



Welcome to the June edition of *Insight*, Fenwick Elliott's newsletter which provides practical information on topical issues affecting the building, engineering and energy sectors.

This issue considers the Court of Appeal's latest approach to relief from sanctions and provides practical advice to both defaulting and non-defaulting parties.

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The latest on relief from sanctions

On 4 July 2014, the long awaited judgment of the Court of Appeal in the conjoined *Denton/Decadent/Utilise* appeals was handed down and a new three-stage test for assessing an application for relief for sanctions was born, consigning the previous Court of Appeal authority on relief from sanctions, *Mitchell* (see http://www.fenwickelliott.com/files/insight_issue_34.pdf), to the history books.

The purpose of this 37th issue of *Insight* is to (i) consider the Court of Appeal's latest approach to relief from sanctions and (ii) provide practical advice to both defaulting and non-defaulting parties on how litigation practice should be altered to avoid falling foul of the new rules going forward.

Denton: The new *Mitchell*

The Denton appeals in brief

In *Utilise*, the claimant filed a costs budget late in breach of the terms of an unless order, and was also 13 days late complying with an order requiring it to notify the court of the outcome of negotiations. The first instance court refused the claimant's application for relief from sanctions because the claimant had given no reason for its non-compliance. The claimant appealed.

In *Decadent*, the claimant sent a cheque to the court by DX on the date on which the unless order expired. The cheque then went missing. The non-payment became evident to the parties three weeks later at the Pre-Trial Review and the claimant finally made payment two days later. The first instance judge refused relief from sanctions on the basis that two aggregate breaches had become one significant breach and the claim was struck out. The claimant appealed.

In *Denton*, the claimant served six new witness statements two months before trial that it alleged were necessary due to a change in circumstances four months earlier. The first instance judge granted relief from sanctions and adjourned what would otherwise have been a meaningless trial without all the necessary witness evidence. The defendants appealed.

The Court of Appeal's decision

The Court of Appeal noted that the judges in *Decadent* and *Utilise* adopted an unreasonable approach to relief from sanctions as in each case the defaults were at the lower end of seriousness. The judge in *Denton*, however, was unduly relaxed as the late filing of witness evidence so close to trial was wrong and eventually caused the trial to be vacated.

The Court of Appeal chose to amplify the guidance it had set down eight months earlier in *Mitchell*, and set out a new three-stage test for the granting of relief from sanctions which, for the first time, requires a consideration of all the circumstances of the case. The Court of Appeal emphasised that the new test should replace the decision in *Mitchell* (and the *Mitchell*-related

satellite litigation), and should be used in isolation going forward.

The new three-stage test

In considering applications for relief from sanctions, judges should:

Stage 1

Assess the significance and seriousness of the default which led to the application for relief.

NB1. If the default is not significant and serious, then relief will usually be granted and the court may not have to concern itself with Stages 2 and 3 below.

NB2. In assessing whether a default is significant and serious, consideration should be had to whether the breach is material, i.e. whether it might impact on future hearing dates, or otherwise disrupt the conduct of the litigation.

Stage 2

If the breach is significant and serious, consider why the default occurred and whether there was a good reason for it.

NB. The Court of Appeal was not prepared to provide factual examples in order to demonstrate Stage 2. Accordingly, each case has to be determined on its own particular facts.

Stage 3

(Irrespective of any conclusion that might have been reached at Stages 1 and 2) evaluate all the circumstances to enable the application to be dealt with justly: namely, the need for (i) litigation to be conducted efficiently and at proportionate cost and (ii) to enforce compliance with court rules, practice directions and orders.

NB. Persistent past breaches would be a relevant factor at this stage.

The new test is something of a departure from the previous test for relief from sanctions expounded by the Court of Appeal in *Mitchell*, which confirmed that the relevant sanction for any breach of a court rule would be applied unless the breach was trivial, or there was a "good reason" for it (such as if a party or its solicitor had suddenly been taken seriously ill).



