The Jackson Reforms: One year on
A retrospective on relief from sanctions and costs budgeting since 1 April 2013

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Introduction

1. The first anniversary of the implementation of the Jackson reforms looms. Has all the fear and dread it engendered at the time been justified? Views will vary, whether because of temperament or because of preference, but in our view, for what it's worth, the answer is "yes". In the sphere of relief from sanctions at least, and in the kind of costs budgeting that we most often face, many of the concerns warned of in advance have come to pass. The by now well-known case of Andrew Mitchell has illustrated the draconian approach being taken by the courts to relief from sanctions, with the support of what appears to be a hand-picked Court of Appeal. The methodology of county courts in dealing with costs budgeting and CCMCs varies widely, making it difficult to predict or advise on procedural issues in the run up to trials and hearings.

2. The upshot is that litigation has become even more uncertain, with higher risks to the parties beyond the pure legal merits of their respective cases, and often more expensive as well. If it was Lord Justice Jackson's hope that his programme for change would make litigation less expensive and more efficient then it seems that these goals (if they are achievable at all) are not going to be brought about by his reforms directly, but by the marketplace making drastic adjustments to the way in which litigation is approached as a result. It may well be that litigants are diverted in increasing numbers into alternative forms of dispute resolution.

3. In tonight's seminar we survey the decisions relating to relief from sanctions over the past year, with an eye on whether or not an emerging trend can be identified. *Mitchell* is, of course, the headline grabber, but there have been other decisions both before and since. We will also report on some of our experiences, in a practical sense, at the county court level, where much of the day to day costs budgeting takes place.

Background

4. By way of reminder, one of the more dramatic features of the Jackson Reforms was the re-writing of CPR r.3.9, scrapping the familiar checklist of nine criteria. Previously, the court had been guided by the criteria set out in the Civil Procedure Rules. Whilst this list was never intended to be a strait-jacket, and the court was required to consider "all the circumstances of the case", one of Lord Justice Jackson's criticisms was that the nine criteria had increasingly come to be treated as a set of hurdles which, if cleared, would justify relief from sanctions. The rule previously stated:

> *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 –*
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> *(a) The interests of the administration of justice;*
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> *(b) Whether the application for relief has been made promptly;*
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> *(c) Whether there is a good explanation for the failure;*
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> *(d) The extent to which the party in default has complied with other rules, practice directions, court orders and any relevant pre-action protocol;*
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> *(e) Whether the failure to comply was caused by the party or his legal representative;*
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> *(f) Whether the trial date or the likely trial date can still be met if relief is granted;*
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> *(g) The effect which the failure to comply had on each party; and*
>
> *(h) The effect which the granting of relief would have on each party.*

5. The new rule now reads:

> *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".

6. The new paragraph (a) echoes the re-cast overriding objective. Whereas pre-Jackson the overriding objective of the procedural code at r.1.1(1) was to enable the courts *"to deal with cases justly"*, the new overriding objective is to enable the courts "*to deal with cases justly and at proportionate cost*". In other words, justice has a price tag, and the court's management of that cost is part and parcel of the administration and delivery of justice. In the words of Lord Dyson (set out more fully below) the public interest in the administration of justice is not confined to justice being done in any one particular case. It is a more holistic approach, where the demands of justice in one particular case may be weighed against the costs and resources it will place on other users of the court system.

7. It has been said that the new r.3.9 is intended to make relief harder to obtain, although how it achieves this is not immediately obvious, at least to this writer. However, everyone should take time to read the speech by Lord Dyson MR on 22 March 2013[1]. It was a firm statement that judges would henceforward be enjoined to take a completely different and much tougher approach to a failure to comply with rules and directions. In the last of the implementation lectures, delivered on 22 March 2013, Lord Dyson MR drew these strands together in the following way:

First of all, the rule change implements an often-forgotten aspect of the Woolf reforms, the need to simplify the rules. The previous checklist approach was less than ideal. It was cumbersome, and often difficult to apply in practice. I have no doubt that it often became an exercise in ticking-off the various elements. That was almost inevitable. As the Court of Appeal's recent decision in Ryder Plc v Dominic James Beever [2012] EWCA Civ 1737 shows, it was not a means of securing clarity in

[1] http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/mr-speech-judicial-college-lecture-2013.pdf

decision-making, which in itself is a recipe for satellite litigation. The removal of the checklist should improve things.

Secondly, and more importantly, it is intended to underline and reinforce the importance of conducting and managing litigation so as to ensure that no more than proportionate costs are incurred as between the parties and that no one piece of litigation is permitted to utilise more of the court's resources than is proportionate, taking account of the needs of other litigants. It thus requires the court to focus much more clearly and consistently than it has in the past on these essential aspects of case management in the light of the overriding objective. This point has of course rightly been emphasised by Lord Justice Jackson (who else?) in the recent Court of Appeal in Fred Perry (Holdings) Ltd v Brands Plaza Trading Ltd [2012] EWCA 22410 where he said this,

> *'Non-compliance with the Civil Procedure Rules and orders of the court on the scale that has occurred in this case cannot possibly be tolerated. Any further grant of indulgence to the defendants in this case would be a denial of justice to the claimants and a denial of justice to other litigants whose cases await resolution by the court.'*

As I have said, one of the problems that has undermined the efficacy of case management has been too great a desire to err on the side of individual justice without any real consideration of the effect that has on the justice system's ability to secure effective access to justice for all court-users. The Court of Appeal has been as guilty of this error as any other court. That the Court of Appeal could in 2011 in Swain-Mason & Others v Mills & Reeve LLP [2011] 1 WLR 2735 comment that early, robust, decisions by the Court of Appeal that emphasised the need to take account of the needs of all court-users and not just those of the immediate parties had been lost from view makes the point. The revised rule 3.9, by referring back to the overriding objective, is intended to ensure that such issues cannot become lost again post-April.

Thirdly, consistently with this, the revised rule is intended to put a stop to what Lord Justice Jackson referred to recently in Mannion v Ginty [2012] EWCA Civ 1667 as the 'culture of toleration of delay and non-compliance with court orders. . ..'. That the Court of Appeal could call for such a culture to be brought to an end, as Jackson LJ did in that case, demonstrates just how far we have moved away from the approach that the CPR and the overriding objective were intended to establish in 1999. In this regard it is another irony that five years earlier than the Mannion decision Lord Justice Brooke felt the need to remind the courts and practitioners that, as he put it,

'The Civil Procedure Rules, with their tough rules in relation to requiring compliance with court orders, were introduced to extinguish the lax practices which existed before the rules were introduced . . .' *Thomson v O'Connor* *[2005] EWCA Civ 1533 at [17].*

Tough rules but lax application; tough rules but a culture of toleration; and lax application and toleration are all fatal to the new philosophy. By emphasising the need to take account of the new explicit elements of the overriding objective, rule 3.9 is intended to eliminate lax application and any culture of toleration.

