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Post-Mitchell costs regime clarified by the Court of Appeal

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Master of the Rolls finds guidance was 'substantially sound' but 'misunderstood and misapplied'

The Court of Appeal has today handed down a significant judgment in three cases that will provide far greater clarity in the post-Mitchell costs regime.

The court's earlier decision in Mitchell v News Group Newspapers Ltd saw the claimant sanctioned for filing a costs budget six days after the deadline for doing so had expired. Since then the lower courts have taken a zero-tolerance approach to what has been described as 'minor infractions' of the Jackson reforms.

The three cases before the court were all in relation to the granting of relief from sanctions under the new CPR 3.9. Denton & Ors v TH White, related to a party that served six witness statements late. Decadent Vapours Ltd v Bevan & Ors had been struck out for late payment of fees while in Utilities TDS Ltd v Davies, the court had to decide whether two 'trivial' breaches aggregate to become a significant breach. Master of the Rolls, Lord Dyson, upheld all three appeals.

Lord Dyson ruled that the guidance in Mitchell was "substantially sound" but had been "misunderstood and misapplied" and that the use of the word 'trivial' in Mitchell had given rise to confusion and difficulty. He found it was this confusion that had led to the lower courts taking a zero-tolerance approach to breaches of compliance.

In his judgment, he concluded: "It is clear that the guidance in Mitchell needs to be clarified and further explained. It seems that some judges have ignored the fact that it is necessary in every case to consider all the circumstances of the case. This may be the reason for the decisions in Decadent and Utilise.

"But other judges have adopted what might be said to be the traditional approach of giving pre-eminence to the need to decide the claim on the merits. That approach should have disappeared following the Woolf reforms. There is certainly no room for it in the post-Jackson era. It seems, however, that this approach must have been applied in Denton."

In future cases, courts will consider whether breaches of compliance are 'serious or significant'. If they are deemed not to do so, then the court should grant relief. Even if a breach is significant, unless there has been an adverse effect on the efficient running of litigation, courts should consider granting a defaulting party relief from sanction.

The Court of Appeal has instituted a three-stage test to assist the lower courts in assessing whether applications for relief should be refused. Furthermore, heavy costs sanctions will be imposed on parties who unreasonably oppose applications for relief.

Cooperation restored

Lawyers have today hailed the restoration of 'cooperation' in commercial litigation. David Greene, a past president of the 1,400-member London Solicitors Litigation Association (LSLA) welcomed the court's judgment.

"The effect of Mitchell has been corrosive and antagonistic taking litigators back to dark days of non-cooperation at the expense of ensuring a procedure to achieve a just result as, in Mitchell, tactical moves can and have led to substantial benefits for one party.

"Thankfully, today, common sense has prevailed heading off the potential for an unwelcome wave of satellite litigation that threatened to result from Mitchell. With a change in the tests to achieve relief from sanctions, we remove the damaging impact that prescribed that only 'trivial' breaches should automatically secure relief from sanctions," he said.

Greene concluded: "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."

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'Sea change'

"The judgment is a fair and proportionate recalibration of the post-Mitchell costs regime. Lord Dyson and Lord Justice Vos ruled that while the guidance in Mitchell was substantially sound, it had been misunderstood and misapplied, with the lower courts often taking a zero-tolerance approach to breaches of compliance.

"Now, the court should consider whether a failure to comply is serious or significant – if it is neither then the court should grant relief. Even if a breach is significant, unless there has been an adverse effect on the efficient running of litigation courts hearing applications should be more willing to grant relief depending upon all the circumstances of the case.

"This is a sea change away from circumstances over the past year, where many trivial breaches have been treated as significant, sometimes with disastrous results for claimants. Save for exceptional cases, trial dates should not be threatened – as had happened in Denton v T H White – and the new guidance should improve cycle times for cases because the rules are clearer-cut than before.

"This judgment will help to eliminate the large volumes of satellite litigation that developed from the aftermath of Mitchell. Equally, it is also clear that there will be serious repercussions for litigants who try to 'point-score' by opposing relief applications unreasonably."

Matthew Harrington is a partner at BLM, who acted for the appellant in Denton v T H White

'Weighing the breach'

"Today's decision will have a significant impact on litigation cases going forward and is a hugely positive move for the profession as a whole.

"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."

Peter Kaye is a litigation partner at Linder Myers Solicitors, who acted for the appellant in *Utilise TDS v Davies*