Fenwick Elliott
The construction & energy law specialists

Issue 30, December 2013

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

In this issue we consider the new approach to litigation heralded by the Jackson reforms.

Insight

The Jackson reforms: what to expect from the courts in 2014

In the 29th issue of *Insight* we discussed the Jackson reforms from the perspective of the disclosure of documents in litigation, which is one small aspect of the wider reforms that were introduced by Lord Justice Jackson in April 2013 to control costs and promote access to justice for all.

This 30th issue of *Insight* considers the new approach to litigation heralded by the Jackson reforms as now confirmed by the Court of Appeal, and provides practical pointers and guidance on how the Jackson reforms will be applied by the courts going forward into 2014.

In particular we concentrate on the amendments that have been made to the overriding objective, in respect of which the Court of Appeal has recently provided clarity through its decision in *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1526.

Mitchell - the facts

Mitchell was the well-known case brought by Andrew Mitchell against News Group Newspapers ("NGN") for defamation of character over the *Sun* newspaper's coverage of the Plebgate affair.

Under the rules which then applied to defamation claims, the parties had to prepare and preferably agree costs budgets.

Contrary to the rules, budgets were not agreed and Mr Mitchell's solicitors failed to respond to NGN's attempts to discuss the budgets as the firm was overstretched and had very limited staff resources. NGN's budget was filed on time but Mr Mitchell's budget was filed six days late, after his solicitors were prompted by the court. As a result of the late filing of Mr Mitchell's budget, it was necessary for the original hearing to be adjourned.

Decision of the first instance court

At the adjourned hearing, the Master held that Mr Mitchell should be penalised for the late filing of his costs budget which caused the original hearing to be delayed, and limited his costs recovery to court fees only, as opposed to the costs budget he had filed at court which was in excess of £500,000.

Mr Mitchell applied for relief against what he perceived to be a very draconian sanction indeed. The Master, however, considered the new overriding objective and refused to give relief against sanctions in light of (i) the need for litigation to be conducted efficiently and at proportionate cost; (ii) the requirement that court rules, practice directions and orders should be enforced; and (iii) the effect of Mr Mitchell's non-compliance on other court users. The need for the Master to re-list the original hearing meant that a hearing in relation to proceedings brought by victims of asbestos had to be delayed.

The Master acknowledged that prior to the April 2013 changes in the court rules, she would have granted relief from sanctions in line with the traditional approach that used to be adopted by the courts in relation to breaches of court orders, namely, to excuse non-compliance and deal with any prejudice that might otherwise have been caused to the innocent party by making a costs order against the defaulting party.

Given the wording of the new overriding objective, however, the Master was not prepared to grant relief from sanctions even with the making of an order for costs. Instead, in light of the importance of the matter, she granted an appeal against her refusal to grant relief from sanctions of her own motion, leapfrogging the case straight to the Court of Appeal for consideration.

Decision of the Court of Appeal

The Court of Appeal agreed with the Master and commented that whilst the Master's decision was robust, it was not unacceptable in light of the new overriding objective governing the conduct of litigation at CPR 3.9. CPR 3.9 requires the courts to enforce compliance with rules, practice directions and court orders very strictly indeed, and the need for litigation to be conducted efficiently and at proportionate cost is now of paramount importance. This means that the courts can now go further and validly look at external factors, such as the effect on other court users of any non-compliance, in order to ensure that wider public justice is achieved.

Going forward, the Court of Appeal confirmed that relief from sanctions will only usually be given if (i) the breach can be regarded (on a strict basis) as being truly trivial; (ii) the party seeking relief has otherwise fully complied with court rules, practice directions and court orders; and (iii) the application for relief is made promptly. Alternatively, there has to be a good, or very good reason why relief should be granted, in which case the application for relief should again be made promptly.

A "*trivial breach*" may include, for example, very narrowly missing a deadline given in a court order but otherwise fully complying with its terms, or a failure of form but not substance.