I should deal with one specific criticism of a tough approach to relief from sanctions at this point. It has been said by some that a tough approach, one which hardens its heart and refuses to allow a party to adduce probative evidence that has not been exchanged at the required time, or which strikes out a claim or defence for non-compliance with an unless order, is one which is inimical to justice. It has been said that such an approach improperly deifies compliance; and that it transforms rules into tripwires for the unwary and the incompetent, as Dame Janet Smith recently put it in the *Ryder* *case [2012] EWCA Civ 1737 at [62], or equally into procedural weapons for the unscrupulous. It has also been said such an approach is fundamentally at odds with the position outlined in Lord Esher MR's famous dictum in* *Coles v Ravenshear* *[1907] 1 KB 1. Lord Esher MR said this,*

> *'. . . a Court cannot conduct its business without a code of procedure, I think that the relation of rules of practice to the work of justice is intended to be that of handmaid rather than mistress, and the Court ought not to be so far bound and tied by rules, which are after all only intended as general rules of procedure, as to be compelled to do what will cause injustice in the particular case.'*

These words must be viewed with great caution in the 21st century. They are based on an idea that was rejected by the Woolf reforms – that justice is not subject to wider policy considerations. If the justice system, and the public interest in the proper administration of justice, was solely concerned with one set of proceedings that approach might be justifiable. It is not. It is a system that has to command public confidence through securing for the majority, many of whom have limited resources, access to a system that itself must operate with limited resources. Doing justice in the individual case can only be achieved through a fair procedure operated in a way that is fair to all.

In order to achieve this, the Woolf reforms and now the Jackson reforms were and are not intended to render the overriding objective, or rule 3.9, subject to an overarching consideration of securing justice in the individual case. If that had been the intention, a tough application to compliance would have been difficult to justify and even more problematic to apply in practice. The fact that since 1999 the tough rules to which Lord Justice Brooke referred have not been applied with sufficient rigour is testament to a failure to understand that that was not the intention.

The revisions to the overriding objective and to rule 3.9, and particularly the fact that rule 3.9 now expressly refers back to the revised overriding objective, are intended to make clear that the relationship between justice and procedure has changed. It has changed not by transforming rules and rule compliance into trip wires. Nor has it changed it by turning the rules and rule compliance into the mistress rather than the handmaid of justice. If that were the case then we would have, quite impermissibly, rendered compliance an end in itself and one superior to doing justice in any case. It has changed because doing justice is not something distinct from, and superior to, the overriding objective. Doing justice in each set of proceedings is to ensure that proceedings are dealt with justly and at proportionate cost. Justice in the individual case is now only achievable through the proper application of the CPR consistently with the overriding objective.

The tougher, more robust approach to rule-compliance and relief from sanctions is intended to ensure that justice can be done in the majority of cases. This requires an acknowledgement that the achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations. Those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure their own costs are kept within proportionate bounds. But more importantly they serve the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the court enables them to do so.

This may mean that in some cases, or some classes of case (such as those allocated to the small claims or fast track), that the court must reach a decision at trial on less evidence than it might have done in the past. To some extent, this has already been happening as a result of the introduction of case tracks. It also means that, where we exclude evidence because of a failure to comply with rules, PDs or orders, we must determine the cases on less evidence than we would have done in the pre-Woolf and pre-Jackson days.

> *That we have to do so stems from our commitment to proportionality, and the need to secure a fair distribution of court resources amongst all those who need to come to the courts in order to vindicate their rights. We have limited resources. Demand for those resources outstrips that limit. We have to cut our cloth accordingly. The wider public interest in the proper administration of justice requires us to do so. For that reason we have no choice but to take a more robust approach to rule compliance and relief from sanctions than previously. Our approach in the case immediately in front of us has consequences wider than for the parties themselves.*

8. When one adds to this (a) the fact that all judges were given further judicial training to indoctrinate them with the new Jackson approach, and (b) the fact that Lord Neuberger of Abbostsbury confirmed (in the fifteenth implementation lecture) that he had *"agreed with Sir Rupert that, in due course, two specific members of the Court of Appeal will be asked to sit on all appeals arising out of the Jackson reforms to ensure consistency and efficiency"* it is quite clear that the scene was set for a top to bottom change in approach. It was not long before the post-April 2013 wave of cases began to test to what extent the boundaries really had been re-drawn.

Case review

Venulum Property Investment Ltd v Space Architecture Limited and Others [2013] EWHC 1242 (TCC) (Hearing: 11 April 2013, Judgment: 22 May 2013)

Edwards-Stuart J

An application for permission to extend time for service of Particulars of Claim

REFUSED

9. This was an interesting case because the application was made before 1 April 2013, and the hearing was on 11 April 2013, just after the Jackson reforms had come into force. To that extent at least its application is somewhat peculiar to its circumstances, but it is nevertheless one of the first indicators of how a new "*zeitgeist*", even if somewhat undefined, was able to influence the decision reached by the court.

10. The application arose out of the Claimant's failure to serve particulars of claim together with its claim form. The circumstances were as follows. In or around early 2006 Space

Architecture Ltd obtained planning permission in connection with a residential development in Northampton, which included a requirement for a certain number of car parking spaces. Venulum Property Investments Ltd exchanged contracts on the property in September 2006, and completed in December 2006. It transpired thereafter (discovered by Venulum in February 2007) that the design of the supporting pillars and the like in the underground car park were such that the necessary number of car parking spaces could not be delivered, and so the development could not be built in accordance with the planning permission.

11. Venulum did not issue its claim form until 12 November 2012, and then served, without particulars of claim, on 12 March 2013. That was an oversight, as the long stop date for the service of the particulars is four months from the issue of the claim form, without the extra fourteen-day window. Eight out of the ten defendants agreed a short extension for service, but the estate agents objected.

12. It is important to bear in mind that as against the estate agents the claim was a rather unusual one – although they were not surveyors the claim against them was based on the assertion that they owed the purchaser a duty to warn that the design might not be possible to implement, and that they acted in bad faith by being more interested in obtaining their commission and in hurrying the purchaser into a decision. That did colour the sympathies of the court, but the more narrow issue for tonight's purposes was how the court engaged with r.3.9.

13. Strictly speaking, an application for permission to extend time for the service of a claim form is an application under r.7.6. However, the editorial in the White Book, referring to the decision in *Price v Price* [2003] EWCA Civ 888, warns that where the application is to extend time for the service of particulars that is an application that needs to be made under r.3.1(2)(a) and the court is to adopt the r.3.9 framework.

14. Although the application had been issued pre-Jackson, and the transitional provisions provided that the new rules were not to apply to pre-1 April 2013 applications for relief

from sanctions, counsel for the estate agents insisted that as this was not an application for relief, the amendments to r.3.9 were relevant. What is more interesting is the way the parties presented their position on r.3.9. Neither counsel was prepared to say that

> *all or any of the nine factors that had been set out in CPR r.3.9 were no longer to be taken into account by the court when considering an application to extend time for service of particulars of claim....or could be ignored. However....the emphasis has shifted as a result of the amendments to the rules so that the court is now required to take a much stronger and less tolerant approach to failure to comply with matters such as time limits*.

