JACKSON

- *How bad is it really?*

by

Joanne Wicks QC
Wilberforce Chambers

Some nice member of the PLA was kind enough to tell the Legal 500 this year that Joanne is *'undoubtedly one of the leading property silks, who is destined for the top*.' That destiny is now fulfilled, "*the top*" clearly meaning the Chairmanship of the PLA Autumn Training Day. She is thrilled to have reached these dizzy heights.

WILBERFORCE CHAMBERS

8 New Square
Lincoln's Inn
London WC2A 3QP

Telephone: 020 7306 0102
Fax: 020 7306 0095
Email: jwicks@wilberforce.co.uk

Introduction

The Autumn of 2014 seems like a good time to pause and reflect on the Jackson reforms introduced in April 2013. A year and a half has passed: enough time for most practitioners to have had at least some practical experience of the new regime, whether by way of costs budgeting, disclosure or sanctions. The reforms were hardly greeted with unalloyed joy by property litigators – has the reality so far been as bad as we feared? Or worse? Or do we, deep down, think that it is better for our clients to litigate in a world where rules and orders are to be obeyed and costs strictly controlled?

This session at the Autumn Training Day will ask the audience to share their experiences of various aspects of the Jackson reforms. The notes that follow concentrate on the thorny issue of sanctions and relief from them, which has been productive of the greatest number of reported cases in the months since the reforms took effect and, in particular, the Court of Appeal decisions in *Mitchell v News Group Newspapers Ltd*[1] and *Denton v TH White Ltd*[2].

The Old and New Rules

CPR r.3.8(1) provides:

> "Where a party has failed to comply with a rule, practice direction or court order, any sanction for failure to comply imposed by the rule, practice direction or court order has effect unless the party in default applies for and obtains relief from the sanction."

The old CPR 3.9(1) said

> "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;

[1] [2014] 1 WLR 795

[2] [2014] EWCA Civ 906

(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."

The Jackson Report[3] decided that

> "Courts at all levels have become too tolerant of delays and non-compliance with orders. In so doing they have lost sight of the damage which the culture of delay and non-compliance is inflicting upon the civil justice system. The balance there needs to be redressed."

It recommended a change to CPR r.3.9(1) to the following:

> "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 requirements that litigation should be conducted efficiently and at proportionate cost; and
>
> (b) the interests of justice in the particular case."

The Civil Procedure Rules Committee did not entirely accept this recommendation. The new CPR r.3.9 provides as follows:

> "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 –

[3] Sir Rupert Jackson's "Review of Civil Litigation Costs: Final Report" December 2009

(a) for litigation to be conducted efficiently and at proportionate cost; and

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

So there was a deliberate decision to remove a reference in CPR r.3.9 to "the interests of justice in the particular case" and to replace it with "the enforcement of compliance with rules, practice directions and orders." Some, including Jackson LJ himself, might think that was unfortunate.

When does CPR 3.9 Apply?

The Court has a general case management power to extend or shorten time for compliance with a rule, practice direction or order, under CPR r.3.1(2)(a). The exercise of that jurisdiction is governed by the overriding objective, which has been amended to make specific reference to include "enforcing compliance with rules, practice directions and orders". However, in non-sanction cases, CPR r.3.8, 3.9 and the stringent approach of the *Mitchell* and *Denton* cases considered below do not apply. So it becomes critical to identify those rules, practice directions and orders which apply a sanction, and those which do not. This is not always easy.

In *Summit Navigation Ltd v Generali Romania Asigurare Reasigurare SA*[4] Leggatt J held that the term "sanction" includes any consequence adverse to the party to whom it applies.

It is necessary to look very carefully at the particular rule, practice direction or order which applies to work out whether there is an express or implied sanction for non-compliance. For example, CPR r. 32.10 provides:

> "If a witness statement or a witness summary for use at trial is not served in respect of an intended witness within the time specified by the court, then the witness may not be called to give oral evidence unless the court gives permission."

[4] [2014] 2 Costs LR 367 at [27]

The Court of Appeal in *Chartwell Estate Agents Ltd v Fergies Properties SA*[5] explained ~~that the rule does impose~~ a sanction, namely preventing the witness being called to give oral evidence. This is the case even though the rule contains a proviso allowing such late service if the court gives permission. It was argued that the sanction had not yet taken effect because it would apply only when the parties finally reached trial: that argument was rejected. The sanction takes effect once the time limit for serving the witness statement has expired.

On the other hand, in *Associated Electrical Industries Ltd v Alstom UK*[6]*,* Andrew Smith J considered CPR 58.5, which provides (in relation to the Commercial Court)

> "(1) If, in a Part 7 claim, particulars of claim are not contained in or served with the claim form…
>
> (c) the claimant must serve particulars of claim within 28 days of the filing of an acknowledgement of service which indicates an intention to defend."

