Tom Owen
Keating Chambers
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Practical Guidance on Relief From Sanctions after Denton

In Denton, Decadent Vapours Ltd and Utilise TDS Ltd [2014] EWCA Civ 906 ("Denton") the Court of Appeal again considered the correct approach to applications for relief from sanctions under CPR r.3.9 and clarified and amplified the decision in Mitchell v News Group Newspapers Ltd [2014] 1 W.L.R. 795 ("Mitchell").

This article gives practical guidance on the correct approach to applications for relief from sanctions following Denton; appeals and applications under CPR r.3.1(7) to vary or revoke an order imposing a sanction or refusing relief; and whether to resist or to consent to an application for relief from sanctions.

Denton – a three-stage exercise

The Court of Appeal held that courts must address an application for relief from sanctions in three stages:

> Stage 1: assess the seriousness and significance of the breach.
>
> Stage 2: consider why the default occurred.
>
> Stage 3: evaluate all the circumstances of the case, with particular importance on the need for litigation to be conducted efficiently and at proportionate cost and to enforce compliance with rules, practice directions and orders.

Although the Court of Appeal stated in Denton that its guidance should avoid the need in the future to resort to the earlier authorities on relief from sanctions, the decision in Denton did not overrule any of the previous case law nor deem it expressly to be irrelevant.

Preliminary stage: has there been a sanction?

Prior to undertaking the three-stage analysis, check whether a sanction has in fact been imposed.

An application for relief from sanctions is required for sanctions arising from, for example:

(1) automatic sanctions imposed by court orders, including unless orders; and

(2) sanctions imposed by operation of the CPR, for example:

(a) CPR r.3.14, which treats a party which has not filed its costs budget in accordance with CPR r.3.13 as having filed a budget comprising only the applicable court fees;

(b) CPR r.32.10, which imposes the automatic sanction that a party may not call a witness to give oral evidence if the witness statement of that witness is not served within the time specified by the court.

However, if no sanction is in fact imposed in respect of a breach of a court order, rule or practice direction, then no application for relief is necessary. For example:

(1) filing a costs budget without a statement of truth which complied exactly with the wording required by CPR Part 22 did not mean that the costs budget had not been filed validly pursuant to CPR r.3.13 and did not give rise to the sanction imposed by CPR r.3.14: Bank of Ireland v Philip Pank Partnership [2014] EWHC 284 (TCC);

(2) filing a costs budget verified by a statement of truth by a person who was not in fact a senior legal representative of the party did not render the costs budget a nullity nor mean that it had not been filed validly pursuant to CPR r.3.13 such that the sanction imposed by CPR r.3.14 would apply: Americhem Europe Ltd v Rakem Ltd [2014] EWHC 1881 (TCC).

Stage 1: seriousness and significance of the breach

In assessing the seriousness and significance of the breach, the court will consider the following.

(1) The court will assess the particular breach in respect of which relief is sought.

(a) Previous default in the litigation (even provisions of one particular order) will not affect the characterisation of the particular default from which relief is sought nor render serious or significant an otherwise insignificant breach.

(b) Instead, prior default may form part of the court's assessment of all the circumstances of the case at Stage 3.

(2) The most useful measure of whether a breach is serious and significant will often be determined by whether the breach:

(a) imperils a hearing date; and/or

(b) otherwise disrupts the conduct of the litigation in the proceedings in issue and on litigation more generally.

(3) However, those factors are not exhaustive. There may be serious and significant breaches which do not affect the efficient progress of the litigation, for example, failure to pay court fees.

(4) If the breach is not serious or significant, relief will usually be granted.

Stage 2: why the default occurred

The court will now consider in every case why the default occurred.

Whereas under Mitchell the court would not necessarily have to consider why the default occurred if the court found the default to be trivial, this is no longer the position. The court will consider the reason(s) for the default; although if the breach is not serious or significant it will be unnecessary to spend much time in doing so.

Therefore, the reason(s) for the default(s) should be addressed in the evidence supporting the application for relief.

The guidance in Mitchell at [41] remains good law as to whether there is a good reason for the default.

In assessing the reason(s) for the default, the court will consider the following:

(1) The more serious or significant the breach, the less likely it is that relief will be granted unless there is a good reason for it.

(2) If there is a good reason for a serious or significant breach, relief is likely to be granted.

(3) For example, if the reason why a document was not filed on time 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.

(4) 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, even though the period seemed to be reasonable at the time and could not realistically have been the subject of an appeal.

(5) However, merely overlooking a deadline, on account of being overworked or otherwise, is unlikely to be a good reason.

(6) Solicitors are expected to delegate work to others in their firm, if they are unable or unlikely to meet a deadline.

(7) Missing a deadline after proceeding in the hope of meeting it is unlikely to constitute a good reason in light of:

(a) the introduction of CPR r.3.8(4) which, provided no hearing date is put at risk, permits litigants to agree to a 28 day extension for doing an act within a specified time, with which failure to comply would otherwise impose a sanction;

(b) the clear encouragement by the Court of Appeal in Hallam Estates Ltd v Baker [2014] EWCA Civ 661 for parties to seek and reasonably to agree to in-time and prospective extensions of time prior to expiry of a deadline;

(c) the Court of Appeal's confirmation in Hallam Estates at [27] that the relief from sanctions provisions and criteria do not apply to in-time applications for extensions of time;

(d) failure to seek a prospective extension of time prior to expiry of the deadline may be seen as "*indifference to compliance*": Associated Electrical Industries Ltd v Alstom UK [2014] EWHC 430 (Comm) at [24].

