

## CPR 3.9 - Mitchell Decisions

As at 11 June 2014

By Rupert Cohen

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## 1. Witness Statements/Expert Reports

	Name	Summary	Delay	Outcome
1.	<i>Clarke v Barclays Bank</i> [2014] EWHC 505 (Ch)	The C's appointed expert retired. The C sought a new expert but only applied to adduce his report some 9 months after the relevant deadline. C's application was granted by a DJ at first instance. Appealed by D.	9 months	<b>Relief refused</b> - (appeal allowed). The DJ failed to consider the importance of C's delay/decision to appoint a new expert and wait for the report before informing D/the court.
2.	<i>Chambers v Buckinghamshire Healthcare NHS Trust</i> [2013] EWHC (QB) Master Cook	The D applied for an extension of time to admit expert evidence just over a month after the relevant deadline passed.	6 weeks	<b>Relief refused.</b> Application was finely balanced (due to both triviality and good reason arguments based on complexity) but insufficient.
3.	<i>Newland Shipping &amp; Forwarding Ltd v Toba Trading FCZ</i> [2014] EWHC 210 (Comm)	The Ds in the action had breached a number of orders including filing witness statements late. They applied (independently) for relief from sanctions on the grounds that, shortly before the deadline, they were without representation.	N/A	<b>Relief refused.</b> D1's loss of legal representation stemmed from a dispute about legal fees. It was therefore predictable. Moreover, as to D2 and D3 their loss did not amount to a good reason where it occurred just before the deadline.
4.	<i>M A Lloyd &amp; Sons Ltd -v- PPC International Ltd</i> [2014] EWHC 41 (QB)	The C was obliged to serve witness statements following which D was to serve its statements in response. The time for both C's and D's service passed. D subsequently applied for an extension of time. At the hearing D presented a consent order agreed by the parties regarding new, agreed directions. C did not attend the hearing.	N/A	<b>Relief refused</b> – (The consent order was rejected and C was <i>debarred from relying on any witnesses</i> due to its failure to adhere to the necessary directions); the parties under r.3.8(2) were not able to change the timetable by agreement. D's application was 'unduly timid', it could not serve its w/s until it had received C's.
5.	<i>Karbhari v Ahmed</i> [2013] EWHC 4042	D applied to amend his defence and adduce a new/updated witness statement on the morning of the trial. The date by which witness statements were to be served was some 7 months previously.	7 months	<b>Relief refused.</b> Moreover, the court noted that where there was a possibility of evidential developments between the date on which witness statements were to be served and trial, the court is to make two separate orders relating to the service of witness statements.

6.	<i>Bianca Durrant v Chief Constable of Avon &amp; Somerset Constabulary</i> [2013] EWCA Civ 1624	C appealed a decision which allowed D to rely on two w/s served 1 day late and, four served 2 months late and two more 11 weeks late.		<b>Relief refused.</b> The application to admit the w/s were made too late.
7.	<i>McTear v Englehard</i> [2014] EWHC 722 (Ch)	The Defendants applied to: (1) extend time by 50 minutes to allow for the late filing of their witness statements; (2) permission to amend their defences; and, (3) to adduce what amounted to expert evidence.	50 minutes	<b>Relief refused</b> (application refused). On its own the application for the extension for the w/s was trivial <i>but</i> when placed alongside a history of non-compliance and the other two applications relief should be refused (ie following <i>Durrant</i> ).
8.	<i>JXK v West Hertfordshire</i> (2014 WL 1097092)	The Claimant sought relief from sanctions for the late filing of witness and expert evidence in respect of a claim concerning the education costs of a severely disabled 7 year old girl.	2 months and 5 days	<b>Relief granted.</b> There was a good reason for the delay in the form of difficulties which arose between the claimant's litigation friend and the education expert; difficulties which could not have been predicted when the directions were made.
9.	<i>Chartwell Estate Agents Ltd v Fergies Properties SA</i> [2014] EWCA Civ 506	C applied for an extension of time following its (and the D's) failure to exchange witness statements. Both parties were equally at fault.		<b>Relief granted.</b> Upholding the decision below, the CA held that the judge had not decided to grant relief solely on the basis of the disproportionate consequences that would follow if he did not; but rather that as well as that some of the fault was that of the Appellants.
10.	<i>Canning v Network Rail Infrastructure Ltd</i> (unreported 11 <sup>th</sup> April 2014)	The C sought to admit a supplementary witness statement at trial.		<b>Relief refused.</b> The w/s was inconsistent with the earlier one and could not be regarded as merely amplifying his previous statement within r.32.5. There was no good reason.

