When will a court grant relief from sanctions?

If a party fails to comply with a rule, practice direction or court order the court may apply a sanction. This might result in a party's award in damages being reduced by the court in some way, or an order that that party pays another party's costs (see the document 'Structure of Civil Procedure Rules' which is included with the Modules supplied as part of the Civil Litigation course).

A particularly severe penalty occurs when a party on the multi-track fails to file a costs budget in time. In such instances the court is empowered to treat the party as having filed a costs budget comprising only the court fees. The rules clearly permit the court to impose sanctions in such an instance. The question then becomes whether the party which has been sanctioned can persuade the court to withdraw that sanction, i.e. to 'grant relief'. Perhaps the most important rule in this regard is rule 3.9 which deals specifically with the ambit of the court's discretion:

Relief from sanctions

3.9

(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –

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

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

(2) An application for relief must be supported by evidence.

The difficulty of applying a particular rule

It is not always easy to see how a particular rule is to be applied and rule 3.9 has been the subject of controversy in a number of high profile cases, the most notorious of which is probably the case of *Mitchell*. [1] In *Mitchell* the claimant's solicitors failed to file the claimant's costs budget on time. As a result, the claimant was to be treated as though he had

[1] M*itchell v. News Group Newspapers Ltd* [2013] EWCA Civ 1537, [2014] 1 WLR 795.

filed a costs budget comprising only the court's fees. Given that the costs budget was in the order of half a million pounds, it can be seen that a strict application of rule 3.9 can have a devastating effect on a party. It is for this reason that rule 3.9 exists: the court's application of sanctions is not always the final word – a sanction can always be appealed.

Case management

Note that rule 3.9 is in Part 3 of the rules, which is entitled *The Court's Case Management Powers*. Case management is at the heart of the CPR, but in some courts it has become the dead hand of the CPR because judges sometimes see case management as an end in itself, whereas it is really a means to an end, the end or purpose being to further the overriding objective. Fortunately, as will be seen below, this has been recognised at appeal.

The rule is, however, undoubtedly part of the court's armoury in managing cases. It is designed to ensure that the court has adequate powers to deal with parties who do not comply with the rules.

Following *Mitchell*, the courts were faced with a high number of cases involving relief from sanctions. Inevitably, the *Mitchell* ruling caused problems for appeal court judges who had the thorny task of deciding whether a party should be penalised for breaching rules such as:

- late filing of costs budgets;
- failure to consider mediation or some other form of alternative dispute resolution (ADR);
- failure to file evidence on time.

Some examples of cases relating to the rule

The case of *Durrant* followed shortly after *Mitchell* and concerned a breach by the defendant of several orders. [2] The defendant had failed on a number of occasions to exchange its witness statements and the court applied sanctions. This was appealed and the court ordered the sanctions to be removed, merely postponing the date of the trial in order for the claimant to deal with the new evidence. In fact the witness statements were filed and served less than 24 hours after the time limit for doing so had expired. However, the Court of Appeal did not

[2] *Durrant v. Chief Constable of Avon and Somerset Constabulary* [2013] EWCA Civ 1624; [2014] 2 All ER 757.

approve of this approach and the claimant was prevented from relying on the statements at trial. This had an adverse effect on the defence, and was considered by some observers to be even more draconian than *Mitchell*.

Clarke v Barclays Bank concerned the a party's attempt to rely on the report of a new expert and the party's failure for a period of several months to inform the court that the previous expert had withdrawn. [3] The court allowed relief but this was appealed. The sanction of the appeal court under rule 3.9 was to refuse the party's reliance on the report. This in turn effectively put paid to the claim.

The rule 'resolved'

The above cases illustrate that *Mitchell* failed to provide clarity on the question of when sanctions should be imposed for non-compliance and, equally, when relief from sanctions should be granted. Some judges were allowing serious breaches to go unchecked, appeal courts were reversing those decisions and imposing a much stricter regime than that envisaged by those who had drafted the rules: equally, other judges were imposing what were seen as draconian sanctions, only to be reversed on an apparently much more liberal footing at appeal.

To some extent the regime appears to have been softened following the ruling in *Denton*. [4] This was a conjoined appeal of three cases, all relating to the issue of relief from sanctions. The fact that these three important appeals were joined, and the fact that in each case the Court of Appeal found that the lower courts had either applied the wrong test, or had applied the correct test, but had done so incorrectly, demonstrates the confusion sown by *Mitchell*.

In Denton, the court laid down the test for whether relief ought to be given as a three stage process:

1. Identify the breach and assess its seriousness and significance; do not consider other, unrelated failures until the third stage. If the breach is not serious, there is no need to spend much time on stages two and three;
2. Consider why the default occurred. The court said that there was little point in

[3] Clarke v Barclays Bank & Lamberts Surveyors [2014] EWHC 505.
[4] *Denton -v- TH White Ltd & De Laval Ltd, Decadent Vapours Ltd -v- Bevan, Salter & Celtic Vapours Ltd, Utilise TDS Ltd -v- Davies, Bolton Community College Corp & Watertrain Ltd*, [2014] EWCA Civ 906 Case Numbers: A2/2014/0126; A3/2014/0767; and A3/2014/0870.

producing an encyclopaedia of good and bad reasons for a failure to comply with a rule – every case must be decided on its merits;

3. At the third stage, the court will evaluate all the circumstances; 'all the circumstances' includes the first two stages.

'All the circumstances'

The court was keen to stress that a serious breach for which there was no good reason would not necessarily mean that the application for relief would fail. This is why an investigation into "all the circumstances of the case" is important.

The key question is the effect of the non-compliance. Here, the question is not simply whether the offending party breached a rule, practice direction or court order, but did the party's conduct actually affect the efficiency of the litigation, or cause disproportionate costs for the other party? For example, did a trial date have to be postponed in order for a particular step to be completed? Part of the court's duty under the rubric of dealing with cases justly and at proportionate cost is to ensure that the court allots an appropriate share of its resources to a case, while taking into account the need to allot resources to other cases. If a court considers that a party's default had such serious consequence, it may be the case that relief would not be granted.

Finally, although a previous breach, if 'trivial', cannot be converted into a serious breach, consideration of such breaches does form part of the 'circumstances of the case', and a party which breaches an unless order should consider that the court may not grant relief, even if the last breach was 'trivial'. Hence, serial offending may be detrimental to an application.

So, to sum up: "if the default is not serious and significant, relief is likely to be granted" (*Altomart Limited v Salford Estates (No. 2) Limited* [2014] EWCA Civ 1408; per Moore-Bick LJ Paragraph 19). For relief to be refused, the breach needs to be material. It must affect the course of the proceedings in a serious or significant way.