

LSLA

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### Profession lauds Court of Appeal's approach in Mitchell 2

There has been a strong welcome from the profession for the Friday's Court of Appeal ruling in what has been dubbed *Mitchell 2* – three conjoined cases looking at how the original *Mitchell* ruling has been interpreted.

Peter Kaye, litigation partner at Manchester firm Linder Myers, whose successful appeal on behalf of Utilise formed one of the three test cases, described the decision as "a hugely positive move for the profession as a whole".

He explained: "The new guidance is a very welcome development providing fair, and clear, definitions with regards to the weight of breaches clarifying those which will warrant the court's time and should serve to minimise satellite litigation over trivial matters going forward.

"A more pragmatic and sensible approach to applications for a relief from sanctions can now be adopted by both legal professionals and the courts as a result."

Greg Cox, a partner at fellow Manchester firm Colemans-ctts, which was involved on behalf of the interveners in the case, said it was a "brave" judgment.

"It should restore co-operation between the parties and sanity in the lower courts," he said. "Parties who have been subject to the more extreme decisions will need to seek advice on appealing those decisions in the light of this clarification. Parties who have taken a *Mitchell* point against their opponent will need to consider carefully and quickly whether to now agree that relief should be given or be prepared to face the consequences."

One of those interveners, the Law Society, said the ruling should make litigation "less adversarial and more co-operative", problems that had arisen as a result of the original decision.

David Johnson, president of the Forum of Insurance Lawyers, welcomed the ruling and appeal court's recognition of the problems *Mitchell* had caused, but said it falls "a long way short of removing all headaches for litigators having to make or respond to applications for relief".

He explained: "The stated twin goals of greater timetable compliance but a return to a co-operative approach between parties are worthy causes but do not necessarily sit easily alongside each other.

"Even with the clarified three-tier test to the application of *Mitchell*, and the implied threat of penalties for those who do not recognise that contested applications for relief from sanctions should be uncommon, there remains a juggling act to be performed by litigators and *Mitchell* applications will by no means die out as a consequence.

"However, the clear message at the heart of the judgment that increased timetable compliance must still be promoted but at the same time, common sense and justice must be allowed to prevail, is a welcome one."

David Greene, past president of the London Solicitors Litigation Association, predicted that the ruling would head off "the potential for an unwelcome wave of satellite litigation that threatened to result from *Mitchell*".

He said: "*Mitchell* had always seemed at odds with Jackson LJ's civil litigation reforms. While today's judgment is very welcome, the LSLA fully supports and applauds Jackson LJ for his dissenting views in calling for a wider interpretation of the rules to take greater notice of all circumstances in relief from sanctions applications.

"We would urge that the emphasis on ensuring justice between the parties should be the founding principle of the litigation process."

PJ Kirby QC of Hardwicke Chambers was somewhat more acerbic in his assessment of the decision. "In the eagerly awaited decision in *Mitchell 2* the Court of Appeal has told us that we have all misunderstood *Mitchell 1*," he said.

"In other words *Mitchell* did not mean what it said or what we thought it said. In the light of today's decision we have a new three-stage approach – what many of us would regard as a much welcomed watered down *Mitchell* approach...

"This is a retreat from what most of us understood the effect of *Mitchell 1* to be even if we had collectively been suffering from a common misunderstanding. Orders should be complied with but this decision allows justice and common sense back into the equation."

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