## 2. Statements of Case/Pleadings

	Name	Summary	Delay	Outcome
11.	<i>Samara v MBI &amp; Partners</i> [2014] EWHC 563 (QB)	The D failed to file a defence. Default judgment was entered. The D applied to set it aside some 18 months later. <i>**Mitchell criteria applied to the application to set aside Default Judgment – BUT see Mid-East Sales Limited [2014] EWHC 1457 below**</i>	18 months	<b>Relief refused.</b> CPR requires an application to be made 'promptly'. Mitchell applied (para 36); the reasons for the failure to apply were neither 'trivial' nor was there a 'good reason'.

12.	<i>Associated Electrical Engineering Ltd v Alstom</i> [2014] EWHC 430 (Comm)	The C applied for permission to serve Particulars of Claim 20 days late. The D cross-applied to have the claim struck out. C argued that delay was trivial/they could re-issue in any event.	20 days	<b>Relief refused.</b> 20 days cannot properly be construed as ‘trivial’. The emphasis the CA gave in <i>Mitchell</i> to enforcement of the CPR in order to encourage procedural discipline outweighed the judge’s conclusion that it was unjust to refuse C’s application (para 47).
13.	<i>Venum Property v Space Architecture</i> [2013] EWHC 1242 (TCC)	The C filed its Particulars of Claim 14 days after the relevant deadline. It applied for an extension of time. <i>The case was heard under the old CPR 3.9</i> but the Jackson reforms were deemed a relevant consideration.	14 days	<b>Relief refused</b> (application refused). Three factors were of importance: (i) the case was poorly pleaded; (ii) it did not appear strong, (iii) the C had waited 5 years before issuing.
14.	<i>Singh v Singh</i> [2013] EWHC 4571 (Ch)	The D appealed a decision refusing relief from a sanction imposed for continually filing a defence which was non-compliant with CPR 16.5. His original defence was incomprehensible; an unless order was subsequently granted requiring the production of a different, compliant defence. This was not adhered to.		<b>Relief refused</b> (appeal rejected). “The defaults in the second attempt to produce a defence to the claim cannot be considered minor or trivial, and there was no good excuse for them” (para 50).
15.	<i>Robert Aldington &amp; 133 Others v ELS International Lawyers LLP</i> [2013] EWHC B29 (QB)	In an action comprised of 134 Claimants, an order divided the relevant dates for service of their Particulars of Claim into three tranches. Of the second tranche 7 claimants served their Particulars of Claim 14 days out of time.	14 days	<b>Relief granted</b> – the application was made promptly and the 14 day delay would still have brought the relevant Claimants within the timings for the third tranche.
16.	<i>Hague Plant Ltd v Hague</i> [2014] EWHC 568 (Ch)	The C sought to re-amend substantial parts of its Particulars of Claim having already done so at substantial cost.	N/A	<b>C’s application rejected.</b> Allowing the application would have led to further extensive judicial time being expended at the expense of other litigants and was not proportionate.
17.	<i>Lincolnshire CC v Mouchel Business Services Ltd, R.G. Carter Building Services Ltd</i> [2014] EWHC 352 (TCC)	The C, on a without notice application, sought and received an order extending time for service of a claim form. The D applied to set aside the order.	N/A	<b>Order set-aside.</b> Neither the C’s solicitor’s absence on holiday nor a need to comply with the pre-action protocol amounted to a good reason.
18.	<i>Dany Lions Ltd v Bristol Cars Ltd</i> 05 March 2014 (unreported)	D sought to amend its defence to add a stand-alone defence based on C’s purported breach of contract two days before trial.		<b>Amendment refused.</b> It was no good enough for D to merely assert that the C would only be prejudiced in costs. Something much weightier was required.

