Costs Law Update
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- The Defendant Costs Specialists

Mitchell v News Group Newspapers Ltd

The Court of Appeal yesterday dismissed the appeal in the costs budgeting case of *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1526 (arising out of the affectionately named "Plebgate" saga).

Briefly, the underlying claim proceeded under the pilot defamation costs management scheme. This required the parties to file costs budgets 7 days before a CMC. The claimant failed to file a budget until the day before the hearing. The Master dealing with the CMC decided that, because the claimant had failed to file his costs budget in time, he was to be treated as having filed a costs budget comprising of only the applicable court fees. This was by virtue of imposing, by analogy, the sanction in this situation that is now included in the new rules for all matters subject to costs budgeting. The costs budget filed by the claimant was in the sum of £506,425. Ouch! The Master then refused to grant relief from sanctions under CPR 3.9 from her first decision. Ouch!

The Court of Appeal unanimously dismissed the appeal.

This decision is not only of crucial importance for costs budgeting purposes – fail to serve and file a budget on time and your costs will be limited to court fees only, with no real hope of relief from sanctions – it has much wider implications for the future of civil litigation.

This was the Court of Appeal's first opportunity to give guidance as to the post-Jackson approach to non-compliance with rules and the approach to adopt to relief from sanctions applications. How sympathetic are the courts now meant to be to breaches? Not very.

Giving general guidance, the Court said:

1. "It will usually be appropriate to start by considering the nature of the non-compliance with the relevant rule, practice direction or court order. If this can properly be regarded as trivial, the court will usually grant relief provided that an application is made promptly. The principle "*de minimis non curat lex*" (the law is not concerned with trivial things) applies here as it applies in most areas of the law. Thus, the court will usually grant relief if there has been no more than an insignificant failure to comply with an order: for example, where there has been a failure of form rather than substance; or where the party has narrowly missed the deadline imposed by the order, but has otherwise fully complied with its terms." – This

leaves open the issue of how minor a breach must be before it is trivial. Is one day late trivial? If so, what about two? Or three? That way madness lies (and further satellite litigation).

2. "If the non-compliance cannot be characterised as trivial, then the burden is on the defaulting party to persuade the court to grant relief. The court will want to consider why the default occurred. If there is a good reason for it, the court will be likely to decide that relief should be granted. For example, if the reason why a document was not filed with the court was that the party or his solicitor suffered from a debilitating illness or was involved in an accident, then, depending on the circumstances, that may constitute a good reason. Later developments in the course of the litigation process are likely to be a good reason if they show that the period for compliance originally imposed was unreasonable, although the period seemed to be reasonable at the time and could not realistically have been the subject of an appeal. But mere overlooking a deadline, whether on account of overwork or otherwise, is unlikely to be a good reason." - Good reasons are likely to arise from circumstances outside the control of the party in default. Bad reasons or no reasons will not result in relief.

3. "applications for an extension of time made before time has expired will be looked upon more favourably than applications for relief from sanction made after the event." – This is crucial. If you are in danger of missing a deadline, you must apply for an extension before the deadline passes.

4. "In line with the guidance we have already given, we consider that well-intentioned incompetence, for which there is no good reason, should not usually attract relief from a sanction unless the default is trivial." – Expect to see professional indemnity premiums, and professional negligence claims, soar.

5. "In the result, we hope that our decision will send out a clear message. If it does, we are confident that, in time, legal representatives will become more efficient and will routinely comply with rules, practice directions and orders. If this happens, then we would expect that satellite litigation of this kind, which is so expensive and damaging to the civil justice system, will become a thing of the past." – Yes. The message is certainly clear. The likelihood of a reduction in satellite litigation, less so.

Costs budgeting is still in its infancy but here are a few mistakes to avoid:

- **"The costs have come in on budget so there is no point challenging the amounts claimed." –** CPR 3.18 states: "In any case where a costs management order has been made, when assessing costs on the standard basis, the court will … (b) not depart from such approved or agreed budget unless satisfied that there is good reason to do so." However, budgets are set by phase. If a party has over spent on one phase of a budget (eg witness statements), they cannot move this element over to another phase where they have under spent (eg expert reports). Individual phases can be reduced even where the total is within the approved budget. With the current bill of costs

format, it is a difficult task to determine whether there has been an overspend in any given phase.

- **"The other side's proposed directions look reasonable so I will simply agree them." –** Costs budgeting and case management go hand-in-hand. You should not approve the other side's directions until you have seen their budget. Early experience suggests some courts are giving directions without first holding a CMC and without making a costs management order. It is probably sensible to make agreement to any directions conditional on the costs implications. For example: "the Claimant's draft directions can be agreed subject to their estimated costs not exceeding £50,000". In the event a subsequent budget is served exceeding this amount, you can ask for the directions to be varied to bring the costs budget down. Even if the court does not make a costs management order, you have at least flagged up at an early stage what you consider to be a proportionate costs spend.

- **"Given I hope to recover costs in this matter, it better to submit a very high budget and hope a correspondingly high budget is approved rather than submit a more modest one that means there is a risk of an overspend that cannot be recovered." –** No. Again, costs budgeting and case management go hand-in-hand. If you submit a high budget there is a very real danger a judge will give directions to force down the budget. For example, you ask for permission for 10 witnesses. You are allowed only 5. You wanted medical experts in 5 disciplines. You are limited to 3. Submitting a high budget may mean you are unable to run the matter in the way you wish (and could actually have done proportionality). This problem should not arise if the judge is of the view the budget submitted is proportionate.

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Costs Budgeting Training

GWS are currently arranging a limited number of in-house costs budgeting training sessions for defendant panel solicitors. These are designed to provide practitioners with a practical insight into this new area of law and to deliver tactical tips on staying one step ahead of the opposition.

Please contact Simon Gibbs if you would like to find out more.

Contact

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