MITCHELL – RELIEF FROM SANCTIONS

1 We believe that the decision of *Mitchell* impedes the proper administration of justice.

2 The CPR as interpreted in *Mitchell* creates a new species of sanction and forfeiture, which is something legislators could not have intended.

3 If you do not breach a procedural time limit to serve your cost budget and your opponent does miss the deadline then you are handed a windfall immunity from risk of payment of your opponent's legal costs throughout the remaining litigation. This impedes the proper administration of justice as it clearly places one party at an unfair disadvantage and more importantly is likely to result in an unfair trial.

4 Say you have a case where you obtain a liability judgment in your client's favour and you then file your client's cost budget hours late (missing a deadline). The Court subsequently orders that you are not to be paid your legal costs at all. Perhaps you are late serving a witness statement and the Court orders that your client cannot rely upon witness evidence at trial. Perhaps you are late filing an updated schedule of loss or medical report and the Court orders that your client cannot rely on the updated schedule or updated medical report at trial. The result is to go to trial at a distinct unfair disadvantage without all the evidence usually required by the Court to have a fair trial. The result is an unfair trial, which is in breach of Article 6 of the European Convention on Human Rights – Right to a Fair Trial, enshrined in UK law by The Human Rights Act 1998.

5 Where is the prejudice to the Defendant and how does the late filing of a cost budget or other document justify such an extreme and disproportionate sanction? Why should the Defendant in such a case receive a windfall saving with regards to all of the Claimant's legal costs? This simply does not make sense and is grossly unfair.

6 We agree with the recent statement in the Law Gazette: *"A Mitchell sanction, being too heavy-handed at too early a stage in the litigation, can defeat its own means (compliance with rules, practice directions and orders) and impede the proper administration of justice. Despite Andrew Mitchell MP not having gone to the Supreme Court, there must be at least a real prospect of an appeal there in some later case over the issue – possibly to be brought by the "leapfrog procedure".*

7 We are furthermore seeing the Court's time being taken up with numerous applications for relief from sanctions. This satellite litigation relates to seeking relief from sanctions and it is a direct result of the *Mitchell* interpretation of the CPR. Parties are also seeking to take tactical advantage of every single small technical breach of procedural rules or late service or filing in order by trying to get an opponent's claim struck out or disadvantaged by limiting evidence to be relied upon. Whereas, prior to *Mitchell* matters would be more likely to proceed amicably and be dealt with by consent or at the very least not be subject to a draconian order but a lighter cost penalty. We are now in a position (post *Mitchell)* where the parties' correspondence is vitriolic and they are unable to agree anything as an application and court order is required. The courts are being tested daily to make a subjective decision as to which breaches are trivial and which breaches are not. This unavoidably results in an uncertain outcome for many and ultimately a significant increase in legal costs in cases.

8 We believe that a disproportionately heavy handed approach by the Court must be an act of last resort not a first instance response to a situation. It appears the Supreme Court agrees as it has shown in the recent case of *Daejan Investments*

Limited v Benson 2013 UKSC 14 that a reasonable and proportionate response to civil rule-breaking is preferred. The Supreme Court did not strike the case out for failure by a party to comply with civil rules but instead allowed the landlords service charges to be recovered upon condition that they pay the leaseholders' legal costs (in an application to a First –tier Tribunal) and be penalised a percentage reduction in the service charges they recover. This is a refreshing and very sensible assessment of the likely prejudice suffered by the "innocent party" in the case.

9 In addition we are noting instances of judicial uncertainty or contrast. An example of this can be seen in two contrasting decisions arising from Birmingham Civil Justice Centre dealing with similar instances where costs budgets were not filed with directions questionnaires:

10 Firstly, *Porbanderwalla v Daybridge 30 January 2014*. Wherein, Worster J considered the interaction between CPR 3.13 (Filing and exchange of costs budgets) and CPR 26.3 (Directions questionnaires) alongside the approach in CPR 3.14 (failure to file a costs budget). The sanction in CPR 3.14 was not applied and parties permitted to file costs budgets in due course pursuant to court order.