"*Good, or very good reason*" is to be construed very strictly and would be likely to be a reason that is entirely outside of the control of the party or its legal representative. An example might (*might*

Insight

being the operative word here) be the solicitor with conduct of the case suffering from a serious debilitating illness, or being involved in a serious accident. Administrative errors, or pressure of work coupled with insufficient staff, would not be sufficient.

Although the Court of Appeal's decision may seem harsh, if the Court of Appeal had overturned the Master's decision to refuse relief, then the attempt to achieve the change in culture that was intended by the Jackson reforms would have received a major setback, and the rationale behind the Jackson reforms (to ensure cases are dealt with justly and at proportionate cost) would have been completely undermined. The Court of Appeal therefore had no option other than to endorse the Master's robust approach.

Practice points for 2014 following *Mitchell*

Applications for relief against sanctions now stand a much lower chance of succeeding than they did previously. Going forward, you should:

- Make sure you are familiar with all court rules and practice directions (particularly those that have been brought in by the Jackson reforms relating to disclosure of documents, which are radically different from the previous rules). Any argument that you were short of resources or time will be met with zero sympathy and the courts will not tolerate what the Court of Appeal described as "*well-intentioned incompetence*". Well-intended errors and oversights are no longer acceptable but errors in form over substance may be.

- If you fail to comply with court rules, orders and practice directions, you risk your budget being limited to court fees only, or you may be prevented from relying on any evidence or pleadings that are submitted late.

- If you think there is a risk you may not be able to comply with a court rule, order or direction, act as soon as it becomes clear that you will need an extension of time. Approach the other party (and the court if necessary) in advance of the deadline and request a reasonable extension of time. If you wait until you are already in breach of a deadline and then apply for an extension, do not expect to receive favourable treatment.

- If the court imposes sanctions upon you, then you should consider appealing the sanctions decision, or ask for it to be revoked or varied. Do not wait until your application for relief from sanctions to attack the original sanction(s); it will be too late.

- In your application for relief against sanctions, think about whether you can demonstrate that the non-compliance was trivial or was caused by matters beyond your control.

- Tactically speaking, it will now be much easier to exploit any failure by the other party to comply with court rules, practice directions or court orders, as your opponent will face much harsher sanctions than has been the case historically for any non-compliance.

- Provided you are confident you can comply with all deadlines prescribed by court rules, practice directions or court orders, then you should consider refusing any requests for unreasonable or repeated extensions of time by the other party to your own tactical advantage.

Conclusion

A stark new culture is prevailing to prevent delay, avoidance and non-compliance, and the courts are moving away from focusing on doing justice in individual cases. From now on, the courts will pay very careful attention to the parties' conduct of litigation and the emphasis is firmly on strict compliance. Parties can no longer expect indulgence if they fail to comply with their procedural obligations.

Sanctions are now much more likely to be applied by the first instance courts (and honoured by the appellate courts) against those who fail to comply with court rules, practice directions or court orders unless (i) the breach is trivial; or (ii) there is a very good reason for the non-compliance which is entirely outside of the defaulting party's control; and (iii) the application for relief is made promptly. The court will no longer grant relief as has been the case previously by addressing any prejudice that might otherwise be suffered to the innocent party by an adverse costs order against the defaulting party because under the Jackson regime other court users also have to be considered.

If you do not comply with court rules, practice directions and court orders, then you will face what are likely to be very draconian consequences. The message for 2014, therefore, is tread carefully when engaging in litigation: those who do not fall into line should beware.

In 2014, *Insight* will cover topics such as 'The Jackson Reforms: one year on', a series on 'NEC', a 'BIM update' and much more. If you would like us to comment on a particular issue or aspect of law that is of interest to your business, please email your suggested topics to Lisa Kingston - lkingston@fenwickelliott.com.

Wishing you all a very merry Christmas and a happy new year.

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

Follow us on and for the latest construction and energy legal updates

Fenwick Elliott LLP
Aldwych House
71-91 Aldwych
London WC2B 4HN
www.fenwickelliott.com