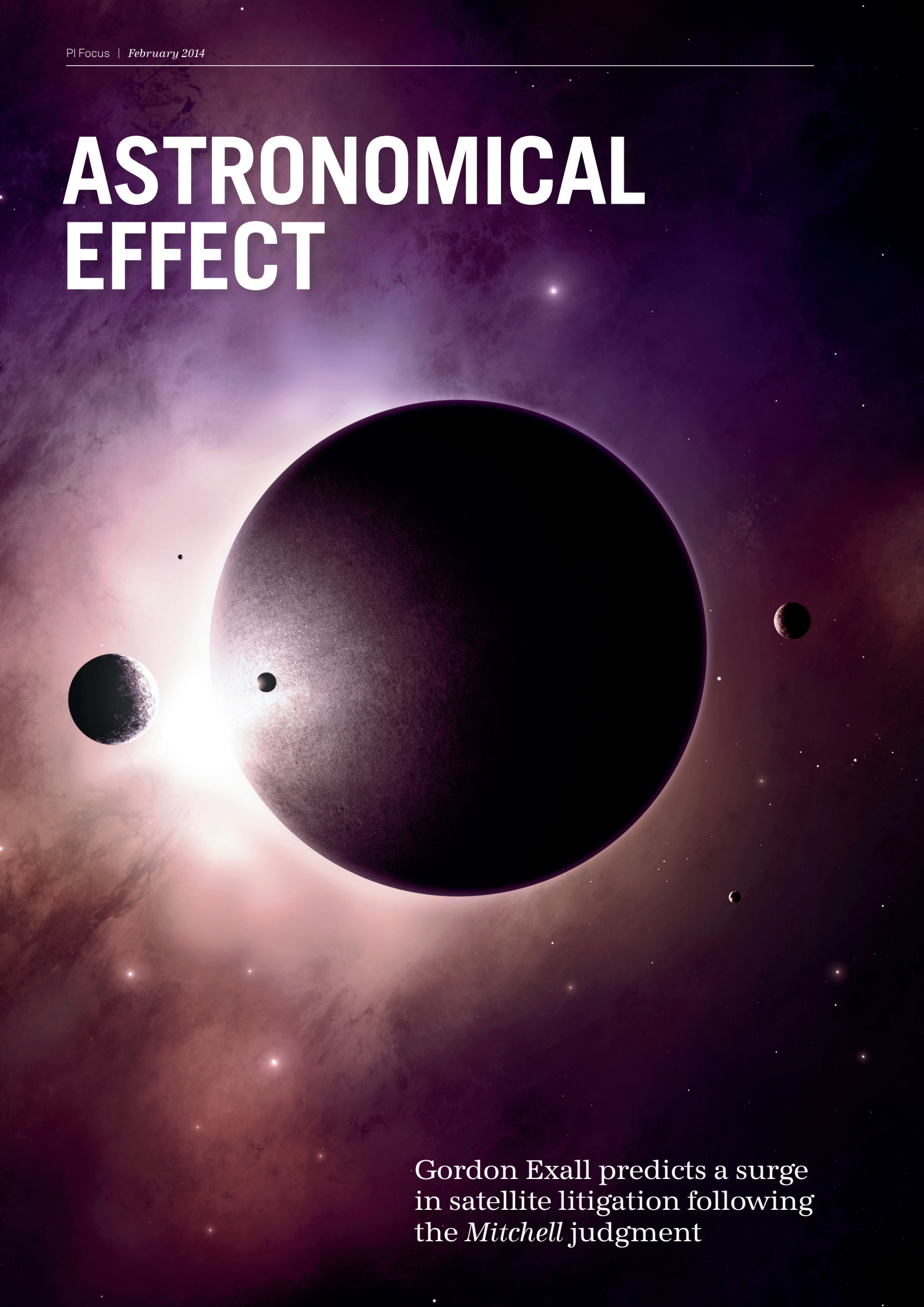
ASTRONOMICAL EFFECT



Gordon Exall predicts a surge in satellite litigation following the *Mitchell* judgment

In case anyone hasn't noticed, the civil courts have become strange places recently. Rather than being the purveyors of justice, they have become places of rampant *injustice*. A few examples, from many, being reported:

- An action struck out at trial because the trial bundle had been delivered late. (The judge had the trial bundle and had read it prior to trial. All the parties were present, ready and able to proceed, but the action was still struck out).
- A costs budget being disallowed because the statement of truth was in square brackets.
- A claimant being debarred from calling evidence. The unsigned witness statement was filed in time, the signed statement 30 days later. There was no prejudice to the defendant. The claimant would not be able to call any evidence at trial.

