Andrew Mitchell MP, Plebgate, Sanctions & Relief

The New Court of Appeal Compliance Directive

Little did Andrew Mitchell realise when he left Downing Street on that fateful autumn evening on 19 September 2012 that a heated exchange would follow which would usher in a turbulent political storm, a fall from grace, a police enquiry and a case which would have implications for all in the legal profession.

Amidst the dialogue between the representatives of government and the police Plebgate was born.

As we now close in on the centenary of the First World War another storm is brewing, not just in the Crimea, but in the corridors of the courts and the legal landscape. Andrew Mitchell may not be a caped eco warrior although he will forever be a legal cause celebre.

Somewhere between the front pages of the press and Operation Alice a defamation action subsequently took shape which eventually came to the attention of the Court of Appeal in the form of a judgment handed down on 27th November 2013: **Mitchell MP v News Group Newspapers Ltd [2013] EWCA Civ 1537**. It has been described as the most significant ruling since the Jackson reforms came into force.

Mitchell MP the Background

On 21 September 2012, the Sun Newspaper reported that Andrew Mitchell then the Chief Whip of the Conservative Party had raged against police officers at the entrance to Downing Street shouting 'you're f…ing plebs.' The incident which received wide public attention became known as Plebgate. In an attempt to protect his reputation Andrew Mitchell issued proceedings for defamation on 7 March 2013 which were defended on the basis of justification and public interest the *Reynolds* defence.

CPR PD51D Defamation Proceedings Costs Management Scheme applied to the proceedings. Paragraph 4 of the practice direction provided: *The parties must exchange and lodge with the court their costs budgets in the form of Precedent HA not less than 7 days before the date of the hearing for which the costs budgets are required.*

On 5 June 2013, the court issued an order that there would be a case management and costs budget hearing on Monday 10 June. As a result of the late notification of the date to the parties the hearing was re-listed to 18 June. The defendant filed its costs budget of £589,558 on 11 June. The Claimant's solicitors filed their costs budget of £506,425 on the afternoon of 17 June the day before the hearing. The Defendant took issue that the costs budget was late and asked for sanctions to be applied.

The Issue for the Court of Appeal

As the Claimant had not filed its cost budget within seven days prior to the date of the first hearing on 18th June Master McLoud determined that the Claimant should be treated as having filed a budget comprising only the court fees and limited costs accordingly. She allowed the Claimant to apply for relief from sanctions which she heard on 25th July although the Claimant faired no better and she refused to grant

relief. The Claimant's contentions as to pressures of work and lack of prejudice to the Defendant cut no ice. By contrast for the Claimant, the effect of the order was to deny a potential cost recovery of £500,000 if successful at final hearing on the merits. The Claimant in consequence appealed.

As the Court of Appeal stated in its judgment: ***'The question at the heart of the appeal is: how strictly should the courts now enforce compliance with rules, practice directions and court orders?'***

Indeed this was the first time that the Court of Appeal had been called upon to decide the correct approach to the revised version of CPR 3.9 (relief from sanctions) which came into force on 1 April 2013 to give effect to the reforms recommended by Sir Rupert Jackson.

After swiftly addressing due warnings given by the Judiciary as to sanctions which would be applied in cases of default the Court of Appeal turned to the question of relief from sanctions.

Old CPR 3.9
Prior to 1st April 2013 the old CPR 3.9(1) provided as follows:

'On an application for relief from any sanction imposed for failure to comply with any rule, practice direction or court order the court will consider all the circumstances including

(a) the **interests of the administration of justice**;

(b) whether the application for relief has been made promptly;

(c) whether the failure to comply was intentional;

(d) whether there is a good explanation for the failure;

(e) the extent to which the party in default has complied with other rules, practice directions, court orders and any relevant preaction protocol;

(f) whether the failure to comply was caused by the party or his legal representatives;

(g) whether the trial date or the likely trial date can still be met if relief is granted;

(h) the effect which the failure to comply had on each party; and

(i) the effect which the granting of relief would have on each party.'

