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Sanctions After Mitchell

Introduction

Procedural rules exist to ensure that litigation is conducted efficiently and in an orderly way¹. They lay down the steps that need to be taken by the parties to prepare for the resolution of their dispute, whether by negotiated settlement or trial. In England and Wales the procedural steps that have to be followed in litigation are laid down in a combination of the pre-action protocols, the CPR, practice directions and in case management directions made in individual cases by the court. Any system of justice needs to have appropriate powers to ensure that parties keep to the timetable and ensure they are ready for trial when the time comes. Failure to enforce compliance results in delay, expense and vexation. The system of sanctions is the method used to combat these problems.

Procedural defaults vary widely in their seriousness and consequences. Filing a document one minute after a deadline is far less serious and has less impact on the civil justice system than not being ready for trial resulting in the loss of a trial date. Defaults also vary considerably in their blameworthiness. Missing a deadline by a minute may be due to pure incompetence, whereas not being ready for trial may be due to illness or other circumstances outside the control of the party.

Approaches to dealing with procedural default have varied over the years². Before the Judicature Acts 1873-75 English procedure was dominated by form and technicality, with as many cases being defeated on points of procedure as were decided on their merits³. An overly formalistic approach encouraged interim applications taking technical points, which lead to congestion in the courts, delays, and parties with meritorious cases being deprived of justice. This was swept away in 1875, and replaced by a system designed to ensure that procedure was subordinated to the interests of justice. Under the Rules of the Supreme Court any failure to comply with the requirements of the rules was treated as an irregularity and did not nullify the proceedings or any step taken in the proceedings⁴. The interests of justice were primarily served by deciding cases on their merits. "The principle obviously is that unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure."⁵ This resulted in an extremely restrictive approach to dismissal for want of prosecution⁶, and encouraged a climate of letting sleeping dogs lie⁷ when a claim became inactive because taking steps to enforce compliance might provoke the claimant into making further progress with the claim, with any default being readily forgiven.

Introduction of the CPR should have resulted in far more active judicial intervention to prevent non-compliance with procedural timetables. As explained by Professor Zuckerman⁸, even the original version of the overriding objective introduced a three-dimensional approach to the concept of justice, comprising:

¹ For litigation in England and Wales this is laid down by the overriding objective in the Civil Procedure Rules 1998, SI 1998/3123 ("CPR"), r 1.1(1) as amended. This provides that the overriding objective of the CPR is to enable the court to deal with cases justly and at proportionate cost.

² Adrian Zuckerman, "The revised CPR 3.9: a coded message demanding articulation"[2013] CJQ 123 at 126.

³ W.B. Odgers, "Changes in Procedure and in the Law of Evidence" in *A Century of Law Reform* (1901) 203.

⁴ Rules of the Supreme Court 1965, SI 1965/1776 ("RSC"), order 2, r 1(1), replacing similar provisions in earlier versions of the rules. The equivalent provision in the CPR is r 3.10.

⁵ Lord Atkin in *Evans v Bartlam* [1937] AC 473 at 480.

⁶ The principles were laid down in *Birkett v James* [1978] AC 297.

⁷ Lord Salmon in *Birkett v James* said this was perfectly permissible.

⁸ Adrian Zuckerman, "The revised CPR 3.9: a coded message demanding articulation"[2013] CJQ 123 at 128-9.

- (a) Merits. An essential part of the court's function is to arrive at a correct decision in accordance with the law and evidence⁹;
- (b) Time. Dealing with disputes expeditiously¹⁰ is one of the imperatives of the overriding objective, and reflects the venerable aphorism that justice delayed is justice denied; and
- (c) Resources. Dealing with a case justly includes saving expense and dealing with it in ways that are proportionate to what is at stake, and allotting to it an appropriate share of the court's resources¹¹.

Since the CPR came into force in April 1999 the courts have had a duty to manage cases actively¹², and parties have been under a duty to help the court in furthering the overriding objective¹³. In doing so the court has to balance the three dimensions laid down by the overriding objective without giving one of them undue weight¹⁴. Despite initial good intentions, and despite dispelling the idea of letting sleeping dogs lie¹⁵, in practice the courts tolerated repeated breaches of directions, which resulted in a proliferation of interim applications and appeals over the consequences of non-compliance. Unless a fair trial was no longer possible¹⁶, or if there were repeated breaches amounting to a total disregard of court orders¹⁷, cases were rarely struck out for procedural default¹⁸. A slack approach to compliance with procedural orders was recognised by Sir Rupert Jackson¹⁹ as a driver of excessive litigation costs.

To combat this Sir Rupert Jackson recommended that judges should take a more robust approach to case management, and make sure that realistic timetables are observed²⁰. A key component of this approach was the replacement of CPR, r 3.9, with effect from 1 April 2013. Whether the new r 3.9 achieves its intended objectives and effects the right balance between the three elements of justice set out above must be open to question.

Rule 3.9: Relief from Sanctions

With effect from 1 April 2013, relief from sanctions is governed by CPR, r 3.9 which is in the following terms:

'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

⁹ CPR, r 1.1(1) and 1.1(2)(d).

¹⁰ CPR, r 1.1(2)(d).

¹¹ CPR, r 1.1(2)(b), (c) and (e).

¹² CPR, r 1.4; Robert Turner, "'Actively': the word that changed the civil courts" in *The Civil Procedure Rules Ten Years On*, ed Deidre Dwyer (Oxford: OUP, 2009), 77-88.

¹³ CPR, r 1.3.

¹⁴ *Holmes v SGB Services plc* [2001] EWCA Civ 354 at [38], per Buxton LJ.

¹⁵ *Blackstone's Guide to the Civil Procedure Rules* 2nd ed (Oxford: OUP, 1999), 174; PD 28, para 5 (fast track) and PD 29, para 7 (multi-track); *Khalili v Bennett* [2000] EMLR 996.

¹⁶ *Taylor v Anderson* [2002] EWCA Civ 1680. While a considerable risk of not achieving a fair trial was relevant on an application to strike out for delay, it was regarded as not applicable on an application for relief from sanctions (*Hansom v E Rex Makin & Co* [2003] EWCA Civ 1801).

¹⁷ For example, *UCB Corporate Services Ltd v Halifax (SW) Ltd* [1999] CPLR 691.

¹⁸ See the cases cited in *Blackstone's Civil Practice 2013* (Oxford: OUP, 2013) chapter 46, and in particular at paras 46.12 to 46.28.

¹⁹ *Review of Civil Litigation Costs: Final Report* (2009), chapter 39.

²⁰ *Review of Civil Litigation Costs: Final Report*, Executive Summary para 6.8.

(b) to enforce compliance with rules, practice directions and orders.¹

As pointed out by Professor Zuckerman²¹, in itself this rule says very little that is not already stated in the overriding objective as set out in r 1.1, or which goes without saying in that it is obvious that rules, practice directions and orders are made with the intention that they should be complied with. Lurking within the rule was a code waiting to be unlocked by the Court of Appeal.

The current rule 3.9 replaced the version introduced with the CPR in April 1999. As originally enacted, the rule spelt out nine factors that the court had to take into account when considering all the circumstances of the case in an application for relief from sanctions²². Early authorities on the original version of r 3.9(1) held it was essential for the judge to consider each of the factors listed in r 3.9(1) systematically, and then to weigh the various factors in deciding whether granting relief would accord with the overriding objective²³. This formalistic approach was disapproved by *Khatib v Ramco International*²⁴, where it was said the judge has to identify the factors from the r 3.9(1) list that are relevant to the circumstances of the particular case, and conduct an appropriate review and balancing exercise.

With a list of nine relevant factors, almost inevitably some would favour granting relief, and others would militate against relief. While the courts disavowed the temptation to indulge in simple head-counting²⁵, and insisted it was necessary to assess the significance and weight of all the relevant circumstances, there would almost always be reasons why relief should be granted. Part of the problem was that the list of factors was too long, leading to information overload, and damaging decision-making²⁶. Also contributing to the problem was the failure to prioritise the factors set out in the rule, and the underlying culture that the interests of justice can best be satisfied by deciding cases on the merits with scant regard to the other two dimensions of time and resources.

The new rule 3.9 sweeps away the old nine factors, and replaces them with two concepts: the need for litigation to be conducted efficiently and at proportionate cost, and the need to comply with the timetable for the case. One of the objectives was plainly to remove the checklist approach to

²¹ Adrian Zuckerman, "The revised CPR 3.9: a coded message demanding articulation" [2013] CQJ 123 at 124-5.