Courts are routinely striking out cases where, with very minor adjustments, there could be a fair trial of an action within the envisaged trial window. How has this situation come about? I have categorised it as 'mayhem' - many prefer 'madness'. In this article, I will look at how CPR 3.9 has been amended; the forgotten lessons of history; the dangers of unilaterally imposed 'sanctions', and proposals for reform.

Jackson's version of CPR 3.9

The strange thing about CPR 3.9 in its current form is that it is vastly different from that anticipated in the Jackson Report which led to its introduction. In his Final Report, Lord Jackson recommended that CPR 3.9 be amended. This part of the report is instructive. At 6.7 of the Final Report (p.397) he discusses the need for a change to CPR 3.9:

Proposed rule change.

I recommend that sub-paragraphs (a) to (i) of CPR rule 3.9 be repealed and replaced by:

'(a) the requirement that litigation should be conducted efficiently and at proportionate cost; and

(b) the interests of justice in the particular case.'

This form of words does not preclude the court taking into account all of the matters listed in the current paragraphs (a) to (i). However, it simplifies the rule and avoids the need for judges to embark upon a lengthy recitation of factors. It also signals the change of balance which I am advocating.

It is significant that the report proposed that 'the interests of justice in the particular case' be one of the two factors the court had to consider. There was no indication that the rules themselves would automatically override the interest of justice of the particular case.

What is the difference between an extension of time and relief from sanctions?

There is nothing unobjectionable in the amendments proposed in the report. The interests of justice remained a specific factor that the court would have to consider.

But compare this to the final version of the rule in CPR 3.9:

(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –

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

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

The 'interests of justice in that particular case' have disappeared.

If the revised rule was confined to cases where a party had breached a peremptory order, then it may still have been unobjectionable. However, as we shall see, there are now major advantages to a party arguing that a breach by their opponent requires 'relief from sanctions'.

Automatic striking out

This is not the first attempt by the judiciary to achieve discipline and prevent delay by imposing strict principles of procedure. Older readers will remember CCR Ord 17.r.11(9), where the rules provided for 'automatic striking out' if an action was not set down for trial within 15 months of a defence being filed.

That led to a whole series of cases in the Court of Appeal, starting with *Rastin v British Steel* 1994, 1WLR 739F. In that case, the Master of the Rolls formulated a test for reinstatement which is remarkably similar to the test set out in *Mitchell*. To get relief from sanctions, a plaintiff (in the pre-CPR world) had to show that they had acted with 'reasonable diligence' and had an 'excusable reason'. Oversight, overwork or ignorance were not excusable reasons.

Because reinstatement was so difficult, many technical arguments developed as to whether an action had, in fact, been struck out. The arguments were voluminous – and indeed I wrote a whole book on them.

This rule, which was a single rule imposing automatic striking out of an action, went to the Court of Appeal on numerous occasions. On one of these, in *Bannister v SGB* [1997] 4 All ER 129, Saville LJ was moved to comment:

1.2 The evils created by delay in the conduct of litigation were highlighted in 1988 by the report of the Civil Justice Review body, which followed three years of painstaking consultation. The review body seems never to have contemplated the creation of a blunderbuss remedy for these evils, which the automatic strike-out sanction represents. Its recommendations were designed to strengthen the powers of the court, and to increase the resources available to the court, including the provision of appropriate technology, so that it might make suitably tailored orders that would enable it maintain effective control over the timetable of an action. Such orders might, of course, include timetables in a standard form, and they might be made effective by the existence of remedial sanctions which have been carefully developed over the years, to which we refer below.