This rule specifies a particular time period within which something must be done, but it does not expressly specify the consequence of missing the deadline. The Judge held that r. 3.9 did not strictly apply. However, in light of the new overriding objective, and the culture sought to be fostered following *Mitchell*, he said that the Courts would adopt a firm line on enforcement. Consequently, given the general importance of compliance with rules, practice directions and orders, he declined to grant the extension sought.

One issue which has arisen is whether an application for an extension of time made "in time" (i.e. before the expiry of the relevant period for doing the act in question) is governed by CPR 3.9 or not. In *Re Guidezone Ltd (Kaneria v Kaneria)*[7] an order had been made in standard form that

> "The first to fifth respondents shall by 14 February 2014 serve and file a defence in relation to the preliminary issues."

The respondents made an application on 11 February for an extension of time to serve their defence. Nugee J held that the application was to be treated as an ordinary application for an extension of time under CPR r. 3.1(2)(a) and not as an application for relief from sanctions under CPR r. 3.9.

[5] [2014] 3 Costs LR 588 at [24-5]
[6] [2014] 3 Costs LR 224
[7] [2014] 3 Costs LR 415

Guidezone was a case in which the order did not provide expressly for any consequences to attach to the failure to meet the deadline imposed: it was not an "unless" order. If the "ordinary" jurisdiction to extend time CPR r. 3.1 does not apply to an in-time application to extend time under such an order, then it is difficult to see how the jurisdiction could ever apply – CPR 3.9 would have entirely engulfed the ordinary jurisdiction to extend or abridge time for doing something.

An in-time application to extend time under a rule that *does* provide for a sanction in the event of non-compliance was considered by the Court of Appeal in *Hallam Estates v Baker*[8]. Under CPR 47.9, the period for serving points of dispute in a detailed assessment is 21 days after the date of service of the notice of commencement. By CPR 47.9(3)

> "If a party serves points of dispute after the period set out in para (2), that party may not be heard further in the detailed assessment proceedings unless the court gives permission."

This, then, is a rule which, according to the *Chartwell* decision, provides for a sanction in the event of non-compliance. The claimant applied for an extension of time at 2:43pm on the day of the deadline, and the application was only stamped by the Court the next day. Jackson LJ concluded that the application was in time, and the fact that the Court did not stamp the application that day was immaterial. In those circumstances it was held that CPR 3.9 did not apply and that the relevant jurisdiction was the ordinary discretion under CPR 3.1(2)(a).

An out-of-time application for an extension under a rule which provides for a sanction is clearly an application for relief from sanctions under CPR r. 3.9. But what about an out-of-time application under a rule which does *not* provide for a sanction? The Courts appear to be treating such applications as analogous to an application for relief from sanctions under CPR 3.9, even if that rule does not strictly apply.

In *Raayan Al Iraq Co Ltd v Trans Victory Marine Inc*[9], the claimant, out of time, applied for an extension of two days for the service of its particulars of claim. The time limit for doing so was specified by CPR 58.5, set out above, which sets a time limit but does not impose an express sanction for failure to comply. The Court of Appeal in *Mitchell*

[8] [2013] 6 Costs LR 911

[9] [2014] EWCA Civ 661

characterised the application as "in substance" an application for relief from sanctions under r. 3.9 and criticised the Judge for too lenient an approach to the request for an extension. It was no doubt with this in mind that the same Judge in *Associated Electrical Industries Ltd v Alstom UK*[10] analysed a similar failure to comply with CPR 58.5 by reference to the *Mitchell* test, even though he held that CPR 3.9 did not, strictly apply. As Nugee J observed in *Guidezone*, this is nothing new: in *Sayers v Clarke Walker*[11], back in 2002, a case of an out-of-time application for an extension of time for appealing, Brooke LJ had said that it was appropriate to have regard to the check-list then contained in CPR 3.9. However, Nugee J noted that there might be out-of-time applications where the analogy with an application for relief from sanctions is less close. It is suggested that this must be right. CPR r.3.1(2)(a) expressly recognises that the Court may grant retrospective extensions of time under its ordinary jurisdiction just as it may grant prospective extensions: to insist that all out of time applications must be dealt with as if CPR 3.9 applies is to read words into CPR r.3.1 which the Civil Procedure Rules Committee has not put in there or in the overriding objective which governs the application of discretion under that rule.

