FORUM OF INSURANCE LAWYERS

Informing Progress – Shaping the Future

FOIL UPDATE May 2014

The courts set some *Mitchell* boundaries

The last FOIL Update on *Mitchell* case-law in January this year was entitled *'Mitchell – rough weather forecast'* and detailed the tough approach being taken by the Court of Appeal, with a trickle-down effect to the lower courts, leading to some very tough decisions. Anecdotally, FOIL reported an environment where applications to the court were becoming routine, with many practitioners feeling they were obliged to try to '*Mitchell*' their opponent should the opportunity arise, to avoid facing criticism from their clients when such rich results were in prospect if a judge could be persuaded to refuse relief.

It would be going too far to say that the climate has changed but there are signs that the judicial approach to *Mitchell* is becoming less knee-jerk and more thoughtful. The Court of Appeal having talked tough, and Lord Dyson having accepted that there have been some "*ridiculous*" judicial decisions, the Court of Appeal has now warned that courts hearing applications for relief from sanctions should not have as their sole objective a "*display of judicial musculature*" (see *Chartwell*, below) but should be looking to achieve a just result having regard to the interests of the parties and the wider interests of justice. Coupled with this CA warning to judges against throwing their weight around without justification, there have been a number of decisions in which the limits of the *Mitchell* principles have been clarified – not everything that comes before the court is subject to the *Mitchell* approach.

The need for efficiency and compliance will not always be decisive

In the case of *Chartwell Estate Agents Ltd v Fergies Properties SA and Anr [2014] EWCA Civ 506* the Court of Appeal was asked to consider the order of Mr. Justice Globe who, having found that both parties were in breach of an order for exchange of witness statements, granted an extension of time and relief from sanctions to both parties and made directions pushing the matter on to trial. The judge found that the claimant was at greater fault and that its failure was not trivial and was without good reason, but taking into account all the circumstances of the case he also found that a fair trial could still be had without losing the trial date; that granting relief would not incur significant costs and that a refusal to grant relief would effectively be the end of the claim as the claimant would have no evidence to put before the court.

The Court of Appeal held that Globe J was entitled to decide the matter as he did. Although, in itself, the fact that refusing relief would have had grave consequences for the claimant would not lead to relief being granted, it would be "*unreal*" to not have regard to the consequence of termination of the claim as one of the circumstances to be taken into account. The two factors in CPR 3.9, focusing on efficiency and proportionate cost and the need to ensure compliance will not always prevail over all other circumstances in the case.

The Court of Appeal expressed concern that the new culture appears to be promoting satellite litigation at present, rather than discouraging it: it hopes that this will be temporary. Whilst stating that the best way to avoid satellite litigation is to comply, or seek extra time or relief as soon as possible, it also emphasised that appeal courts will not lightly interfere with a case management decision. The Court of Appeal will support "*robust and fair case management decisions*". That applies equally to cases where relief has been granted as to cases where relief has been denied.

Mitchell does not apply where a time extension is sought within time

There had already been an indication from the High Court in April, in *Kaneria v Kaneria*, that *Mitchell* principles should not be applied to applications for time extensions brought within time but the matter has now been confirmed by Lord Justice Jackson in the Court of Appeal in the case of *Hallam Estates and anr v Baker [2014] EWCA Civ 661*. If an application for an extension of time is made prior to the deadline it is not an application for relief from sanctions, even if the application is heard after the deadline has passed. An application for an extension of time should be dealt with in the light of the overriding objective, not the principles in CPR 3.9. Lord Justice Jackson made it clear that the new CPR 1.1(2)(f), adding the need to achieve compliance as one of the aims of the overriding objective, did not prevent courts from allowing reasonable extensions of time which did not affect hearing dates or disrupt the proceedings.

Although the new provision in CPR r 3.8 allowing the parties to agree extensions of up to 28 days does not come into force until 5 June, Lord Justice Jackson was keen to encourage parties to be sensible in agreeing time extensions:

> *"Under r 1.3 the parties have a duty to help the court in furthering the overriding objective. The overriding objective includes allotting an appropriate share of the court's resources to an individual case. Therefore legal representatives are not in breach of any duty to their client when they agree to a reasonable extension of time which neither imperils future hearing dates nor otherwise disrupts the conduct of the litigation. On the contrary, by avoiding the need for a contested application they are furthering the overriding objective and also saving costs for the benefit of their own client."*

In *Kaneria v Kaneria [2014] EWHC 1165 (Ch)* Mr. Justice Nugee was also keen to discourage applicants from believing that refusing a request for an extension of time might result in a windfall decision. In deciding, in applying the overriding objective, whether granting an extension of time would impact on other court users, he acknowledged that the application for an extension had taken up the time of the court. However, the application,

> *"..was caused by the [respondent's] decision to mount a full-scale opposition to the application. I have already said that I regard that as an entirely rational attempt to win his case without having to prove it at trial, but however understandable it is, I do not think [the respondent] can rely on the fact that he has chosen to oppose the application as itself a reason for refusing it. To do so would simply increase the temptation for those asked to consent to extensions to refuse to do so and argue at length why they should not be granted".*

A delay in filing a costs budget is not always fatal

In making their application it would have been reasonable for the fourth defendant's lawyers in the case of *Wain v Gloucestershire County Council [2014] EWHC 1274 (TCC)* to have suffered the "*sweaty palms*" predicted by Mr. Justice Ramsey when costs budgeting was introduced. Having filed their costs budget a day late there must have been concern that a strict approach by the court would result in a costs budget limited to court fees only.

