This is the 2014 Jonathan Brock QC Memorial Prize Essay

Have the cases on relief from sanction under the Civil Procedure Rules, from *Mitchell* onwards, gone too far?

How do procedural fairness and substantive justice relate to one another?

This conundrum lies at the heart of reforms to civil procedure, not just in England and Wales but across the legal systems of developed countries.[1] It is a concern that, in the context of relief from sanction, branches out into many other questions, each of which have a role in assessing whether the developing case law has "gone too far" in any particular direction, whether too lenient or too tough, since the Court of Appeal's decision in *Mitchell*.[2]

Should a meritorious claim be barred simply because of a procedural error or omission on the part of lawyers, at the expense of a claimant and so giving a windfall to the defendant? Should a litigant be able to seize on the smallest default as a weapon capable of denying their opponent almost all their costs? If the answers are no, what factors can be taken into account, and what threshold do those factors need to cross, to grant the defaulter relief?

Courts have become increasingly busy in this jurisdiction in the past decade despite the growth of alternative dispute resolution, thanks in part to the gentle rise in litigation without a corresponding increase in dedicated resources. The pressures of increasing demand against fixed supply push for greater efficiency in the use of personnel, buildings and time. To what extent are courts public assets where the opportunity cost of the litigation at hand can legitimately be weighed against their

[1] Noted by Jackson LJ at paragraph 6.6, p.397, *Review of Civil Litigation Costs: Final Report*, December 2009, ('Jackson Report'). Available at: www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf.

[2] *Andrew Mitchell MP v News Group Newspapers Limited* [2013] EWCA Civ 1537 ('*Mitchell*').

alternative use? Should swift-but-rough justice be preferred to the delayed-but-elaborate?

Prompted by successive governments, senior judges have attempted to grapple with the civil justice system by addressing chokepoints like the principles governing and the cultural attitudes of judges, lawyers and litigants to compliance with rules, practice directions and orders. Jackson LJ recognised the inherent tension between courts "at all levels" becoming "too tolerant" of procedural faults on the one hand, without realising the "damage which the culture of delay and non-compliance is inflicting upon the civil justice system", and, on the other, the need to have "realistic" rather than "impossibly tough" timetables for cases, "in order to give an impression of firmness".[3]

As part of his redress of the equilibrium between these two limbs of justice, Jackson LJ proposed simplification of relief from sanction in order to improve it. No longer were judges to be guided via a narrow list of nine factors in their consideration of "all the circumstances" of an application for relief from sanction for failure to comply with any rule, practice direction or court order. As Lord Dyson MR explained shortly before the reforms came into force, the previous rule had scope for improvement. The "checklist approach was less than ideal. It was cumbersome, and often difficult to apply in practice."[4] In the view of the editors of the *White Book 2014* the nine-point test was "laudable" but "did lead to a tendency among lawyers to treat the nine criteria as constituting a statutory code" which was "too generous" to defaulting litigants.[5] In the view of the Master of the Rolls and Vos LJ in *Denton*, the nine-point test did not move the assessment of relief from sanction far enough away

[3] Paragraph 6.5, p.397, Jackson Report.
[4] Paragraph 20, *The application of the amendments to the Civil Procedure Rules*, 22 March 2013. Available at: www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Speeches/mr-speech-judicial-college-lecture-2013.pdf
[5] Commentary at 3.9.2, *White Book 2014*.

from “the traditional approach of giving pre-eminence to the need to decide the claim on the merits.”[6]

Jackson LJ’s apparently simpler test did not seek to fetter so tightly the judge charged with striking the balance between a party’s right to portray its case in the best light and the interests of punishing those who infringed the necessary flow of the administration of justice – or, as Jackson LJ himself put it, “between case management considerations and pure justice”.[7] He preferred a twin-fold test that obliged a court to consider both the “requirements that litigation should be conducted efficiently and at proportionate cost” and “interests of justice in the particular case”. However, the Civil Procedure Rule Committee rejected this as too broad. It was a swing of the pendulum too far in the opposite direction from the list and gave too much discretion: the new rule 3.9, which came into force on 1 April 2013, was to be more focused on “enforcing compliance” with rules, practice directions and orders. Simultaneously, rule 1.1 was amended and two new emphases added. The new overriding objective of the CPR is to enable courts to deal with cases justly “and at proportionate cost”, including “so far as is practicable…(f) enforcing compliance with rules, practice directions and orders”. Lest it was unclear from the new rule 3.9, proportionate costs and compliance with timings are now core concerns of the CPR.

