Neutral Citation Number: [2014] EWCA Civ 506

Case No: A2/2014/0655

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MR JUSTICE GLOBE
[2014] EWHC 438 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/04/2014

Before :

LORD JUSTICE LAWS
LORD JUSTICE SULLIVAN
and
LORD JUSTICE DAVIS

- -

Between :

CHARTWELL ESTATE AGENTS LIMITED	**Claimant/ Respondent**
- and -	
(1) FERGIES PROPERTIES SA **(2) HYAM LEHRER**	**Defendants/ Appellants**

- -
- -

MR ROBERT DEACON (instructed by **Blake Lapthorn**) for the **Appellants.**
MR MICHELE DE GREGORIO (instructed by **SGH Martineau LLP**) for the **Respondent.**

Hearing date: 3 April 2014

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Approved Judgment

Lord Justice Davis:

Introduction

1. This is another appeal from a decision relating to relief from sanction under CPR 3.9. The context is failure to serve witness statements within the time specified by a prior court order. In the present case Globe J decided to grant relief from sanction. The defendants have appealed, with leave granted by Lewison LJ, against his order of 18 February 2014 to that effect. At the conclusion of the argument before us, the court announced that the appeal would be dismissed, for reasons to be given in writing subsequently. These are my reasons for being party to that decision.

Background Facts

2. The nature of the underlying dispute between the parties was this.

3. The claimant ("Chartwell") is a company providing estate agency services, operating from Mayfair, Central London. The first defendant ("Fergies") is a company incorporated in Panama. At the relevant times it was registered proprietor of a property in Wilton Crescent, Knightsbridge, London SW1. The second defendant is a solicitor.

4. It is claimed that a company called Messila Residential Limited ("Messila"), acting as agent for Fergies, notified Chartwell that the property in question was for sale and invited Chartwell to find a buyer. Chartwell then invited a sub-agent, Solid Foundations, to assist in the process: and they located a Mr Radovan Vitek as a prospective purchaser.

5. Thereafter Mr Vitek, through his agents or intermediaries, made a number of proposals which Chartwell communicated to Fergies via Messila.

6. A provisional agreement to buy the property for the sum of £27.5 million was reached. This was communicated by Chartwell to Messila on 11 May 2012, together with Chartwell's Agency Agreement incorporating the terms of its business. A fee of 1.5% plus VAT was indicated.

7. The Agency Agreement was returned by Messila on behalf of Fergies to Chartwell on 14 May 2012. It had been dated and signed by Mr Lehrer as being "duly authorised" on behalf of Fergies. The document was then countersigned on behalf of Chartwell.

8. Mr Vitek subsequently withdrew from the proposed purchase. The property, however, remained on the market; and subsequently Mr Vitek made a further offer to Fergies to buy the property for £25 million. This was accepted. The matter proceeded and it seems that the property was sold to Mr Vitek at that price, the transaction being completed on 22 April 2013.

9. Chartwell claims to be entitled to commission in the sum of £450,000 including VAT on that sale. It relies upon the terms of the Agency Agreement (and also on what was said previously to have been agreed orally) in that regard. It further claims that Mr Lehrer was also liable, on a joint and several basis, by reason of the terms of business forming part of the Agency Agreement. Fergies and Mr Lehrer dispute that they have any liability. They dispute that there was any contractual obligation, in the

circumstances of the case, to make such payment. They also raise, among other issues, what are said to be breaches of s.18 of the Estate Agents Act 1979 and various other matters.

The course of the proceedings

10. Proceedings were commenced by Chartwell by claim form issued on 8 May 2013. A defence was served on 20 May 2013 and a reply on 20 June 2013. SGH Martineau LLP ("SGHM") were and are the solicitors acting for Chartwell and Blake Lapthorn ("BL") were and are the solicitors acting for Fergies and Mr Lehrer.

11. On 1 July SGHM wrote to BL proposing various detailed directions for the future conduct of the case. On 7 August 2013 BL sent an electronic documents questionnaire, which among other things indicated the documentary searches proposed. SGHM queried the extent of these; and there was an amount of inconclusive correspondence thereafter on the matter. Some disclosure was given. There was also discussion about a timetable for exchanging witness statements. It was said by SGHM, however, that the failure to disclose relevant documents made it impossible for Chartwell to finalise its witness statements. BL disputed this. The position remained unresolved.