²² In its original form, r 3.9(1) provided: "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 including-

- (a) the interests of the administration of justice;
- (b) whether the application for relief has been made promptly;
- (c) whether the failure to comply was intentional;
- (d) whether there is a good explanation for the failure;
- (e) the extent to which the party in default has complied with other rules, practice directions, court orders and any relevant pre-action protocol;
- (f) whether the failure to comply was caused by the party or his legal representative;
- (g) whether the trial date or the likely trial date can still be met if relief is granted;
- (h) the effect which the failure to comply had on each party; and
- (i) the effect which the granting of relief would have on each party."

²³ *Woodhouse v Consignia plc* [2002] EWCA Civ 275, [2002] 1 WLR 2558 and *RC Residuals Ltd v Linton Fuel Oils Ltd* [2002] EWCA Civ 911, [2002] 1 WLR 2782.

²⁴ [2011] EWCA Civ 605, [2011] CP Rep 35.

²⁵ *Hansom v E Rex Makin & Co* [2003] EWCA Civ 1801 at [20]; *Fred Perry (Holdings) Ltd v Brands Plaza Trading Ltd* [2012] EWCA Civ 224, [2012] FSR 28 at [18].

²⁶ Inbar Levy, "Lightening the overload of CPR Rule 3.9" [2013] CQJ 139. A three-factor test had been proposed by Andrew Higgins in "The costs of case management: what should be done post-Jackson?" [201] CQJ 317, namely (1) whether granting relief would prejudice the other parties' right to a fair trial; (2) whether granting relief would result in the court allocating disproportionate resources to the dispute; and (3) whether there was a good reason for the failure to comply.

applications for relief from sanctions, and to free the courts from the growing jurisprudence on the old nine factors. Another was to set out the two primary considerations that have to be considered on applications for relief from sanctions. Courts are still required to consider all the circumstances of the case, but are now given clear guidance that efficient and proportionate conduct together with compliance with rules must weigh most heavily when balancing all the relevant circumstances.

It is also plain that the new rule 3.9 was intended to implement recommendation 86 from the *Review of Civil Litigation Costs: Final Report*. This said:

"The courts should be less tolerant than hitherto of unjustified delays and breaches of orders. This change of emphasis should be signalled by amendment of CPR rule 3.9. If and in so far as it is possible, courts should monitor the progress of the parties in order to secure compliance with orders and pre-empt the need for sanctions."

In discussing the enforcement of rules and directions, Sir Rupert set out the following conclusions²⁷:

"First, the courts should set realistic timetables for cases and not impossibly tough timetables in order to give the impression of firmness. Secondly, courts at all levels have become too tolerant of delays and non-compliance with orders. In doing so they have lost sight of the damage which the culture of delay and non-compliance is inflicting upon the civil justice system. The balance therefore needs to be redressed²⁸. However, I do not advocate the extreme course which was canvassed as one possibility in [the Preliminary Report] or any approach of that nature."

Sir Rupert went on to suggest a form of words for the new rule 3.9 which are similar to the new rule as enacted²⁹. His version had an identical para (a), but instead of para (b) on the need to enforce compliance with rules, practice directions and orders, required the court to consider "the interests of justice in the particular case." Sir Rupert's draft rule therefore balanced the "time" and "resources" factors in his para (a) with the interests of justice factor in his para (b). As enacted, rule 3.9 has the interests of justice factor in the main part of rule 3.9(1), the "time" and "resources" factors in para (a), and a new emphasis on compliance with rules for its own sake in para (b). It may be that the rule as enacted was intended to effect a hardening of attitudes to rule compliance.

The "extreme course" referred to in the *Final Report* was that non-compliance with the rules or directions would not be tolerated except if there were "exceptional circumstances"³⁰. As will be seen, the Court of Appeal has come very close to laying down a principle that adopts this extreme course.

Pre-Mitchell Decisions

Predictably, there were a considerable number of mostly first instance and High Court decisions on the new CPR, r 3.9 in the six months after the rule came into force. They are likely to be regarded as mainly being of historical interest given the guidance given by the Court of Appeal in *Mitchell v News*

²⁷ *Review of Civil Litigation Costs: Final Report*, para 39.6.5.

²⁸ This new approach was referred to in a number of Court of Appeal decisions before 1 April 2013. An example is *Fred Perry (Holdings) Ltd v Brands Plaza Trading* [2012] EWCA Civ 224, [2012] FSR 28, per Lewison LJ, who specifically adopted the words set out in the quotation from the *Final Report*.

²⁹ At para 39.6.7. Lord Dyson M.R. in *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537 at [35] appears to have thought that the draft rule 3.9 in the *Review of Civil Litigation Costs: Final Report*, para 39.6.7 was the same as r 3.9 as enacted.

³⁰ *Review of Civil Litigation Costs: Preliminary Report* (2009), para 43.4.21.

Group Newspapers Ltd. First in time is *Murray v Dowlman*³¹ where the claimant's costs budget under the pilot scheme in PD 51G mistakenly omitted to include the CFA success fee and ATE premiums. The error amounted to failing to tick a box on the form, a box that was not included in the costs budget forms that were introduced on 1 April 2013. Relief to rectify the error was granted. Next was *Venulum Property Investments Ltd v Space Architecture Ltd*³² where the claim form was served on the final day of its validity. This meant that the particulars of claim had to be served at the same time³³, but the claimant's solicitors mistakenly believed they had another 14 days to do so. Edwards-Stuart J in his judgment addressed each of the old r 3.9(1) factors in turn³⁴, and concluded that they were fairly evenly balanced³⁵. Relief was refused partly because of factors not on the old r 3.9 list, such as pre-issue delay, the strength of the case, and what the judge described as vague pleading, together with the stricter approach required under the civil justice reforms of 2013.

In *Wyche v Careforce Group plc*³⁶ there was a failure to comply with an unless order for disclosure through failing to carry out one of the keyword searches ordered by the court, and through miscategorising other documents as privileged when they were not. A total of 89 documents were therefore disclosed late in a substantial case involving thousands of documents. Relief was granted under r 3.9, the judge commenting that allowance had to be made for human error, that the mistakes had been rectified and had been unintentional. This decision was criticised as not amounting to a good reason by the Master of the Rolls in *Mitchell v News Group Newspapers Ltd*³⁷, and should not have resulted in relief from the sanction unless the breach was trivial.

*Thavatheva v Riordan (No 1)*³⁸ proceeded on the basis that there had been serious failures to comply with disclosure obligations under the terms of an unless order, and relief was refused. The judge said that although the checklist of factors under r 3.9 had been removed, they continued to be matters which needed to be considered as they enabled the court to assess whether relief from sanctions would be appropriate under the new r 3.9. The same point about the continuing relevance of the old checklist was made in *Rayyan Iraq Co Ltd v Trans Victory Marine Inc*³⁹, where particulars of claim were served two days late. The court criticised the defendant for seeking to take advantage of the error, and granted relief because refusing to do so would have been disproportionate and given the defendant an unjustified windfall. These two cases, together with *Venulum Property Investments Ltd v Space Architecture Ltd*⁴⁰ go too far in applying the old r 3.9(1) factors⁴¹. Depending on the facts it may be appropriate to consider some or even all the old factors as part of "all the circumstances of the case", while giving due weight to the two factors set out in the new r 3.9(1).

*Biffa Waste Services Ltd v Dinler*⁴² was an example of multiple breaches of court directions. The claimant failed to file a pre-trial checklist in time or to pay listing or hearing fees. He served his witness statements 27 days late, failed to attempt to agree the trial bundle, and lodged it on the day before the trial rather than 7 days before as directed. The trial judge simply imposed a costs sanction. On appeal Swift J noted that the trial judge had failed to undertake a balance of factors

³¹ [2013] EWHC 872 (TCC).

³² [2013] EWHC 1242 (TCC).

³³ This is the effect of CPR, rr 7.4(2) and 7.5(1), supplanting the usual 14 day rule in r 7.4(1).

³⁴ At [36] to [44].

³⁵ At [47].

³⁶ [2013] EWHC 3282 (Comm), Walker J.

³⁷ [2013] EWCA Civ 1477 at [48].

³⁸ Hildyard J, 9 August 2013.

³⁹ [2013] EWHC 2696 (Comm), Andrew Smith J. This decision was criticised in *Mitchell v News Group Newspapers Ltd* at [50]-[51] for placing too much emphasis on doing justice between the parties.

⁴⁰ *Supra*.

⁴¹ *Mitchell v News Group Newspapers Ltd* at [49].

⁴² Swift J, 10 October 2013.

approach, and that under the new r 3.9 the court was required to consider wider issues of court time and resources. This was a case of flagrant disregard of court orders and requirements set out in the rules, and relief from the automatic striking out in CPR, r 3.7(4) for non-payment of fees was refused.

