

## **COURT OF APPEAL GIVES GUIDANCE ON RELIEF FROM SANCTIONS FOLLOWING MITCHELL AND DENTON**

*Michael Wilson & Partners Ltd v Sinclair* [2015] EWCA Civ 774

### **Introduction**

By a decision handed down on 23 July 2015 in *Michael Wilson & Partners Ltd v Sinclair* [2015] EWCA Civ 774, the English Court of Appeal revoked a judge's order refusing to reconsider the striking out of an appeal in a company's claim for damages against a former director. The principles established by the Court of Appeal in *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537 ("*Mitchell*") were restated by the Court of Appeal in *Denton v TH White Ltd* [2014] EWCA Civ 906 ("*Denton*") and this restatement was a sufficient change in circumstances to justify revoking the order in the instant case.

### **Background**

The underlying claim by the company concerned breaches of contractual and fiduciary duties by a former company director by accepting payments from the second respondent. The company pursued the former director through arbitration and pursued the second respondent through court proceedings.

The arbitrator found largely against the company. The court subsequently struck out the court proceedings against the second respondent as an abuse of process. The company appealed against the abuse of process decision. Rix LJ ordered the company to make a payment into court within a specified time. The company failed to comply with the order of Rix LJ and, accordingly, the appeal was stayed.

The company applied to lift the stay. Lewison LJ refused permission and struck out the appeal. Lewison LJ viewed the application to lift the stay as an application for relief from sanctions pursuant to CPR 3.9. Lewison LJ applied the Court of Appeal's decision in *Mitchell* and the strict approach to relief from sanctions embodied in that decision – refusing to view the company's breach of Rix LJ's order as a trivial breach.

Subsequently the Court of Appeal gave its decision in *Denton* in which the strict approach of *Mitchell* was restated.

Two weeks after the decision in *Denton*, the company applied for the court to exercise its discretion under CPR 3.1(7) to revoke Lewison LJ's order. The company argued that the decision in *Denton* represented a fundamental change of circumstances that rendered Lewison LJ's understanding of the principles of *Mitchell* plainly wrong.

## **Decision**

*Denton* sets out a three-stage approach:

- (a) The court will consider whether the breach giving rise to the sanction was serious or significant. If the breach is neither serious nor significant, relief will usually be granted.
- (b) The court will consider why the breach occurred.
- (c) The court will consider all the circumstances of the case so as to enable it to deal justly with the application, considering the need for litigation to be conducted efficiently and at proportionate cost and the need to enforce compliance with rules, practice directions and orders.

The Court of Appeal (Richards and Christopher Clarke LJJ) held that the first two stages of the *Denton* test, when applied to the instant facts, would not have produced a different result to that arrived at by Lewison LJ.

However, the Court of Appeal held that Lewison LJ had not applied the third stage of the *Denton* test. Given that Rix LJ had expressly declined to issue an unless order with regard to the payment into court for the appeal, Lewison LJ should have considered this as a factor signifying that strike-out of the appeal was too draconian a step.

The exceptional circumstances justified revoking Lewison LJ's order and granting relief from the order of Rix LJ. The appeal would be allowed to proceed on terms as to costs.

## **Concluding Remarks**

The decision provides a further illustration of how the court is to approach applications for relief from sanctions. The restatement in *Denton* of the strict approach set out in *Mitchell* illustrates that judges must have regard to all the circumstances of the case.

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