12. There was then a case management conference before Master Leslie on 17 October 2013. Both sides were represented by counsel. Some of the directions were agreed: others were determined by the Master. By order of that date, standard disclosure, on a retrospective basis, was ordered. No further specific disclosure was directed (or, seemingly, sought). Under the heading "Witness Statements of Fact" this was ordered:

> "Each party shall serve on the/every other party the statements of all witnesses of fact and any notice relating to evidence on whom it intends to rely.
>
> There shall be simultaneous exchange of such statements by no later than 4 p.m. on 22 November 2013."

This was therefore the first occasion on which the court had given a direction as to service of witness statements. We were told that that particular time limit for exchange had in fact been agreed. In addition a trial window of March, April or May 2014, with a time estimate of four days, was indicated by the order. Subsequently, the case was fixed for trial in a trial window commencing 29 April 2014.

13. After that order had been made, there continued to be disputes about disclosure. SGHM were pressing BL for more disclosure from the defendants, including disclosure of the conveyancing file and of relevant documents of Messila. BL disputed that there were any more documents requiring disclosure. There was no agreement on this and, so far as the conveyancing file was concerned, BL in due course sought to impose (on the face of it, rather surprising) prohibitions on copying documents from such file. An application for specific disclosure was threatened by SGHM.

14. SGHM continued to maintain the stance that Chartwell could not finalise its witness statements for exchange in the absence of proper disclosure. On 20 November 2013 BL sent an email querying whether SGHM intended to seek an extension of time for service of evidence.

15. In the result, 22 November 2013 came and went without either side serving any witness statements. Neither side sought an extension of time from the court.

16. Instead, the correspondence with regard to further disclosure dragged on. On a number of occasions in the course of the exchanges SGHM proposed a mutual extension of time for exchange of witness statements: with no direct response being given by BL. SGHM also again threatened to make an application for specific disclosure. BL requested them to refrain from doing so.

17. Eventually, on 16 January 2014 BL gave an amount of the disclosure being sought, whilst repeating their view that the documents in question were not relevant to the matters in dispute. By their letter of that date they also made reference to CPR 32.10 and CPR 3.9 and, among other things, said:

> "….applying the *Mitchell* principles we don't see that there are any grounds for permission to be given. That is the position as we see it, and we should be grateful if you would please confirm what your intentions are."

18. SGHM responded by proposing a draft consent order extending the time for service of witness statements by each side. By letter of 21 January 2014 BL stated:

> "We would have been ready to exchange witness statements on 22 November 2013 in accordance with the Directions set by the court, however, we did not finalise our statements at the time because you stated that you would not be in a position to exchange witness evidence by that date."

The letter made further reference to CPR 32.10 and CPR 3.9, and said that it must be a matter for the court to decide. The letter concluded in this way:

> "We shall finalise our client's witness evidence and, subject to any order the court may make, will be in a position to exchange statements by the end of this week. We await service of your application together with any supporting evidence."

19. On 27 January 2014 an application notice was issued on behalf of Chartwell. It among other things sought an extension of time for exchange of witness statements to 10 February 2014; provision for supplementary statements, in the event of further disclosure; and in addition asked that relief be given to "the parties" from sanction under CPR 3.9 for failure to exchange witness statements by 22 November 2013, alternatively that "the parties" have permission under CPR 32.10 to rely upon the evidence of those witnesses whose statements were served by 10 February 2014.

20. The application was accompanied by a very detailed witness statement from the senior associate at SGHM having the conduct of the litigation on behalf of Chartwell.

It exhibited the relevant correspondence. Complaint was made that BL had been uncooperative, if not positively obstructive, with regard to disclosure: and indeed it was explained that further disclosure was still being sought. A no less detailed witness statement was put in by a partner of BL, rebutting the allegations of obstructiveness and maintaining that the further documentation sought was not relevant. That statement also dealt with the various directions sought by SGHM. As to the claim for relief under CPR 3.9 and CPR 32.10, the witness statement shortly said:

> "Our position on this is that it is a matter for the court to decide."

21. In the event, that stance shifted into one of positive opposition to relief from sanction being granted by the time of the hearing of the application, which took place before Globe J on 18 February 2014.

The legal framework

22. The rules of particular relevance for present purposes are as follows.

23. CPR 32.10 is in these terms:

> "If a witness statement or a witness summary for use at trial is not served in respect of an intended witness within the time specified by the court, then the witness may not be called to give oral evidence unless the court gives permission."

CPR 3.1(2)(a) provides:

> "Except where these Rules provide otherwise, the court may -
> (a) extend … 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)".