In *Thavatheva v Riordan (No 2)*⁴³ the defaulting party made a second application for relief from sanctions under r 3.9, producing evidence that they had been misled by their former solicitors into believing that the solicitors had complied with the unless order. Relief was granted by the first instance judge on the basis that there was no evidence the solicitors had wilfully not complied with the original order, which amounted to a material change of circumstances. This was regarded as wrong in principle by Richards LJ in the Court of Appeal as lacking the robustness demanded by *Mitchell v News Group Newspapers*. The first instance judge varied the original order under r 3.1(7), which provides a general power to vary or revoke previous orders. This part of the decision was reversed in the Court of Appeal for varying the order under r 3.1(7) far too readily, and for wrongfully treating late compliance with the original order as a change in circumstances.

*Kesabo v African Barrick Gold plc*⁴⁴, like *Venulum Property Investments Ltd v Space Architecture Ltd*⁴⁵, was a case where the claim form was served close to the end of its period of validity, but in this case the particulars of claim were served 16 hours late. Simon J applied the two main factors set out in the new r 3.9(1), commenting that the new factors do not require any further elaboration or refinement. He also said that some of the criteria from the old r 3.9(1) might be relevant in considering all the circumstances of the case, although they should not be applied in a formalistic way. Given the short period of breach, relief was granted. The final case in the series is *Boyle v Commissioner of Police of the Metropolis*⁴⁶, which was a Court of Appeal decision under the old r 3.9. An expert's report was served one working day before the trial, and no explanation was given for the delay. Relief was refused, a decision that was upheld in the Court of Appeal. Livermore LJ at [11] commented that:

"There is the further important consideration that, as must now be well known, the courts are becoming less and less tolerant of failure to serve expert evidence in accordance with previous orders of the court, just as they are becoming less and less tolerant of other breaches of court orders. It is not merely prejudice to the parties that matters. There is prejudice to the system of justice as a whole and, in particular, to waiting litigants if their cases are to be deferred because of delays in litigation currently before the court. ... As the judge in this case said, any court is reluctant to see a catastrophically injured claimant go uncompensated, but there has to be a clear message that prolonged and persistent failures to comply with court orders may well result in cases being dismissed."

Mitchell v News Group Newspapers Ltd

On 19 September 2012, at approximately 7.30pm, Mr Andrew Mitchell M.P., at the time the Government Chief Whip, left his office at 9 Downing Street in order to cycle home. His exchange with the police officers at the entrance to Downing Street became instantly notorious, and widely known as "plebgate". An article published by the defendant newspaper two days later was the subject of defamation proceedings brought by Mr Mitchell. PD 51D, the defamation proceedings costs management pilot scheme, applied to the proceedings. This provided that the parties had to

⁴³ [2013] EWHC 3179 (Ch), Andrew Sutcliffe QC, reversed after the decision in *Mitchell v News Group Newspapers* [2013] EWCA Civ 1537 by the Court of Appeal at [2014] EWCA Civ 15.

⁴⁴ [2013] EWHC 3198 (QB).

⁴⁵ [2013] EWHC 1242 (TCC).

⁴⁶ [2013] EWCA Civ 1477. There are problems with the substantive and evidence law issues in this case, which are beyond the scope of this article.

discuss the assumptions and the timetable upon which their costs budgets were based⁴⁷, and had to exchange and lodge their costs budgets not less than 7 days before the hearing for which the costs budgets were required⁴⁸.

On Wednesday 5 June 2013 the court issued an order convening a case management conference and costs budget hearing for Monday 10 June 2013. This failed to give the minimum 3 days' notice required for case management conferences⁴⁹, let alone enough time to lodge costs budgets 7 days in advance of the hearing. The hearing was relisted for 18 June 2013, it not being clear from the judgment when notice of the relisted hearing was given, but Master McCloud's judgment seems to indicate this was on Friday 7 June 2013⁵⁰. Given that periods expressed in the CPR, practice directions and court orders mean clear days⁵¹, this meant that costs budgets had to be exchanged and filed by Monday 10 June 2013. Technically this allowed only one working day to discuss budgetary assumptions, prepare, exchange and file costs budgets in a case where each party's costs were about £500,000.

Rule 2.8(2) seems to have been overlooked by the Master and the Court of Appeal. At [60] and [61] of her judgment the Master said:

"60. I have given close consideration to the amount of time which the Claimant had to produce his budget. Was there procedural unfairness? On the face of it 4 days is short and even shorter when one considers that two days were weekend days. But having considered this carefully, because it was a point which troubled me, the view I have taken is that the parties were well aware that this was a case for which budgeting would be required from the start and that the mere fact that a date is set for CMC is not supposed to be the starting gun for proper consideration of budgeting.

61. Budgeting is something which all solicitors by now ought to know is intended to be integral to the process from the start, and it ought not to be especially onerous to prepare a final budget for a CMC even at relatively short notice if proper planning has been done. The very fact that the Defendants, using cost lawyers, were well able to deal with this in the time allotted highlights that there is no question of the time being plainly too short or unfairly so."

In the event by engaging outside costs lawyers the defendant filed its costs budget on 11 June 2013. Technically this was one day late⁵². No point has been made about that. It appears that the defendant may have attempted to engage in discussions on budgetary assumptions after filing its budget⁵³, which was also technically a breach of PD 51D, para 4.1, which required the discussions to take place during the preparation of the costs budgets, not after they were filed.

On the claimant's side, the evidence was that work started on the costs budget on 10 June, that counsel sent figures on 13 June, that a draft budget was sent to chambers on 14 June, but that nothing was communicated to the court until 17 June 2013 after the Master sent an email chasing the situation. The response indicated that the delay was caused by the need to chase counsels'

⁴⁷ PD 51D, para 4.1.

⁴⁸ PD 51D, para 4.2.

⁴⁹ PD 29, para 3.7.

⁵⁰ [2013] EWHC 2355 (QB) at [37].

⁵¹ CPR, r 2.8(2).

⁵² Master McCloud at [2013] EWHC 2355 (QB), [38], commented that filing on 11 June 2013 was in compliance with the rules.

⁵³ [2013] EWHC 2355 (QB) at [38]. At [2013] EWCA Civ 1537, [54], Lord Dyson MR said there was no specific evidence to support the Master's finding that the defendant's solicitor had sought to engage in budget assumption discussions.

figures. A costs budget was filed later on 17 June. When the case came before Master McCloud on 18 June 2013 it transpired that the real reason for the delay was a combination of the senior associate solicitor who usually did the costs budgeting having left the firm, and the other fee earners with conduct of the case being heavily engaged on another case, with three different hearings in that week as well as a substantial statement of case to prepare. As the Master put it, the firm was "stretched very thin in terms of resources"⁵⁴. She said the excuses put forward by the claimant's solicitors were not unusual: "pressures of work, a small firm, unexpected delays with counsel and so on"⁵⁵, but these amounted to no good excuse for the default⁵⁶.

On 18 June 2013 Master McCloud decided⁵⁷ that there had been an absolute failure by the claimant to engage in discussions over budgetary assumptions, as well as the failure to exchange and file the claimant's costs budget until the day before the case management conference. She therefore imposed a sanction of treating the claimant as having filed a costs budget limited to court fees. On 25 July 2013 Master McCloud heard an application for relief from that sanction. There being objections from Mr Mitchell's side to a long wait, the Master needed to vacate a half day in her list which had been pre-allocated to deal with claims by persons affected by asbestos related diseases. As Master McCloud explained⁵⁸, there is an expedited list for such claims because life expectancies in these cases are often very short. It is hard to understand why the relief from sanctions application justified vacating the appointments in the asbestos related claims. Nevertheless, it illustrates the fact that any application dealing with the consequences of non-compliance has an impact on other, probably more deserving, cases awaiting adjudication. The Master emphasised the importance attached to rule compliance following the civil justice reforms of 2013⁵⁹, and decided it would not be just to grant relief from the sanction imposed on 18 June 2013⁶⁰.

In the Court of Appeal it was held that the Master was entitled to apply the sanction laid down by CPR, r 3.14, to disallow the claimant's costs other than court fees, by analogy⁶¹. Although there was no equivalent sanction provision in PD 51D, this sanction represented the considered view of the Civil Procedure Rule Committee as to what constituted a proportionate sanction for failure to file a costs budget in time unless the court ordered otherwise. A court should only order otherwise in most cases on the same grounds as are relevant to a decision to grant relief from sanctions under r 3.9⁶². This is of course a legitimate reading of r 3.14. Another interpretation of the rule is that the sanction set out in r 3.14 is intended to have a coercive effect (rather like committal for contempt), which is partly to punish, and partly to encourage compliance, so that the draconian effect can be adjusted once compliance has been achieved. That is not the way the Court of Appeal has approached the position. It almost certainly means that all the other sanctions set out in the CPR are also to be taken as the considered view of the Civil Procedure Rule Committee as to what constitutes proportionate sanctions for the relevant instances of non-compliance.