(8) Pre-existing commitments which could reasonably be factored into the litigation timetable or into the execution and delegation of the matter in issue by a party's legal representatives are unlikely to constitute a good reason for default: McTear v Englehard [2014] EWHC 722 (Ch) at [76].

(9) Default caused by third parties not responsible for the conduct of the litigation, and not by the solicitors or the party to the litigation, might, depending on the circumstances, constitute a good reason: Summit Navigation Ltd v Generali Romania Asigurare Reasigurare SA [2014] EWHC 398 (Comm) at [47].

Stage 3: all the circumstances of the case

The court will consider all the circumstances of the case in deciding whether to grant relief.

In assessing all the circumstances of the case, the court will have regard to the following.

(1) The two factors of particular (but not paramount) importance are the need:

(a) for litigation to be conducted efficiently and at proportionate cost; and

(b) to enforce compliance with rules, practice directions and orders.

(2) The promptness of the application for relief is relevant.

(3) Prompt remediation of a breach is also relevant.

(4) Historic and previous defaults in the proceedings may be taken into account.

(5) It is not the function of the Jackson Reforms or the rules on relief from sanctions "*to turn rules and compliance into 'trip wires', nor into 'the mistress rather than the handmaid of justice', nor to render compliance 'an end in itself'.*"

(6) It is properly open to a court to find that a breach is significant and serious and that there is no good reason for the default, but still to grant relief in light of all the circumstances of the case; especially where the consequence of the ultimate sanction would be to bring the claim to an end or would be too severe: Chartwell Estate Agents Ltd v Fergie Properties SA [2014] EWCA Civ 506.

Appeals and applications under CPR r.3.1(7) to vary or revoke an order

An application for relief from sanctions presupposes that the sanction has been properly imposed.

If a party wishes to contend that it was not appropriate for the court to make the order or to impose the sanction in the first place, that should be:

(1) by way of appeal from the order imposing the sanction; or

(2) exceptionally, by applying under CPR r.3.1(7) to vary or revoke the order imposing the sanction.

The same applies in relation to an unsuccessful application for relief. It is not open to a party simply to make a fresh application for relief from sanctions in respect of the same sanction if the application has already been dismissed: Thevarajah v Riordan [2014] EWCA Civ 14.

As to appeals:

(1) An appeal will only be allowed pursuant to CPR r.52.11(3) if the decision of the court imposing the sanction was:

(a) wrong; or

(b) unjust because of a serious procedural or other irregularity.

(2) Successful appeals against case management decisions, including against any order imposing sanctions, are very rare. Appeal courts will uphold robust and fair case management decisions. They will not lightly interfere with them: Mitchell at [52].

As to applications under CPR r.3.1(7) to vary or revoke an order:

(1) The circumstances are limited in which an order imposing sanctions and/or an order granting or refusing relief from sanctions can be varied or revoked.

(2) The court will consider the Tibbles criteria (Tibbles v SIG [2012] 1 W.L.R. 2591), namely:

(a) whether there has been a material change of circumstances since the order was made; or

(b) whether the facts on which the original decision was made had been misstated; or

(c) whether there has been a manifest mistake by the judge in formulating the order.

The present difficulty: to resist an application for relief or not to resist?

The Court of Appeal in Mitchell had stated that relief will be granted "*more sparingly than previously*". Strictly, that approach remains. However, in light of Denton and in practice, relief is now likely to be granted more frequently than in the aftermath of Mitchell itself, not least because parties now may not contest applications for relief as often as occurred in the immediate aftermath of Mitchell.

In Denton the Court of Appeal indicated so in express terms: "*it should be very much the exceptional case where a contested application for relief from sanctions is necessary*".

However, that does not mean that:

(1) relief will now *necessarily* be granted; or that

(2) a respondent to an application for relief should *necessarily* consent to the application for relief and not oppose the application.

Whereas after Mitchell, the key issue for lawyers was how to frame and make a successful application for relief from sanctions, the key issue after Denton is likely to be in deciding which applications to resist and which to consent to.

This question poses particular difficulties for lawyers and litigants. The courts now will be more ready to penalise opportunistic and unreasonable opposition to relief applications by:

(1) ordering the offending party to pay the costs of the contested application; and/or

(2) by formally recording unreasonable opposition to a relief application, to be taken into account at the end of the litigation as misconduct under CPR r.44.11, in making costs orders against the offending party, including:

(a) if the offending party ultimately wins at trial, reducing substantially the costs recoverable from the party which had sought relief;

(b) if the offending party ultimately loses at trial, ordering it to pay costs of the proceedings on the indemnity basis; and

(c) freeing the party who had sought relief from CPR 3.18, which, when assessing costs of the proceedings, would otherwise prevent the court from departing without good reason from that party's last approved costs budget.

Conclusion

The Jackson Reforms and the reformulation of CPR r.3.9 were intended ultimately to introduce a culture of compliance. Denton has not changed that underlying rationale.

Litigants will still need to consider whether and how to make and whether to resist applications for relief from sanctions and/or whether to appeal such decisions.

The momentum in the litigation might be won or lost on a party's decision successfully to resist an application for relief, or conversely, in unsuccessfully resisting. It is crucial that lawyers and litigants make informed decisions about this. Each case is different.

Tom Owen
Keating Chambers
If you require advice or legal representation, please contact Tom's Clerks in the first instance on 020 7544 2600.

Tom's CV is available at: www.keatingchambers.co.uk/profiles/barristers/Tom_Owen.aspx

LinkedIn: uk.linkedin.com/in/tomowenbarrister/