Impact of "*Mitchell*"

Response of the Chancery Bar Association to the Chairman of the Bar's invitation of views dated 30 May 2014

1. On 16 and 17 June 2014 the Court of Appeal, with the Master of the Rolls presiding, is due to hear three appeals dealing with relief from sanctions.

2. On 23 May 2014 the Master of the Rolls invited the Bar Council and the Law Society to intervene in the appeals and to file, by 9 June 2014, written submissions addressing the general impact of the Court's decision in *Mitchell v News Group Newspapers Limited* [2013] EWCA Civ 1537.

3. On 30 May 2014 the Chairman of the Bar circulated to Chairs of SBAs an email inviting views, to be submitted by 10am on 4 June 2014, to be taken into account in the Bar Council's written submissions.

4. Given the shortness of time between the request and the deadline for the submission of views, the approach that the Chancery Bar Association has taken has been to invite views and comments from its membership which are reflected, in anonymised form, below. These include responses from members who sit as Deputy Masters in the Chancery Division, or as Deputy District Judges, and have therefore had direct experience of the impact of *Mitchell* on the workload of the Courts. For obvious reasons there has not been time to prepare and provide a fully-considered submission on behalf of the Association.

5. This Response has been compiled by Anna Markham and Patrick Harty.

General Observations

6. On 3 November 2008 the Master of the Rolls announced that he had appointed Lord Justice Jackson to lead a fundamental review into the costs of civil litigation. The objective of that review (as set out in its terms of reference) was: "*To carry out an independent review of the rules and principles governing the costs of civil litigation and to make recommendations in order to promote access to justice at proportionate cost*".

7. In May 2009, Lord Justice Jackson produced his *Review of Civil Litigation Costs: Preliminary Report*. Section 4(iii) of Chapter 43 addressed sanctions for non-compliance. Paragraphs 4.20 to 4.21 of that chapter set out various possible reforms to address this issue. Lord Justice Jackson noted that one possibility was:

> "*...a declared change of judicial policy that as from a stated date, say 1st January 2010, non-compliance with deadlines or due dates would no longer be tolerated, save in exceptional circumstances. There would then be a series of "hard cases" in January 2010 where parties found themselves struck out or unable to rely upon late evidence etc., and thus thrown back upon their remedies against their own lawyers.*"

8. However, Lord Justice Jackson's final report stated (Ch 39, paragraph 6.5):

> "*I do not advocate the extreme course which was canvassed as one possibility in PR* [the Preliminary Report] *paragraph 43.4.21 or any approach of that nature*".

9. It is therefore unfortunate that the experience of many members of the Association is that *Mitchell* has had a negative impact on the efficient and effective administration of civil justice, for the following reasons:

   9.1. The principal effect in many cases of the decision in *Mitchell* has been to increase both costs and satellite litigation dramatically, despite the objective of Lord Justice Jackson's review.

   9.2. This has had an inevitable knock-on effect on the amount of the Court's time taken up by such satellite litigation and procedural issues

(a point expressly raised in the responses received by members of the Association who sit judicially).

9.3. In many quarters the decision in *Mitchell* has been interpreted in such a way that its effect is practically indistinguishable from "*the extreme course*" which Lord Justice Jackson expressly declined to advocate.

9.4. On the other hand, we have heard from some of those sitting judicially that they do their very best to do justice as they see it notwithstanding the stringencies of *Mitchell*, and on occasions "find ways" to avoid upholding severe sanctions even though the law as interpreted by the Court of Appeal strictly requires otherwise. This strongly suggests that the Court of Appeal has gone too far, contrary to the interests of justice, and it has the consequence that application of the rules becomes less predictable and more worth fighting about, thereby increasing further the burden of satellite litigation and the likelihood of appeals.

10. Additional concerns reported by members include the following:

10.1. Parties have in some cases been unable (by the present rules) to agree extensions of time, and in other cases unwilling to do so either due to tactical considerations or due to their own uncertainty as to whether this is permitted.