It was further held that the sanction in r 3.14 applies both to situations where a party fails to file a costs budget at all and also where a party files a costs budget late. The mischief addressed by rr 3.13 and 3.14 is the last-minute filing of costs budgets⁶³. A court cannot manage the litigation and the

⁵⁴ [2013] EWHC 2355 (QB) at [40]; [2013] EWCA Civ 1537 at [14].

⁵⁵ [2013] EWHC 2355 (QB) at [53]; [2013] EWCA Civ 1537 at [16].

⁵⁶ [2013] EWHC 2355 (QB) at [55]; [2013] EWCA Civ 1537 at [16].

⁵⁷ [2013] EWHC 2179 (QB).

⁵⁸ [2013] EWHC 2355 (QB) at [28].

⁵⁹ [2013] EWHC 2355 (QB) at [62].

⁶⁰ [2013] EWHC 2355 (QB) at [63].

⁶¹ [2013] EWCA Civ 1537 at [27].

⁶² [2013] EWCA Civ 1537 at [32].

⁶³ [2013] EWCA Civ 1537 at [30].

costs to be incurred unless costs budgets are filed in good time before the first case management conference. Lord Dyson, MR, at [30] makes a comment to the effect that under the main costs budgeting provisions that came into force on 1 April 2013 the need to discuss budgetary assumptions and the timetable is also an important requirement. This was an obligation under PD 51D, para 4.1, but it has not been included either in CPR rr 3.12 to 3.18 or PD 3E.

Relief from Sanctions: the *Mitchell* Principles

The Court of Appeal in *Mitchell v News Group Newspapers Ltd*⁶⁴ intended to send out a clear message that the civil justice reforms of 2013 have brought in a new robust approach to rule compliance. Rather than focussing on the interests of justice in the individual case, there is a shift to recognising the time and resources dimensions of administering civil justice. This means that importance has to be attached to the needs and interests of all court users when case managing individual cases. As Lord Dyson MR pointed out at [39], if the claimant had complied with the costs budgeting requirements in PD 51D the costs management aspects of the case would have been dealt with in less than an hour on 18 June 2013. Non-compliance meant that the hearing on 18 June was abortive, and a further half-day was devoted to the hearing for relief from the sanction which could have been better used in managing the asbestos related disease claims. To stop the haemorrhaging of court resources and costs on satellite litigation over procedure a tough approach was needed to the problem of non-compliance. Once it is well understood that the courts will adopt a firm line on enforcement, the expectation is that litigation will be conducted in a more disciplined manner, and the need for satellite litigation over non-compliance will be reduced⁶⁵.

Accordingly, on an application for relief from sanctions the following principles apply:

(1) the court must consider "all the circumstances of the case, so as to enable it to deal justly with the application"⁶⁶. This means that the court:

- (a) must apply the overriding objective; and
- (b) must perform a balancing exercise taking into account the factors relevant to the application⁶⁷.

(2) the two most important factors are⁶⁸:

- (a) the need for litigation to be conducted efficiently and at proportionate cost; and
- (b) the need to enforce compliance with rules, practice directions and orders.

(3) relief from sanctions is unlikely to be granted unless either:

- (a) the breach is trivial and the application for relief is made promptly⁶⁹; or
- (b) there is a good reason or the non-compliance⁷⁰, the burden being on the defaulting party to persuade the court to grant relief⁷¹.

⁶⁴ [2013] EWCA Civ 1537 at [60].

⁶⁵ [2013] EWCA Civ 1537 at [48].

⁶⁶ This is expressly stated by CPR, r 3.9(1), and acknowledged by Lord Dyson MR at [37].

⁶⁷ In applications to extend the period of validity of claim forms under CPR, r 7.6(3), which have some affinity to applications for relief from sanctions, the court must first consider whether there is a good reason, and only if there is, move on to consider the balance of hardship (*Cecil v Bayat* [2011] EWCA Civ 135, [2011] 1 WLR 3086 at [109]). The form taken by r 3.9(1), which requires the court to consider whether granting relief would be just in all the circumstances of the case, taking into account stated factors, probably precludes the court from regarding the need for either a trivial breach or a good reason as a precondition before undertaking the balancing exercise.

⁶⁸ [2013] EWCA Civ 1537 at [37]. Lord Dyson MR said other circumstances should be given less weight than the two considerations specifically set out in r 3.9(1).

⁶⁹ [2013] EWCA Civ 1537 at [40].

It will usually be appropriate to start by considering the nature of the non-compliance⁷². Examples of trivial breaches suggested by Lord Dyson MR included instances of failures of form rather than substance, and cases where a deadline has been narrowly missed.

A good reason for non-compliance is most likely to arise from circumstances outside the control of the party in default⁷³. Examples given by the Master of the Rolls⁷⁴ included cases where the party or its solicitor suffered a debilitating illness or was involved in an accident. There may also be a good reason if later developments in the claim show that the period for compliance originally imposed was unreasonable⁷⁵.

Bad reasons identified by the Master of the Rolls included overlooking a deadline and failing to meet a deadline through other pressures of work⁷⁶. Solicitors cannot take on too much work and expect to be relieved from sanctions if they fail to meet deadlines. Either they should refuse the work, or they should delegate the work to other fee earners in the firm. The need to conduct litigation efficiently means there can be no relaxation in the approach to rule compliance.

Original Sanction too Harsh

It is impermissible on an application for relief from sanctions to argue that the sanction imposed under an unless order is too harsh. If there is any legitimate complaint about the seriousness of the sanction, the correct course is to appeal against the original order⁷⁷ or, exceptionally, by asking the court which made the original order to vary or revoke it under CPR, r 3.1(7)⁷⁸. An application for relief from sanctions presupposes that the sanction was in principle properly imposed.

Application to Vary or Revoke the Original Order

Applications to vary or revoke orders under CPR, r 3.1(7) are governed by the principles in *Tibbles v SIG plc*⁷⁹. Upholding the finality of decisions, avoiding giving litigants a second bite of the cherry, and supporting the appeals system all point towards a restrictive approach to applications under r 3.1(7). Accordingly, a court will normally only vary or revoke an earlier order if:

- (a) there has been a material change of circumstances; or
- (b) the facts on which the original order was made were misstated; or
- (c) there was a manifest mistake on the part of the judge in formulating the original order.

⁷⁰ [2013] EWCA Civ 1537 at [42]. A quotation from *Hastroodi v Hancock* [2004] EWCA Civ 652, [2004] 1 WLR 3206 in this paragraph of the judgment in *Mitchell v News Group Newspapers Ltd* uses the phrase "a very good reason", but "good reason" is used by Lord Dyson MR at [42], [43] and [48], and in his summary of the principles at [58].

⁷¹ [2013] EWCA Civ 1537 at [41].

⁷² [2013] EWCA Civ 1537 at [40].

⁷³ [2013] EWCA Civ 1537 at [43], citing *Blackstone's Guide to The Civil Justice Reforms 2013* Stuart Sime and Derek French (Oxford: OUP, 2013), at paras 5.85 to 5.91 and Adrian Zuckerman, "The revised CPR 3.9: a coded message demanding articulation" [2013] CJK 123 at 136-7.

⁷⁴ [2013] EWCA Civ 1537 at [41].

⁷⁵ In this situation the better course is to apply for an extension under r 3.1(2)(a) before the deadline expires, [2013] EWCA Civ 1537 at [41].

⁷⁶ [2013] EWCA Civ 1537 at [41], although the Master of the Rolls said the latter would "rarely" be a good reason.

⁷⁷ *Fred Perry (Holdings) Ltd v Brands Plaza Trading Ltd* [2012] EWCA Civ 224, [2012] FSR 28 at [24].

⁷⁸ *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537 at [44].

⁷⁹ [2012] EWCA Civ 518, [2012] 1 WLR 2591. See *Mitchell v News Group Newspapers Ltd* at [44], [45]. These principles formed the basis of the decision in *Thevarajah v Riordan (No 2)* [2014] EWCA Civ 15.

If an application for relief from sanctions is combined with an application to vary or revoke the original order under r 3.1(7), the proper course is to consider the application under r 3.1(7) first, applying the *Tibbles v SIG plc* principles. If that application succeeds, there may be no breach and no sanction to be relieved. If the r 3.1(7) application is unsuccessful, the application for relief under r 3.9 has to proceed on the basis the original sanction was properly imposed.