1.3 The introduction of the automatic strike-out sanction has led to a torrent of new litigation. This litigation has been devoted to two questions. The first involves an inquiry whether the action has indeed been automatically struck out. If the answer is Yes, the

second invites the court to consider whether it should be reinstated. This is a species of what the former Master of the Rolls (Bingham MR) has described as 'satellite litigation'. By this phrase he was referring to proceedings which are not concerned with resolving the real dispute between the parties, but with ancillary questions.

1.4 Although the introduction of the rule will unquestionably have had a salutary effect on the working habits of dilatory litigators, the spawning of all this satellite litigation is in total conflict with the original purposes of the rule. Actions have been delayed, sometimes for years, while these questions have been debated through the courts, at great expense to the parties, or to their insurers, or to the taxpayer through the legal aid fund. The number of Court of Appeal decisions alone runs into dozens, and as we have already said, in March of this year there were still over 100 appeals or applications for leave to appeal awaiting consideration by this court. In short the courts, including the Court of Appeal, have been flooded with extra work which has had the effect of diverting their limited resources from the determination of mainstream litigation. Judge Hague QC spoke for hundreds of judges and district judges up and down the country when he said in one of the appeals before us: 'The application before me today is yet again concerned with the ill-considered, badly drafted and much-litigated CCR Ord 17, r 11.'

The interesting thing about the *Rastin* criteria is that, when considering whether to grant relief, the courts were not concerned with the merits of the case, only with the conduct of the claimant's solicitors. The similarities with *Mitchell* are striking.

But CCR Ord. 17, r 11 ended with the rule being quite capricious, and the courts coming up with ways to find that the action had not been struck out. Applying for an extension of time amounted to an 'implied' request for a hearing date, for instance, and the exceptions lengthened. The whole situation became quite bizarre.

The debacle of 'automatic striking out', however, had a major impact on the implementation of the Civil Procedure Rules. Automatic striking out was widely recognised as a major blunder. The draftsmen of the new rules were anxious to avoid repeating the same mistake. That is why the original CPR 3.9 was so carefully calibrated. It kept an eye on the merits of the case, coupled with the Overriding Objective.

The *Mitchell* decision

Mitchell is, in many respects, *Rastin* Mark II. In fact, it could be categorised as Rastin on steroids - since it applies not to one rule, but to numerous provisions of the Rules and Practice Directions. But the one significant aspect of *Mitchell* that has not been commented on in detail is the original decision of the Master to impose the sanction of depriving the claimant of future costs. At the time, this was not part of the rules. It was a sanction imposed unilaterally by the Master, who was (it has to be said understandably) exasperated by the claimant's default in failing to lodge a costs budget in accordance with the then existing Practice Direction.

It is this practice of unilaterally imposing a sanction which is not in the rules, and then refusing relief from the sanction, that is at the heart of the problem with *Mitchell*.

The *Mitchell* criteria are wholly appropriate when the court is considering an application for relief from sanctions posed by a breach of a peremptory order. In these circumstances, the court has already considered the issue of default; considered how much time a party should have to comply, and given an opportunity to comply. A defaulting party therefore has few (if any) grounds for complaint.

However where it is wrong, is where it is being applied to every single aspect of litigation. There are now major advantages to a party stating that any failure by their opponent requires 'relief from sanctions', that *Mitchell* applies, and that relief should not be granted.

Rules as an end in themselves

The effect of *Mitchell* has been that the parties to litigation have - indeed on one view *must* - now use the rules as best they can to manoeuvre their opponent to be in a position where they are in breach. Once a breach has occurred, then the action/defence should be struck out and relief from sanctions refused.

An example of this is the decision in *Dinsdale Moorland Services Ltd v Evans* [2014] EWHC 2 (Ch), where the claimant obtained an 'unless' order against the defendants on the grounds that only one list of documents had been served, whereas each defendant should serve a copy. The defendants' solicitors had served one list in an attempt to save costs. The claimant then argued that the defendants had failed to comply with the peremptory order because the lists that were served were incomplete (the claimants having given no prior notice that they considered the original lists were inadequate).

