Mitchell: the problem of guidance

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The Master of the Rolls expressed surprise the guidance he delivered in *Mitchell* had apparently led to a substantial increase in satellite litigation, a reduction in cooperation between parties to litigation, and a significant increase in costs, during the hearing of the three conjoined appeals in *Denton v T H White Ltd*, *Decadent Vapours v Devon & others*, and *Utilise TDS v Bolton College*. He said it was "*just guidance*" and the intention had not been to remove discretion. The problem with guidance of course is people are likely to follow it. As to that, he said it had been "*misinterpreted*". But it is unsurprising that District and Circuit Judges have refused to grant relief from sanction for non-trivial breaches for which there is no good explanation. Paragraph 58 of *Mitchell* is clear: the expectation is the sanction will usually apply unless the breach is trivial or there is a good reason for it. Whilst the court still has the power to grant relief if neither of these applies, the two specific factors mentioned in Rule 3.9 will usually trump other circumstances.

Counsel for the Law Society, David Holland QC, pointed out the effect of *Mitchell* has been that non-trivial breaches for which there is no good explanation were often resulting in a disproportionate sanction, even though the breach has had no effect on the timetable of the litigation generally nor the business of the court or other litigants. In written submissions, the Bar Council suggested the importance of justice in the individual case ought to rank on a par with the two specific factors in Rule 3.9. But if that is followed we are back to where we were before. The Law Society suggested what should matter is whether a breach is 'material' rather than 'trivial'. As the Master of the Rolls pointed out, that begs the question: material to what? The triviality or otherwise of the breach looks set to stay as the first question. It has the advantage of looking simply at the gravity of the breach. Where further guidance may emerge is in relation to the importance of considering all the circumstances of the case. If a non-trivial

breach occurs, without adequate explanation but in an otherwise well-run case, the weight to be attached to (a) and (b) of Rule 3.9 may not necessarily be as great as has been thought hitherto and therefore may be more easily outweighed by the individual circumstances of the case. The extent to which more flexibility will be allowed in this kind of situation is the point of greatest interest. I expect their Lordships will want to do something to correct what they perceive as a general misinterpretation of *Mitchell*. But the room for manoeuvre is limited if the change of culture away from non-compliance is to be achieved.

The problem of opportunistic resistance to a self-evidently trivial breach was the subject of anxious discussion. Mr Holland QC submitted costs sanctions would remain a good deterrent. However, whilst this may be so in many types of civil work, it is not the case in personal injury litigation. A claimant, with the benefit of QOCS, who knows his claim may well fail, is unlikely to be fazed by the threat of a costs sanction for refusing to consent to relief for a trivial breach. CPR Rule 44.14 is pretty clear. None of the exceptions in CPR 44.15 or 44.16 will apply. It was suggested on behalf of the Law Society the legal representative should bear the costs. Such an order could be made under CPR 44.11. However, this will be easily circumvented by a solicitor saying his client gave firm instructions to oppose the application. In that event it is hardly fair to visit a costs order on the solicitors. The court has few other weapons to deploy to deter a speculative objection by someone bringing a speculative personal injury claim. One option would be to mark that party's card; for example, to say that the objection was unreasonable and has disrupted the administration of justice and that will be taken into account should that party himself require relief from sanction in the event of a breach. A party who knows he will fall to be judged by standards he has tried to set for others in the context of a minor breach is more likely to be willing to behave reasonably.

Whilst their Lordships will no doubt want to get this judgment right, don't expect it to take very long. Those needing relief from sanction would be well advised to ensure their applications are dealt with after the decision is published; especially if the application is borderline. Those who are unable to persuade the court to postpone the hearing may want to seek a fairly generous extension of time to appeal. If a judge has '*misinterpreted*' *Mitchell* by refusing relief for a breach, which, though not trivial nor well explained, has had no effect on the timetable or the wider administration of justice, with the result that the individual concerned suffers a substantial injustice, then on appeal justice may yet prevail.

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