The Decision

On the facts in *Mitchell v News Group Newspapers Ltd* the claimant's solicitors missed the deadline primarily through pressures of work. There was no evidence of any prejudice to the claimant, and a direct impact on court resources and other litigants. There were two breaches (not discussing budgetary assumptions and late filing of the costs budget), both of which were important, so this was not a trivial breach case. There was no good reason for the breach. While the Master might have imposed a less draconian penalty, for example through disallowing part of the claimant's costs rather than all his costs other than court fees, the sanction imposed was the one stipulated by r 3.14. There was no basis for interfering with the Master's decision, and the appeal was dismissed.

Lord Dyson MR recognised that the decision might be regarded as harsh⁸⁰. It is. It is also a neat use of a sophisticated lawyer's device to say so expressly, because experience shows this is an effective way to defuse criticism. To some extent a strong decision was necessary in order to bring home to the profession that the courts are serious about the change in culture brought in by the civil justice reforms 2013, which include greater emphasis on compliance with litigation timetables.

There are a number of serious procedural concerns about the decision:

(a) While it recognised that the time given to the parties to prepare their costs budgets was short, the decision proceeds on the basis that the time given was adequate. Sir Rupert Jackson said a necessary precondition for tough case management was that the court should set realistic timetables⁸¹. One working day is not a reasonable time to comply with a requirement to file a costs budget in a substantial case. The courts have to keep to their obligations in setting realistic deadlines if a tough approach is to be workable.

(b) Parties are not always able to fund whatever expenses are thrown at them. In this case the defendant was the publisher of a stable of national newspapers, and was able to afford to engage outside costs lawyers to compile its costs budget over the weekend and the next two working days. The court took the fact that the newspaper had achieved this as meaning it was reasonable for the claimant's solicitors to do the same⁸². This is to assume parties are on an equal footing, whereas the overriding objective includes ensuring the parties are on an equal footing, which is a very different thing.

(c) Needing to throw money at cases in order to meet tight deadlines is the exact opposite of the purpose of the civil justice reforms 2013, which is to promote access to justice at proportionate cost. The "resource" dimension includes the costs incurred by the parties.

(d) Costs management is only worth doing if the additional costs of producing costs budgets and costs management result in overall savings through better management of the claim⁸³. Forcing the pace on this will add to the cost of the process.

⁸⁰ [2013] EWCA Civ 1537 at [41].

⁸¹ Note 27 above.

⁸² [2013] EWCA Civ 1537 at [17], quoting the Master's judgment at [61].

⁸³ *Blackstone's Guide to The Civil Justice Reforms 2013* Stuart Sime and Derek French (Oxford: OUP, 2013), at paras 6.06. PD 3E, para 2.2 imposes limits on the recoverable costs of the costs management process.

(e) Costs are only recoverable from the other side if they are necessary (as well as being reasonable and proportionate). Paragraph 61 of the Master's judgment⁸⁴ assumes that work on costs budgets should have been started before being notified of the case management conference. The usual argument on detailed assessments is that premature work is not necessary, and should be disallowed on that basis.

(f) It was assumed that the sanction in CPR, r 3.14, was the considered view of the Civil Procedure Rule Committee as to what constitutes a proportionate sanction for breach of the requirement to file costs budgets. This is not borne out by a comparison of sanctions for different types of breach set out in the CPR, a subject which is considered further below.

(g) There is a lack of clarity over how the principles enunciated in *Mitchell v News Group Newspapers Ltd* fit together. In the formulation set out above it has been assumed that the test is that the court must consider all the circumstances of the case so as to deal with the application justly (following the wording of r 3.9(1)), with the other principles (the two factors set out in the rule, and the trivial breach and good reason principles laid down by the Court of Appeal) being matters to be weighed in deciding what is just. The trivial breach and good reason principles alternatively could be considered to be pre-conditions to be established before the court proceeds to the balancing exercise. This will no doubt be clarified in due course by the Court of Appeal. As a further alternative, the trivial breach and good reason principles may be intended to be practical guidance to first instance courts in deciding what is just in all the circumstances. In other words, these principles are the relevant "circumstances" that have to be considered under r 3.9(1)⁸⁵.

(h) The effect of the decision was to impose in effect reverse one-way costs shifting on the claimant in a defamation claim. This is the complete opposite of what Sir Rupert Jackson had in mind for defamation claims in the *Final Report*, recommendation 65⁸⁶.

(i) If *Mitchell v News Group Newspapers Ltd* is correct, then a large number of provisions in the CPR and practice directions will need to be amended to fit in with it. This covers prescribed sanctions that are not proportionate to other sanctions, and also provisions laying down tests for things like setting aside default judgments, amendment of statements of case, extending time under r 3.1(2)(a), rectifying errors of procedure under r 3.10, adjourning trials, and setting aside after non-attendance, that do not fit with the principles laid down by the Court of Appeal⁸⁷. A similar exercise had to be undertaken after the Court of Appeal decided that the deemed service rules in the CPR created an irrebuttable presumption of law⁸⁸. An alternative view is that *Mitchell v News Group Newspapers Ltd* is wrong because it is inconsistent with the scheme of the CPR.

⁸⁴ Cited at [2013] EWCA Civ 1537, [17], and set out in the discussion following note 51 above.

⁸⁵ Although this third interpretation seems too restrictive given that the phrase used in r 3.9(1) is "all the circumstances of the case".

⁸⁶ Of course the loss of the prospect of recovering costs other than court fees was a consequence of non-compliance, so may be regarded as justified. Given the terms of reference of the Jackson Review were to find ways of promoting access to justice at proportionate cost, and that qualified one-way costs shifting was proposed in order to promote the access to justice side of this equation, it is a little disconcerting that the sanction provided the well-resourced party in the litigation with an order in effect giving it one-way costs protection. One danger in the decision is that courts in the future may overlook that fact that the claimant in *Mitchell v News Group Newspapers Ltd* was to some extent protected by the fact he was litigating with the benefit of a conditional fee agreement.

⁸⁷ See notes 108 to 111 below.

⁸⁸ See note 94 below.

(j) Adopting a restrictive view on what amounts to a "good reason" means the Court of Appeal has laid down an approach to non-compliance which is indistinguishable from the "extreme course" rejected by Sir Rupert Jackson (no relief unless there are exceptional circumstances).

(k) An unforgiving attitude to procedural default⁸⁹ probably means the end of party co-operation as part of the overriding objective. Why should a party try to help solve a situation when an opponent gets into difficulties when they know the court will impose tough sanctions?

(l) Perhaps the most worrying aspect of the decision is that it seems to give undue precedence to resource considerations. Justice, time and resources should be held in balance. While the principles laid down include dealing with the application justly, the effective requirements that will govern the great majority of applications are whether the breach was trivial and whether there was a good reason for the default. The way these have been defined⁹⁰ means that very few applications will succeed. That may be a good thing from a court management point of view. Combined with points (a) to (c) above, unless they are addressed, the danger is that a large number of meritorious claims will be struck out or hamstrung through sanctions dealing with evidence for technical defaults.

Also of concern is that procedural defaults will be treated more harshly than errors that look like errors of procedure but which are governed by statutory provisions. Examples are the discretionary powers to allow claims to proceed despite not meeting the primary limitation period⁹¹, and amendments that involve making new claims⁹².

Early Post-Mitchell Decisions

*Durrant v Chief Constable of Avon and Somerset*⁹³ applied *Mitchell v News Group Newspapers Ltd* in an appeal by a claimant against a decision granting relief against sanctions in a case where the defendant was late in serving its witness statements. A total of eight police witnesses were intended to be called at trial. Witness statements were originally directed to be exchanged in January 2013, but the defendant's solicitor encountered problems partly through pressures of work and partly as a result of the Christmas holiday season, bad weather, and operational commitments of the witnesses. Pressures of work of course are not good reasons. Practical problems in obtaining the statements were probably good reasons for not being able to comply with the original order, but their force was spent thereafter.

In February 2013 an unless order was made for these witness statements to be served by 12 March 2013. On 12 March 2013 the defendant's solicitor emailed two witness statements to the claimant (who was a litigant in person), and also sent them by post. Evidence was accepted that these were received by the claimant on 13 March 2013⁹⁴. Despite a protest in an email from the claimant that

⁸⁹ In applying *Mitchell v News Group Newspapers Ltd*, the Court of Appeal in *Durrant v Chief Constable of Avon and Somerset* [2013] EWCA Civ 1624 (which is discussed below) regarded a one-day delay in serving two witness statements as not being trivial in the context of the case. If this is right, any rational lawyer will always take a technical point on non-compliance.