15. Both counsel did then make submissions and the learned judge considered them all in turn. There were various considerations which were fact-sensitive to that case, the nature of the claims, the general delay and the way in which the allegations of bad faith had been presented, but overall he felt that matters under the old nine criteria were "fairly finely balanced" (at [47] and [55]). However, he then took into consideration the concept of a new "post-Jackson regime approach" to the enforcement of, and compliance with, orders and time limits. He reminded himself of comments which Lewison LJ and Jackson LJ had made in *Fred Perry v Brands Plaza Trading* [2012] EWCA Civ 224, citing with approval para.6.5 of the Jackson Report 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 on the civil justice system. The balance therefore needs to be redressed.*

16. In the final analysis Edwards-Stuart J did identify three factors which tilted the balance against the Claimant – the fact that it had delayed over five years before instructing solicitors; the fact that its claim against the agents did not appear to be good and, in any case, if there were a claim it would have better claims against the other defendants; and the fact that it had only vaguely advanced a claim for bad faith – and all these factors can be understood in pre-Jackson terms. There is no reason to suppose that this decision would not have been the same before 1 April 2013 as it was after. However, it is quite

clear that the idea of a new tougher approach influenced the judge's thinking. His closing words were:

> *In my judgment, when the circumstances are considered as a whole, particularly in the light of the stricter approach that must now be taken by the courts towards those who fail to comply with rules following the new changes to the CPR, this is a case where the court should refuse permission to extend time. The Claimant has taken quite long enough to bring these proceedings and enough is now enough. I therefore refuse this application.*

Smailes and Others v McNally and Others [2013] EWHC 1562 (Ch) (7 June 2013)

Henderson J

Application to extend time to comply with disclosure obligations

ALLOWED

17. This application arose in the course of a very substantial and long running piece of insolvency litigation. The background details are not relevant to tonight's talk – the essential points to note are that the disclosure exercise to be carried out by the liquidators required the examination and preparation of several hundreds of thousands of documents, and there had been a number of dates for disclosure set by the court. In a hearing on 28 November 2012 the date of 2 April 2013 had been set, but as time ran down to that deadline it was plain that there was no way in which that was achievable. It was not that the liquidators had been idle, but they had instructed new solicitors, and a new methodology had been suggested and was in the process of being implemented. The exercise was, by any conventional yardstick, massive. With a few days to go before 2 April 2013 the liquidators made an application to extend time, on 28 March 2013.

18. It is noted that this application, again, was not a direct application for relief from sanctions. The previous order setting the 2 April 2013 date had not been made on an unless basis, and in any case the application was made before the deadline passed. However, having reflected on whether to deliver judgment the day after the hearing, Henderson J considered that:

> *...the issues were of sufficient difficulty and importance to the parties to merit a written judgment, particularly as they involved consideration of the recent*

> *revisions to the wording of the overriding objective in CPR 1.1 with effect from 1 April 2013. The effect of those changes, introduced as part of a package of reforms stemming from Sir Rupert Jackson's review of civil litigation costs in England and Wales, is to add a reference to "proportionate costs" in rule 1.1(1) and (2), and to add a new-sub-paragraph (f) to rule 1.1(2), which emphasises the importance of "enforcing compliance with rules, practice directions and orders"...*

19. As ever, the particular circumstances of that case and the conduct of the parties was of substantive importance, but it is interesting to see how Henderson J approached this issue. As noted above, it is the re-cast overriding objective that is echoed in the new r.3.9. Henderson J noted that the power to extend time derives from r.3.1(2)(a), and that according to the Court of Appeal in *Robert v Momentum Services Ltd* [2003] EWCA Civ 299, it would be wrong to treat an application to do so as an application for relief where the application is made before a deadline passes. Despite this, and other points that could be made in the applicant's favour, the respondent argued against a further extension on various orthodox grounds – e.g. that the applicant had largely wasted the time it had been given already, and that if they had been more frank at an earlier stage of the proceedings, the respondents would likely have already sought and obtained an unless order.

20. But counsel for the respondent then went further, and invoked the new spirit of the overriding objective. He referred to Lord Dyson's speech of 22 March 2013, extracts of which are set out above, and in particular his stress on the new "Mark II" overriding objective – heralding *"a new and tougher approach to rule compliance and case management, recognising that the need to deal with a case justly involves not only the need to secure justice as between the parties, but also a proper consideration of proportionality and the interests of other court users"*. He also drew the court's attention to the *Venulum* decision, as an example of how the new attitude should influence the court's approach. Henderson J distinguished *Venulum* on the basis that in that case the application had been made after a breach of the rules had taken place, and so it was more properly scrutinised through the relief from sanctions framework, but he went on to offer some very thoughtful observations on the new "tough approach". Although Henderson J

does not require our approbation we think it fair to say that his comments are sound and astute, as he warns against the temptation to "game play" the new regime. They deserve careful thought. He said:

> *In considering these submissions, I begin with the obvious point that this is an application for an extension of time made before the expiry of the relevant deadline under the November order. It is not an application for relief from sanctions under CPR 3.9, and in my judgment it would be wrong in principle to treat it as though it were such an application on the basis of speculation about what might have happened had I been persuaded to make an unless order last November. I consider that the guidance given by the Court of Appeal in Robert v Momentum Services Limited remains good law, with the result that the court must exercise its discretion (paragraph [33]):*
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> > *"… by simply having regard to the overriding objective of enabling the court to deal with cases justly including, so far as practicable, the matters set out in rule 1.1(2)."*
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> *The matters set out in rule 1.1(2) now include, of course, the enforcement of compliance with orders. To that extent, it is no doubt the case that the court will scrutinise an application for an extension more rigorously than it might have done before 1 April, and that it must firmly discourage any easy assumption that an extension of time will be granted if it would not involve any obvious prejudice to the other side.*
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> *On the other hand, I think it is important not to go to the other extreme, and not to encourage unreasonable opposition to extensions which are applied for in time and which involve no significant fresh prejudice to the other parties. In cases of that nature, considerations of cost and proportionality are highly relevant, and the wider interests of justice are likely to be better served by a sensible agreement, or a short unopposed hearing, than by the adoption of entrenched positions and the expenditure of much money and court time in preparing for and dealing with an application that could have been avoided.*
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> *I would also observe that, although all court orders mean what they say, and must be complied with even if made by consent, there are some orders relating to the completion of specified stages in preparation for trial (such as disclosure, the exchange of witness statements or a timetable for expert evidence) where there may still be so many imponderables when the order is made that the date for compliance cannot sensibly be regarded as written in stone. Everything will always depend on the circumstances of the particular case, and the stage in the proceedings when the order is made, but in many such cases it should be understood that there may be a need for reasonable extensions of time or other adjustments as the matter develops. It would, I*

> *think, be unfortunate if the new and salutary emphasis on compliance with orders were to lead to a situation where, in cases of the general type I have described, a reasonable request for an extension were to be rejected in the hope that the court might be persuaded to refuse any extension at all.*

Andrew Mitchell MP v News Groups Newspapers Ltd [2013] EWHC 2179 (Q B) (18 June 2013); [2013] EWHC 2355 (QB) (1 August 2013); [2013] EWCA Civ 1537 (27 November 2013)

Master McCloud

Lord Dyson MR, Richards, Elias LJJ

Application for relief from sanction for late filing of costs budget

REFUSED

21. Poor Andrew Mitchell. One almost gets the feeling that his was just the case the courts were waiting for –high profile, guaranteed to make a huge splash in the media, and an opportunity to make a real example that would get noticed. And yet, even in this dramatic example, the case (as is explained in more detail below) did not arise directly under the new CPR Part 3. The sanction imposed by the court, which led to the application for relief, was a sanction imposed at the court's discretion.