10.2. Injustice to litigants may well arise from an overly rigid application of rules, especially (but not exclusively) where parties are litigants in person.

10.3. There is a lack of clarity in the relevant authorities as to what constitutes a "trivial" breach, and the relevance of consequences of the breach to the Court's decision.

10.4. There is a lack of clarity as to the effect of *Mitchell* in areas of civil law which are subject to specific compliance regimes.

10.5. Clarity is also desired as to the application of *Mitchell* to different forms of order and different varieties of sanction.

10.6. Detailed consideration does not appear to have been given by the most senior courts to the compatibility of *Mitchell* (and its more extreme applications) with the ECHR.

Specific issues and examples

Costly satellite litigation

11. As set out above, there is a concern, raised by our members both as practitioners and sitting judicially as Deputy Masters or Deputy District Judges, that the Court of Appeal's dicta in *Mitchell* are "*being used tactically and satellite litigation is becoming the norm*".

12. There appear to be a number of reasons for this (some of which might be thought to be inherent in the decision in *Mitchell)*:

    12.1. In many cases the effect of the sanction imposed by the Court, where a costs sanction is held to be insufficient, is to bring the claim to an end (e.g. because it is struck out or because the defaulting party is debarred from adducing any evidence whatsoever).

    12.2. This results in what one member described as "*an all or nothing approach*" where it is worth a party's while incurring very substantial costs because "*the prize will be well worth having*" (in the words of Nugee J in *Re Guidezone Ltd* [2014] EWHC 1165 (Ch)).

    12.3. Further, as the decision to impose a sanction is not dependent upon prejudice to the opposing party and the sanction imposed will often be disproportionate to any prejudice to the opposing party (if considered alone), parties will often be in a better position if their opposing party fails to comply with an order than if they do comply. This distorts the incentives for parties to litigation and makes reasonable cooperation less likely. Indeed, members of the Association who would, before the decision in *Mitchell*, have been likely to advise that reasonable variations to orders should be agreed,

have reported that they have been concerned that such advice may no longer be in their clients' interests.

12.4. As a result, parties are very reluctant to agree any extension of time or other variation of a Court order in the hope (in many cases not unrealistic) that the opposing party will breach the order and then be faced with an application for relief from sanctions which is likely to fail on the basis of the decision in *Mitchell*.

13. In line with the above, members who sit judicially have told us that the effect of *Mitchell* "*has been to increase the number of applications for extensions of time significantly*". These are often made on a "*belt and braces*" basis, because of the serious consequences of any default. One respondent, who sits judicially, observed that "*solicitors do not dare miss deadlines without an agreed extension*". On its own this might be laudable; however, combined with parties' understandable reluctance to agree extensions it results in an increase in costs and the use of Court time.

14. Where default has occurred, the satellite litigation is of still greater significance. On applications for relief from sanction parties are tending to put in very substantial evidence and, because so much turns on the outcome of the application, to instruct experienced (and therefore expensive) Counsel. This, of course, renders the satellite litigation costly and onerous for both the parties and the Court. In the limited time available to prepare this Response, our members have told us of recent examples as follows:

14.1. In a High Court claim valued at £100,000 to £150,000, a delay of 92 minutes in filing a Precedent H, in circumstances where no CMC had yet been listed, led to costs of some £27,000 being incurred on a fully-contested relief from sanction application. Five witness statements were served. The hearing lasted one day, an earlier hearing having been adjourned by consent as the time estimate was inadequate.

14.2. In another High Court case the respondent to an application for an extension of time, which would not affect the timetable for the litigation and where no trial date had been set, instructed leading counsel to oppose the application and incurred costs of over £66,000 in such opposition. The total costs exceeded £80,000. A full day of Court time was taken on the hearing of the application (not including the giving of judgment).

15. Substantial court time is being taken up on relief from sanction applications. Members have reported that usually there will be one ineffective hearing when directions are given, and later a substantive hearing taking up anything between 3 hours and one day of court time.