The distinction between rules which apply a sanction and those which do not is less significant if the Court decides to impose a sanction for non-compliance with the original rule. In *Mitchell*, for example, the relevant rule which had not been complied with was part of a pilot scheme for costs management. This required the parties to exchange and lodge costs budgets not less than 7 days before the hearing, but did not specify a sanction for a failure to do so. At the initial hearing on 18 June 2013 Master McCloud imposed a sanction on the non-compliant claimant, namely that he be treated as having filed a budget comprising only the applicable court fees. Then on 25 July she heard the application for relief from that sanction, under CPR 3.9.

Another issue which has arisen is where a party has complied with a rule, practice direction or court order, but defectively or incompetently. The Courts have so far shown a much greater leniency towards a party who does something, even if not well, in time as against one who does something late or not at all. In *Lakatamia Shipping Co Ltd v Su*[12] the claimants argued that, not only was the defendant's disclosure list provided under an "unless" order 46 minutes out of time, but also that it was seriously deficient. Hamblen J analysed the authorities and concluded at [22] that

[10]
[11] above
[2002] EWCA Civ 645

"an order to provide disclosure is complied with for the purposes of an unless order as long as a list is provided and that list is not 'illusory'. It will be 'illusory' if the court can infer "lack of good faith where it is obvious from patent deficiencies in the list that it had been prepared in apparent but not real compliance with the obligation to give discovery."'

Equally, in *The Bank of Ireland v Philip Pank Partnership*[13] a party had filed a costs budget, but without a Statement of Truth as required by the rules. Stuart-Smith J held that no sanction applied where *"a budget"*, even if not one in compliance with the practice direction, had been filed in time. He rejected the notion that *any* failure to comply with Precedent H would render the budget a complete nullity. Accordingly, r. 3.9 did not apply.

Will Relief from Sanctions be Granted?

In *Mitchell* the Court of Appeal explained that the new r. 3.9 had brought about a dramatic change in approach to the exercise of the discretion to grant relief from sanctions. The two factors specified in r. 3.9(1)(a) and (b) would be given paramount importance, and the Court would have regard to the needs and interests of all Court users when case managing an individual case, and not just the justice of that particular case in isolation. At [40] – [41] the Court outlined the following approach when dealing with applications for relief from sanctions:

(1) If the breach is *trivial* and the relevant application has been made promptly, the Court will usually grant relief.

(2) If the breach is not trivial, the burden is on the defaulting party to show a *good reason* for the breach.

Cases subsequent to *Mitchell* confirmed that where the breach was not trivial and there was no good reason for it, then it would be extremely rare for the Court to grant relief from sanctions[14].

It was also clarified subsequently that promptness of the application for relief was not a pre-requisite for relief, but merely a relevant factor.[15]

[13]
[14][2014] 2 Costs LR 301
[15] See e.g. *Summit Navigation Ltd v Generali Romania, above*

Denton provides an important gloss on the guidance given in *Mitchell*. The Court of Appeal has attempted to give a clear exposition of the position in the expectation that this "will avoid the need in future to resort to the earlier authorities" ([24]).

The first stage in the assessment is now whether the breach is "serious or significant", not whether or not it can be said to be "trivial". "Significant" breaches include, but are not limited to, breaches that imperil the conduct of the litigation. Failure to pay Court fees may be designated as "serious" (see [26]). Other breaches likely to be deemed not significant or serious include: defects of form, not substance[16]; breaches where there is no harm to the other party[17] and narrowly missed deadlines[18]. At this stage of the enquiry, unrelated breaches by the party in default should not be considered: these come in later (see [27]). If the breach is neither serious nor significant then the Court is unlikely to need to spend much time on the second or third stages.

The second stage requires a consideration as to why the default occurred.The Court of Appeal declined to provide a list of "good" and "bad" reasons for the breach, but the case law provides the following examples of "good" reasons: serious accident or illness, whether of a party or their solicitor[19]; later developments which show that the period for compliance originally imposed was unreasonable[20]; circumstances outside the control of the party in default[21], e.g. a default of a third party who does not have conduct of the litigation[22]; the Court's failure to serve the order fixing the time limit promptly[23] and loss of legal representation[24].

Reasons likely to be insufficient include: merely overlooking a deadline, whether on account of overwork or otherwise[25] or the complexity of the investigations needed before e.g. particulars of claim could be drafted, when coupled with a failure to make a timely application for an extension of time[26].

