Late service of expert evidence

The court remains loathe to admit late expert evidence, no matter its importance in determining the overall issues: Chris Pamplin questions whether there is a need for a more balanced approach

IN BRIEF

▶ There is arguably a balance to be struck between application of the strict rules of civil procedure, and the admission of late or defective expert evidence which may be of critical importance in the determination of the issues of a case.

On 1 April 2013, a new regime relating to costs in civil litigation was brought in by Lord Justice Jackson's final report into civil litigation costs. Among other things, this heralded a reformulated relief from sanctions provision under CPR 3.9. The intention was to make the courts more costs-conscious.

Following hot on the heels of the reforms, the Court of Appeal made clear in *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537, [2013] All ER (D) 314 (Nov) that the courts were entering a new and stricter era: adherence to the CPR was to be regarded as trumping all other considerations. The court ruled that relief from sanctions would not be granted where deadlines were overlooked. This was commonly applied in cases where deadlines for filing expert reports were missed.

Paramount importance

In *Mitchell*, the court ruled upon the correct application of CPR 3.14 and gave guidance about the approach to be taken to the revised version of CPR 3.9. The considerations explicitly referenced in the revised version of CPR 3.9—namely the need (a) for litigation to be conducted efficiently and at proportionate cost, and (b) for enforcing compliance with court rules, orders, and practice directions—were to be regarded as being of paramount importance and given great weight. Although the provision compelled the court to also consider 'all the circumstances of the case', those circumstances were generally to carry less weight. There was a shift away from focusing exclusively on doing justice in the individual case. Doing justice was not something distinct from the overriding objective; justice in an individual case was only achievable through the proper application of the CPR, consistent with the overriding objective. Where a court considered a party's non-compliance to be trivial, relief from a sanction would normally be granted if an application was made promptly. If the default was not trivial, the burden of persuading the court to grant relief was on the defaulting party. If there was a good reason for it, relief would likely be granted. Mere overlooking of a deadline, for whatever reason, was unlikely to justify relief. Relief from sanctions would not be granted where deadlines were overlooked, so solicitors should not take on so much work that they were unable to meet them.

The court acknowledged that this might seem harsh, but emphasised that the need to comply with rules, practice directions and orders was now essential.

Incompetence for which there was no good reason, even if it was well-intentioned, would not attract relief from sanction unless the default was trivial (paras [36]-[42] and [48]). On an application for relief from sanction, the starting point would be that the sanction had been properly imposed. A party wishing to dispute propriety would have to seek variation or revocation under CPR 3.1(7) and that application would be considered first. There could be no complaint that the CPR 3.14 sanction did not comply with the overriding objective or was otherwise unfair; the words 'unless the court otherwise orders' were intended to ensure that the sanction imposed gave effect to the overriding objective.

The court said that once it was well-understood that the courts would adopt a firm line on enforcement, litigation would be conducted in a more disciplined way.

Too tough?

There is little doubt that the new regime was rigorous and tough—in the view of some, too tough. Judges that followed the decision in *Mitchell* immediately afterwards were frequently seen as being unduly draconian in their approaches, while other judges appeared unduly relaxed. The view that an application for relief was bound to fail unless a default could be characterised as trivial, or unless there was a good reason for it, was leading to manifestly unjust decisions.

The issue came before the courts again in *Denton v TH White Ltd* [2014] EWCA Civ 906, [2014] All ER (D) 53 (Jul). This case essentially re-evaluated the guidance given in *Mitchell*. Lord Dyson MR recognised that *Mitchell* had received criticism for having a 'triviality' test. Effectively it amounted to an 'exceptionality' test, and downplayed the requirement for the court to consider all the circumstances of the case. Dyson MR ruled that, in future, judges should adopt a three-stage approach in deciding whether to grant sanctions relief:

1) They should, firstly, identify and assess the seriousness or significance of the relevant failure. Considerations of triviality was not part of that stage. There were clearly degrees of seriousness and significance. The assessment ought not to involve consideration of past unrelated failures, only the seriousness and significance of the actual breach in respect of which relief from sanctions was sought. If a breach was not serious or significant, relief would usually be granted and there would be no need to spend much time on the second and third stages.
2) The second stage did not, he said, derive from CPR 3.9, but was nevertheless an important step. This was consideration by the court of the reasons why the failure or default occurred. *Mitchell* had given some examples of good and bad reasons, but these had been by way of example only. It was not, in his view, necessary to produce a comprehensive encyclopaedia of these.
3) Lastly, there was a requirement on the court to consider all the circumstances of the case. A serious breach for no reason was not automatically prevented from attracting relief.