22. The claim, as is well known, was Mitchell's defamation action against News Group Newspapers in respect of the infamous "Plebgate" incident in Downing Street. The bump in the road to trial which turned out to be fatal was his failure to serve a costs budget in advance of a listed CCMC. The procedural twist in the tale, which is now largely an academic point, was that there was a period of time when costs in defamation proceedings were governed by what was a pilot costs management scheme under CPR PD 51D. When this was in operation it required, *inter alia*, that costs budgets be filed in advance of any CMC or CCMC, although no automatic sanction was imposed for failure. The pilot scheme was discontinued on 31 March 2013, but as the claim itself was issued before that it was common ground that the pilot regime applied.

23. The CCMC was listed before Master McCloud on 18 June 2013. In advance of the hearing Master McCloud could not find the claimant's Precedent H budget on the court

file, which prompted an email exchange between the Master and the solicitors. Mr Mitchell's solicitors confirmed that the budget had not been filed, initially blaming the delay on a failure to receive counsel's figures, which were being chased. It had also not engaged in a discussion with the defendant about the budgets or budgetary assumptions. A budget was then filed on 17 June, and at the hearing it was said that the reason was in fact to do with pressure of litigation elsewhere in the firm on another case.

24. Master McCloud considered that the Jackson reforms had to mean something in terms of increased strictness, and that it was no longer an option to simply adjourn with the costs thrown away against the claimants, as might have been done previously. Although there was no automatic sanction under PD 51D for the default, she considered that the appropriate sanction would be to apply by analogy what would be the sanction were this to have been a failure to comply with CPR r.3.13. In the circumstances she ordered that the sanction be to limit the claimant's budget to the applicable court fees, as this would be the impact of r.3.14, which provides that "*Unless the court orders otherwise, any party which fails to file a budget despite being required to do so will be treated as having filed a budget comprising only the applicable court fees*". This was somewhat less than Mr Mitchell's budgeted £506,245, leaving him with the right to apply for relief from sanctions, which was the decision of Master McCloud that followed on 1 August 2013.

25. Master McCloud's decision was to refuse relief from sanctions. In her judgment, she referred to the new overriding objective, and the requirements for the court to deal with cases at proportionate cost and in a way that enforced compliance with rules, practice directions and orders. The proportionate allocation of court resources, with a view to the interests of other court users, was powerfully brought to the Master's mind, by the fact that she had had to vacate a half-day appointment to deal with claims by persons affected by asbestos-related diseases, in order to hear Mr Mitchell's relief application. The Master noted that there was no evidence before her of any particular prejudice that Mr Mitchell had suffered as a result of the sanction: she noted that it would be for him to adduce such evidence and that it would be wrong for her to make assumptions about the wording of

any CFA which may or may not mean that the sanction affected him financially or in terms of legal representation. In any event, even if it did so affect him, he was not 'driven from the court'; many claimants make do without legal representation.

26. The Master acknowledged her decision was based on the stricter approach encouraged by the Jackson reforms and may have been different if taken before 1 April 2013. She therefore gave permission to appeal of her own motion.

27. The appeal was taken straight to the Court of Appeal. The Master's decision to refuse relief from sanctions, as everyone knows, was upheld. The Court of Appeal endorsed the tougher approach to compliance advocated by Sir Rupert Jackson. It considered the wording of the new r. 3.9, stating:

> *As Sir Rupert made clear, the explicit mention in his recommendation for the version of CPR 3.9 of the obligation to consider the need (i) for litigation to be conducted efficiently and at proportionate cost and (ii) to enforce compliance with rules, practice directions and court orders reflected a deliberate shift of emphasis. These considerations should now be regarded as of paramount importance and be given great weight. It is significant that they are the only considerations which have been singled out for specific mention in the rule.*
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> *We recognise that CPR 3.9 requires the court to consider "all the circumstances of the case, so as to enable it to deal justly with the application". The reference to dealing with the application "justly" is a reference back to the definition of the "overriding objective". This definition includes ensuring that the parties are on an equal footing and that a case is dealt with expeditiously and fairly as well as enforcing compliance with rules, practice directions and orders. The reference to "all the circumstances of the case" in CPR 3.9 might suggest that a broad approach should be adopted. We accept that regard should be had to all the circumstances of the case. That is what the rule says. But (subject to the guidance that we give below) the other circumstances should be given less weight than the two considerations which are specifically mentioned.*

28. The Court of Appeal noted the needs of other court users as being of importance under the new regime (at [39]):

> *The importance of the court having regard to the needs and interests of all court users when case managing in an individual case is well illustrated by what occurred in the present case. If the claimant had complied with para 4 of PD 51D, the Master would*

have given case management and costs budgeting directions on 18 June and the case would have proceeded in accordance with those directions. Instead, an adjournment was necessary and the hearing was abortive. In order to accommodate the adjourned hearing within a reasonable time, the Master vacated a half day appointment which had been allocated to deal with claims by persons who had been affected by asbestos-related diseases.'

29. Having endorsed the approach advocated by Sir Rupert Jackson, the Master of the Rolls went on to offer guidance as to how the new approach should be applied in practice. It is worth quoting from the judgment at some length:

> *... It will usually be appropriate to start by considering the nature of the non-compliance with the relevant rule, practice direction or court order. If this can properly be regarded as trivial, the court will usually grant relief provided that an application is made promptly. The principle "de minimis non curat lex" (the law is not concerned with trivial things) applies here as it applies in most areas of the law. Thus, the court will usually grant relief if there has been no more than an insignificant failure to comply with an order: for example, where there has been a failure of form rather than substance; or where the party has narrowly missed the deadline imposed by the order, but has otherwise fully complied with its terms...*
>
> *If the non-compliance cannot be characterised as trivial, then the burden is on the defaulting party to persuade the court to grant relief. The court will want to consider why the default occurred. If there is a good reason for it, the court will be likely to decide that relief should be granted. 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. Later developments in the course of the litigation process are likely to be a good reason if they show that the 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. But mere overlooking a deadline, whether on account of overwork or otherwise, is unlikely to be a good reason. We understand that solicitors may be under pressure and have too much work. It may be that this is what occurred in the present case. But that will rarely be a good reason. Solicitors cannot take on too much work and expect to be able to persuade a court that this is a good reason for their failure to meet deadlines. They should either delegate the work to others in their firm or, if they are unable to do this, they should not take on the work at all... If departures are tolerated, then the relaxed approach to civil litigation which the Jackson reforms were intended to change will continue. We should add that applications for an extension of time made before time has expired will be looked upon more favourably than applications for relief from sanction made after the event.*

...