16. These issues have been recognised by the judiciary. Indeed, Lord Justice Jackson, in his paper for the Civil Justice Council conference held on 21 March 2014, noted that, while the Court of Appeal's emphasis in *Mitchell* heralded a genuine change of culture, nevertheless:

> *"...parties should not be allowed to exploit trivial or insignificant breaches by their opponents, as Leggatt J stated in* Summit Navigation Ltd v Generali Romania Asigurare *[2014] EWHC 398 (Comm)."* (paragraph 3.9)

17. However, the experience of members of the Association is that the above issues persist.

Inability of the parties to agree to extensions of time

18. Even leaving aside the tactical exploitation of the rules by opposing parties, a significant problem appears to be that parties wishing to co-operate have been (to some extent at least) prevented by the rules from doing so.

19. CPR 3.8(3) (as in force at the date of this Response) provides that where a rule, practice direction or court order (a) requires a party to do something within a specified time, and (b) specifies the consequence of failure to

comply, the time for doing the act in question may not be extended by agreement between the parties.

20. By way of a further example, CPR 26.3(6A) provides that the date for filing a completed allocation questionnaire may not be varied by agreement between the parties. An application to the Court is required, and such applications take up valuable court time.

21. We heard from one part-time judicial respondent that parties receiving requests for extensions of time "*often wring their hands and say 'we would like to help but it's a matter for the Court*'". In some cases no doubt this is opportunistic, but among practitioners there may well be some confusion as to the extent to which it is open to parties to agree extensions between them and the extent to which they can properly advise their clients to do so, given the potential windfall resulting from any breach. Uncertainty or intransigence can ultimately be expensive for the party failing to agree the extension (in that, if a party is found unreasonably to have refused an extension, causing an application to be made to the Court, then a costs order may be made against him). However, the potential fruits of such a stance mean that this is a risk which many parties appear prepared to take.

22. These formal difficulties now appear to have been recognised. Lord Justice Jackson said in his paper for the Civil Justice Council conference (paragraph 3.10):

> *"Parties should be able to agree sensible variations of time limits which do not disrupt the litigation timetable. It is no part of my recommendations that parties should be prevented from doing this. Parties should be enabled, indeed encouraged, to co-operate in progressing litigation smoothly and at proportionate cost. I understand that the Rule Committee is actively looking at this.*

23. Lord Justice Jackson repeated this sentiment in the Court of Appeal's recent decision in *Hallam Estates Ltd v Baker* [2014] EWCA Civ 661.

24. This is now reflected in the amendments to CPR r.3.8 which will take effect from 5 June 2014, and it is hoped that these will at least address the technical difficulties facing parties who wish to agree extensions. The significance of this will obviously depend on the extent to which parties can be dissuaded from adopting the tactical stances which *Mitchell* has thus far encouraged.

Injustice arising from rigid application of the rules

25. Our respondents have expressed concerns that an overly-rigid application of the rules is leading to injustice, perhaps especially at the expense of litigants in person and those whose claims are dealt with as fast-track cases.

26. Litigants in person, we are told, very often fail to understand the detailed instructions as to provision of witness statements complying with the CPR, and indeed other documents, both to the other side and the court within prescribed time-limits (even where, as is not always the case, such orders are clearly phrased and warnings of sanctions etc. appear prominently upon them).

27. Such parties may:

    27.1. not understand terms such as "filing" and "service";

    27.2. think that a letter or their original claim form or defence will suffice by way of documentation;

    27.3. find it hard to understand why the court (albeit for good reasons) wants everything written out again in detail and documents supplied again.

28. There is a concern that if *Mitchell* (and other cases such as *Durrant v Chief Constable of Avon & Somerset Constabulary* [2013] EWCA Civ 1624) were to be applied with full rigour, then a very large proportion of small claims/fast track cases might be dismissed, notwithstanding the procedure in some courts to have Small Claims Pre-Trial Reviews.