19.	<i>Mid-East Sales Limited v United Engineering and Trading Company (Pvt) Limited, The Islamic Republic of Pakistan</i> [2014] EWHC 1457 (Comm)	The D failed to file a defence. It then applied for relief from sanctions in relation to a default judgment and from an order granting leave to serve out of the jurisdiction (the subsequent default judgment being the sanction). The case was marked by long periods of inactivity.	> 6 months	<b>Relief granted in part.</b> Application for relief in respect of the order granting service of the application was refused – the delay was too substantial. <b>Application for relief in respect of the default judgment granted</b> – CPR 13 applied and <b>Samara v MBI &amp; Partners</b> [2014] EWHC 563 (QB) distinguished.
20.	<i>Groarke v Fontaine</i> [2014] EWHC 1676 (QB)	The D sought to amend his defence to plead contributory negligence on the morning of the trial in front of a District Judge. The DJ refused. D appealed.		<b>Appeal granted.</b> There was no prejudice, waste of court resources or inconvenience to other court users. The amendment should have been allowed.

### 3. Costs Budget

	Name	Summary	Delay	Outcome
21.	<i>Michael Anthony Burt v Linford Christie</i> (2014 WL 320334)	D sent its costs budget by email to C one day late and to the court by DX 2 days late. D applied to allow its costs budget.	1 or 2 days late	<b>Relief refused.</b> Both parties knew that the budgets were required. The late filing allowed no time for agreement.
22.	<i>Bank of Ireland v Philip Pank Partnership</i> [2014] EWHC 284 (TCC)	D applied for an order that C was subject to r3.14 where its costs budget did not have a correctly signed statement of truth.	N/A	<b>Relief granted.</b> The court held (1) minor breaches in the form of a costs budget would not engage 3.14 and (2) even if it did, the breach was 'trivial' and one of 'form not substance'.
23.	<i>Mitchell v News Group Newspapers</i> [2013] EWCA Civ 1537	C failed to file its costs budget 7 days before the CMC and subsequently sought relief from sanctions.	6 days	<b>Relief rejected.</b>
24.	<i>Lotus Cars Limited v Mecanica Solutions</i> [2014] EWHC 76 (QB)	The C construed a consent order as obliging it to file a single costs budget for 3 claims. Two of the claims fell away so it re-filed a new costs budget albeit out of time. D sought to argue that first budget was wrong and second out of time.	N/A	<b>Relief granted.</b> The first budget was not obviously wrong on the terms of the consent order and, if it was, its non-compliance could be characterised as trivial.

25.	<i>Vivek Rattan v UBS AG</i> [2014] EWHC 665 (Comm)	The C agreed with the D that their costs budgets need be served 'on' or 'by' 28.02.14. The C served its budget on the 27.02.14; the D on 28.02.14. The C then applied for an order that D need to apply for relief from sanctions, the 28.02 being only 6 days from the CMC.	N/A	<b>C's application dismissed.</b> <i>CPR 3.9 deemed not applicable.</i> The judge described C's application, in light of the parties' agreement, as being a 'misguided piece of opportunism' and awarded D its indemnity costs.
26.	<i>Kim Murray, Jean Stokes v Neil Dowlman Architecture Limited</i> [2013] EWHC 872 (TCC)	The C sought an order amending a previously court approved budget to expressly exclude ATE premiums and a success fee. The C and D had used different court forms.	N/A	<b>C's application allowed.</b> <i>CPR 3.9 was held not to be applicable;</i> rather it was a highly exceptional case where subsequent amendment would be allowed.
27.	<i>Wain v Gloucester County Council</i> [2014] EWHC 1274 (TCC)	The 4 <sup>th</sup> D served its costs budget one day late (6 days before the CMC not the 7 required)	1 day	<b>Relief granted.</b> There was no prejudice, no significant impact on the timetable (distinguishing Mitchell) and the failure was 'trivial' in any event.
28.	<i>Arrowcroft (JB) Limited v Cooke &amp; Arkwright Limited</i> (in the Central London County Court, 21.03.14)	The C filed its costs budget 10 days late. The relevant associate dealing with the matter had been taken ill prior to the relevant deadline.	10 days	<b>Relief granted.</b> Notwithstanding that the solicitor had returned to work 2 days after the deadline expired and the failure to make the application promptly, sufficient good reason had been shown in light of the solicitor's illness and the lack of cover in her firm.
29.	<i>Azure East Midlands Limited v Manchester Airport Group Property Developments Ltd</i> 2014 WL 2116864	The D was two days late in filing its costs budget (rather than being filed 7 days before the relevant hearing, it was only done so 5 days before).	2 days	<b>Relief granted.</b> The judge emphasised that much depends on the circumstances of the case and found that the breach was trivial.