HH Judge David Grant, however, took a more pragmatic approach, finding that the breach was trivial for the following reasons:

- The delay was one day in the context of a time frame of seven days
- The seven day period could usefully be compared with the three day period for serving an application notice before *its* hearing.
- The claimant had not suffered any prejudice.
- The parties were perfectly able to deal with the issue of costs at the CMC and costs management hearing.
- Unlike in Mitchell, there was no disruption to the court's timetable (because the application for relief from sanction was made orally at the CMC and dealt with by the judge on that occasion)

The judge drew a distinction between the claimants in this case who had had many years to prepare their case and the fourth defendant, brought into the action when proceedings were served without the claimants complying with the pre-action protocol.

It will not always be the case that filing one day late will be trivial: the judge acknowledged that much depends on context and the case in question. However, particularly in cases where revised costs budgets are required after the CMC and where a costs management order is not made at the first hearing, a delay of one day in filing a budget can become "*almost entirely irrelevant or immaterial on the subsequent occasion when the court in fact makes a cost management order"*.

Echoing the point raised by Mr. Justice Nugee in *Kanaria*, above, the judge noted a point raised by Lord Justice Jackson in his paper to the CJC Conference on the reforms in March this year, that "*parties should not be allowed to exploit trivial or insignificant breaches by their opponents".*

Does Mitchell apply to default judgments?

In March of this year Mr. Justice Silber in *Samara v MBI & Partners UK [2014] EWHC 563 (QB)* found that *Mitchell* principles do apply to an application under CPR r.13.3, to set aside a default judgment. Although the lectures in the implementation programme did not deal specifically with the approach under CPR 13.3, Silber J took the view that the new regime had universal application to all rules in the CPR. As evidence of this he referred to the changes to the overriding objective referring to proportionate cost and the need to enforce compliance with the rules.

A party against whom a judgment is entered in default has an obligation to apply promptly under CPR r 13.3(2). Treating the application to set aside the default judgment as an application for relief, Silber J found that the delay in applying to set aside the judgment in this case was not trivial nor was there a good reason for the failure. He therefore refused to set aside the judgment, going on to state that even if the new regime did not apply to the application he would still have refused to set the default judgment aside as the defendant had not made the application promptly as required under the rules.

Master O'Hare in *Brett v Colchester Hospital University NHS Foundation Trust [2014] EWHC B17 (Costs)* has cast doubt on this approach, finding that *Mitchell* does not apply when an application is made to set aside a default costs certificate. He found a significant difference between r. 3.9 and the default judgment rules. The question to be asked when a decision is to be made on setting aside a default judgment is "*is there a good case for the case continuing?"* He noted, *"That difference in wording is relevant because a failure to serve a document on time which leads to a default judgment or a default costs certificate ordinarily has no effect on other court users except the parties themselves".*

In this case, the receiving party had served the bill at the wrong address, having failed to receive a notice of change of solicitors due to a problem with its email system. When no points of dispute were served it obtained a default certificate of costs. In defending its default certificate the receiving party complained of a breach of PD 6A para 4.2 which says that a person intending to effect service by email must first ask the party who is to be

served whether there are any limitations to the agreement to accept email. The paying party had not made such a call before sending the notice of change of solicitors. The judge did not believe that the phone call was a pre-requisite to good service and described the recommendation as of "*historical interest only*" as IT improvements had rendered a call largely unnecessary. If he was wrong and *Mitchell* did apply he found that the failure to make the call was a trivial breach.

Conclusion

There are perhaps the first signs here that, as senior judges have predicted, the new regime is beginning to bed down. The more extreme edges are being rubbed off the new regime, and its limits are being defined, but it would be rash to talk of the principles being watered down.

Perhaps the strongest steer from the recent judgments is not that the judges have gone soft on *Mitchell* but that they are relying upon the parties to do their work for them. The introduction of the new r.3.8 allowing parties to agree extensions of time, coupled with a firm judicial steer that parties should endeavour to deliver on the overriding objective, makes it a difficult call to refuse a reasonable request for an extension of time made within the deadline. Pushing a party to make an application within time is unlikely to be viewed favourably.

However, a party in default will still have work to do to persuade a court to grant relief. Don't be fooled by *Chartwell* (where both parties were in breach) or by *Wain (*where a one-day delay had had little practical effect), there are still likely to be harsh decisions from the courts, and the Court of Appeal has made it clear that it will be very reluctant to get involved.

All of the judgments mentioned above are available on the Bailii website: www.bailii.org