This approach should... be adopted in relation to CPR 3.9. In short, "good reasons" are likely to arise from circumstances outside the control of the party in default...

[Counsel for Mr Mitchell] sought to rely on certain factors which, he contended, showed that the sanction should not have been imposed by the Master in the first place. That was in our view a misguided submission. An application for relief from a sanction presupposes that the sanction has in principle been properly imposed. If a party wishes to contend that it was not appropriate to make the order, that should be by way of appeal or, exceptionally, by asking the court which imposed the order to vary or revoke it under CPR 3.1(7). The circumstances in which the latter discretion can be exercised were considered by this court in Tibbles v SIG Plc (trading as Asphaltic Roofing Supplies) [2012] EWCA Civ 518, [2012] 1 WLR 2591. The court held that considerations of finality, the undesirability of allowing litigants to have two bites at the cherry and the need to avoid undermining the concept of appeal all required a principled curtailment of an otherwise apparently open discretion. The discretion might be appropriately exercised normally only (i) where there had been a material change of circumstances since the order was made; (ii) where the facts on which the original decision was made had been misstated; or (iii) where there had been a manifest mistake on the part of the judge in formulating the order. Moreover, as the court emphasised, the application must be made promptly. This reasoning has equal validity in the context of an application under CPR 3.9.

On an application for relief from a sanction, therefore, the starting point should be that the sanction has been properly imposed and complies with the overriding objective. If the application for relief is combined with an application to vary or revoke under CPR 3.1(7), then that should be considered first and the Tibbles criteria applied. But if no application is made, it is not open to him to complain that the order should not have been made, whether on the grounds that it did not comply with the overriding objective or for any other reason...

The new more robust approach that we have outlined above will mean that from now on relief from sanctions should be granted more sparingly than previously...We accept that changes in litigation culture will not occur overnight. But we believe that the wide publicity that is likely to be given to this judgment should ensure that the necessary changes will take place before long.

30. The Court of Appeal in Mitchell acknowledged the concern to minimise satellite litigation and interlocutory disputes over breaches of rules, practice directions and orders. However, the Master of the Rolls stated (at [48]):

We share the... desire [expressed by Walker J in Wyche v Careforce Group PLC [2013]EWHC 3282 (Comm)] to discourage satellite litigation, but that is not a good

> *reason for adopting a more relaxed approach to the enforcement of compliance with rules, practice directions and orders. In our view, once it is well understood that the courts will adopt a firm line on enforcement, litigation will be conducted in a more disciplined way and there should be fewer applications under CPR 3.9. In other words, once the new culture becomes accepted, there should be less satellite litigation, not more.*

31. Applying these principles to the case before it, the Court of Appeal refused relief to Mr Mitchell. Lord Dyson concluded (at [59]):

> *The Master did not misdirect herself in any material respect or reach a conclusion which was not open to her. We acknowledge that it was a robust decision. She was, however, right to focus on the essential elements of the post-Jackson regime. The defaults by the claimant's solicitors were not minor or trivial and there was no good excuse for them. They resulted in an abortive costs budgeting hearing and an adjournment which had serious consequences for other litigants. Although it seems harsh in the individual case of Mr Mitchell's claim, if we were to overturn the decision to refuse relief, it is inevitable that the attempt to achieve a change in culture would receive a major setback.*

SC DG Petrol SRL v (1) Vitol Broking Limited (2) Vitol SA (3) Bogdan Paicu [2013] EWHC 3920 (Comm) (9 December 2013)

Mr Robin Knowles CBE QC, deputy High Court Judge

Application for extension of time to provide security for costs and for relief from strike out sanction upon failure to provide security

REFUSED

32. This Commercial Court claim was brought in tort and concerned an alleged false denunciation by the Defendants to the Romanian authorities which harmed the Claimant's business. The claim was issued on 16 November 2012. At the first Case Management Conference, on 7 June 2013, Eder J ordered the Claimant to provide security for costs, up to and including the exchange of disclosure lists, by 5 July 2013. Standard disclosure was to be given by 15 August 2013, with a further CMC listed in November. Security was not given by 5 July 2013 and the Claimant made no application to extend time. At the second CMC held before Eder J on 4 September 2013, he extended the time for security to be given to 17 October 2013, failing which 'the claim shall be automatically struck out without the need for further order unless a further application has been made to the court

by the Claimant to extend time for the provision of security and a different order as to provision of security by the Claimant has been made'.

33. The Claimant did not provide security by 17 October 2013 and issued an application on that date seeking a further extension of time for the provision of security or alternatively an order for relief from sanctions. That application was heard by Mr Robin Knowles CBE QC, sitting as a deputy High Court Judge, on 6 December 2013.

34. Mr Knowles proceeded on the basis (at [8]) that the claim stood struck out; this was the effect of Eder J's order if no different order as to the provision of security had been made by 17 October. He noted that the application was now being heard in early December and that security had still not been provided.

35. The deputy judge considered the guidance given by the Court of Appeal in the *Mitchell* decision and the evidence and arguments put forward by the Claimant explaining its failure to provide security. These focused on the facts that the Claimant was in an insolvency procedure, that its assets were illiquid, and that litigation by a creditor, challenging the sale of one of the Claimant's assets, was ongoing in Romania, although the Claimant's advice was that the sale was likely to be approved.

36. Mr Knowles refused to grant relief from sanctions. He considered the guidance in *Mitchell* and gave ten reasons for his decision (at [21]), including:
    a. The non-compliance cannot be characterised as trivial;
    b. Eder J had already allowed an extension of time, and even that had been materially exceeded;
    c. Although "good reasons are likely to arise from circumstances outside the control of the party in default", and some things have happened that are outside the Claimant's control, the court has not been provided with anything like an adequate account of matters within its control;

d. To grant an extension of time and relief from the sanction would be to leave compliance with an order for security for costs unenforced in a case in which the provision of security was justified. The litigation would have to remain idle for a further extended period; there is little that could appropriately be done in the meantime to manage it towards trial.

e. The application for an extension of time was not made promptly. The day it was issued was the day the claim stood struck out. The Claimant knew that that was the inevitable position when it decided to leave it until 17 October to issue the application.

