<u>Civil Procedure Update, July 2017</u>

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Phil Sissons considers the following topical issues: The Business and Property Courts; No relief from <u>Mitchell;</u> A new protocol for debt claims; and Costs on the small claims track

The Business and Property Court

On 5 July 2017, the Business and Property Court came into being. It replaces what was the Chancery Division, the Commercial Court and the Technology and Construction Court of the High Court. (Similarly, in the County Court, there is no longer a Chancery List – rather one should refer to the Business and Property Courts list there too). In due course, no doubt, this will lead to rule changes to harmonise procedures across the various types of claim within the umbrella, and perhaps to deployment of judges who have not sat in the Chancery Division to date to deal with mortgage related claims.

For now, the key matter to be aware of is that when issuing, the claimant will need to specify the type of case from a drop down menu. Most mortgage claims should be issued under the "Property, Trusts and Probate List", not the "Financial List", which is intended for claims of over £50 million.

As has been the position in the Chancery Division since April 2017, when what is known as the CE filing system was introduced, all claims and applications must be issued electronically, and all documents must be filed electronically. All this occurs through the website: http://ce-file.uk/index.html.

It is hard to criticise an attempt to modernise the court system by moving online, though it remains to be seen how well the new system works now that it is mandatory even for those who are less comfortable using it. However, one can predict with a reasonable degree of confidence that it is only a matter of time before the courts are obliged to consider the extent to which IT breakdown (or, perhaps more likely, IT incompetence) is a good reason for a failure to comply with a deadline for the purposes of the Denton principles (considered below).

Relief from sanctions: Lakhani v Mahmud [2017] EWHC 1713.

Readers will by now be no doubt wearily familiar with the attempts of the appellate courts to apply CPR 3.9, which sets out when relief will be given from sanctions imposed as a result of failure to comply with procedural deadlines. However, a recent High Court, Lakhani v Mahmud, is nevertheless worthy of note if only as a cautionary tale.

Without attempting to recount the whole saga, the legal world was surprised and alarmed by the decision of the Court of Appeal in Mitchell v News Group Newspapers Ltd [2013] EWCA Civ 1537. In that celebrated case, if that is the right word, the Court of Appeal held that a litigant was, in the tough, new, no-nonsense world created by Jackson L.J., precluded from recovering costs even if successful in the substantive litigation where, due solely to a mistake by their solicitors, they had failed to file a costs budget within the prescribed time limit.

There was then a collective sigh of relief when, just under 8 months later, the Court of Appeal appeared to row back a little from that hard-line approach by issuing fresh guidance in Denton v TH White Limited [2014] 1 WLR 3926. The, by now well-known, three-stage test set out in Denton and applied in innumerable subsequent cases is, in summary, as follows:

(a) Is the breach in question serious or significant? If not, then relief from sanctions will usually be granted;

(b) Is there a good reason for the breach?

(c) Whether, in all the circumstances of the case, it would nevertheless be reasonable to grant relief.

There has been, experience suggests, a perception following Denton that although the courts will take a tougher line as regards late compliance than might have been the case under the pre-Jackson provisions, the Denton guidelines have enabled the courts to backslide to some extent, relying on the old, comfortably familiar considerations of absence of prejudice to the non-defaulting party. The main difficulty has been in working out how the requirement to consider all the circumstances of the case is intended to interact with the first two, rather more absolute considerations.

However, the most recent chapter, Lakhani v Mahmud (a decision handed down on 5th July 2017) serves as a stern warning against any undue complacency.

In this case, which concerned a claim about the condition of car parking spaces, the parties were required by a court order to file and serve updated costs budgets 21 days before a case management conference on 10 January 2017.

The Claimants complied on the correct day, which was 19 December 2016, and, according to the judgment, this "prompted" the Defendants' solicitor to ask a colleague to prepare the Defendants' Precedent H budget, which was in the event served the next day on 20 December 2016.

The parties proceeded to get on with the exercise of commenting on the other sides' proposals and exchanged Precedent R reports shortly before the hearing. A costs budget comparison was produced for the judge, summarising the parties' respective positions. The majority of the Defendants' costs estimates were agreed.

Nevertheless, at the hearing the judge refused to consider the Defendants' costs budget at all, having refused to grant relief from sanctions. As the judge hearing the resulting appeal (Daniel Alexander Q.C. sitting as a deputy judge of the Chancery Division), wryly commented, the application for relief from sanctions "*was not advanced in a manner calculated to optimise the chances of success"*. It was made at the last minute, just before the hearing and so not in a timely manner on or immediately after the deadline. This prevented the claimants serving evidence in response or even having a reasonable time to consider their response. The hearing turned from a 45 minute costs management conference into a ½ day hearing on whether relief should be given.