New CPR 3.9
The new version of CPR 3.9(1) with effect from 1st April 2013 provides as follows:

'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

(j) to **enforce compliance with rules, practice directions and orders**.'

As will be seen there is a marked difference in emphasis between the old and new court rules. With the new rule has come a new interpretation.

Judgment – The New Compliance Directive
Lord Dyson Master of the Rolls who gave the lead judgment in Mitchell drew attention to Sir Rupert Jackson's Report on Civil Justice in which he made the following recommendations:

'First, the courts should set realistic timetables for cases and not impossibly tough timetables in order to give an impression of firmness. Secondly, courts at all levels have become too tolerant of delays and non-compliance with orders. In doing so, they have lost sight of the damage which the culture of delay and non-compliance is inflicting upon the civil justice system. The balance therefore needs to be redressed.'

It will be noted that the New Version of CPR 3.9(1) is the version recommended by Sir Rupert Jackson and signals a marked 'change of balance.'

As Lord Dyson commented the explicit mention of the 2 factors in the New CPR 3.9(1) *'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.'* Lord Dyson noted that whilst all the circumstances of the case should be considered *'the other circumstances should be given less weight than the two considerations which are specifically mentioned.'*

Lord Dyson then drew attention to the **18th implementation lecture on the Jackson reforms** delivered by the Master of the Rolls on 22 March 2013, noting ***'that there was now to be a shift away from exclusively focusing on doing justice in the individual case.'***

In that lecture the Master of the Rolls stated:

'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.'*

'Justice in the individual case is now only achievable through the proper application of the CPR.'

'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****.'*

Lord Dyson embracing the above words on behalf of the Court of Appeal in Mitchell stated '*We endorse this approach.'* The lecture has therefore now come home to roost.

Lord Dyson continued '***the expectation is that the sanction will usually apply unless*** *(i)* ***the breach is trivial*** *or (ii)* ***there is a good reason for it'*** and emphasized that the Court of Appeal *'will not lightly interfere with a case management decision.'* Save where the non-compliance can be characterised as trivial, the burden is on the defaulting party to persuade the court to grant relief.

Save in cases of trivial breaches of rules, practice directions and court orders the approach which the court should adopt was highlighted by Lord Dyson as follows:

'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.'*

Lord Dyson then added:

'In short, ***good reasons*** *are likely to arise from circumstances outside the control of the party in default.'*

'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.'

Lord Dyson in his words was championing in a new disciplined culture of compliance.

Seismic Change - Sanctions, Proportionality & Justice
Counsel for Mr Mitchell contended that the sanction applied in this case was disproportionate. He contended in essence that the punishment should fit the crime and at the very least that partial relief should be granted. In short measure the Court of Appeal dismissed this final submission and with it the appeal commenting that partial relief would rarely be appropriate.

Lord Dyson concluded by saying:

'We hope that our decision will send out a clear message.'

Mitchell was fast tracked to the Court of Appeal to enable the senior judiciary to hand down guidance to the lower courts and sends out a clear message for **Strict Compliance** with the court rules, directions and timetables.

Mr Mitchell, his solicitors or insurers now face a non recoverable £500,000 legal bill even if they win the case.

Life after Mitchell
It did not take long for the Court of Appeal to revisit the question of sanctions and relief. Indeed the case of Mitchell was followed hot on its heels by the Court of Appeal decision in **Durrant v Avon & Somerset Constabulary [2013] EWCA Civ 1624** published on 17th December 2013. If Mitchell did not pronounce its message clearly enough from the parapets Durrant was resonant in its endorsement and embellishment of Mitchell.

Mitchell concerned non compliance with cost budgeting. Durrant by contrast concerned non compliance with the exchange of witness statements and indeed 8 witness statements served at various intervals after the deadline imposed by an unless order.

The claim in Durrant related to an arrest, a claim for false imprisonment, assault, malicious prosecution, misfeasance in public office, defamation and race discrimination.