CPR 3.8(1) and (3) state:

> "(1) Where a party has failed to comply with a rule, practice direction or court order, any sanction for failure to comply imposed by the rule, practice direction or court order has effect unless the party in default applies for and obtains relief from the sanction."

(Rule 3.9 sets out the circumstances which the court will consider on an application to grant relief from a sanction.)

> ….
>
> "(3) Where a rule, practice direction or court order –
> (a) requires a party to do something within a specified time, and
> (b) specifies the consequences of failure to comply,

> the time for doing the act in question may not be extended by agreement between the parties".

CPR 3.9(1), as substituted by the Civil Procedure (Amendment) Rules 2013, states:

> "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 overriding objective provisions of the Civil Procedure Rules (themselves revised by the Civil Procedure (Amendment) Rules 2013) are too familiar to require repetition here.

24. It can therefore be seen that CPR 32.10 provides its own sanction for failure to serve a witness statement within the time specified by the court: that is, that the witness may not be called to give oral evidence unless the court gives permission. Since the rules have determined the applicable sanction (unless the court gives permission) there can accordingly be no available argument that the sanction prospectively to be imposed is of itself unjust or disproportionate. As stated in paragraph 45 of *Mitchell* (cited below):

> "On an application for relief from a sanction, therefore, the starting point should be that the sanction has been properly imposed and complies with the overriding objective."

The question thus is not whether the sanction prescribed by CPR 32.10 is of itself disproportionate or unjust but whether the sanction should be disapplied in the particular case.

25. For this purpose, the phrase "unless the court gives permission" as contained in CPR 32.10 cannot, in my view, be applied in a free-standing way, leaving the exercise of judicial discretion at large. In deciding whether to give permission, the court has to have regard to and give effect to other relevant rules such as CPR 3.1. It also seems to me inescapable that, for this purpose, the court must likewise give effect to CPR 3.8 and CPR 3.9: just because CPR 32.10 is demonstrably imposing a sanction in the event of failure to serve a witness statement within the time specified.

26. I observe that in the notes to CPR 32.10 in the White Book (2014 ed.) it is suggested that:

> "However, where before trial a party requests the court to exercise its powers under r.3.1(2)(a) to extend the time for serving their witness statements it could be argued that r.3.9

> does not apply because at that stage the sanction imposed by r.32.10 has not had 'effect' within the meaning of r.3.8."

27. I can see the argument on a narrow and literal approach to the wording. But in my view it is not correct: a broader reading is called for. Were it otherwise, an application to extend time for service of a witness statement made before trial could stand on a significantly different footing from an application for extension and relief from sanction made at trial when the witness is actually to be called. In my view, the sanction provided in CPR 32.10 is to be taken as having effect once the time limit for serving the witness statement has expired. It would be contrary to the overall purpose of the rules, and could lead to arbitrariness, were it otherwise.

28. As is well-known, the substituted CPR 3.9 is one of the outcomes of the Jackson Report (albeit in a form of wording not precisely reflecting the wording initially recommended in the Report itself). It was to be part of a new approach designed to change a litigation culture then perceived in many quarters to be unsatisfactory and was designed to require greater observance of rules, practice directions and orders with a view to protecting the wider interests of justice including the interests of other court users: who themselves stand to be affected in the progress of their own cases by satellite litigation, delays and adjournments occurring in other cases by reason of non-compliance. The background and underlying purpose are fully explained in Chapter 39 of the Final Report issued by Sir Rupert Jackson in December 2009 and in, for example, the 18th lecture in the Implementation Programme delivered by the Master of the Rolls, Lord Dyson, on 22 March 2013.

29. CPR 3.9 in its previous version had carried with it, it has to be said, the potential for producing widely divergent results in cases. It required consideration of "all the circumstances": but then listed nine matters required to be included in that consideration. That, no doubt, was intended to produce structured decision making. But quite what weight was to be accorded to each such factor (or any other relevant circumstance) was left to the evaluation and discretion of the individual judge in the individual case. It is, at all events, clear – by reason of the replacement of the rule in that form – that that approach had been considered no longer acceptable.

30. Black letter law certainly could be achieved in this context (perhaps the only means by which it could be achieved in this context) by making time limits in rules, practice directions and orders entirely mandatory, with no prospect of extension or relaxation thereafter. Clearly that was considered far too draconian to be acceptable. Further, it is to be gathered – and as had previously been explained by Sir Rupert Jackson – that a test prohibiting the grant of relief from sanction "save in exceptional circumstances" was also considered not acceptable.