⁹⁰ Both in *Mitchell v News Group Newspapers Ltd* and in subsequent cases, particularly *Durrant v Chief Constable of Avon and Somerset* [2013] EWCA Civ 1624.

⁹¹ These are defamation claims (Limitation Act 1980, s 32A) and personal injuries claims (Limitation Act 1980, s 33).

⁹² Limitation Act 1980, s 35 and CPR rr 17.4 and 19.5.

⁹³ [2013] EWCA Civ 1624.

⁹⁴ [2013] EWCA Civ 1624 at [17]. This was impermissible. CPR, r 6.26 creates irrebuttable presumptions of law on the deemed dates of service using various methods of communication (*Godwin v Swindon Borough Council* [2002] 1 WLR 997; *Anderton v Clwyd County Council (No 2)* [2002] 1 WLR 3174). A letter sent by first class post is deemed to be served on the second day after posting (which would be 14 March 2013 given 12 March 2013 was a Tuesday). If the claimant had expressed written willingness to be served by email (PD 6A, para 4.1),

these were late, no application was made for relief from the sanction in the unless order until 15 May 2013. On 22 May the defendant sent the claimant six witness statements, the two previously sent, plus four more. Then on 5 June 2013, just five days before the trial, the defendant issued a second application to be allowed to rely on two further witness statements.

Both applications were considered by the trial judge on the first day of the trial. He considered the nine factors in the old r 3.9(1), and also the terms of the new r 3.9(1). He distinguished the case from many breach of contract claims in that this was an action against the police in which serious allegations of race discrimination were being made against the individual police officers. He pointed to the fact it was not the fault of the individual officers that their statements were served late, and felt that it was important that they should be given the opportunity to explain their actions to the court as their reputations were in question. Relief from the sanction in r 32.10 was granted in respect of all eight witnesses on terms as to costs.

An appeal by the claimant was allowed. This was not a case of trivial breaches, and there was no good reason for the default. While the court will not lightly interfere with a case management decisions⁹⁵, if the message sent out by *Mitchell v News Group Newspapers Ltd* is not to be undermined, Richards LJ said it was vital that decisions under r 3.9 which fail to follow the robust approach laid down in that case should not be allowed to stand. Failure to follow that approach constitutes an error of principle entitling an appeal court to interfere with the discretionary decision of the first instance judge. It is likely also to lead to a decision that is plainly wrong, justifying intervention on that basis too⁹⁶. Further, considerations such as the reputational issues raised by the litigation were regarded as having no more than a limited role to play on an application for relief from sanctions⁹⁷.

The appeal was allowed on this basis in respect of all eight statements. The two statements served a day late caused the greatest concern. On the face of it this was no more than a trivial breach⁹⁸ within the meaning of *Mitchell v News Group Newspapers Ltd*. Although this is not very clear, Richards LJ seems to have taken the much later provision of the other six statements as aggravating the seriousness of the one day breach in respect of the first two statements⁹⁹. A more convincing reason for refusing relief for these two statements is that the application for relief was not made promptly¹⁰⁰. It has to be questioned whether either of these reasons come anywhere near the high threshold required for interfering with a case management decision on an appeal.

An unreported Court of Appeal decision, *Wheeler v Chief Constable of Gloucestershire Constabulary* (18 December 2013), was a case where both parties failed to file costs schedules in breach of PD 44, para 9.5(4). This meant costs had to be referred to a detailed assessment rather than being summarily assessed at the end of the appeal hearing. Applying *Mitchell v News Group Newspapers Ltd*, the successful respondent was penalised by ordering him to pay the costs of the detailed assessment. This is effectively the penalty suggested by PD 44, para 9.6.

Durrant v Chief Constable of Avon and Somerset and *Wheeler v Chief Constable of Gloucestershire Constabulary* show *Mitchell v News Group Newspapers Ltd* is of general application in relation to

service by email is deemed to take effect on the day of despatch if sent before 4.30pm (in which case the first two statements were not late), or on the following day if sent after 4.30 pm.

⁹⁵ *Powell v Pallisers of Hereford Ltd* [2002] EWCA Civ 959; *Mannion v Gray* [2012] EWCA Civ 1667 at [18].

⁹⁶ [2013] EWCA Civ 1624 at [38].

⁹⁷ [2013] EWCA Civ 1624 at [44].

⁹⁸ If it was a breach at all, see note 94 above.

⁹⁹ [2013] EWCA Civ 1624 at [42].

¹⁰⁰ [2013] EWCA Civ 1624 at [49].

relief from sanctions and is not limited to applications under r 3.14. *Durrant* establishes that *Mitchell v News Group Newspapers Ltd* governs both applications for relief from sanctions, and the reverse position where an appellant complains that a procedural judge has failed to apply a sufficiently tough stance to rule compliance. A further case, *Norseman Holdings Ltd v Warwick Court (Harold Hill) Management Co Ltd*¹⁰¹, which was about the status of an undertaking intimated to the court on behalf of a solicitor by counsel, shows *Mitchell v News Group Newspapers Ltd* being used as authority for the general proposition that parties have to conduct litigation in accordance with the rules in order to ensure expensive interlocutory skirmishes become a thing of the past.

Relief from the sanction in an unless order was granted in *Adlington v Els International Lawyers LLP*¹⁰² in group litigation where the order required each claimant to file particulars of claim with specified information and statements of truth. The deadline was met by most of the 134 claimants, but seven of the claimants were on holiday and needed an additional four days. Draft particulars were served on time. It was held that the breach was trivial within the meaning of *Mitchell v News Group Newspapers Ltd* because the failing was one of form rather than substance, alternatively because the deadline had been missed narrowly, and in either case, the application for relief had been made promptly. Alternatively, the judge held that finding seven of the claimants away on holiday was a good reason within the meaning of *Mitchell v News Group Newspapers Ltd*. This reads like a judge desperately trying to fit a case into the exacting criteria laid down by *Mitchell v News Group Newspapers Ltd*.

Relief from the sanction in what used to be CPR, r 44.3B, for failing to give notice of CFA funding on form N251 was granted in *Forstater v Python (Monty) Pictures Ltd*¹⁰³. The relevant information had been given by letter rather than on the prescribed form, which was seen as a matter of form rather than substance. There was a passing reference to *Mitchell v News Group Newspapers Ltd*, which was decided after argument but before the decision.

Relief was refused in *SC DG Petrol SRL v Vitol Broking Ltd*¹⁰⁴ for failure to comply with an unless order extending the time previously given to provide security for costs. The breach was not trivial. The reasons advanced related to problems in selling certain assets to raise the security that had been ordered, but failed to cover other means that might have been available to the claimant to raise funds from other sources. As such it had failed to establish a good reason for non-compliance. The case shows that detailed evidence is required to establish grounds amounting to a good reason, and easy points (even if they are explained at great length) will not suffice.

On the question of the wider impact of the default on other litigants, the judge, Robin Knowles QC at [29], said: "I respectfully offer the observation that there are limits to the contribution that a party, especially a non-defaulting party, can usefully make in evidence or argument in respect of circumstances extending beyond the case in hand - for example on what is needed 'to enforce compliance with rules, practice directions and orders.' This is pre-eminently an area for the judge." So far as this goes this must be true, but it is suggested that this misunderstands the "resources" dimension that judges are enjoined to consider by the new r 3.9(1) and *Mitchell v News Group Newspapers Ltd*. This is really about the general effect on the civil justice system and other litigants. It was probably rather misleading that the specific instance of the asbestos disease claims was raised in *Mitchell v News Group Newspapers Ltd*. This was intended to be no more than an example of the deleterious effects of court time being taken up with hearings over non-compliance. It was not intended to impose an obligation on the court or the parties to adduce evidence of the direct impact

¹⁰¹ [2013] EWHC 3868 (QB), Coulson J at [28].

¹⁰² Judge Oliver-Jones QC, Birmingham District Registry, 12 December 2013.

¹⁰³ [2013] EWHC 3759 (Ch).

¹⁰⁴ [2013] EWHC 3920 (Comm).

of such hearings on other cases in the relevant court or in the diary of the particular judge. In any event, it would be quite wrong if one defaulting party were to be given relief from sanctions because it was their good fortune that the court happened to be free to hear the application for relief, whereas in an identical case of default relief were to be refused because there happened to be evidence that particular cases had to be relisted. It might also be mentioned that investigating and arguing over the actual effects on other litigants would be an additional unnecessary complication and expense, which is the last thing that applications for relief from sanctions need.