Was it the case that, as Lord Dyson predicted in his speech to fellow judges shortly before the reforms took effect, what became known as ‘the Jackson Reforms’ were evolutionary rather than revolutionary and that “within a few months you will feel quite at home in the post-Jackson world”? Given the turmoil since *Mitchell* and the uncertain strictness of the application of the new rule 3.9, few were happy with the instability it has caused – as demonstrated by the volume of satellite litigation the rule change generated.

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[6] Paragraph 81, *Denton v TH Ltd and another, Decadent Vapours Ltd v Bevan and others and Utilise TDS Ltd v Davies and another* [2014] EWCA CA Civ 906 (‘*Denton*’).
[7] Paragraph 6.6, p.397, Jackson Report.

The first major test of the new rule was in Andrew Mitchell's well-known defamation case. In breach of then-Practice Direction 51D (Defamation Proceedings Cost Management Scheme), which required parties (at 4.2) to exchange and lodge with the court their costs budgets not less than seven days before the relevant hearing date, the claimant's solicitors failed to file their budget until day before a case management and costs budget hearing before Master McCloud. As a result, the Master considered a proportionate sanction to be that the claimant was unable to recover any more costs than the applicable cost fees, using the new rule 3.14 CPR for guidance. In subsequently refusing relief from sanction, she took into account the need to vacate a half-day appointment set aside for mesothelioma claims in order to hear the relief from sanction application, the claimant's solicitors' failures to engage with the defendants as PD 51D required, and lack of good reasons for the delay.[8]

In the Court of Appeal's consideration of Master McCloud's reasoning, the starting point for relief from sanction was the proportionality of the sanction itself, and although none was specified in PD 51D, the Master was correct in following the subsequently-introduced rule. The Court gave guidance on the interplay between the factors listed at r 3.9(a) and (b) and the "all the circumstances" of the case: "the other circumstances should be given less weight than the two considerations which are specifically mentioned."[9]

This was subject to, firstly, a consideration of the "nature of the non-compliance": if the breach can "properly be regarded as trivial, the court will usually grant relief provided than an application is made promptly". Examples of an "insignificant failure" include "failure of form rather than substance; or where the

[8] Set out at paragraphs 12 to 17 of *Mitchell* and summarised at paragraph 9 of *Denton*.
[9] Paragraph 37, *Mitchell*.

party has narrowly missed the deadline imposed by the order, but has otherwise fully complied with its terms".[10]

Second, if the default was not insignificant (already recognised by the Court as a troubling term that "may give rise to dispute and therefore to contested applications") then the burden falls on the defaulting party to persuade the court to grant relief by demonstrating a "good reason" for default. The Court accepted a very limited range of "good reasons": "for example, if the reason why a document was not filed with the court was that the party or his solicitor suffered from a debilitating illness or was involved in an accident, then, depending on the circumstances, that may constitute a good reason" or if a "period for compliance originally imposed was unreasonable, although the period seemed to be reasonable at the time and could not realistically have been the subject of an appeal". However, solicitors who merely overlooked a deadline "will rarely be a good reason" in itself.[11]

The problems with the Court's guidance in *Mitchell* were quickly apparent. Relief from sanction was restricted to a narrow range of factual circumstances. There was an undue emphasis on the two factors at the expense of wider circumstances. As even the Court admitted, the interpretative language of rule 3.9 was too uncertain, particularly in what constituted triviality. It encouraged conflict, not co-operation: defaulters were unsure of what principles would be applied by a court in applications for relief, and innocents were encouraged to use it in an opportunistic fashion. It is perhaps doubly unfortunate that *Mitchell* was the test case than brought the new rule to the fore, as it represented the elision of both costs' and case management, exacerbating practitioners' fears that the new rule would be applied heavily on costs and magnifying the penalties for breach of the costs rules.