11 However, soon after this followed the decision of *Burt v Linford Christie 10 February 2014.* Wherein, District Judge Lumb considered the interplay between CPR 3.13 (Filing and exchange of costs budgets) and CPR 26.3 (Directions questionnaires) alongside the approach in CPR 3.14 (failure to file a costs budget). The sanction in CPR 3.14 was ultimately applied, which is at odds with the earlier decision above.

12 The striking observation is that the same Court is not able to interpret the effect of *Mitchell* on the procedural rules and thus differ on the appropriate sanction or relief from sanction to apply.

13 The Commercial Court may be beginning to see common sense as in the case of *Rattan v UBS AG, London Branch [2014] EWHC 665 (Comm)* Mr Justice Males deprecated what he described as a "misguided piece of opportunism" in the Claimant trying to argue that a costs budget had been filed one day late by the Defendant. It was noted that in *Summit Navigation* Mr Justice Leggatt warned that the *Mitchell* ruling is not to be used as a tactical weapon.

14 It is nevertheless clear that parties in ongoing litigation are going to continue to attempt to take whatever tactical advantage they can by relying on a *Mitchell* interpretation of the rules.

15 In summary, the sea of change brought about by following *Mitchell* has created an uncertain and combative environment and resulted in an unfortunate heavy handed, unfair and disproportionate approach by the Court and has resulted in an increase in the legal costs incurred in cases. Thankfully, certain courts are starting to relent but certainty needs to prevail and clarity brought to the table. Further, justice needs to be done and needs to be seen to be done. It cannot be right or just that a man paralysed from the waist down in a road traffic accident should be deprived of a fair trial because his witness statement was one hour late.

16 The proverbial "climate of fear" cannot be permitted to remain and Rules Committee is requested to remedy matters without delay to ensure that the parties are given the opportunity of a fair trial not only in accordance with the European Convention on Human Rights but also as one of the basic principles of the English legal system; a fair trial of all the relevant issues.

Qualified one way costs shifting

17 One of the fundamental principles of the reforms is qualified one way costs shifting (QOCS) which means that if a claimant in a personal injury case is unsuccessful in the legal proceedings that other than a few exceptions, the Claimant has no costs liability to the Defendant.

18 The reason QOCS was brought in was so that claimants could pursue cases without after the event insurance (ATE), an insurance specifically designed to cover the Defendant's costs in the event of the Claimant losing.

19 Therefore a claimant injured now can proceed under a conditional fee agreement (CFA) with QOCS.

20 A claimant who is injured before 1st April 2013 could pursue a claim under a CFA with ATE.

21 Both pre-and post-reform allowed injured people to gain access to justice.

22 However there is one flaw which has not been dealt with and that is the Claimant injured before April 2013 who has a CFA backed by ATE, who for some reason has the CFA and/or ATE cancelled.

23 The cancelling of a CFA and/or ATE can happen for a number of reasons, for example a solicitors' firm closing down or closing its Personal Injury Department.

24 This then leaves the injured person and his legal advisers in somewhat of a quandary. Assuming the CFA is cancelled it therefore cannot be assigned and if the ATE is cancelled it cannot be reinstated.

25 In the above circumstances can an injured person sign a new CFA after April 2013 and have the benefit of QOCS?

26 If the injured person cannot sign a new CFA with QOCS then that injured person cannot gain access to justice as without QOCS and with no ATE insurance the injured person would be personally responsible for adverse costs if the case were unsuccessful.

27 It is therefore respectfully suggested to ensure injured people can gain access to justice that a person whose CFA and/or ATE have been cancelled should be allowed to sign a new CFA with the benefit of QOCS.

28 Sir Rupert Jackson in his reforms was not trying to prevent access to justice but an injured person who falls between the two stools of ATE and QOCS will most definitely be denied access to justice.

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17 March 2014