In *Karbhari v Ahmed*¹⁰⁵ the claim was for the return of very large sums alleged to have been paid to the defendant to invest in the Dubai property market on terms generating a 100% return on the money invested. The defence and the defendant's witness statement were to the effect no monies had been received by him. On the second day of the trial the defendant applied to amend his defence and replace his witness statement to say that he had received four of the cheques, but they were received for onward transmission to a company investing in Dubai. The sanction for late service of witness statements is set out in CPR, r 32.10, and is that the witnesses cannot be called at trial without the court's permission. Applying *Mitchell v News Group Newspapers Ltd* this was not a trivial breach, and Turner J held that the defendant's stated reason for the about face, to protect others from money laundering investigations, was a thoroughly bad reason. Relief was refused. In fact the judge went further, because this was not a change brought about by a mistake, but was deliberate, and involved irreconcilable documents all verified by statements of truth. The defence was also struck out as an abuse of process, and the case was referred to the Economic Crime Unit.

Prescribed Sanctions

One of the key elements of the decision in *Mitchell v News Group Newspapers Ltd* was that the prescribed sanction for not filing a costs budget set out in CPR, r 3.14, represented the considered view of the Civil Procedure Rule Committee as to what constituted a proportionate sanction for breach¹⁰⁶. With respect, as indicated above, this is unsustainable. If this was correct it would be possible to discern a clear hierarchy of sanctions prescribed in the CPR, with the most draconian being reserved for the most serious varieties of defaults. The sanctions imposed by the CPR for the key stages in litigation are set out in the following table.

Table: Sanctions prescribed by the CPR

Step in litigation	CPR provision	Prescribed sanction for default
Pre-action protocols	PD Pre-action Conduct para 4.6	Range of sanctions, including staying proceedings until prescribed steps are taken, and costs and interest penalties
Serve claim form	r 7.6	No extension = claim defeated
Serve particulars of claim	r 7.4	None
Acknowledge service / serve defence	r 12.3	No automatic sanction, but claimant able to enter default judgment
Other statements of case / further information	Part 16	None
Directions questionnaires in designated money claims	r 26.3(7A)	Statement of case struck out
Directions questionnaires in	r 26.3(8)	Court may:

¹⁰⁵ [2013] EWHC 4042 (QB). The judge commented this sounded too good to be true, a point borne out by the difficulties encountered in recovering the monies invested.

¹⁰⁶ [2013] EWCA Civ 1537 at [27].

other claims		(a) order directions; (b) strike out the claim; (c) strike out the defence; or (d) list for a CMC.
Disclosure reports	r 31.5(3)	None
Costs budgets	r 3.14	Limit costs to court fees
Inadequate attendance at CMC	r 29.3 / PD 29 para 5.2(3)	Normally a wasted costs order
Disclosure of documents relied upon	r 31.21	Defaulting party cannot rely on the documents unless the court gives permission
Disclosure of documents helpful to other parties	rr 31.5 / 31.6	None
Witness statements	r 32.10	Witness may not be called to give oral evidence unless the court gives permission
Experts' reports	r 35.13	Report may not be used or expert may not be called to give oral evidence unless the court gives permission
Short notice of interim application	r 23.4	None. May be allowed to make the application orally (PD 23A, para 2.10)
Non payment of directions / listing / hearing fees	rr 3.7(4), 3.7A(6), 3.7B(3)	Automatically struck out
Failing to lodge trial bundles	r 39.5	None
Not ready for trial	PD 28 para 5.4; PD 29 para 7.4	Detailed guidance, but includes: (a) possibly depriving a party of right to raise or contest an issue or to rely on evidence (b) disallowing costs (c) refusing adjournment
Non-attendance of one party at trial	r 39.3	Proceed in absence of the party, or strike out
Non-attendance of all parties at trial	r 39.3(1)(a)	May strike out proceedings
Appeal out of time	rr 52.4 and 52.6; PD 52B paras 3.1 to 3.3	None
Schedule of costs for summary assessment	PD 44, para 9.5 and 9.6	Taken into account in deciding what order to make about costs
Detailed assessment, commencement	r 47.8	Loss of interest on costs (r 47.8(3)). If paying party applies for an order under r 47.8(1), court may make an unless order (r 47.8(2))

It will be seen from the table that automatic striking out, the most draconian sanction, is prescribed for:

- (a) Not filing directions questionnaires in designated money claims; and
- (b) Non-payment of court fees.

Directions questionnaires and court fees are not the most serious defaults, but they attract the harshest sanctions. This cannot be because the Civil Procedure Rule Committee felt automatic striking out was a proportionate sanction for breach, but must be a purely pragmatic approach of terminating claims if the relevant parties do not pay or comply, with relief being contemplated if and when they do.

The court has a discretion to strike out, but has other options, for:

- (a) Not filing directions questionnaires in non-designated money claims;
- (b) Non-attendance at trial.

Greater impact on other litigants is likely to result from a failure to file directions questionnaires in non-designated money claims, which are more likely to result in case management hearings to sort out the problem, than in designated money claims where a more stringent sanction applies automatically. Other types of default that inevitably have an effect on other litigants include not giving proper notice of interim applications resulting in adjournments, not being ready for trial, and being inadequately prepared for case management hearings so they have to be adjourned. None of these have striking out as the prescribed sanction, even of (say) just the interim application. Only a wasted costs order is deemed appropriate for needing to adjourn a CMC.

Defaults that have the largest impact on costs include not being ready for trial, inadequate disclosure, and not complying with directions on witness statements and experts. The sanction in r 31.10 on disclosure only affects documents that defaulting party wishes to rely on at trial. The most expensive defaults cover documents helpful to the innocent party, for which there is no prescribed sanction. While there are severe sanctions for breach of directions on witness statements and experts' reports, these apply unless the court otherwise orders (which will be governed by the *Mitchell v News Group Newspapers Ltd* principles), and are not as severe as striking out.

The sanctions on late commencement of detailed assessment are light compared to the others. This is because they are often imposed immediately, with limited scope for putting the default right later combined with an application for relief from sanctions.

With judges being encouraged to treat the prescribed sanctions as the considered view on proportionate sanctions for different types of default, it is essential that the whole system of prescribed sanctions be reviewed and revised. A coherent approach would result in a system of graduated sanctions where minor defaults¹⁰⁷ attract light sanctions, and the most damaging defaults attract the most draconian.

Consistency with other Principles

Gaining relief from sanctions under the *Mitchell v News Group Newspapers Ltd* principles should form part of a consistent system with the criteria used to grant relief for other types of procedural failure. There are developed sets of principles dealing with problems such as renewing claim forms, setting aside default judgments¹⁰⁸, striking out for abuse of process¹⁰⁹, amending statements of

¹⁰⁷ Based on an appraisal of the seriousness of typical breaches of the provision, and the anticipated impact of breach on determining the claim on its merits, delay, and resources.

¹⁰⁸ CPR, r 13.3 and *Blackstone's Civil Practice 2014 (Oxford: OUP)* paras 20.13 to 20.19. The primary factor on an application to set aside a regular judgment is whether the defence has a real prospect of success (r 13.3(1)(a); *Thorn v Macdonald* [1999] CPLR 660), which, together with the other criteria used on setting aside application, do not fit with the trivial breach and good reasons principles from *Mitchell v News Group Newspapers Ltd*. Some amendments are trivial and more in the nature of errors of form than substance. However, the existing principles also apply to wide-ranging amendments, and amendments made very late in the litigation.

case¹¹⁰ and setting aside judgments following non-attendance¹¹¹. These are only examples. Obviously it would be unattractive for certain types of procedural default (such as failing to serve a defence in time, which is governed by CPR, Part 13) were to be more readily forgiven than others of equal seriousness (such as failing to serve particulars of claim in time, which is governed by *Mitchell v News Group Newspapers Ltd*). It would also be unattractive for procedural defaults to be met with unyielding sanctions when other defaults, such as missing the limitation period¹¹², are forgiven far more readily.

Avoiding Sanctions by the Back Door

Striking out a claim may be thought to end the litigation, but in many cases this is not so. There may be an obvious professional negligence claim against the lawyers responsible for the default. In many cases a claimant will be able to start fresh proceedings alleging the same cause of action because the limitation period has not expired¹¹³. Starting a second claim after earlier proceedings have been struck out may be an abuse of process, with the pre-CPR caselaw on this saying that a second claim would normally be an abuse of process if striking out was for intentional and contumelious default, unless there was a satisfactory explanation for failing to obey the original order¹¹⁴.