[10] Paragraph 40. *Mitchell*.
[11] Paragraph 41, *Mitchell*.

Mitchell sparked numerous subsequent challenges.[12] The "most important" reported cases were summarised by the Court in *Denton*[13] (when, at the same time, it counselled against referring to earlier authorities[14]). In many, judges found breaches to be trivial, and it seemed there was a rebellion against the 'zero tolerance' approach of Jackson Reforms and *Mitchell*.

Of those cited in *Denton*, there are several instances of judges willing to forgive laxity and exercise lenience: the failure of seven of 134 claimants in a group action to sign their particulars of claim by a date given in an unless order;[15] the failure – by 46 minutes – to give disclosure in time;[16] and the delay, by one day, of a claimant when tendering security for costs.[17] The Court could also have referred to a case similar to *Mitchell* where the court found to be trivial the service and filing of a costs budget on time but without a valid statement of truth.[18]

However, the Court of Appeal has not been so lenient when repeated failures in exchanging witness statements by ordered deadlines occurred close to trial.[19] Echoing *Mitchell*, the Court did not consider as a good reason the defendant's solicitor's admission that she had underestimated the timescales involved in drafting the relevant witness statements. Conversely, the Court found that despite the absence of good reasons, the judge at first instance could allow relief for serving

[12] E.g. the Practical Law Company keeps separate lists of pre-*Mitchell* (http://uk.practicallaw.com/5-557-3185) and post-*Mitchell* and post-*Denton* (http://uk.practicallaw.com/6-554-3225) cases. As of 29 August 2014 there were 8 and 58 cases listed respectively, an indication of the uncertainty *Mitchell* had triggered.
[13] Paragraphs 13 to 20.
[14] Paragraph 82. This is not the first time the Court of Appeal has haphazardly tried to reset the case law: in *Bansal v Cheema*, March 2, 2000, CA, unrep, the then-new rule3.9, introduced following the Woolf Reforms, meant there was no need to refer "back to the substantial authorities decided under the old rules".
[15] *Adlington v ELS International Lawyers LLP* [2013] EWHC B29 (QB).
[16] *Lakatamia Shipping Co Ltd v Su* [2014] EWHC 275 (Comm).
[17] *Summit Navigation Ltd v Generali Romania Asigurare Reasigurare SA* [2014] EWHC 398 (Comm).
[18] *Bank of Ireland v Philip Pank Partnership* [2014] EWHC 284 (TCC).
[19] *Durrant v Chief Constable of Avon & Somerset* [2013] EWCA Civ 1624.

witness statements several weeks late, following an assessment of all the circumstances of the case.[20]

In a bid to restore order, rule 3.8, which mandates that sanctions have affect unless relief is sought, was amended to allow parties discretion to agree extensions of time of up to 28 days for any action required within a specified time and with a specific consequence of failure to comply, "unless the court otherwise orders" and "provided always such extension does not put at risk any hearing date" (rule 3.8(4). This 'buffer rule' aimed to take the pressure off litigants following *Mitchell*, recognition the law was too strict in allowing courts to seize control of litigation without giving parties the opportunity to co-operate and agree variations.

Denton provided the most recent opportunity for the law to be "clarified and amplified in certain respects".[21] Giving the leading judgment, the Master of the Rolls and Vos LJ considered that the law "some judges are approaching applications for relief on the basis that, unless a default can be characterised as trivial or there is a good reason for it, they are bound to refuse relief. This is leading to decisions which are manifestly unjust and disproportionate. It is not the correct approach and is not mandated by what the court said in *Mitchell*...A more nuanced approach is required…"[22], one that is neither "unduly draconian" nor "unduly relaxed".[23] Jackson LJ himself saw *Denton* as a chance to resolve misunderstandings, provide further guidance, and advocate "access to justice at proportionate cost" which would not happen if satellite litigation or unjust decisions on relief were allowed to flourish.[24] *Mitchell* had gone too far.