The application failed, but it was necessary for an application for relief from sanctions to be made (which was not required). Enormous expense, and no doubt a little anxiety, were spent arguing a matter that did not touch upon the merits of the case as a whole.

We must make sure that the rules of procedure do not become ends in themselves

Satellite litigation

Satellite litigation will increase, not decrease. That is the ultimate irony of the *Mitchell* decision. It will *not* save costs; it will *not* increase the speed of litigation. The lessons of history are clear from the experience of automatic striking out. They have clearly been forgotten. Much time and effort is already being spent on arguments as to whether a breach is occurred; whether relief from sanctions is required and whether it should be granted.

The courts are regularly becoming places of injustice rather than justice. It cannot be doubted that litigants will attempt to use every aspect of the *Mitchell* decision and CPR 3.9 to their advantage. Indeed, there is an argument it is the lawyer's *duty* to do so. To fail to note that your opponent has breached a rule, requires relief from sanctions and may be struck out or debarred from adducing evidence is negligent. So litigators, keen to prove their value to their clients (and not be sued themselves), *must* make applications.

Further - and this is the real irony- the lower the merits of a litigant's case, the higher the incentive to take technical points. The problem is that there are many (previously forgotten)

sanctions in the rules in relation to witness statements, expert reports and disclosures.

Another issue is that judges are unilaterally imposing 'sanctions' whenever a party is adjudged to be in default. This is what happened in *Mitchell*, remember; there was no sanction in the rules, the Master decided to impose one.

Time extension or relief from sanctions?

What is the difference between an extension of time and relief from sanctions? This is one of the great 'open' questions of contemporary litigation. CPR 3.1(2) provides:

(2) Except where these Rules provide otherwise, the court may:

(a) extend or shorten the time for compliance with any rule, practice direction or court order (even if an application for extension is made after the time for compliance has expired);...

Some litigators are turning up at court to find the district judge stating that the application or hearing is under CPR 3.1(2), and a relief from sanction hearing is not needed. Others are finding that the judge states that any failure to comply, by the smallest amount of time, requires relief from sanctions. Often the 'sanction' is imposed there and then, and the defaulting party is invited to apply for relief (which is almost invariably refused).

Compliance issue

Why can't lawyers simply comply with the rules? This is the question posed every time a complaint is made about the *Mitchell* decision. Every single litigator knows that there are firms which *must* operate on the basis that they cannot, or will not, comply with basic rules of court. Or do not know the rules at all. There can be no other explanation for the conduct seen. The *Mitchell* decision is one, in many ways, of exasperation. To be frank, I do not think we should concern ourselves with those firms. I am concerned only with honest litigators, doing decent work in difficult situations. That is virtually every litigation solicitor I know. Why should they - alone in society - have honest mistakes or failings characterised as 'well-intentioned incompetence' (the phrase used in *Mitchell*)?

The civil litigation system exists because things go wrong in our society in all kinds of ways. We have to have a fair, just and reasonable way of resolving disputes. This must be speedy and as cost effective as possible. It can come as no surprise to anyone, however, that things go wrong in the litigation process. When this happens, the system for putting things right should also be fair, just and reasonable. We have to make sure that the rules of procedure do not become ends in themselves. It benefits no one (except a few specialist counsel) when the rules of litigation become more important than the merits of the cases themselves.

One day soon I am sure I am going to be sitting outside a court room with a bereaved family, informing them that their case is struck out because their solicitor delivered the trial bundle one day early. If this sounds ridiculous, it is no more so than some of the decisions cited above. Sending the bundle early is a breach of the rules. On the view of many judges, such a breach requires relief from sanctions. The outcome of such an application is far from certain.

The unintended consequence of *Mitchell* is the incentive it gives

to parties to either manoeuvre a breach, or raise numerous technical arguments that their opponent requires relief from sanctions, and that these should not be granted.

Access to justice

There are a number of fundamental principles upon which we should all agree.