## 4. Compliance with Orders

	Name	Summary	Delay	Outcome
30.	<i>Summit Navigation Ltd v Generali Romania Asigurare Reasigurare SA</i> [2014] EWHC 398 (Comm)	By the terms of a consent order the C had to put up a bond as security by 4pm on 05.12.13. If not, its claim was automatically stayed. The C put up the bond at 10.01am on 06.12.13. C applied to lift stay.	< 24 hours	<b>Relief granted.</b> A 16 hour delay was clearly trivial. Moreover there was a good reason for the delay and granting the C's application was the just result.
31.	<i>Lakatamia Shipping v Nobu Su</i> [2014] EWHC 275 (Comm)	The D's were ordered to provide disclosure lists by 4.30pm failing which its defence would be struck out. They did so at 5.16pm.	45 minutes	<b>Relief granted.</b> A 45 minute delay was properly to be described as 'trivial'.

32.	<i>R (Saker) v Royal Free London NHS Foundation Trust</i> [2013] EWHC 4101 (Admin)	The 2 <sup>nd</sup> D sought to set aside an order obliging it to contribute to the costs of the 1 <sup>st</sup> D. It did so 6 weeks after the relevant date for giving a notice of objection.	6 weeks	<b>Relief refused.</b> 6 weeks was too long.
33.	<i>Thavatheva Thevarajah v John Riordan</i> [2014] EWCA Civ 14	The C appealed an order granting the D relief from sanctions for non-compliance with an unless order concerning disclosure. The D's had made a previous application for relief which had been rejected and then sought to do so again at the start of the trial which had been allowed.	2 months and 2 days ( <i>obiter</i> )	<b>Relief refused.</b> The grant of relief amounted to a second application for relief on the part of D which was impermissible. Even if it had been allowed the initial application was too late and took up too much court time.
34.	<i>SC DG Petrol Srl v Vitol Broking Ltd</i> [2013] EWHC 3920 (Comm)	C sought an extension of time and relief from sanctions on the final day of an unless order directing security for costs. The C had failed on a number of previous occasions to provide security.	N/A	<b>Relief refused.</b> The time had already been extended and the necessary security still hadn't been provided
35.	<i>Dinsdale Moorland Services Limited v Gareth Mark Evans</i> [2014] EWHC 2 (Ch)	C sought a declaration that D's case had been struck out for non-compliance with a disclosure order.	N/A	<b>Declaration refused.</b> The court held that D had provided a list and did so in good faith BUT had it not, relief would <i>not</i> have been granted.
36.	<i>Kaneira v Kaneira</i> [2014] EWHC 1165 (Ch)	The Respondents applied for an extension of time 3 days before the deadline set in a previous order for the filing of their respective defences. The issue was whether Mitchell was to apply to applications made before the deadline.		<b>Extension granted.</b> <i>Robert v Momentum Services Ltd</i> [2003] EWCA Civ 299 remained good law. Where an application is made before the relevant expiry date it is to be determined in accordance with the overriding objective.
37.	<i>Summit Asset Management Ltd v Coates</i> (2013 WL 7117507)	The D was given 15 days to file and serve his defence. Due to court delay in sealing the unless order he only received the order after 12 of the 15 days had elapsed. He emailed the court asking for extra time prior to the expiry of the time period permitted.		<b>Relief granted</b> (although treated as request for extra time/vary the original order). The delay was attributable to good reason – ie the court delay rather than an error on D's part.
38.	<i>Michael Wilson &amp; Partners Ltd v Sinclair &amp; Ors</i> [2013] EWCA Civ 1732	The D was ordered to pay a sum into court failing which its appeal would be stayed. The D only did so 5 months after the time stated in the order. D applied to lift the stay.	5 months	<b>Application refused.</b> The delay of 5 months was neither trivial nor was there a good reason for it. The stay should remain.
39.	<i>Medical Supplies and Services International Ltd v Acies Engineering Ltd</i> [2014] EWHC 1032 (QB)	The D applied for relief from sanctions for failing to comply with an unless order in respect of its disclosure obligations.		<b>Application refused.</b> The non-compliance was neither trivial nor was there a good reason for it.