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Going forward, if there is a serious or significant breach, and there is no good reason for the breach, then any application for relief from sanctions will not automatically fail as had been the case in the past.

Further, it is no longer correct to focus on the triviality of the breach (albeit the Court of Appeal pointed out that the triviality of the breach may be a useful concept when deciding whether a breach was significant or serious). Post the *Denton* appeals, the significance and seriousness of the default, the reason why the default occurred, and the surrounding circumstances all have to be considered.

It is important to note that there was a divergence of opinion amongst their Lordships as to the weight that should be attached to Stage 3 of the test, which requires a consideration of the surrounding circumstances. Lord Dyson MR and Lord Justice Vos took the view that Stage 3 should be given more weight. Lord Justice Jackson (the architect of the Jackson reforms), on the other hand, thought the surrounding circumstances were amongst the matters to be considered and no greater weight should be attached to Stage 3 than the other two stages.

Whilst this difference in opinion did not affect the outcome of the *Denton* appeals, the correct balance between the three stages is likely to be revisited by the Court of Appeal in the future. If Lord Dyson MR and Lord Justice Vos's approach is followed when the third stage of the test is considered, the test may become softer still as the ability to consider all the circumstances may provide for discretion where none had existed previously.

Practical tips

For defaulting parties

- Continue to ensure wherever possible that you comply with

court rules and orders, as the Court of Appeal has made it very clear that there is to be no return to the previous culture of non-compliance. If you have a history of past breaches, then you may fall foul of Stage 3 of the test and relief from sanctions may not be granted.

- If it appears that you are in danger of missing a court deadline, or will be unable to comply with a court rule or order, then you should endeavour to agree an extension of time under the new buffer direction at CPR 3.8. The new buffer direction allows parties to agree a 28-day extension of time in writing provided the extension of time does not put any hearing dates at risk.
- If your opponent is not prepared to provide an extension of time under the buffer direction, make a prompt application to the court for relief from sanctions prior to the deadline expiring.

For non-defaulting parties

- If you are the non-defaulting party, try and avoid getting involved in a contested application for relief from sanctions, as relief may be easier to come by now than it has been in the past. The new three-stage test potentially provides greater scope for relief than the more restrictive *Mitchell* test as it requires a consideration of the surrounding circumstances.
- Be reasonable if your opponent asks you for an extension of time. If the breach is not significant and serious, and will not impact upon future hearing dates, then agree a 28-day extension of time in line with the buffer direction.
- If you act unreasonably and do not agree to an extension and later find yourself contesting an application for relief from sanctions, going forward, the court will be more willing to penalise you if it considers you are being opportunistic, and you may find yourself on the receiving end of a heavy costs penalty. In appropriate cases, this may extend beyond the

remit of the costs of the application for relief from sanctions, and costs may be awarded against you on the indemnity basis at the conclusion of the trial.¹

Conclusion

The decision in the *Denton* appeals represents a clear softening of the previous approach to relief from sanctions that was taken by the Court of Appeal in *Mitchell*, which led to judges in many of the lower courts taking a very draconian approach to applications for relief from sanctions.

In the *Denton* appeals, the Court of Appeal expressed its hope that the new three-stage test would remove the need for judges to refer to *Mitchell* (and the extensive satellite authorities that followed it) in the future, but at the same time, the Court of Appeal emphasised there would be no return to the pre-Jackson approach (and, indeed, pre-Woolf reforms approach) of determining claims purely on their legal merits.

Whilst procedural discipline and compliance with court rules and orders therefore still rule supreme, parties who try and tie their opponent to too strict an approach may face heavy costs sanctions. A good balance between the two is key.

Footnotes

¹ This may have the effect of releasing the winning party from the confines of its costs budget.

Should you wish to receive further information in relation to this briefing note or the source material referred to, then please contact Lisa Kingston. lkingston@fenwickelliott.com. Tel +44 (0) 207 421 1986

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