The retreat from *Mitchell*

Andrew McLaughlin, St John's Chambers

Published on 4 July 2014

The Court of Appeal has moved quickly to stamp out judicial intolerance of litigation which has been conducted imperfectly but does not affect the administration of justice, in the most eagerly awaited judgment this year.

In *Denton v T H White Ltd* and the conjoined appeals their Lordships have not merely clarified or amplified certain aspects of *Mitchell*; they have recast the guidance to be followed by first instance judges to 3.9 applications, and pointed a gun at those who might think it is worth trying to take advantage of another's mistake.

Triviality has gone. The first question is: was the breach serious or significant? At this stage the court is concerned solely with the gravity of the breach and nothing else. A useful though not exclusive benchmark is whether the breach imperils a hearing date or otherwise disrupts the conduct of the litigation. The implication is, if it does not, the breach is neither serious nor significant. That is except of course when it comes to the payment of court fees.

If the breach is serious or significant, the court must consider, at the second stage, why the failure occurred. The limited circumstances referred to in paragraph 41 of *Mitchell* are now merely examples but no more than that. The Master of the Rolls was careful to avoid restating that a good reason must necessarily be one which is not within the control of the party.

Importantly, even if there is no good reason for a serious or significant breach, an application for relief will not fail automatically. At the third stage the court has to consider all the circumstances of the case so as to enable it to deal justly with the application. When doing so, the court should no longer consider factors (a) and (b) of paramount importance; they are of

particular importance but not determinative. The Master of the Rolls acknowledged that the failure to apply this third stage has led to decisions which are manifestly unjust and disproportionate. A more nuanced approach is required.

Apparently, it was or should have been clear to judges and practitioners alike that *Mitchell* required something very similar to the approach set out in *Denton*. But *Mitchell* was black and white. *Denton* is a much better judgment. Whether or not the nuances in it were there to be seen in *Mitchell* doesn't matter. What matters is things should change.

Their Lordships have made clear that if a party unreasonably refuses to agree to an extension of time or to an application for relief, he will face a heavy costs penalty; that penalty may not simply be limited to the costs of making the application; at the conclusion of the claim an intransigent litigant will face the prospect of suffering a cut in the costs he may recover if he is successful, or an indemnity costs order in the event he fails. The spectre of this type of order is intended to make contested applications for relief very much the exception.

Anyone needing an extension of time or relief from sanction, whose application is still outstanding, is now in a much stronger position. Expect an outbreak of consent orders. Some parties may wish secretly they do not get one in the hope their application will be allowed and the judge will then visit a substantial cost penalty on their opponent, which in the end extends well beyond the costs arising from the application. Parties who have preyed on the misfortune of others could find they are the ones now being savoured.

Broadly, the judgment in *Denton* is likely to be welcomed by all those involved in the conduct of litigation. The tide of anxiety that has risen over the past 7 months is almost certain to ebb. The new 3.9 was never supposed to transform the rules into trip wires. As the Master of the Rolls said in the 18th Implementation Lecture, rule compliance is meant to be the handmaid not the mistress of justice. *Mitchell* may have forced justice to embrace the rules too closely. But *Denton* has put them in their rightful place.

Andrew P McLaughlin
Counsel for T H White Ltd in *Denton v T H White Ltd*