- The function of the civil courts is to provide justice to litigants.
- Once a case is issued, one of two things is going to happen: it is going to settle, or it is going to trial.
- Every case that settles represents a 'victory' for civil society (and the Jackson reforms have helped fair settlements in some ways, because a defendant need not worry about having to pay double the costs or major indemnity premiums).
- Every case or defence that is struck out without consideration of its merits represents an affront to civil society.
- Striking out is necessary where a litigant has failed to comply with a clear order of the court.

The trouble with *Mitchell* as it is being applied is that it is depriving parties of a fair trial in circumstances where there has been no 'egregious' conduct, and where a fair trial is still possible.

Case management

As stated above, when an action is issued it will either settle or go to trial.

The tension that the courts face (although this is never made explicit) is that the parties do not actually *want* a trial. The claimant wants the defendant to settle. The defendant wants the claimant to go away (and clients who want a trial are invariably major problems in themselves). The Court Rules already give parties plenty of opportunity to settle. If the matter will not settle, then the purpose of case management is to ensure that, when the action gets to trial, the parties have put in place all the necessary steps to ensure that the trial will be fair, and carried out at a reasonable cost.

This, it has to be said, also involves a fundamental reappraisal by litigators. Most cases settle; and so many are never prepared for trial. But the only safe assumption, once proceedings are issued, is that the action will proceed to trial – and every action should be approached on this basis.

Given that case management is there to ensure that a fair trial takes place, there is something badly wrong when it is used by litigants as a device to ensure that a fair trial cannot take place, or a trial does not happen at all.

The only research available shows that costs increase. We are all taking part in an experiment

Proposals for reform

The problem at the moment is that all breaches are being treated equally, whereas - in reality - some breaches are more equal than others. There is a blurred line between cases where a retrospective extension of time is needed, and those where relief from sanctions is needed. This needs attention. In cases where default has occurred and a time limit missed:

(1) The first priority on retrospective application to extend time should be whether or not there can still be a fair trial.

(2) If a fair trial is possible, then a series of peremptory orders should be made to ensure that the action proceeds to trial as soon as possible.

(3) The *Mitchell* principles should apply to any breach of a peremptory order.

(4) There should be a presumption that a party in breach has to pay costs, assessed on an indemnity basis, forthwith.

This should focus litigators' minds on the real issues in the case. Recalcitrant lawyers will suffer significant (but not disproportionate) costs penalties, and there will be an actual saving of court time, as parties are likely to agree orders.

At the moment, *Mitchell* is being used in all kinds of circumstances where there was no obvious sanction, or the imposition of a sanction is wholly disproportional.

Effect on costs

Will costs management and the new 'tough' line save money and court resources? Put bluntly, no one knows - though many practitioners believe costs will rise. This absence of knowledge of the effects was quite express in the Jackson report, which recognised that research on case management in America indicated that it tended to increase costs. At 5.11 (p.395), it said:

The RAND Study in the USA found that case management by US federal courts tended to increase costs rather than reduce them. A research study on the effects of case management in England and Wales, conducted on a similar scale to the RAND Study, would be of considerable benefit. If any university proposes to carry out such research, it may be sensible to start after any reforms consequential upon this report have been implemented. I do not make this matter the subject of a specific recommendation. However, I draw the attention of the academic community to the need for such research.

All those sceptics who believe that Cost Management Hearings increase rather than decrease the costs of litigation may well be right. The truth is, no one knows. The only research available shows that costs *increase*. We are all taking part in an experiment.

Will the tough new rule on 'sanctions' save costs and court resources? Again, that is unknown – but history suggests that it will not. There is a real danger that the courts will become, indeed are becoming, clogged up with applications to strike out, extend time and grant relief from sanctions.

Top priority

One matter that needs to be resolved soon is the difference between an application for a retrospective application of time, and an application for relief from sanctions. Until that issue is resolved - assume the worst.

- For further writing on the potential pitfalls of post-*Mitchell* litigation and how to avoid these, see http://civillitigationbrief.wordpress.com/

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