Mitchell: A survival guide

In case anyone is thinking otherwise, those failing to comply with deadlines will do so at their peril, as **Georgina Squire** explains

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Despite seemingly weekly decisions from the High Court refusing relief from sanctions (*Webb Resolutions Limited v e.surv Limited* and *MA Lloyd & Sons Limited v PPC International Limited*, to name but a few), some litigators are still questioning whether the Court of Appeal's (CoA's) "new broom" mantra can be avoided.

Recently, the unreported decision of *Addlington v ELS International Lawyers LLP* [2013] granted relief from sanctions on the basis that a failure to file particulars of claim on time was a trivial breach and did not affect the trial timetable. Judge Oliver-Jones QC held that "circumstances do not have to be exceptional to attract the granting of relief" and "procedure has not changed so as to transform rules and rule compliance into trip wires". Does this herald a relaxation of the CoA's draconian decisions?

Whilst this case has encouraged debate amongst those adverse to Mitchell, it is one High Court decision in the face of many others upholding *Mitchell*. The CoA in *Mitchell* went out of its way to consider the cases of *Raayan Al Iraq Co Ltd v Trans Victory Marine and Ian Wyche v Careforce Group Plc* [2013] and expressly held that it disagreed with the more lenient approach adopted in those cases.

We are told that any Jackson-related appeal will be heard by at least one of the "Jackson Five" in the Court of Appeal. Despite some lower court decisions to the contrary, Mitchell seems here to stay. Those failing to comply with court deadlines and rules do so at their peril.

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How to avoid becoming a victim

Aside from the obvious, such as effective diary systems, clear communication and constant review, how do litigators avoid becoming the next victim of Plebgate?

- Start work on the costs budget: Notice of the first case management conference should not be the first time costs budgets are considered. In Mitchell, the claimant received three days' notice to prepare its costs budget. Nevertheless, this was not held to be a relevant factor, as Mr Mitchell's solicitors should have known a costs budget would be needed. Litigators should be thinking about, and preparing, budgets as soon as proceedings are issued.
- Liaise with counsel, experts and witnesses early: Litigators should be liaising with counsel, experts and witnesses at an early stage in proceedings, ideally shortly after proceedings are issued. Carefully consider any planned holidays/previous engagements with experts and witnesses before finalising the directions timetable. Clearly explain the level of input that will be required from these parties and keep any timetable changes under review.
- Start reviewing disclosure early on: The courts now expect litigators to be ahead of the game, preparing for the 'next step' well in advance. Review documentation early, consider the scope of disclosure necessary and try to agree one of the menu options of disclosure with your opponent to avoid protracted arguments later.
- Seek early instructions from the client: Clients should be informed of the effects of *Mitchell* before proceedings are issued. Busy clients can no longer expect extensions or to provide last-minute instructions. Clear communication is key to avoid missing deadlines.

When time runs out

Inevitably, there will still be occasions when a procedural step cannot be completed on time. What happens when an expert or witness suddenly finds he/she is unable to meet a deadline?

- Review current timetable: An extension which is unlikely to affect the progress to trial is more likely to be granted than one that causes an adjournment.
- Consider reasonableness: A deadline may have looked reasonable initially but later developments (such as an expert's subsequent work commitments) mean it is no longer possible or reasonable to expect compliance. Commentators suggest the courts may be more amenable to a prompt application seeking an extension in this situation. However, the key is to make the application before the deadline expires, as relief from sanctions will only be granted in extreme circumstances.
- Seek consent from the other side: Courts want to avoid satellite litigation and the costs of interim applications. Impress upon the other side the costs benefit of an application by consent, reminding them that they may need reciprocity in the future.
- Prompt application: A prompt application prior to expiry of the deadline will garner more sympathy from the court that one for relief once the deadline has passed. Litigators need to be proactive, not reactive.

With forward planning and a proactive approach, there is no reason to be 'Mitchelled'. **SJ**