31. In the result, it might on one view be said that, on the face of it, the new CPR 3.9 in the wording adopted has not been very specific and has not significantly added to what was in the rules already. Indeed, it has been so said: see the very interesting discussion by Professor Zuckerman in his book on Civil Procedure 3rd ed. at pages 574 ff. Thus for the purposes of deciding whether or not to grant relief, the court is still in terms required to consider "all the circumstances"; it is in terms required to "deal justly with the application" (a reflection of the overriding objective); and, further, all the circumstances are to "include" the need to consider the matters specified in (a) and (b): without – for example, by use of such words as "in particular"

– giving any obvious steer as to the importance of, or the weight to be given to, the matters so specified in (a) and (b).

32. But the interpretation of, and the approach required under, CPR 3.9 is now subject to the decision of the Court of Appeal in *Mitchell v News Group Newspapers Limited* [2014] 1 WLR 795, [2013] EWCA Civ 1537, with which all those specialising in litigation will by now be familiar. The decision is of the utmost importance. In all these cases of applications for relief from sanction the starting point has to be the terms of CPR 3.9 itself; and CPR 3.9 has itself to be read, and applied, in accordance with what is said in *Mitchell*.

33. That decision makes quite specific that the need for litigation to be conducted efficiently and at proportionate cost and the need to enforce compliance with rules, practice directions and court orders are now "to be regarded as of paramount importance and be given great weight": paragraph 36. Further, the other "circumstances of the case" referred to in CPR 3.9 are, subject to the guidance set out in the decision, to be given less weight than the two considerations specifically mentioned in the rule: paragraph 37. The emphasis thus under the new CPR 3.9 is not to be placed simply on the interests of the parties in the individual case; a wider approach is mandated, calling for protection of the position of court users generally. As is stated at paragraph 41:

> "… the need to comply with rules, practice directions and court orders is essential if litigation is to be conducted in an efficient manner."

Laxity in compliance by the parties and laxity in enforcement by the courts will accordingly not be acceptable. A tougher and more robust approach is called for.

34. Regard must of course be had to the totality of the decision in *Mitchell*. But the guidance can, I think, for present purposes be summarised as follows:

i) It is necessary to consider whether the nature of the non-compliance is such that it can be regarded as trivial.

ii) If the non-compliance is not trivial, it is necessary to consider whether there is a good reason explaining the non-compliance.

iii) The promptness (or otherwise) of an application to court for an extension of time and relief from sanction for these purposes will be material.

iv) If the non-compliance is not trivial and if there is no good reason for the non-compliance then the "expectation" is that the sanction will apply. The court has power to grant relief but, if the non-compliance is not trivial and if there is no good reason for it, the expectation is that the factors mentioned in (a) and (b) of the rule will "usually trump other circumstances".

See, in particular, paragraphs 40-41 and 58 of the judgment of the court. It is also stated (at paragraph 46):

> "The new more robust approach that we have outlined above will mean that from now on relief from sanctions should be granted more sparingly than previously."

35. One other point at this stage may be noted from *Mitchell*. It is stated in paragraph 52 of the judgment – reflecting what is recommended by Sir Rupert Jackson in his Report – that "this court will not lightly interfere with a case management decision".

36. A number of other authorities were cited to us, although it is not necessary to refer to all of them. Thus *Durrant v Chief Constable of Avon and Somerset Constabulary* [2013] EWCA Civ 1624 was a case in which the Court of Appeal, applying the approach laid down in *Mitchell*, reversed a first instance decision (made before the decision in *Mitchell*) to grant relief from sanction. That was a case involving a very late application which followed a sustained failure to comply with time limits for serving witness statements imposed by a previous "unless" order. *Thevarajah v Riordan* [2014] EWCA Civ 15 was another case in which the Court of Appeal reversed a decision to grant relief from sanction and, in addition, a decision to revoke a previous debarring order. The circumstances there were striking. A High Court Judge had actually made a debarring order against the defendants for significant failures to comply with a previous "unless" order made by a High Court Judge which had itself attached the debarring sanction. Notwithstanding that, the deputy High Court Judge then revoked the previous debarring order and granted the defendants relief from sanction on a further (and late) application made on the date of trial: thereby, when granted, necessitating an adjournment of the trial. It was wholly unsurprising that that decision was reversed by the Court of Appeal: indeed, the decision might well not have withstood scrutiny even under an application of the rules in their previous form.