The judge noted that being one day late in filing a budget might not be regarded as terribly serious. However, the error had been compounded by the failure to accept the mistake so that days which should have been spent on agreeing the budgets were instead spent in arguing about whether or not there had been a breach of the rules. The situation was made worse by the closure of the solicitors' office for the Christmas period, so that filing late restricted the already limited time available for discussion. The judge could not see that there was a sensible excuse and so refused the application. The consequence, as in Mitchell, was that the Defendants were precluded from recovering any costs in the litigation, even if successful.

On appeal to the High Court, the judge was plainly troubled by the apparently draconian consequences of an apparently minor breach. However, on the other hand, he was equally concerned by being asked to interfere with a discretionary case management decision which had obviously been made with the relevant authorities firmly in mind.

The judgment contains a useful and detailed discussion of the factors that might be relevant in assessing the seriousness or significance of a breach. These include (i) the absolute and relative amount of time lost by missing the deadline; (ii) whether missing the deadline affected the litigation or a procedural step in it or was likely to do so; and (iii) the direct consequences of missing the deadline and how it was addressed.

In the event, the judge concluded that the consequences of the mistake could properly be regarded as serious and there was no reasonable excuse. The apparent misunderstanding of the way in which the deadline should be calculated (which turned on whether "21 days" meant "21 clear days") was not a good enough reason. The judge concluded:

> "*…it is true that some judges may have taken a more charitable view* [however]... *I am unable to say that the judge's evaluation was wrong in principle…."*

So, whilst the decision appears to be, as the appeal judge himself remarked "*on the tougher end of the spectrum"*, it serves as a clear warning that Mitchell is alive and kicking, and procedural errors, even apparently very minor ones, may not be forgiven.

Pre-Action Protocol for Debt Claims

A new pre-action protocol applicable to debt claims will come into force on 1 October 2017. It does not replace the existing pre-action protocol for possession claims based on mortgage arrears in respect of residential property, which has been in force since 19 November 2008, with the blessing of the CML. However, this new protocol will apply where a claim for a money judgment rather than a possession claim is brought.

The new protocol will apply to any business claiming payment of a debt from an individual, including a sole trader, although business-to-business lending is expressly excluded (for reasons that are not altogether clear at first sight). It follows what is by now a familiar form for pre-action protocols by requiring the creditor to send a letter of claim before issuing proceedings. The letter before claim must include information such as the amount of the debt, whether interest or other charges are continuing and particulars of the agreement from which the debt arises. One of the main reasons behind the introduction of the protocol is said to be to reduce the number of claims that are issued where no copy of the agreement can be found. The protocol also requires the enclosure of an information sheet, a form of which is appended to the Protocol, which offers suggestions as to what the recipient should do about the letter and details of organisations from which they might obtain assistance, should they need it.

Costs on the small claims track

Where a case is assigned to the small claims track (which is the usual track for any claim with a value of £10,000 or less), the usual rule is that neither party is entitled to costs, aside from very limited fixed costs for issuing the claim and recovering court fees. However, under CPR 27.14 (g) the court can award further costs if satisfied that one party has behaved unreasonably.

There has been much authority as to what type of conduct is sufficiently unreasonable to justify a costs order for these purposes. Much of it derives from the very similar position that pertains in the First-Tier Tribunal, Property Chamber under rule 13 of the 2013 rules and its statutory predecessor. The short answer is that the conduct must be very unreasonable indeed. The test established by Ridehalgh v Horsefield [1994] Ch 205 is whether there is any reasonable explanation for the conduct of which complaint is made.

In the recent case of Dammermann v Lanyon Bowdler LLP [2017] EWCA Civ, a mortgage lender instructed receivers to sell a property where the borrower defaulted on his mortgage payments. The receivers instructed solicitors to conduct the sale and the property was sold. The solicitors rendered their bill to the receivers, which was duly paid and became part of the borrower's overall liability under the mortgage in the usual way.

The borrower, however, did not take this lying down and proceeded to issue a claim in the county court challenging the solicitors' fees, naming the solicitors as the defendant. The claim was assigned to the small claims track and was dismissed by a District Judge on the basis that there was no contract between the solicitors and the borrower. There was no order as to costs. The borrower was not finished yet and applied for permission to appeal, which was forthcoming. The appeal was dismissed and, this time, the judge made a costs order against the borrower on the basis that he had behaved unreasonably in pursuing the appeal.

The Court of Appeal noted that it was, perhaps, rather harsh to describe the conduct of the borrower in pursuing an appeal as unreasonable, when he had been given permission by a judge to do so. The point was not altogether straightforward because the relevant wording of the mortgage in question was somewhat unclear as to whether the receivers were, in appointing the solicitors, acting as the agent for the borrower (which, if it were so, meant that the principal in that agency relationship, being the borrower, was in a contractual relationship with the solicitors, albeit indirectly).

The Court of Appeal considered that under rule 27.14 (2) (g) conduct could not properly be described as unreasonable simply because it led to an unsuccessful result or because other legal representatives might have cautiously advised a different approach. In the circumstances of this case, applying the test from Ridehalgh v Horsefield, the borrower had not acted unreasonably and so the costs order made against him was set aside.