It was against this backdrop that the court in *Future Properties SE Ltd v Favorite (Restaurants) Ltd* (9 November 2022) considered a recent appeal against a trial judge's refusal to admit late expert evidence.

No excuses

The case involved a hearing to determine the open market rent for a business tenancy renewal. The tenant was the proprietor of a fried chicken takeaway business which they operated from premises leased from the landlord. On application for renewal of the business tenancy, the parties were unable to agree on the new open market rent and some other terms of the lease. The landlord sought help from the court. Directions were given for expert witness statements to be exchanged no later than 4 February 2021, and for an agreed expert statement to be produced by 9 April 2021. The order stated that the parties must comply with the terms of the directions order, or their case was likely to be subject to the imposition of sanctions.

The landlord had served his expert report prior to issue of the proceedings. The tenant served a one-page document purporting to be

an expert report. It was, however, defective in many respects and did not comply with the requirements for an expert report. The identity of the report's author was unclear; there was no reference to qualifications; and no suggestion that the maker of the report had even visited the property. In acknowledgment of the manifest defects, a witness statement was filed on behalf of the tenant by his solicitor stating that the tenant's sole director had been suffering from ill-health. This had led to a lack of attention to the business and the current court proceedings. The statement said, however, that the director's health was improving and he had since been able to take steps to obtain an expert report.

In September 2021, the parties were given due notice by the court that the trial would take place six weeks later. On 29 September 2021, the tenant applied for permission to adduce an expert report from a chartered surveyor. The report was attached to the application and was in the proper form. However, the application was adjourned to be heard at the trial. Shortly before the trial date, the tenant dismissed his solicitors and applied for an adjournment. The application was refused, and the tenant failed to attend the trial. The judge hearing the matter in the tenant's absence refused the adjourned application to admit the expert's report on the ground that the tenant had failed to demonstrate any good reason for his failure to comply with directions. The judge determined the open market rent and ordered the tenant to pay the landlord's costs. The tenant appealed, partially on the ground that the expert's report should have been admitted.

Hearing the application for permission to appeal, Mr Justice Roth said that the trial judge should have considered the evidence in the solicitor's witness statement and taken it into account. However, the question to be answered was how far this evidence would have impacted upon the court's decision. Where there was a manifest failure to comply with directions, the three-stage approach in *Denton* was engaged. The key issue at trial was the open market value of the lease. This was an issue that would turn entirely on the expert evidence. Consequently, any breach of the directions order in relation to the filing of expert evidence was serious and significant. Whether or not the trial judge had considered them, the reasons given in the solicitor's witness statement for the breach were wholly inadequate.

If expert evidence central to the trial was to be adduced so shortly before the trial date, the inevitable consequence would be that the trial be vacated. This was wasteful of time and costs, and it would be the opposite of efficient conduct of litigation. The decision to refuse to adduce the evidence late was, said Roth J, unimpeachable. Permission to appeal was refused on that ground.

A fine balance

There is a balance to be struck between application of the strict rules of civil procedure and the admission of late or defective expert evidence which may be of critical importance in the determination of the issues. Given that the judge in this case had identified that the key issues would turn on the expert evidence, it is perhaps a little surprising that the late evidence was rejected so vigorously.

Post-*Mitchell* (and even post-*Denton*), although the court is still required to consider 'all the circumstances of the case' (Dyson's third stage), those circumstances will clearly carry less weight than the application of the CPR which now trumps all other considerations. Experts and solicitors who sail close to the wind in the preparation and service of reports should take heed and be warned! NLJ

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