The judgment

37. The judgment of Globe J, which was ex tempore, is conspicuously thorough and clear.

38. He reviewed the factual background. He set out the provisions of the relevant rules. He quoted at length from the decision in *Mitchell* and also referred to certain other authorities, including *Durrant*. He found that "both parties were at fault for what has happened": although he ascribed "greater fault" to Chartwell's solicitors, as they were the ones dissatisfied with disclosure but had failed to apply for specific disclosure either at the hearing of 17 October 2013 or prior to 22 November 2013. He also observed that no application to extend time was made until weeks after 22 November 2013. But he found that the default of Chartwell was "not to be seen in isolation". He found the attitude of the defendants' solicitors in correspondence not to have been helpful: and the approach of giving the disclosure (in January 2014) could have been adopted much earlier and more swiftly, given the repeated requests.

39. The judge found that Chartwell's non-compliance with the order of 17 October 2013 could not be regarded as trivial in the sense explained in *Mitchell*. He also rejected Chartwell's argument that there was "good reason" – viz the asserted default in disclosure by the defendants – for non-compliance. He gave two reasons: first, even absent the disclosure Chartwell could have served witness statements by the specified date and then (after subsequent disclosure) sought leave to file supplemental

statements; second, no justifiable reason had been advanced for failing to seek an extension of time prior to the specified date.

40. The judge, however, attached weight to the fact that the order was for exchange of witness statements and not for sequential service. In this regard, he made the important finding – and indeed as had been frankly conceded before him – that the defendants themselves were not in fact, notwithstanding the possible suggestion in the first paragraph of the letter of 21 January 2014, ready to serve their own witness statements on 22 November 2013. Indeed, they were not ready to do so even at 21 January 2014. "The default is therefore on both sides", as he found.

41. The judge's ultimate conclusion was encapsulated in this paragraph of his judgment:

> "39. The overriding objective requires me to deal with the case justly and at proportionate cost. The trial date remains. Both parties can exchange witness statements almost immediately, certainly within 7 days. If a relief from sanction is required, a refusal to give relief on the basis of a robust application of the new CPR 3.9 would effectively mean the end of the action. In my judgment, that would be too severe a consequence and would be an unjust result when considered against the background history, as described in this judgment; default occurring on both sides; the fact that the trial date can be maintained; and there are no significant additional cost implications if, as I intend should be the case, the cost budgets are not increased. In this regard, any additional expenditure on each side is a direct consequence of their own default. The proportionate cost of the whole action is therefore not affected by a relief from sanction."

42. In such circumstances, he granted an extension of time and relief from sanction to *both* sides; and also made certain other, essentially agreed, consequential directions for the trial. He made no order as to costs.

Submissions

43. Mr Deacon, for the defendants and Mr De Gregorio, for Chartwell put in detailed and thorough written arguments on this appeal and addressed us concisely on the issues.

44. Mr Deacon made clear that he did not dispute the judge's findings of fact. Nor did he dispute that the judge had been entitled to take into account the factors which the judge had listed. His challenge was, as he made clear, to the *weight* that the judge had given to those factors. He emphasised the approach laid down in *Mitchell* and the paramountcy of the two considerations set out in CPR 3.9. He objected that the judge had failed to adopt an appropriately robust approach in this regard and had failed to give proper effect to the decision in *Mitchell*. He criticised Chartwell and its advisers for bringing these consequences down on their own heads by their "pursuing their own agenda", as he put it, and without promptly seeking the directions of the court.

45. Mr De Gregorio, on the other hand, emphasised that this was a matter for the evaluation and discretion of the judge. He submitted that the new CPR 3.9 did not require the interests of the parties and the justice of the particular case positively to be

disregarded. He submitted further that the judge had plainly had due and proper regard to the principles set out in *Mitchell*. Mr De Gregorio also particularly relied on the finding that the defendants had themselves been found to be at fault: indeed, he emphasised that the outcome had been that relief from sanction had been granted not just to Chartwell but also to the defendants.

Disposal

46. At the conclusion of the argument I was – as I remain – of the view that the judge was entitled to decide the matter as he did.