Unlike in Mitchell the judge at first instance in Durrant granted relief from sanctions in the light of the serious allegations being made against police officers to enable the Defendant to rely upon witness evidence. The Court of Appeal however took a somewhat tougher, more robust view.

Lord Justice Richards who gave the lead judgment in Durrant observed:

'The judgment in Mitchell reiterated …that this court will not lightly interfere with a case management decision…Equally, however, if the message sent out by Mitchell is not to be undermined, it is vital that decisions under CPR 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.'

Lord Justice Richards characterised the delivery of 2 witness statements that were posted just before the deadline for service but which arrived after the deadline as trivial in itself. That however was not the end of the matter. By contrast 4 witness statements which were served two months late and another 2 witness statements which were served just days before the trial were characterised as serious breaches. The Defendant did not come close to offering good explanations for non compliance in relation to the latter 6 statements and these were accordingly refused in evidence. The Court of Appeal then revisited the 2 statements served just after the deadline and returned to the words of Mitchell:

'If this can properly be regarded as trivial, the court will usually grant relief provided than an application is made promptly.'

Lord Justice Richards then focused on the 2 month delay in applying for relief from sanctions.

'If relief from sanction was to be sought, it should have been sought promptly. Taking everything into account, and placing particular weight on the failure to make a prompt application for relief from sanction, we have come to the conclusion that the application for relief should be refused even in relation to the evidence of those two witnesses.'

Lesson: If an application for relief from sanctions is to be made it is important to do so promptly. More importantly as Mitchell indicated if deadlines are likely to be missed and further time justifiably needed applications for extensions of time should be made before and not after the deadline has passed.

'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.'

Trivial Breaches & Hope

Mitchell endorsed the principle that trivial breaches could be excused by granting relief from sanctions. Pay heed however to the lessons from Durrant above. In Mitchell Lord Dyson stated:

'We hope that it may be useful to give some guidance as to how the new approach should be applied in practice. 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.'*

The default in Mitchell was not considered to be minor or trivial and indeed without excuse. Questions therefore arise as to what amounts to a trivial breach. After all Mitchell was a case where there was a delay of 7 days in serving a cost budget in

circumstances where the parties were given at most 4 days prior notice from the court to comply if we include the weekend.

2014 cases
The case of Mitchell came to the attention of the High Court in two recent cases which may perhaps offer a limited degree of comfort to the weary practitioner: **Summit Navigation Ltd v Generali Romania Asigurare Reasigurare SA [2014] EWHC 398** (Comm) and **Rattan v UBS AG, London Branch [2014] EWHC 665** (Comm).

In Summit Navigation the Claimant provided security for costs at 10am the morning after the 4pm deadline had expired the previous day. The Defendant relying on Mitchell sought to argue that the case could not proceed and should be permanently stayed.

Leggatt J giving judgment and granting relief in Summit Navigation stated that '*the reliance placed on Mitchell in this case has had the very consequences which the new approach enunciated by the Court of Appeal in Mitchell is intended to avoid'*.

Leggatt J continued: *'The defendants in this case have sought to rely on Mitchell to turn to their tactical advantage a short delay by the claimants in providing security for costs which in itself had no material impact on the efficient conduct of the litigation.'*

Leggatt J concluded by saying that he would put his reasons in writing *'in the hope of discouraging other litigants from making similar arguments to those made by the defendants in this case, with similar disruptive consequences.'*

Leggatt J sought to distinguish security for costs and sanctions *'not intended to be permanent'* and characterised the breach in any event as trivial and '*not material'*.

Likewise in Rattan, Males J handed down his judgment in writing on 12th March 2014 with the express intent of reinforcing '*the message that **the Commercial Court will firmly discourage the taking of futile and time wasting procedural points**.'* The Claimant had taken issue that the Defendant's cost budget had been filed 1 day late and that their costs should be restricted in consequence only to the court fees. It should be noted that combined costs in the case were estimated at £2m. The Defendant by contrast alleged that the Claimant had not only agreed but suggested that cost budgets be exchanged on 28th February rather than 27th February as required under the rules. The Defendant contended that the Claimant was trying to lead it into *'a cunning trap'*. Males J preferred to characterise this as a *'misguided piece of opportunism'*.