29. Obviously in some cases the failure to comply with relevant orders would render a fair trial impossible and necessitate at least an adjournment, to some extent justifying the imposition of a sanction, even against a litigant in person. However, in other cases a poorly-educated litigant in person might simply be told that they would not have their case heard as a result of a technical non-compliance with procedure which had not resulted in any practical problem. The approach in *Mitchell* appears to be discouraging a pragmatic approach and instead presenting unnecessary tripwires for unsophisticated litigants. Our respondents consider that even the imposition of stringent sanctions is unlikely to result in any "*change of culture*" amongst these litigants in person who do not understand such sanctions. Our respondents have also suggested that this may raise ECHR and public policy issues (addressed further below).

30. The concern as to the risk of injustice flowing from an overly-rigid approach is not limited to small claims or litigants in person. As reflected at paragraph 9.4 above, we have heard from some of those sitting judicially that they do their very best to do justice as they see it notwithstanding the stringencies of a strict application of *Mitchell*. Whilst this to some extent tempers concerns about injustice, variations in practice and approach between courts necessarily lead to uncertainty in the civil justice system, and a lack of consistency and predictability is damaging to the integrity of the system.

31. One respondent provided us with details of a recent case in which a litigant in person missed (by one day) a deadline for filing his papers for an appeal from a decision of a district judge. The default appears to have arisen out of a mistake as to how Christmas holidays were to be taken into account in calculating the deadline. Nothing was said to the litigant at the time as to lateness and he did not know there had been a default. In due course an opposing party took a point on default in a skeleton argument and within 10 days of receiving that skeleton argument (but some three months after the default) the litigant in person applied for relief from sanction. Although the

default was adjudged to be trivial, relief from sanction was denied at least partly on the ground that the application for relief had not been made promptly, and the judge declined to go on to hear the substantive application for permission to appeal.

32. Cases such as the one summarised above raise an interesting point as to how *Mitchell* (and particularly paragraphs 40 and 41 of that judgment) ought to be applied in a case where the default is adjudged to be trivial, but the application for relief from sanction has not been made promptly.

33. Further case examples which have been provided to us include the following:

33.1. A claim for a six-figure sum was struck out for failure to comply with an unless order. The relevant party (a litigant in person) misconstrued an unless order requiring him to mark up a document with the result that his marking-up, though provided on a timely basis, was incomplete. His application for relief from sanction was refused, even though it was accepted by the opposing party that it knew roughly how the document should have been marked up and had suffered no prejudice. Permission to appeal was refused at appellate level both on paper and orally.

33.2. In another case, a defence was struck out for failure to comply with an unless order where witness statements were served either two hours or two days late (no trial date having been fixed). In that case the defendant did not apply for relief from sanctions.

33.3. In the County Court, a barely articulate litigant in person had been ordered to file and serve evidence as to his occupation of a property in a possession claim. In an attempt to comply, he filed a statement with exhibits at court, but without a case reference number. The document was returned to him by court staff with a message asking

for him to supply the case reference. He did so, but by that stage the initial time limit had expired. He failed to serve the statement at all, not understanding the difference between filing and service. The landlord sought and obtained an unless order in relation to service, but the defendant still failed to comply, the meaning of "service" apparently not having been explained to him. He was debarred from defending and the matter was listed as an undefended possession claim.

33.4. In other cases difficulties have arisen as a result of defective court notices being sent out or of purported court orders being made improperly (for example, being issued to the parties by an officer of the court without a formal court order). The courts have had to wrestle with the consequences for the parties either of non-compliance with purported (but defective) notices or orders, or of reliance on purported extensions of time improperly given.

Lack of clarity as to the legal position: "trivial" breaches

34. The post-*Mitchell* authorities are not consistent on the definition of breaches in respect of which relief will normally be given (provided that the application is made promptly) following the dicta at paragraph 40 of the Court of Appeal's judgment in *Mitchell*. One respondent suggested to us that it would make the test clearer if the term '*trivial*' were dispensed with and replaced with '*not material*', as suggested by Leggatt J in *Summit Navigation*.

