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ENGLISH COURT OF APPEAL CLARIFIES SANCTIONS IN CIVIL CASES FOR PROCEDURAL DEFAULTS

Denton & Ors v TH White Ltd & Ors [2014] EWCA Civ 906

Introduction

On 4 July 2014, the Court of Appeal handed down its decision in *Denton & Ors v TH White Ltd & Ors* [2014] EWCA Civ 906 in which it provided guidance on the granting of relief from sanctions pursuant to CPR rule 3.9.

As readers may be aware, CPR 3.9 was introduced as part of the "Jackson reforms" in an endeavour to encourage civil litigation parties to comply with procedural directions. Of interest in this case which dealt with three appeals relating to sanctions is the fact that Lord Justice Jackson (the author of the reforms) adopted different reasoning from the majority of the Court of Appeal - as explained further below.

Background

CPR rule 3.9 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."

On 27 November 2013, the Court of Appeal handed down its decision in *Mitchell MP v News Group Newspapers Ltd* [2013] EWCA Civ 1537 in which the applicant sought relief from sanctions. In dismissing the applicant's appeal, the Court of Appeal stated that the English courts would take a robust approach to compliance with the rules, and the need to comply with rules, practice directions and orders was essential. In particular, the Court emphasised the need (a) for litigation to be conducted efficiently and at proportionate cost, and (b) for enforcing compliance with court rules, orders, and practice directions, were to be regarded as being of paramount importance and be given great weight. Solicitors should not take on so much work that they were unable to meet their deadlines.

The decision in *Mitchell* was applied in a number of cases, and resulted in a number of criticisms (identified by the Court of Appeal in its decision in the present case):

- the "triviality" test amounts to an "exceptionality" test which was rejected by Lord Justice Jackson in his report and is not reflected in the rule, and is unjustifiably narrow;
- the description of factors (a) and (b) in rule 3.9(1) as "paramount considerations" gives too much weight to these factors and is inconsistent with rule 3.9 when read in accordance with rule 1.1;
- it has led to the imposition of disproportionate penalties on parties for breaches which have little practical effect on the course of litigation. The result is that one 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.
- the 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.

Summary

The present case involved three appeals:

- *Denton*: the parties had served all their witness statements for use at trial by 27 July 2012, yet the claimant served six further statements in December 2013 one month before the date fixed for a 10 day trial. The further statements were said to be in response to a change of circumstances that had occurred in August 2013. The judge granted the claimant relief from the automatic sanctions in CPR rule 32.10, and as a result the trial had to be adjourned. The defendant appealed against the decision to allow relief from sanctions.
- *Decadent*: the claimant failed to comply with an order which provided that, unless it paid certain court fees by 4.00 pm on 19 December 2013, its claim would be struck out. A cheque for the full fees was sent to the court on the due date by document exchange, so that it could have been expected to arrive only one day late. The cheque was lost, and the non-payment only came to the attention of the parties when the judge mentioned it at a pre-trial review on 7 January 2014. They were paid on 9 January 2014. The judge refused relief from sanctions on 18 February 2014. The claimant appealed against the decision to not allow relief from sanctions.
- *Utilise*: this case involved two breaches. First, the claimant filed a costs budget some 45 minutes late in breach of an order which specifically made reference to the automatic sanctions in CPR rule 3.14, and secondly, the claimant was 13 days late in complying with an order requiring it to notify the court of the outcome of negotiations. No relief from sanctions was granted on the grounds that the second breach rendered the first breach, which would otherwise have been trivial, a non-trivial one. The claimant appealed against the decision to not allow relief from sanctions.

Decision

All three appeals were allowed.

In a joint decision, the Master of the Rolls and Lord Justice Vos held that the guidance issued in *Mitchell* was substantially sound; however, in view of the way that the decision had been interpreted in later cases, they proposed to restate it. In a separate decision, Lord Justice Jackson agreed with the three-stage approach, but disagreed with the importance of the factors to be taken into account

A judge should address an application for relief from sanctions in three stages.

- The first stage is to identify and assess the seriousness and significance of the "failure to comply with any rule, practice direction or court order" which engages rule 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages.
- The second stage is to consider why the default occurred.
- The third stage is to evaluate all the circumstances of the case, so as to enable [the court] to deal justly with the application including [factors (a) and (b)].

The Court of Appeal made the following observations:

First stage

- The first stage should focus on whether the breach was "serious or significant" rather than trivial (the word "trivial" was said to have resulted in "semantic disputes" which did "not promote the conduct of litigation efficiently and at proportionate cost.")
- The assessment of the seriousness or significance of the breach should not, initially at least, involve a consideration of other unrelated failures that may have occurred in the past – this was better suited to the third stage.
- If a judge concluded that a breach is not serious or significant, then relief from sanctions will usually be granted.

Second stage

- It would be inappropriate for the Court of Appeal to provide "an encyclopaedia of good and bad reasons for a failure to comply with rules, practice directions or court orders".
- While paragraph 41 of Mitchell gave some examples, these were "no more than examples."

Third stage

- A misunderstanding had arisen that if (i) there was a non-trivial (now serious or significant) breach and (ii) there was no good reason for the breach, the application for relief from sanctions would automatically fail – that was not the case.
- The Master of the Rolls and Lord Justice Vos held that factors (a) and (b) were of particular importance and should be given particular weight at the third stage when all the circumstances of the case are considered. Lord Justice Jackson disagreed, stating that while CPR rule 3.9 required that factors (a) and (b) be taken into account in all cases, the rule did not require that factor (a) or factor (b) be given greater weight than other considerations.
- The more serious or significant the breach the less likely it is that relief will be granted unless there is a good reason for it. Where there is a good reason for a serious or significant breach, relief is likely to be granted. Where the breach is not serious or significant, relief is also likely to be granted.
- Other relevant circumstances would include the promptness of the application and other past or current breaches of the rules, practice directions and court orders by the parties.

Litigation strategy

- It was 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.
- The court would be more ready in the future to penalise opportunism.
- Heavy costs sanctions should, therefore, be imposed on parties who behave unreasonably in refusing to agree extensions of time or unreasonably oppose applications for relief from sanctions, and the court could, in an appropriate case, also record in its order that the opposition to the relief application was unreasonable conduct to be taken into account under CPR rule 44.11 when costs are dealt with at the end of the case.

Concluding Observations

Many commentators have observed that CPR 3.9 has been used as a litigation weapon rather than (it was perhaps intended) an incentive to comply with procedural directions. It remains to be seen whether the guidance provided by the Court of Appeal will in fact achieve the "re-focus" which is required in this regard.

15th July 2014