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A sea change

Will *Mitchell* herald a whole new culture of conducting civil litigation, asks Nicholas Heaton

Commentators on the Court of Appeal's decision in *Mitchell v News Group Newspapers* [2013] EWCA Civ 1537, [2013] All ER (D) 314 (Nov) have so far focused on the justice or otherwise of the decision, or on its importance in terms of the rules on costs budgeting. In time, however, the *Mitchell* decision may be seen as the catalyst for something far more ground-breaking: a whole new culture of conducting civil litigation. The case may allow the Jackson reforms to achieve something that the Woolf reforms did not manage—a more general understanding that the rules are there to be obeyed.

Power of the courts

One of the key innovations in the Woolf reforms was that responsibility and control of litigation would shift from the litigants and their legal advisers to the courts. A range of case management powers was duly included in the new Civil Procedure Rules, the idea being that judges would fix and enforce strict timetables for procedural steps leading to trial and for the trial itself. However in practice little changed. Procedural deadlines were still missed, with no real sanctions for defaults. Parties continued to agree extensions of times whenever permissible. Case management conferences became "ritualistic occasions", with judges issuing standard directions, rather than being opportunities for courts to get to grips with the case, narrow the issues and control the volume of evidence.

Lord Justice Jackson made abundantly clear (Final report, 2009) that "courts should be less tolerant than hitherto of unjustified delays and breaches of orders" and that this change of emphasis should be reflected in amendments to CPR 3.9 (which permits relief from sanctions for breaches of the rules and orders). He wanted to see a "culture change" in case management, similar to that recently achieved in Singapore. There, in the face of a "substantial backlog of cases" and a generally "inefficient court system", a new regime of robust case management was imposed. In Singapore, court orders were strictly enforced and defaulting parties often had their cases struck out. After a period of initial "discontent" from the legal profession, these "shock tactics" achieved real change, as lawyers and court users gradually began to recognise the benefits of the reforms.

Strengthening of CPR 3.9

CPR 3.9 has been duly strengthened to make it more difficult to obtain relief from sanctions. When the new rule came into effect, however, some judges seemed to have missed the Jackson message. For example, in *Wyche v Careforce Group plc* [2013] EWHC 3282 (Comm), Walker J granted relief from sanctions (for failure to comply with an "unless order" relating to e-disclosure). The defendant's errors had been inadvertent. Parties were not expected to dot every "i" and cross every "t", nor were they expected to be automatons, robotically carrying out to the letter what was set out in an order, with no allowance for human error.

Similarly, in *Rayyan Al Iraq Co Ltd v Trans Victory Marine Inc* [2013] EWHC 2696 (Comm), [2013] All ER (D) 225 (Nov), Andrew Smith J (again granting relief from sanctions) held that the new rule on relief from sanctions in CPR 3.9 should not be applied so strictly that a refusal to give relief would be disproportionate and give the defendant an unjustified windfall. While the courts were now supposed to be being far less indulgent to litigants who substantially disregarded the CPR or court orders, the slight delay in this case had not affected the administration of justice. The claimant had made the application for an extension promptly and its failure to comply was unintentional and had been explained. The judge even went so far as to describe the defendant's attempt to exploit the error as "regrettable".

False sense of security

For several months, lawyers have been litigating under a false sense of security, where it seemed that the Jackson reforms were not going to have much real impact. Now a wake-up call has been sounded—the Court of Appeal's decision in the *Mitchell* case—which has shattered this illusion.

The court had to decide whether, in the "Plebgate" libel action, a Master had been justified in applying the ultimate sanction for a breach of the rules. Andrew Mitchell's solicitors had failed to comply with the requirement to submit a budget, setting out their projected litigation costs, seven days before the case management conference. They filed their budget the day before the CMC, and then only after being prompted by their opponent and the court.

At the CMC, Master McCloud rejected the lawyers' excuse that their breach had been a result of severe understaffing. She went on to apply the sanction stated in the new CPR 3.14: that the defaulting party would be treated as if it had "filed a budget comprising only the applicable court fees". She later refused the claimant's application for relief from this sanction.

On appeal, the Court of Appeal endorsed the Master's "robust" approach to sanctions, making clear that relief against sanctions should only be granted where the breach of a rule or order had been trivial or there was "good reason" for it, for example where a party or its lawyer had suddenly suffered from a debilitating illness or been involved in an accident. The court acknowledged, however, that judges might be more flexible where extra time had been requested in advance, rather than after a deadline had been missed.

The Master of the Rolls commented: "We hope that our decision will send out a clear message. If it does, we are confident that, in time, legal representatives will become more efficient and will routinely comply with rules, practice directions and orders. If this happens, then we would expect that satellite litigation of this kind, which is so expensive and damaging to the civil justice system, will become a thing of the past."

A sea change for litigators

The *Mitchell* decision really does seem to represent a sea change for litigators. The Court of Appeal could not have been clearer in its message: from now on, courts will approach breaches of rules and orders with zero tolerance (subject to the *de minimis* principle). Furthermore, they will show little sympathy to those who seek leniency following such defaults. Litigators and their clients had better mend their ways. NLJ

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