40.	<i>Holloway v Transform Medical Group (CS) Ltd</i> [2014] EWHC 1641 (QB)	The applicants applied to join a group litigation 10 months after the cut-off date in an order. They sought to argue that the cut-off date was not a sanction because the applicants were not subject to the order.	10 months	<b>Relief refused.</b> It was clearly a case of relief for sanctions. To argue otherwise would be to rob the court of its power to manage group litigation. 10 months was not trivial and there was no good reason.
41.	<i>Decadent Vapours v (1) Bevan (2) Salter (3) Celtic Vapours</i> (unreported 18 February 2014)	The C sought relief from sanctions where an unless order had set a deadline for filing pre-trial checklists and the payment of the hearing fee which was missed. The C relied on the listing officer at court who informed him (incorrectly) that a cheque which arrived late would suffice. The cheque was never received.	1 month	<b>Relief refused.</b> The solicitor was an officer of the court and should not have relied on a member of the court staff. Moreover, in his W/S the solicitor indicated that he could have paid the hearing fee by the deadline for payment but was unwilling to send a member of staff to the court.

## 5. Compliance with CPR (inc. appeals out of time/costs)

	Name	Summary	Delay	Outcome
42.	<i>HMRC v McCarthy &amp; Stone (Developments) Ltd, Monarch Realisations No 1 PLC (in Administration)</i> [2014] UKUT B1 (TCC)	HMRC were obliged to serve a notice of appeal within one month of the grant of permission. They finally did so 2 months late and subsequently sought to extend time.	2 months	<b>Relief refused</b> (application dismissed). 2 months is too long in the absence of good reason. The judge also held that the tenor of Mitchell applied to tribunals.
43.	<i>Webb Resolutions Ltd -v- E Surve Limited</i> [2014] EWHC 49 (QB)	The D sought to appeal a decision. By CPR 52.3(5) the D had 7 days to renew its application to appeal. It only did so 3 weeks late and sought an extension of time which was initially granted. C appealed.	3 weeks	<b>Relief refused</b> (C's appeal granted). The court held that CPR 52.3(5) amounted to a sanction and D's application should have been assessed under CPR 3.9. 3 weeks delay is too great.
44.	<i>Forstater v Python (Monty) Pictures Ltd</i> [2013] EWHC 3759 (Ch).	The 2 <sup>nd</sup> C sought relief from sanctions to allow it to recoup its uplift from the unsuccessful party where it had served the correct information (re. a CFA) but in the wrong <i>form</i> in contravention of CPR 44.3(b).	N/A	<b>Relief granted.</b> The issue was one of form not substance and should be allowed. Mitchell belatedly applied.
45.	<i>SET Select Energy GmbH v F&amp;M Bunkering Ltd</i> [2014] EWHC 192 (Comm)	The D was 1 day late in making an application disputing the jurisdiction of court under CPR 11 following the filing of an acknowledgement of service.	1 day	<b>Relief granted.</b> D's application to extend time was granted (although it subsequently lost on the substantive ground under CPR 11).