It is interesting to note that Males J took the view, in the light of the timetable agreement between the parties that no application for relief was necessary although he expressly stated that '*if relief from sanctions had been necessary, which in my judgment it was not, the case for such relief would have been overwhelming'*.

Indeed Males J dismissed the Claimants attempt to apply sanctions within the context of an agreed timetable as *'manifest nonsense'* and ordered the Claimant to pay wasted

costs of the argument on an indemnity basis of £4500. A similar adverse costs order was also made in Summit Navigation.

In Rattan, Males J concluded by saying: '**It is in my view a case which cries out for mediation**.' Mediation, as encouraged by PGFII, may indeed save blushes, avoid litigation risks and provide solutions that all parties can live with.

There are still clearly interpretations to be made and fine lines to be drawn. The issue of sanctions and relief is far from set in stone. What after all is trivial or material? What can parties agree? And how may Mitchell be distinguished or applied? First instance judges are still at the front line of case management. Where sanctions are not prescribed decisions are still primarily in their hands. It may be difficult, however, to appeal an unfavourable decision on the grounds of proportionality or fairness.

The Outlook
Mitchell has been described as a modern litigation 'game changer'. It has implications far beyond cost budgeting and extends in its current form to all areas and issues of compliance under the court rules.

Many however now question whether rule compliance has become the mistress rather than the handmaid of justice. Thompsons solicitors have described a *'climate of fear.*' Even the Law Society has voiced concerns about co-operation breaking down.

Questions have been raised about Justice and whether the pre-eminent position of the British Legal system has been undermined. Justice may indeed have been consigned to the sub text of CPR 3.9. Some judges, however, are wielding a liberal interpretation with justice in mind.

It is of course a matter for the lawyer to properly manage his diary and pay heed to the court rules and judge's directions. As Durrant noted excuses of *'other professional commitments, holiday season, bad weather, operational commitments of the witnesses'* will rarely be accepted. Bells and Klaxons may indeed now need to sound out ever increasing timely warnings of impending peril.

Kerry Underwood characterised the decision in Mitchell as '*breathtakingly Orwellian.*' Norman Tebbitt MP, a man of 1984, once famously told us to get on our bike. Perhaps, however, there are dangers in store for those who do!

The Message from the Courts is clear: The Need for Compliance with Court Rules & Directions. The Courts certainly now adopt a tough more robust approach to enforcing compliance with rules, practice directions and orders and in considering relief from sanction. Some of us may need to pay a trip to LawCare for relief and support.

Whilst 'trivial breaches' and 'good reason' may provide salvation for some and the justice of Lord Denning may on occasion come to the rescue of unwitting souls cloaked in the now unassuming garb of a judge wielding Excalibur in hand and creative interpretation aloft the legal path is now cloaked with danger for the unwary.

Like Sherlock Holmes one suspects and hopes that Justice is not dead and may rise from the ashes although practitioners now miss deadlines and breach rules and court orders at their peril. Indeed there may be no Britannia or Arthurian Knight to come to the rescue.

If you are engaged in conflict Mediation could be right for you. March 2014

By Russell Evans, Mediation & Arbitration Manager, Resolve UK

At ReSolve UK we have experts in: Business Disputes/ Insurance Claims/ Property Disputes/ Employment/ Construction/ Professional Negligence/ Personal Injury/ Sport/ Music & Entertainment/ Shipping & Maritime/ International Trade & Energy/ Director & Shareholder/ Probate Trusts & Estates/ Family/ Community/ Workplace

Russell Evans: Mediator Arbitrator & Manager Resolve UK
E-Mail: resolve@resolveuk.co.uk **Web**: www.resolveuk.co.uk

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