37. Interestingly, the deputy judge stated (at [27]) that 'I cannot say that my conclusion is different from the conclusion I would have reached before CPR 3.9(1) was amended or *Mitchell* was decided in the Court of Appeal'. However, he noted that the way in which the parties had presented their cases on the application before him had differed and offered the following two 'observations' – or tips:

> *On an application under CPR 3.9(1) the Court will be engaged in looking more widely than at the case in hand, as well as at the case in hand; "the new approach… seeks to have regard to a wide range of interests": see [51]. I respectfully offer the observation that there are limits to the contribution that a party, especially a non-defaulting party, can usefully make in evidence or argument in respect of circumstances extending beyond the case in hand — for example on what is needed "to enforce compliance with rules, practice directions and orders." This is pre-eminently an area for the judge. In Mitchell the Court of Appeal was not putting an enhanced tactical weapon into the hands of non-defaulting parties to the litigation. This is clear from the nature of the factors specified at (a) and (b) of CPR 3.9(1). It is reinforced by the concern of the Court of Appeal to reduce satellite litigation: see [60].*
>
> *The second observation arises from the fact that when citing the Court of Appeal in Mitchell the parties referred me closely to the examples given by the Court of Appeal, with the Defendants (the non-defaulting parties) pressing me with the point that the case in hand was not within one or more examples. I respectfully doubt that is the right approach. The examples are there simply to illustrate the principles described by the Court of Appeal. The Court's inquiry should be guided by the principles. My own view is that ideally the jurisdiction to extend time and grant relief from sanctions is one in which (as Lord Templeman urged in The Spiliada [1987] AC 456, HL in*

relation to service out of the jurisdiction) a judge would not be referred to other decisions on other facts.

38. If these observations are generally representative of the judiciary's views, parties will not find favour in relief from sanction applications by enunciating at length the impact of default on other litigants and the courts' resources, nor from losing focus on the facts and circumstances of the case in hand, in an effort to draw parallels with other cases or examples.

Bianca Durrant v Chief Constable of Avon and Somerset Constabulary [2013] EWCA Civ 1624 (17 December 2013)

Richards, Lewison, Coleridge LJJ

Application for relief from sanction debarring reliance on late-filed witness statements

REFUSED

39. The Claimant was arrested along with two friends in the early hours of the morning of 13 June 2009, on suspicion of assaulting a taxi marshal in Bristol. She was put in the caged area of a police van to be taken to a police station, while her friends were not put in the caged area. Her friends were processed upon arrival at the custody suite before she was, and, following a slight delay after she asked an officer if she could use the bathroom, she urinated on the police station floor. The Claimant was subsequently charged with assault, but when the case came on for trial, the prosecution offered no evidence and she was acquitted.

40. The Claimant, who acted throughout as a litigant in person, subsequently brought a claim against the Defendant police force, alleging false imprisonment, assault, malicious prosecution, misfeasance in public office, defamation, race discrimination and breach of the European Convention on Human Rights.

41. On 19 November 2012, Lang J directed that witness statements be exchanged by 4.00pm on 21 January 2013. The Defendant did not serve any witness statements on or by that

date; the Defendant's in-house solicitor, Ms Hammond, wrote to the Claimant on 21 January seeking to agree an extension of time for exchange. The Claimant did not agree, but made (what the Court of Appeal considered to be a misconceived) application to commit the Chief Constable for contempt. This application did bring the matter back before the court, however, and on 26 February 2013, Mitting J dismissed the Claimant's contempt of court application but made the following order in relation to witness statements:

> *Defendant do file and serve any witness statements by 4pm on 12 March 2013. The Defendant may not rely on any witness evidence other than that of witnesses whose statements have been so served.*

42. On 12 March 2013, the Defendant posted two witness statements to the Claimant, which were not received until 13 March. The Claimant protested loudly that this was not in compliance with Mitting J's order, but no application was made for relief from sanctions. Around this time, the parties were informed that the trial was set to commence on 10 June 2013. On 15 May 2013, however, the defendant did make an application for relief, to permit it to rely on unspecified witness statements. On 22 May 2013, it served six statements on the Claimant, including the two already served in March and an additional four. On 5 June, the Defendant made another application for relief, seeking permission to call evidence from a further two police officers.

43. Both the 15 May 2013 and the 5 June 2013 applications for relief were heard by the trial judge, HHJ Birtles, on 10 June 2013, the day on which the trial was set to begin. The 15 May 2013 application was supported by evidence from Ms Hammond that she had underestimated the time that would be taken to prepare witness statements, particularly given that some of the officers involved had left the force and others were busy with operational commitments. She also pointed to the delay brought about by the Christmas break and bad weather. She herself accepted full responsibility for the failure to file the statements. Both the 15 May and 5 June applications relied on arguments that the claims against the force and the officers involved were extremely serious, and that it was in the interests of the officers concerned and the public that those officers be given the

opportunity to explain their actions and give their side of the story: excluding their evidence could have serious professional repercussions for the officers involved.

44. HHJ Birtles, who did not have the benefit of the guidance of the Court of Appeal in *Mitchell*, allowed the applications for relief and adjourned the trial to allow the Claimant to prepare to cross-examine the witnesses. That decision was appealed by the Claimant and, by the time the Court of Appeal determined the appeal, the decision of that court in *Mitchell* had been handed down.

45. The Court of Appeal allowed the appeal and reversed HHJ Birtles' decision, with the effect that the Defendant was debarred from relying on witness evidence. The Court of Appeal acknowledged, noting *Mannion v Gray* [2012] EWCA Civ 1667, that it should be slow to interfere with case management decisions. However, Richards LJ went on to say (at [38]):

> *if the message sent out by Mitchell is not to be undermined, it is vital that decisions under CPR r. 3.9 which fail to follow the robust approach laid down in that case should not be allowed to stand. Failure to follow that approach constitutes an error of principle entitling an appeal court to interfere with the discretionary decision of the first instance judge.*

46. The Court of Appeal rejected the Defendant's argument that such an approach would lead to more appeals, echoing the *Mitchell* decision in saying that when the new culture was accepted, there would be less satellite litigation, not more.

47. In reversing HHJ Birtles' decision, the Court of Appeal considered firstly (at [40]) that the judge had given insufficient consideration to the fact that the sanction imposed by Mitting J's order 'was itself a proportionate sanction which complied with the overriding objective': 'as was observed at para 45 of the judgment in Mitchell, "the starting point should be that the sanction was properly imposed and complies with the overriding objective"'. Secondly (at [41]), the judge was criticised for considering the checklist of nine factors in the superseded r. 3.9, before coming to the two considerations specifically mentioned in the new r. 3.9:

he did not appreciate that the two considerations specifically mentioned in the new rule are the most important considerations and should be given greater weight than other factors. Nor did he appreciate how much less tolerant an approach towards non-compliance with rules, practice directions and orders is required by the new rule.

48. The Court of Appeal went on to consider (at [42]-[43] and [48]-[49]) that, while the breach of the direction in respect of the first two witness statements, served just after the deadline, was trivial, the breach in respect of the other witness statements was serious: the last two were served only days before the trial. Furthermore, the applications for relief had not been made promptly in respect of any of the witness statements: sanctions even for trivial breaches were only to be relieved when the application for relief was made promptly. Consequently, the Defendant was to be debarred from relying on any of the witness statements, including the first two.

49. Finally, the Court of Appeal (at [44]) considered the weight placed by the judge 'on the potential effect on the careers and reputations of individuals and the police force if the officers concerned were unable to give evidence, and on the public interest in scrutinising the actions of police officers in the light of all of the evidence from both sides'. Richards LJ stated that such considerations might be relevant in considering how much time should be allowed for service of witness statements in the first place, or in deciding what sanction should be imposed for late service, but went on to say that 'we do not think that such considerations can properly carry much weight in determining whether to grant relief from the sanction for non-compliance'.