46.	<i>Long v (1) Value Limited (2) Ocean Trade Limited</i> (SCCO, Case No JR 1306057)	The C failed to file a statement setting out the details of its success fees/uplift with a Bill of Costs. As per CPR 44.3B her solicitors were debarred from claiming them. The C applied for relief from sanctions.	N/A	<b>Relief refused.</b> Notwithstanding a delay of 3 weeks, C conceded that the non-compliance was not trivial. In the absence of 'good reason', relief was refused.
47.	<i>(1)Harrison (2) Harrison v Black Horse Limited</i> [2013] EWHC B28 (Costs)	The C applied for relief from sanctions having failed to serve a Notice of Funding on the D in relation to a number of CFAs. As per CPR 44.3B her solicitors were debarred from claiming them. The C applied for relief from sanctions.	N/A	<b>Relief refused.</b> Notice was never served and no good reason was shown.
48.	<i>Emakpose-Patrick v Lowell Portfolio Ltd</i> (Ch D) (unreported, 7 <sup>th</sup> March 2014)	The appellant sought an extension of time to appeal. She had missed a prior bankruptcy hearing and had sought to have the resultant order annulled which accounted for her delay.	2 months	<b>Relief refused</b> (A's application refused). There was a real concern that, given the amendment to r.3.9 and <i>Mitchell</i> , the delay and costs of the instant case were out of all proportion to the claim's subject matter.
49.	<i>Peter Arnett Leisure (a firm) v The Commissioners for HMRC</i> [2014] UKFTT 209 (TC)	The A sought to extend time to appeal a VAT decision out of time. It could only do so 'with the permission of the tribunal'. The application was made some 2.5 years after the relevant deadline.	2 ½ years ***tax tribunal decision***	<b>Extension granted.</b> The tribunal held that the application was to be distinguished from the new CPR 3.9 and <i>Mitchell</i> on the grounds that <i>Mitchell</i> applies primarily to the conduct of litigation and that the tribunal had express discretion. Instead it applied the old CPR 3.9 checklist.
50.	<i>Kagalovsky v Balmore Investment Ltd</i> [2014] EWHC 108 (QB)	The 8 <sup>th</sup> D sought permission to extend time for filing an appellant's notice on the last day of the time for filing.	N/A	<b>Application rejected.</b> There was no justification for the 3 week delay nor was the court satisfied that an appeal was even arguable.
51.	<i>Baho v Meerza</i> (unreported, 10 <sup>th</sup> April 2014)	The applicant filed a notice of appeal 7 days out of time.	7 days	<b>Relief refused.</b> Not only was the delay more than trivial but the original reasons put forward to support the application turned out to be false.
52.	<i>Harrogate BC v Secretary of State for Communities and Local Government</i> [2014] EWHC 1506 (Admin)	The applicant local authority sought an extension of time for the service of a planning permission application 2 days out of time.	2 days	<b>Relief granted.</b> 2 days was to be categorised as trivial and, in any event, there was a public interest where the decision of a public authority was to be challenged.

53.	<i>Hallam Estates Ltd v Baker</i> [2014] EWCA Civ 661	The appellants appealed against a decision which characterised their previous application for an extension of time to serve points in dispute in relation to costs as one for relief from sanctions even though the period for compliance had not expired.	<b>Application allowed/relief granted.</b> <b>Robert v Momentum Services Ltd</b> [2003] EWCA Civ 299, [2003] 1 W.L.R. 1577 and <b>Guidezone Ltd, Re</b> [2014] EWHC 1165 (Ch) followed. Moreover parties had a positive duty to agree reasonable extensions of time.
54.	<i>Lehman Brothers International (Europe) (In Administration), Re</i> [2014] EWHC 1687 (Ch)	The applicant applied to court for an extension of time in which to apply to court to challenge a decision made by an administrator. This was the 4 <sup>th</sup> extension sought.	<b>Application refused.</b> It was not congruent with the efficient conduct of the administration of the company in question for an extension to be granted particularly when the applicant knew of the requirements to show proof of debt as long as 20 months before.

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