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Relief from sanctions: Where are we now?

Robin Dunne, Barrister at Clerksroom

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www.clerksroom.com

Administration:
Equity House
Blackbrook Park Avenue
Taunton Somerset TA1 2PX
DX: 97188 Taunton Blackbrook

T: 0845 083 3000
F: 0845 083 3001
mail@clerksroom.com
www.clerksroom.com

RELIEF FROM SANCTIONS: WHERE ARE WE NOW?

Robin Dunne, Barrister Clerksroom – July 2014
Email: dunne@clerksroom.com or telephone **0845 083 3000**

Robin Dunne, barrister at Clerksroom, considers the important judgment of Denton v TH White Limited.

Earlier in July, the court of appeal gave their judgment in the case of Denton v TH White Limited [2014] EWCA Civ 906 . This allowed the court, and the Master of the Rolls in particular, to clarify the correct approach to relief from sanctions under the new r. 3.9.

Background:

r. 3.9 sets out the criteria that governs relief from sanctions applications. Following the recommendations of the Jackson report the rule was altered with the intention that defaults by parties would be more readily punished.

Mitchell v NGN [2013] EWCA Civ 1537

The Court of Appeal were afforded the opportunity to provide detailed guidance as to the new rules in the Mitchell case. As well as re-iterating that the new rule was designed to be tougher, the court set out a two stage test to be applied:

(1) Was the default trivial?
(2) Was there a good reason for the default?

What followed was chaos in civil litigation; with parties refusing to co-operate, taking opportunistic points and the courts being swamped with applications for strike out.

Denton: Mitchell has been misunderstood and the new tests

The MOR, giving the lead judgment, was of the firm view that the Mitchell decision (which he gave) has been misunderstood. The court then sought to clarify the criteria which should be applied on an application for relief.

The court was particularly concerned that some judges were adopting an unreasonable approach to applications for relief and that parties were seeking to take advantage of mistakes that were not significant.

There should be a three stage test:

1. Is the breach serious or significant? Whether there have been other minor breaches should not be considered at this stage (in other words, multiple insignificant breaches do not amount to a serious breach.) Multiple defaults could, however, be considered at the third stage.

If the breach is not significant then relief will usually be granted. If it is a serious default the judge should move on to stage two and three.

2. The judge should then consider why the default occurred. The guidance in Mitchell is not a prescriptive list, merely examples. Even if the default was serious and there is no good reason for the breach, that does not mean the application will automatically fail. The judge should always consider stage three.

3. The judge is required, finally, to consider all the circumstances of the case, so as to enable it to deal justly with the application. The two criteria as set out in 3.9 are of *particular* importance but they are not of *paramount* importance.

Thus, while those two factors are very important, they are not the only considerations. All the factors of the case must be considered.

If the breach has prevented the court or parties from conducting the litigation efficiently (for example, if it has caused directions to slip or a hearing date to be lost) or the default has caused disproportionate costs then this will be a factor weighing in favour of refusing relief.

The approach of the Parties

The court reminded parties that the new r. 3.8(4) allows them to extend the deadline for compliance with directions and orders. The court made it clear that parties should be ready to agree such extensions.

There was also a warning that parties must not seek to use the rules to gain an advantage by seeking strike out or sanctions where the breach was not serious. Costs sanctions should be sought against any party acting in an unreasonable manner.

Contested relief from sanctions applications should be rare and exceptional.

The Courts

As well as ensuring that judges apply the appropriate test, the court also reminded judges that any directions given must be realistic. Furthermore, unless orders should be used sparingly and reserved for situations where they are truly required.

Going Forward

The intention of the Denton judgment is to inject some sanity back into civil litigation. Parties will, it is hoped, begin to co-operate and be more willing to address any minor defaults between themselves, whether by extending time or consenting to relief from sanctions.

A word of caution is still required. The Denton judgment makes clear that defaults which imperil the directions or trial date are serious and may still result in a refusal for relief.

Parties should still keep an keen eye on directions and orders and, if they are concerned that a deadline cannot be met, should always seek an extension before any default occurs. If an opponent will not agree then an application can be made to extend the time period (which would not be heard under 3.9) with the opponent very likely to pay the costs of such an application.

Nebulous concepts such as 'serious' and 'significant' are likely to lead to argument in the courts in respect of individual breaches. As before, it is far better to be pro-active and act before a default occurs.

Robin Dunne has a general common law practice and specialises in costs and litigation funding. He has acted for a number of claimants and defendants in respect of relief from sanctions applications since the Mitchell decision.

Email: **dunne@clerksroom.com** or telephone **0845 083 3000**

Robin has written an 86 page ebook on costs which can be downloaded for free on the Clerksroom website.