35. It appears from the responses we have received that it would be helpful for the Court of Appeal to clarify whether, when considering whether a breach is '*trivial*' (or '*not material*'), the Court should take into account:

35.1. Both the relevant party's conduct during the compliance period and the consequences of the breach, or

35.2. Only the relevant party's conduct during the compliance period (with any consequences of the breach going not to triviality/materiality but only to the exercise of the Court's discretion).

36. The importance of the distinction drawn in the above paragraph arises because, following paragraph 41 of the Court of Appeal's judgment in *Mitchell*, if the non-compliance cannot be characterised as trivial, then the burden is on the defaulting party to persuade the court to grant relief.

Lack of clarity: interaction with other regimes

37. A concern has been raised that there is significant room for uncertainty as to the application of *Mitchell* in areas of civil law which have their own compliance regimes. An example provided to us is that of possession claims, and in particular whether *Mitchell* ought to be applied differently or not at all in such cases because of the effect of the extended power to postpone the date for possession even after a possession order has been made (relying on *Hackney v Findlay* [2011] HLR 15).

Distinctions between different varieties of sanctions

38. Members have also reported that *Mitchell* has been interpreted as, in effect, transforming all orders into unless orders. This point was addressed by Leggatt J in *Summit Navigation* (paragraphs 31 to 37) and by Nugee J in *Re Guidezone Ltd* [2014] EWHC 1165 (Ch) (paragraphs 52 to 54). However, the point has not been addressed by any higher court.

39. Similarly, responses we have received also suggest that as a matter of justice there should be a clear distinction between the court's approach in cases of sanctions intended to be permanent, on the one hand, and non-permanent sanctions, on the other (again, see *Summit Navigation*).

Human rights

40. Respondents also noted that there appear to be unresolved questions in relation to the compatibility of the decision in *Mitchell* (at least as it has subsequently been interpreted) with the ECHR. In *Stone Court Shipping Co SA v Spain* (2005) 40 EHRR 31 the ECtHR had to consider a Spanish procedural rule regulating the right to appeal. The Court noted that rules of procedure were principally a matter for domestic courts but held (at paragraph 42) that:

> "*...the particular combination of facts in this case destroyed the relationship of proportionality between the limitations (as applied by the Supreme Court) and the consequences of their application. As a result, the particularly strict interpretation by the courts of a rule of procedure deprived the applicant of the right of access to a tribunal for the purpose of having its appeal on points of law heard.*"

41. Concern has been expressed by certain of our respondents that, at present, the issue of whether the sanctions imposed in reliance on *Mitchell* are consistent with proportionality, although touched upon in recent judgments including that of Andrew Smith J in *Associated Electrical Industries Ltd* v *Alstom UK* [2014] EWHC 430 (Comm), does not appear to have received adequate consideration at Court of Appeal level.

Concluding comments

42. While a number of responses indicated that members had concerns about the consequences of the decision in *Mitchell*, we did not receive responses suggesting that members considered that decision itself to have been incorrect. The decision itself was (on one view) nothing more than a straightforward application of the prescribed sanction for failing to file a costs budget (albeit by analogy). The Rules Committee had decided the appropriate sanction and, had the sanction not applied in that case where the hearing was adjourned, it might have been thought that it would not in fact apply in any case, despite being prescribed in the rules. It might also be noted that the consequence of the decision in *Mitchell* itself was limited to costs (albeit in a very significant way).

43. However, the responses of our members indicated that *Mitchell* has been applied in many cases to defaults for which there was no prescribed sanction and has been interpreted to justify the imposition of the most extreme sanction, namely one which brings the case to an end. It is doubtless desirable for guidance to be given as to whether *Mitchell* should be applied in this way, and if so as to the circumstances in which it should be so applied.

3 June 2014