The great push-back--interpreting the Mitchell principles on a case by case basis

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Dispute Resolution analysis: Which test should judges apply when lifting a stay imposed by reason of one party's compliance failings? James Watthey of Hardwicke Chambers, who acted for the claimants in Summit Navigation, cautions that every application for relief is fact specific.

Original news

Summit Navigation Ltd and another v Generali Romania and another [2014] EWHC 398 (Comm), [2014] All ER (D) 202 (Feb)

In the course of litigation regarding insurance on a vessel, the claimant companies failed to comply with an order for security for costs, providing the security on the day after the time period for doing so ran out. The defendant companies refused to accept the security. Both parties made applications to the Commercial Court. The court decided, in allowing the claimants' application to allow the stay to be lifted, that the case was not such that the principles in Mitchell v News Group Newspapers Ltd [2013] All ER (D) 314 (Nov) would apply, and that the default had been trivial.

What issues did this case raise?

The application was to lift a stay of proceedings in a marine insurance claim. It arose under a consent order dealing with the provision of security for costs. The order provided for further security to be provided by way of a bond by 4pm on 5 December 2013, and imposed an automatic stay in the event that security for costs was not provided by that time. In fact, security was offered the next morning, but it was refused by the defendants on the basis that it was late and that the action was stayed.

There was no express provision in the order saying the stay would automatically lift upon provision of security, so the question arose whether there was an implied term to that effect. If there was no such implied term, it was common ground that the claimants would have to apply to the court to have the stay lifted so that the matter could continue to trial.

In short, the question was 'what is [the] proper test that [the] judge should apply when lifting a stay imposed by reason of the [claimants] failing to provide security for costs by the stipulated deadline?'. The key questions from a *Mitchell* perspective were therefore:

- whether such a stay is a 'sanction'
- if so, whether the test for relief from that sanction involved the *Mitchell* principles
- if *Mitchell* applied, whether the breach was trivial and/or explicable by some good reason

To what extent does the judgment clarify how the court will apply the Mitchell principles?

This was key to Leggatt J's whole approach--he wanted to make clear what he thought were the limits of *Mitchell's*reach and effect. I also asked him to bear in mind that his judgment would provide useful guidance to practitioners and junior judiciary (much needed, given the horror stories I regularly hear from juniors in chambers who have returned bloodied from County Court hearings where their claims have been dismissed for trifling breaches of deadlines that had no effect on the trial timetable).

The defendants' contention was that this matter was now permanently stayed (in effect struck out), but Leggatt J thought this could not possibly have been what either Sir Rupert Jackson in his reforms or the Court of Appeal in *Mitchell* could possibly have intended.

The judge set out the following principles:

- it was necessary to apply to lift a stay in these circumstances, ie in the absence of express provision that the stay would lift automatically upon security being provided
- the stay, while in force, was a 'sanction' for the purposes of the Civil Procedure Rules 1998, SI 1998/3132, Pt 3.8 (CPR)
- the claimants would therefore have to apply for relief from sanctions under CPR, Pt 3.9
- however, that did not mean that the *Mitchell* principles applied--the court should consider the nature of the sanction imposed. This one was inherently temporary, and protective. It was wrong to treat it in the same way as a striking-out or other sanction that was by its very nature intended to be permanent

Even if the *Mitchell* principles were applied, Leggatt J said the granting of relief was inevitable. The breach was 'trivial' (although his Lordship preferred 'not material', since the word 'trivial' seemed at odds with the new culture's increased emphasis on compliance with rules and orders). There was also a good reason--the bond could not be executed on time because the underwriter's signature could not be obtained on 5 December.

Are there still any grey areas or unresolved issues lawyers will need to watch out for?

The whole nature of this area of law is that it is evolving--a new set of rules, which on their face create a minor change of emphasis, interpreted in *Mitchell* as having huge changes in practice. Stories that I hear from the County Courts suggest that it has been almost impossible to get relief from District Judges.

Everything is up for grabs. It creates, unfortunately, what barrister Gordon Exall has described as 'the litigator's dilemma'--should a respondent fight every application for relief, given the dramatic effects of the sanction in some cases--or should their response be more nuanced? It must be the latter.

What are the implications for lawyers and their clients?

This case makes clear what was perhaps not fully appreciated--*Mitchell* might have been the right result on its facts, but every case is different. Every application for relief is fact specific. In *Summit*, if the bond had been a month late, and disclosure had not taken place because of that, the result may well have been different.

The best guidance I can give is to realise this, and take every case on its merits. Analyse the type of sanction, the consequences of it, the consequence of not consenting to relief, and the costs of dealing with a contested application for relief. The judge certainly thought the defendants had failed to do that in *Summit*, and he took the opportunity of reserving his judgment so that he could warn other respondents thinking of leaping on a minor delay to gain tactical advantage.

Unlike the claimants' default itself, the defendants' response to it had a very serious impact on the litigation. The whole timetable for the proceedings was derailed, significant costs were incurred and court time was wasted to the detriment of other court users. In other words, the reliance placed on *Mitchell* in this case has

had the very consequences which the new approach enunciated by the Court of Appeal in *Mitchell* is intended to avoid.

Are there any patterns or trends emerging in the law in this area?

This decision is part of what many have identified as 'the great push back' or the 'counter revolution'. But, while recognising that the new culture requires more respect for rules, the courts have not been turned into machines. Compliance is not a means in itself, and courts should not mechanically shut out good claims on the back of a minor breach that had no impact on the trial timetable.

Interviewed by Nicola Laver.

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