[15] *Chartwell Estate Agents Ltd v Fergies Properties SA and Another* [2014] EWCA Civ 506 at [34]
[16]
[17] *Forstater v Monty Python Pictures Ltd* [2013] EWHC 3759 (Ch)
[18] *Adlington v ELS International Lawyers LLP* [2013] EWHC B29 (QB) at [32(b)]
[19] *Mitchell* at [40].
[20] *Mitchell* at [41]
[21] *Mitchell* at [41]
[22] *Mitchell* at [43]
[23] *Summit Navigation Ltd v Generali Romania, above* at [47]
[24] *Summit Asset Management Ltd v Coates* (unreported, 10 December 2013)
[25] *Newland Shipping & Forwarding Ltd v Toba Trading FZC* [2014] EWHC 210 (Comm).
[26] *Mitchell* at [41]
Associated Electrical Industries Limited v Alstom UK [2014] EWHC 430 (Comm) at [29] to [31]

At the third stage, it is necessary to have regard to all the circumstances of the case, but the two factors specified in CPR r. 3.9(a) and (b) are of "particular importance" and should be given "particular weight". The Court of Appeal in *Denton* stated that there had been an "important misunderstanding" in the application of the third stage, with Courts assuming that if the breach is significant and if there is no good reason then the application for relief must fail.

It is interesting to note the dissenting judgment of Jackson LJ on the third stage analysis in *Denton*. He did not consider that the factors mentioned in CPR r. 3.9(a) and (b) were of particular importance or to be given greater weight than other factors. The word "including" in the rule meant that the factors (a) and (b) are included amongst the things to be considered, no more and no less. The majority rejected Jackson LJ's reading of the rule on the basis that the draftsman would not have mentioned factors (a) and (b) if they were not to be given particular weight, and also the fact that the Rules Committee had chosen not to adopt the Jackson Report's recommended wording of the rule in full.

New CPR r. 3.8(4)

Until recently, CPR 3.8(3) made it clear that the parties could not agree to extend the time for compliance with a rule, practice direction or order which imposes a sanction. A new subparagraph (4) has now been added, as of 5 June 2014. This provides:

> "…unless the court orders otherwise, the time for doing the act in question may be extended by prior written agreement of the parties for up to a maximum of 28 days, provided always that any such extension does not put at risk any hearing date."

Note that this only applies in respect of *prior* written agreement.Where a deadline has been missed, then an application to Court is necessary but if the other party consents to the extension then an oral hearing may not be necessary:

Beyond that 28-day period,

> "any agreed extensions of time must be submitted to the Court by email including a brief explanation of the reasons, confirmation that it will not prejudice any hearing date and with the draft Consent Order in Word format. The Court will then

consider whether a formal application and hearing is necessary. Any retrospective agreement to extend time is to be submitted to the Court in like manner."[27]

Unreasonable Resistance to Applications for Relief

The *Mitchell* decision immediately attracted criticism that it dis-incentivised co-operation between the parties and would drive up the costs of litigation by encouraging satellite litigation over the most minor or unimportant of defaults. Parties would naturally wish to take advantage of any slip on the part of their opponent which might result in a summary dismissal of a claim or defence or provide a serious hindrance to their opponent's presentation of their case. If resisting an application has this potential, why not give it a try and see what happens?

Denton has tried to squash this potential for satellite litigation by giving greater prominence to CPR 1.3, which states that

"The parties are required to help the court further the overriding objective".

At [41] it was said:

"We think we should make it plain that it is wholly inappropriate for litigants or their lawyers to take advantage of mistakes made by opposing parties in the hope that relief from sanctions will be denied and that they will obtain a windfall strike out or other litigation advantage. In a case where (a) the failure can be seen to be neither serious nor significant, (b) where a good reason is demonstrated, or (c) where it is otherwise obvious that relief from sanctions is appropriate, parties should agree that relief from sanctions be granted without the need for further costs to be expended in satellite litigation. The parties should in any event be ready to agree limited but reasonable extensions of time up to 28 days as envisaged by the new rule 3.8(4)."

If the Court considers a party has acted non-cooperatively or opportunistically, then "heavy costs sanctions" should be imposed. This may not be limited to the costs of the relief application; the Court may record in its order that the opposition was

[27] See Civil Procedure at 3.8.1

unreasonable conduct under CPR, r. 44.11 and therefore should be taken into account at the end of the case (see [43]).

Parties whose opponents breach the rules may feel stuck between a rock and a hard place. On the one hand, whilst softening some of the stringency of *Mitchell, Denton* has continued to emphasise how difficult it can be to obtain relief from sanctions. On the other hand, if a party too robustly resists an application for relief, he or she may be penalised, and not just in the costs of the application. Whether the *Denton* approach will make us all more co-operative, or simply generate yet further satellite dispute, is yet to be seen.

Conclusion

Jackson LJ's difference of opinion with the majority of the Court of Appeal in *Denton*, and his judgment in *Hallam Estates v Baker*, suggests that he may feel that his Report's emphasis on compliance with rules, practice directions and orders has been taken too far. Whether there will be fewer cases of obvious injustice after *Denton* remains to be seen. In the meantime, property litigators everywhere had better make sure their insurance policies are up to date.