Lakatamia Shipping Company Limited v Nobu Su [2014] EWHC 275 (Comm) (13 February 2014)
Hamblen J
Application for relief from sanction for late service of disclosure list
ALLOWED

50. In this case, in the Commercial Court, the claimant claimed £45 million-odd from six defendants pursuant to various contracts and from the seventh defendant as a guarantor. The parties agreed by consent to extend the deadline initially set for exchange of standard disclosure lists, but the Claimant refused the Defendants' request for a further extension. Accordingly, the Defendants applied for a further extension, which was granted by Cooke J, but subject to an unless order, in the following terms:

> *... unless standard disclosure is provided on or by 17 January 2014 the Defendants' defence and counterclaim shall be struck out.*

51. Under the CPR, it is provided that orders imposing a time limit for doing any act must include the time of day by which the act must be done: CPR r. 2.9(1)(b) and PD40B 8.1. Cooke J's order did not include the time of day. However, the Commercial Court Guide provides at D19.2 that absent specific provision in an order, the latest time for compliance is 4.30pm on the day in question. Cooke J's order was therefore to be interpreted as requiring standard disclosure to be given by 4.30pm on 17 January 2014.

52. It emerged from the evidence that the Defendants' solicitors mistakenly understood the deadline to be 5.00pm on 17 January. They were working up to the deadline for exchange because of further documents provided by one of the Defendants on that day. By around 4.40pm, their list was ready, and at 4.45pm they emailed the Claimant's solicitors offering to exchange. The Claimant's solicitors replied at 4.54pm stating: 'there is an argument that this is out of time. We are considering and will revert soonest.' Nothing having been heard, at 5.16pm (46 minutes late), the Defendants' solicitors served their disclosure list on the Claimant's solicitors.

53. Hamblen J allowed the Defendants' application for relief from sanction. He quoted his own summary of the Mitchell decision from a judgment of his own the previous week, *Newland Shipping & Forwarding Limited v Toba Trading FZC* [2014] EWHC 210 (Comm):

> *39. The leading authority is the Mitchell case. This requires a "robust" approach to be taken. As explained at [41], "the need to comply with rules, practice directions*

and court orders is essential if litigation is to be conducted in an efficient manner. If departures are tolerated, then the relaxed approach to civil litigation which the Jackson reforms were intended to change will continue".

40. Under CPR 3.9 the "paramount" considerations are now "the need (i) for litigation to be conducted efficiently and at proportionate cost and (ii) to enforce compliance with rules, practice directions and court orders" [36].

41. Whilst "regard should be had to all the circumstances of the case…the other circumstances should be given less weight" than the two "paramount" considerations [37].

42. The "starting point" is that "the sanction has been properly imposed and complies with the overriding objective" [45]. "An application for relief from a sanction presupposes that the sanction has in principle been properly imposed. If a party wishes to contend that it was not appropriate to make the order, that should be by way of appeal or, exceptionally, by asking the court which imposed the order to vary or revoke it under CPR 3.1(7) " [44].

43. In considering whether relief should be granted, "it will usually be appropriate to start by considering the nature of the non-compliance with the relevant rule, practice direction or court order. If this can properly be regarded as trivial, the court will usually grant relief provided that an application is made promptly." [40].

44. "If the non-compliance cannot be characterised as trivial, then the burden is on the defaulting party to persuade the court to grant relief. The court will want to consider why the default occurred. If there is a good reason for it, the court will be likely to decide that relief should be granted." [41]. "Good reasons are likely to arise from circumstances outside the control of the party in default" [43].

45. In summary, the importance of the "paramount" considerations means that as a general rule relief will not be granted unless (i) the non-compliance was trivial or (ii) there was good reason for the default. Although all the circumstances of the case are relevant, they are of less weight than the "paramount" considerations. Compelling circumstances are therefore likely to be required if relief is to be granted for a non-trivial default for which there is no good reason.

54. Hamblen J added in *Lakatamia* (at [15]) that,

conversely, if the applicant can show that the non-compliance was trivial and / or that there was good reason for the default, relief will "usually" be granted. In such a case compelling circumstances are therefore generally likely to be required if relief is to be refused.

55. Hamblen J considered (at [16]) that the Defendants' default was trivial: their disclosure list was 46 minutes' late – 'a delay measured in minutes, not hours'. He also rejected (at [18]) the Claimant's submission that the Defendant's history of breaches vitiated the triviality: 'the history of default may be a relevant general circumstance to take into account but it does not affect the characterisation of the relevant non-compliance or metamorphose a trivial default into a serious default.'

56. Turning to whether there was a good reason for the default, Hamblen J acknowledged that one of the Defendants had provided further documents on the day of the deadline. However, he found that the Defendants' solicitors would have got the disclosure list together by 4.30pm if they had realised that that was the deadline. The 'operative and main reason' for the default was the Defendants' solicitors misunderstanding as to the actual time of the deadline. This misunderstanding was understandable given the silence of the order on the point and, as Hamblen J identified, the Claimant's solicitors were themselves unclear about the exact timing of the deadline, as indicated by their 4.54pm email. Hamblen J concluded, on the reason for the default (at [29]) that:

> *It cannot be said that the delay was due to circumstances outside the control of the party in default. It was due to a mistake rather than extraneous circumstances. In accordance with the guidance offered in the Mitchell case I accept that no good reason for the default has been made out, although there is an understandable explanation for it.*

57. Hamblen J finally went on to consider other circumstances, concluding that these favoured relief. He stated (at [40]):

> *Of particular importance is the fact that the non-compliance has had no effect on the Claimant or other court users. Further, the Claimant was itself in breach of the Order and, had it provided a list or sought to exchange lists prior to the deadline it is likely that the Defendants would have done likewise. Instead it chose to wait and see. Moreover, it appears that it too was uncertain about the precise deadline for compliance.*

Vivek Rattan v USB AG, London Branch [2014] EWHC 665 (Comm) (12 March 2014)

Males J

Indemnity costs awarded against party taking "futile and time-wasting" procedural points

58. This was a very short decision, the judge being very clear that his purpose was to slap the Claimant down hard for what seemed to be a blatant piece of opportunism. The Claimant, having agreed with the Defendant that costs budgets should be filed "on" or "by" February 28, served his on February 27 and contended that the Defendant's budget, which was served the next day, should be disallowed because February 28 was six days before the case management conference, not seven days as required by CPR r.3.13. Males J, thankfully, gave this short shrift, dismissing it as "manifest nonsense" and ordering the Claimant to pay costs on the indemnity basis.

59. A written judgment was handed down to 'reinforce the message that the Commercial Court will firmly discourage the taking of futile and time-wasting procedural points', as it appeared that this message, which should have been apparent from Leggatt J's decision in *Summit Navigation Ltd v Generali Romani Asigurare Reasigurare SA* [2014] EWHC 398 (Comm), 'may not yet have been heard'.

Summary of emerging trends

60. Considering the cases reviewed above, are there any emerging trends in the court's treatment of relief from sanction applications and are there any hints or tips to be gleaned to strengthen one's case, whether seeking or opposing relief from sanctions?

