliance is no longer tolerated*".[5] However, the court should also take all other circumstances into account. Examples include the promptness of the application, and the occurrence of past or current breaches of the CPR Rules, practice directions and court orders.

The Court of Appeal, in analysis which may be helpful in future cases, applied the three-stage approach to each of the three present appeals, and allowed all of them. In doing so it criticised "*satellite litigation and non-cooperation*":

> "*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. In a case where (a) the failure can be seen to be neither serious nor significant, (b) where a good reason is demonstrated, or (c) where it is otherwise obvious that relief from sanctions is appropriate, parties should agree that relief from sanctions be granted without the need for further costs to be expended in satellite litigation. The parties should in any event be ready to agree limited but reasonable extensions of time up to 28 days as envisaged by the new rule 3.8(4).*"[6]

The Law Society, at the invitation of the Court of Appeal, had intervened in the proceedings, calling for clear guidance on costs sanctions to foster less adversarial and more co-operative civil litigation. The Law Society has welcomed the decision, stating:

"*The Court of Appeal's decision in these three cases and their conclusion that the earlier judgment in Mitchell had been misunderstood and misapplied by some courts is welcome news for solicitors… The court's previous decision in* Mitchell *and the way it was being applied by the lower courts had resulted in disproportionate penalties and a breakdown in co-operation between parties to litigation, clogging up the system and introducing huge uncertainty into the whole process of civil litigation. This in turn had led to a significant amount of unnecessary satellite litigation, a waste of costs and court resources and the risk of big increases in professional indemnity insurance costs for our members. The guidance has clarified the factors which the court believes should be taken into account… [This] crucial decision will make civil litigation in England and Wales less adversarial and more co-operative*".[7]

We expect the Court of Appeal's decision to be a welcome clarification for litigants, and to enable the court to better deal with cases justly.

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Endnotes

1 *Denton v. TH White Ltd and another; Decadent Vapours Ltd v. Bevan and others; and Utilise TDS Ltd v. Davies and others* [2014] EWCA Civ 906

2 *Mitchell v. News Group Newspapers Ltd* [2013] EWCA Civ 1537, [2014] 1 WLR 795

3 Judgment, para. 21

4 E.g. *Adlington & Ors v. ELS International Lawyers LLP* [2013] EWHC B29 (QB) (found at http://www.bailii.org/ew/cases/EWHC/QB/2013/B29.html); *Durrant v. Chief Constable of Avon & Somerset Constabulary* [2013] EWCA Civ 1624 (found at http://www.bailii.org/ew/cases/EWCA/Civ/2013/1624.html); *Newland Shipping and Forwarding Ltd v. Toba Trading FZC* [2014] EWHC 661 (Comm) (found at http://www.bailii.org/ew/cases/EWHC/Comm/2014/661.html).

5 Judgment, para. 34.

6 Judgment, para. 41.

7 http://www.lawsociety.org.uk/news/press-releases/court-of-appeal-ruling-will-make-civil-litigation-less-adversarial-and-more-cooperative-after-law-society-intervention