Taking account of criticisms of *Mitchell*, the main judgment sets out a three-stage test for judges to follow: identify whether the breach of any rule, practice

[20] *Chartwell Estate Agents Ltd v Fergies Properties SA* [2014] EWCA Civ 506.
[21] Paragraph 3, *Denton*.
[22] Paragraph 38, *Denton*.
[23] Paragraph 37, *Denton.*
[24] Paragraph 95, *Denton*.

direction or court order was “serious or significant”, a higher threshold than merely “trivial”;[25] ask why the failure or default occurred (although the Court considered it “inappropriate to produce an encyclopaedia of good and bad reasons” beyond that in *Mitchell*);[26] then consider all the circumstances of the case, giving “particular weight” to the factors at 3.9(1)(a) and (b) because courts were not previously doing so.[27] In his dissent, Jackson LJ disagreed with this last part: these were factors only to be “included amongst the matters to be considered. No more and no less.”[28] However, the majority’s view is to be preferred because it resists eliding evaluation of the substantive merits of the case with procedural fairness.

The Court was rightly scathing of innocent parties who took advantage of mistakes by opponents “in hope that relief from sanctions will be denied” and “litigation advantage” obtained, as this spawned unnecessary disputes and was inimical to co-operation: “the court will be more ready in the future to penalise opportunism” through costs’ awards.[29] This, too, is welcome as redressing the balance.

In conclusion, the Court of Appeal was already emphasising, prior to the implementation of the Jackson Reforms, the need for parties to behave reasonably towards each other and not delay the dispute resolution process.[30] A smoothly-paved legal system requires not only the correct rules and procedures to be designed and enforced, but a “culture of compliance” with those rules and an attitude

[25] Paragraph 25-28, *Denton*.
[26] Paragraphs 29-30, *Denton*.
[27] Paragraphs 31–36, *Denton*.
[28] Paragraph 85, *Denton*.
[29] Paragraph 40-43, *Denton*.
[30] E.g. *Fred Perry Holdings Ltd v Brands Trading Plaza Ltd* [2012] EWCA Civ 224 and *Mannion v Ginty* [2012] EWCA Civ 1667. Yet see also Chadwick LJ in *Securum Finance Limited v Ashton* (2001) CH 291 at 309: reference to “the ‘change of culture’ following the Woolf Reforms.

of co-operation between the parties.[31] The *Mitchell* to *Denton* period was a bump in the road; the number of appeals post-*Denton* will reveal whether it is still there.

As Jackson LJ requested, the Court of Appeal has tried hard to keep consistency in its guidance on relief from sanction and not to interfere with case management decisions that correctly apply the relevant principles unless they are plainly wrong.[32] Master McCloud's decision was undoubtedly harsh on the claimant's solicitors and a windfall for the defendants, but the Court has retained the thrust of that decision, which was within the permission range of case management discretion. Despite repeated protestations to the contrary, it did at times seem that enforcing compliance is an end in itself: as Voltaire remarked, *pour encourager les autres.*

In *Denton* it is to be hoped that the courts have reached a place of greater stability, as Lord Dyson hoped, when striking the balance in the interests of justice, for legal practitioners to become comfortable in the post-Jackson era and thus co-operate more. The courts are slowly getting the key messages across to practitioners: always seek a prospective extension before the time limit expires if a litigant is in any doubt as to whether they will be able to comply with a time limit (as the court will not treat these as relief applications at all); pay special care to costs budgets and anything which could cause the striking out of the claim (especially unless orders); and if in breach or default, apply for relief promptly.

A fine line exists between the competing notions of justice inherent in relief from sanctions. The move away from triviality as the first test of a breach makes the line thicker: the labels "serious or significant" allow characterisation in firmer ways, and provide the benefit of the doubt to the defaulter. The decision in *Denton* to give

[31] Paragraph 40. *Denton*.
[32] "Consistency of guidance will be particularly important in relation to appeals concerning sanctions for non-compliance with orders and relief from sanctions." *Jackson Report*, 7.1 and 7.2, p.398.

additional weight to compliance, efficient litigation and proportionate costs puts the accent on these imperatives which are the tenor of the Jackson Reforms - without excluding valid and reasonable factors which, if heavy enough, may tip the balance. Ultimately, if the law on relief from sanction has gone “too far” in any particular, direction, it remains open to alter the nature of the sanction imposed in the first place.

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