61. Firstly, and unsurprisingly, it may be noted that *Mitchell*'s impact has been dramatic. The hand-picked Court of Appeal in that case set out intentionally to offer guidance on the application of the new approach under the Jackson regime, and that guidance has been applied by some judges to the extent of becoming a new test for relief from sanctions in itself, over and above the new r.3.9 and in substitution for the old r. 3.9. In *SC DG Petrol*, *Durrant* and *Lakatamia*, the court considered in each case the triviality or otherwise of the breach; whether there was a good reason for the breach; and the primacy of the paramount considerations under the new r. 3.9, namely the need for litigation to be

conducted efficiently and at proportionate cost and the need to enforce compliance with rules, practice directions and orders. Hamblen J's summary of *Mitchell* in *Newland Shipping*, which he himself applied in *Lakatamia*, comes close to reducing *Mitchell* to a new checklist of factors to be considered on an application for relief from sanctions. That, to a great degree, appears to be what the Court of Appeal wanted to do in *Mitchell.* In considering prospects of success on an application for relief from sanctions, practitioners must look for guidance, first and foremost, to *Mitchell.*

62. Secondly, however, the courts have reacted against non-defaulting parties seeking to jump on breaches by their opponents, and against any party seeking to step into the judge's shoes in assessing the impact of default on the court system and the interests of other litigants. In the former regard, in *Lakatamia*, Hamblen J noted, in giving relief, that the party not subject to an unless order sanction had itself failed to meet the disclosure deadline; in the latter regard, in *SC DG Petrol*, the deputy judge confirmed that questions of the impact of default on the courts and other litigants was a matter primarily for assessment by the judge than for evidence and submissions by the parties. The courts have also emphasised the need to consider each case on its own facts, without seeking to bring it within or take it outside any of the example cases in which *Mitchell* indicated relief would or would not be given: again, see *SC DG Petrol*. Overall, parties seeking to take advantage of another party's default should ensure that their own compliance is whiter-than-white; and, whether seeking or opposing relief from sanctions, all parties should focus their evidence and arguments on the facts underlying the parties' own conduct in the proceedings in which they are involved.

63. Thirdly, it is clear that while the courts are concerned to encourage compliance with all rules, practice directions and orders, their greatest ire is reserved for defaults which impact on setting or complying with further directions in the case, or with progressing the case to trial in its listed slot. In *Lakatamia*, relief was granted where the 46-minute late service of the disclosure list did not impact upon compliance with other directions. On the other hand, a key point of concern in *Mitchell* was that the failure to file a cost budget not

only prevented discussion of costs between the parties and a timely consideration of the budget by the court, but also prevented the court from making case management directions at the first CMC which the parties could then immediately begin to follow. So too, in *SC DG Petrol*, the failure to give security for costs prevented the case proceeding to disclosure and beyond. In *Durrant*, the late service of witness statements necessitated the adjournment of the trial. The emphasis on keeping the trial date has always been an important factor in relief from sanction applications, but the broader emphasis on setting and complying with directions generally reflects the concern of the Jackson reforms with the efficient management of litigation: it fits in with the general reforms to the preparation for, and conduct of, case management conferences, considered in the next part of this seminar.

64. Fourthly, it is important for the parties to ensure, so far as possible, that realistic directions are set to begin with and that, where sanctions are to be imposed on non-compliance with particular directions, the parties will be able to comply. If a party repeatedly misses deadlines, that will count against them in applying for relief from sanctions. Furthermore, if a party does not challenge directions when initially made, or appeal an order imposing a sanction, they will be unlikely to receive sympathy in arguing that the directions timetable was too tight or that the sanction ought not to have been imposed, if they later find themselves applying for relief. The courts do recognise that circumstances may change – for instance, that deadlines initially set may later transpire to be too ambitious (see *Smailes*) – but in such cases parties must make prospective applications to extend time, rather than retrospective applications for relief from sanctions.

65. Fifthly, those courts which are "on message" – including the Court of Appeal in *Mitchell* – have generally dismissed concerns about satellite litigation. The view is that, when the Jackson reforms have bedded down, there will be fewer applications to impose or to consider relief from sanctions; and fewer appeals against case management decisions. Parties are simply expected to realise that a tougher regime is now in place and get on

with complying with directions to start with. At first thought, this might seem idealistic; however, if the courts continue robustly refusing relief from sanctions, the message will, at some point, have an effect.

Precedent H and CCMCs

66. Practitioners will all be well aware that costs budgeting is provided for in CPR 3.12 *et seq post.* It currently applies to all multi-track cases except for cases in the Admiralty and Commercial Courts, and such cases as may be directed in the Chancery Division, TCC and Mercantile Courts. Word on the grapevine is that the exemption for cases in the Commercial Court is going to be closed down because of parties issuing proceedings in the Commercial Court as a loophole, although the case is not appropriate for that forum.

67. This section of the talk does not rehearse the rules and regulations; its purpose is to provide feedback as to the conduct of CCMC's in practice. It is therefore somewhat anecdotal.

68. The disappointing news is that there does not yet appear to be any real consistency across the court system at county court level. Some county courts have given guidance to their district judges, so there is at least some internal consistency, but that is not always the case. In one case in Central London County Court, consideration of budgets was adjourned to a CCMC so that the parties could attend with laptops and make their changes to the Precedent H form immediately – an approach generally favoured at that court.

69. In terms of actual consideration of the budgets, there are differing approaches. Some judges take the time to go through each section individually, and comment on the specific allocation of time and/or grade of fee earner etc, and adjust accordingly. Such hearings can be very time consuming, and a substantial amount of time may be spent attending court for what would otherwise be a short CMC. Other judges (including one circuit

judge in Leeds) have been known to take a global view of what would be appropriate for a section or for a trial, and then leave the party in question to adjust the figures across the sections to make it fit. This is really "finger in the air" territory, and whilst it is a quicker approach it is as well to ask the judge to at least consider it section by section so as to minimise the risk of argument in the future.

70. In terms of presentation, we suggest preparing as thoroughly as possible to justify your assumptions, if necessary in a short supporting statement. Consideration needs to be given to the division of labour between partners and fee earners, and proper budgeting for contingencies. Somewhat like looking through the wrong end of a telescope, think about what you would say if you were supporting costs incurred on an assessment after trial. In fact, some firms of solicitors are apparently sending their papers to specialist costs solicitors in advance.

71. There is now more to be said for considering whether a case is better off on the fast track, and so can avoid the Precedent H regime. There is a trade off in costs which will need to be weighed up, but whether or not a case requires experts and/or can be tried in one day may be a useful starting point. Another practical tip may be to try and agree as many directions as possible at an early stage – for example, in a contested possession hearing it would be useful to agree at least as far as close of pleadings (if not further) at the first return date in the five minute list.

72. It is also as well to ask the court staff whether a CCMC or CMC has been allocated to a district judge internally, or whether they are aware that there is a costs budget to go through. Forewarned is sometimes forearmed, and some judges may be persuaded (under pressure of time) to note that budgets have been exchanged without going through them and amending.