Whether this can be transplanted into the new code formed by the CPR may be doubtful¹¹⁵. It would also be inconsistent with the approach to second claim cases under the Limitation Act 1980, s 33¹¹⁶. However, the *Janov v Morris* principles were loyally applied in *Hall v Ministry of Defence*¹¹⁷, where the second claim was restored on appeal because a failure to pay the costs ordered in the first claim was not intentional or contumelious, nor was this a case of wholesale disregard of court orders. Phillips J said there had to be something transforming the delay into an abuse of process¹¹⁸, for

¹⁰⁹ CPR, r 3.4(2)(b) and *Blackstone's Civil Practice 2014 (Oxford: OUP)* paras 33.12 to 33.22. Also see the discussion of *Janov v Morris* [1981] 1 WLR 1389 below.

¹¹⁰ CPR Parts 17 and 19 and *Blackstone's Civil Practice 2014 (Oxford: OUP)* chapter 31. Traditionally amendments are allowed if there is no prejudice that cannot be compensated in costs (*Cropper v Smith* (1883) 26 ChD 700). Modern cases frequently adopt the balancing of factors approach laid down by *Swain-Mason v Mills and Reeve LLP* [2011] EWCA Civ 14, [2011] 1 WLR 2735, which is closer to the *Mitchell v News Group Newspapers Ltd* principles, but obviously pre-dates that decision, so does not in terms use the trivial breach and good reasons principles.

¹¹¹ CPR, r 39.3 and *Blackstone's Civil Practice 2014 (Oxford: OUP)* chapter 62. Rule 39.3(5) comes very close to the *Mitchell v News Group Newspapers Ltd* principles (judgment may be set aside if the party who did not attend acts promptly and has a good reason for non-attendance). It does not include the trivial breach element. The third requirement in r 39.3(5)(c), having a reasonable prospect of success, is not inconsistent with *Mitchell v News Group Newspapers Ltd* because it is an additional requirement.

¹¹² For example, under the Limitation Act 1980, s 33. See *Blackstone's Civil Practice 2014 (Oxford: OUP)* paras 10.19 to 10.25.

¹¹³ This option was almost certainly not available to Mr Mitchell because of the one year limitation period in defamation claims under the Limitation Act 1980, s 4A, although there is the discretion to disapply this under s 32A.

¹¹⁴ *Janov v Morris* [1981] 1 WLR 1389. *Icebird Ltd v Winegardner* [2009] UKPC 24, which applies the *Janov v Morris* principles, is a Privy Council decision on an appeal from the Bahamas, where rules similar to the old Rules of the Supreme Court apply, so is not strictly binding in England and Wales.

¹¹⁵ See the cases discussed in *Blackstone's Civil Practice 2014 (Oxford: OUP)* at paras 1.21 to 1.24 on the effect of the CPR being a new procedural code.

¹¹⁶ *Horton v Sadler* [2006] UKHL 27, [2007] 1 AC 307. Saying a second claim would necessarily be an abuse of process was regarded as impermissible and to amount to ignoring the will of Parliament in *Aktas v Adepta* [2010] EWCA Civ 1170; [2011] QB 894.

¹¹⁷ [2013] EWHC 4092 (QB), Phillips J.

¹¹⁸ The ground specified by CPR, r 3.4(2)(b). These problems might be avoided by applying to strike out the second claim under r 3.4(2)(c), that there has been a failure to comply with a rule, practice direction or court

example evidence that the claimant had lost interest in the claim. There is an obvious difference in the approach to the initial breach exemplified by *Mitchell v News Group Newspapers Ltd* and the *Janov v Morris* principles on striking out second claims. As a result that are likely to be many cases where a second claim will survive a strike out application.

Striking out also creates a mis-match between the effects on claimants and defendants. If *Hall v Ministry of Defence* is correct, claimants may be able to start again. Claimants in difficulties may also seek to avoid the consequences of *Mitchell v News Group Newspapers Ltd* by discontinuing and accepting the costs consequences in r 38.6, and then starting again. Defendants simply lose the case.

Lesser sanctions also create problems of defaulting parties avoiding the effects of the sanction by the back door. Richards LJ in *Durrant v Chief Constable of Avon and Somerset* (where the defendant was prevented from calling witnesses) was alive to this, pointing out that the claim depended in part on the claimant's own credibility, which the defendant was entitled to challenge at trial; and there was documentary material on the basis of which the defendant could properly mount such a challenge even though the Chief Constable was unable to call any witnesses on his own behalf¹¹⁹. It was probably wider than this. All the sanction did was to prevent the defendant from calling the police officers as witnesses. They had provided signed witness statements. These were hearsay evidence, and hearsay is never rendered inadmissible purely on the ground that it is hearsay¹²⁰.

Of course there is a discretionary power to exclude otherwise admissible evidence, but using CPR r 32.1 for this purpose would involve a considerable extension of its present ambit¹²¹, and would involve the need for a further interim application. A similar problem was recognised by Turner J in *Karbhari v Ahmed*¹²² (where a replacement witness statement was disallowed), because it was inevitable that cross examination would afford the defendant the opportunity to introduce by the back door the evidence which the court had refused to admit through the front door. Patently false statements of truth gave the judge scope to prevent this by striking out the defence as an abuse of process.

Conclusion

Mitchell v News Group Newspapers Ltd is the most important decision on civil procedure since *American Cyanamid Co v Ethicon Ltd*¹²³ almost 40 years ago. In fact *Mitchell v News Group Newspapers Ltd* marks a watershed in civil justice. Directions are now made to be obeyed. Rules and practice directions mean what they say. Litigators need to organise themselves so that they are in a position to comply in all respects with the procedural timetable, because little or no mercy will be shown if they fail. A culture change was promised when the civil justice reforms came into force on 1 April 2013. The extent of the change was no more than nascent in the wording of the rules as enacted. It has been brought into sharp focus by *Mitchell v News Group Newspapers Ltd*.

A clear message to the profession was the intended purpose of the decision. The problem is whether it is the right message. A tough approach to compliance has worked in other jurisdictions, such as Singapore (although views are to the effect that it took about 20 years for the new culture to

order. This would require extending the accepted meaning of r 3.4(2)(c), which is traditionally regarded as referring to breaches within the present proceedings.

¹¹⁹ [2013] EWCA Civ 1624 at [55].

¹²⁰ Civil Evidence Act 1995, s 1(1). It is also not rendered inadmissible for failure to give due notice: the sanction in the Civil Evidence Act 1995, s 4 is restricted to weight and costs.

¹²¹ See the cases discussed in *Blackstone's Civil Practice 2014 (Oxford: OUP)* at para 49.8.

¹²² [2013] EWHC 4042 (QB) at [33].

¹²³ [1975] AC 396.

become accepted). *Mitchell v News Group Newspapers Ltd* goes further than the approach promoted by Sir Rupert Jackson, and does not seem to fit comfortably with the overall scheme of the CPR. A tougher, more robust, approach to compliance did not demand a test that limits relief from sanctions to trivial breaches and those where there is a good reason arising from circumstances absolutely beyond the control of the defaulting party.

Beyond the truly trivial, defaults vary in seriousness, and excuses and reasons shade from those totally beyond the control of the defaulting party, through ones which involve a choice in the deployment of limited resources, to those involving pure indolence or deliberate default. Refusing to give relief for moderate defaults where the reasons for breach are poor to middling will either reform the profession, or will lead to the end of party co-operation. The hope is that the profession will reform and treat deadlines seriously. The law of unintended consequences may mean lawyers end up making a great many more applications than hitherto. With sanctions being deemed to be reasonable and proportionate unless appealed at the time, that might be exactly what solicitors do if unless orders are made with draconian consequences for breach. Rather than giving consent, opponents are likely to leave parties in difficulties to the mercy of the courts. Rather than doing their best to comply, albeit a little late, solicitors may as a matter of course make applications to extend time whenever there is a risk of breach. Instead of doing the work properly, there may be a temptation to serve documents as they are in order to meet the deadline. It may be good tactics to pour money into steps in the litigation process with tight deadlines in the hope the other side will not be able to match the expenditure or meet the deadline. The fear is that we may have turned the clock back to 1874.

A better approach would have been to follow the recommendations of Sir Rupert Jackson. As he stated in *Fred Perry (Holdings) Ltd v Brands Plaza Trading Ltd*, "... litigants who substantially disregard court orders or the requirements of the Civil Procedure Rules will receive significantly less indulgence than hitherto."¹²⁴ This reflects a middle course that adopts a less tolerant and robust approach to non-compliance, rather than one with very little tolerance. This would have taken into account all the various shades of seriousness of the various defaults that tend to arise, and required the court to find a just outcome taking into account the various shades of reasons that may be proffered by defaulting parties, together with the effects on delay and court and party resources. However, the Court of Appeal has chosen a different path. The question is whether the legal profession is able to heed the clear message that has been sent.

¹²⁴ [2012] EWCA Civ 224, [2012] FSR 28 at [4].