47. The judge was justified in finding that the non-compliance on the part of Chartwell was not trivial. He also was justified in finding that there was no good reason advanced to explain the non-compliance. It is right to say and to bear in mind that this was not a case of there being no reason advanced at all. That reason really is self-evident from the contemporaneous correspondence. There is no question of styling this as a deliberate "flouting" of the rules. But that said, the correspondence shows a lack of real understanding of the requirements of the revised rules. No doubt there is sense in parties to litigation trying to sort out matters of this kind consensually. Indeed, that is to be encouraged. But here the dispute had antedated the case management conference; it had continued for weeks thereafter; and yet no application to court was made until 27 January 2014. This was tantamount to reverting to the old, and long exploded, notion of parties setting their own timetable for the conduct of court process. As rule 3.8(3) itself makes explicit, moreover, the courts' control cannot in this context be ousted by the parties' agreement. Further, as the judge himself had pointed out, Chartwell could have lodged witness statements by the specified date: even if needing to supplement them later in the light of subsequent disclosure. The default cannot be entirely explained away as justifiable by virtue of the defendants being to a degree party to it.

48. To the extent, therefore, that Mr De Gregorio challenged the judge's conclusion that no good reason was shown, I reject that challenge. Nor was I much impressed by Mr De Gregorio's extensive trawl through the correspondence in an attempt to claim the moral high ground for Chartwell. As the judge found, both sides were at fault for what happened, with greater fault to be attributed to Chartwell.

49. The judge nevertheless was still required, by the provisions of CPR 3.9, to consider "all the circumstances of the case" so as to enable him to deal with the application justly.

50. Those circumstances included the important fact that the trial date would not be lost if relief were granted and a fair trial could still be had; and the fact that no significant extra cost would be occasioned if relief were granted. But a further circumstance which the judge was, in my view, also justified in taking into account, and to which he was entitled to attribute importance, was that refusal to grant relief from the sanction stipulated in CPR 32.10 would effectively mean the end of the claim: since the burden of proof was on Chartwell to prove its case and it would have no evidence.

51. In this regard, Mr Deacon objected that the judge had erred in relying on the prospective termination of the claim as giving rise to "too severe a consequence" (in the judge's words). He submitted that was simply a consequence of the sanction

provided by CPR 32.10 itself, which is to be taken to be a proportionate sanction. I see some force in that submission. But it is to be remembered that CPR 32.10 does not provide, as the stipulated sanction, that failure to serve a witness statement by the specified time results in the pursuit of the claim or the defence, as the case may be, being struck out or debarred (unless the court grants permission). Rather, the sanction is that that particular witness may not be called (unless the court gives permission). Thus by no means in every case would the sanction for failure to serve a witness statement by the specified date result in the effective termination of the claim or defence, as the case may be. But in this case it would. Mr De Gregorio did not seek to rely in argument on Article 6 of the Convention or on any of the case law arising thereunder and I therefore express no view on any possible implications of that jurisprudence for present purposes. Nevertheless, it would be unreal, in my view, not to have regard to such a de facto consequence of termination of the claim as arises in the present case. That therefore is a relevant circumstance, in my view: and that is so even if it can forcefully be said that such a consequence was at least foreseeable in this case, in the event of non-compliance, and so should have meant that there was all the more reason to comply in the first place with the order for exchange by the stipulated date.

52. That of course, for Chartwell, would indeed be a very grave consequence. I can accept, all the same, that that cannot necessarily be regarded as, in itself, a determinative factor in favour of Chartwell. It cannot just because of the requirements laid down in *Mitchell*. What are of paramount importance, and to be accorded great weight, are the matters specified in (a) and (b) of CPR 3.9. As *Mitchell* lays down, other circumstances are ordinarily to be given less weight than those two specific considerations. Thus the fact, in any given case, that refusal to grant relief from sanction imposed by CPR 32.10 in circumstances of failure to serve witness statements within the specified time would in practice mean the end of the claim or the defence will by no means of itself necessarily warrant the grant of relief from sanction.

53. An illustration of the approach to be taken in the context of failure to serve witness statements can be found in the case of *Durrant* (cited above). That case in fact had a number of features distinguishing it from the present case. Unlike the present case, for example, the failure in that case by the defendant (the claimant had not herself defaulted) to serve the witness statements – which ultimately were provided piece-meal - followed not simply non-compliance with an initial order but further non-compliance with a subsequent specific "unless" order stipulating the sanction. Moreover, in that case the resulting applications for relief from sanction were very late, being made shortly before trial and heard on the first day of trial: thereby necessitating an adjournment when granted. The Court of Appeal, in reversing the first instance decision to grant relief from sanction, understandably emphasised the importance of adopting the approach laid down in *Mitchell.* Relief was thus refused, notwithstanding that the result would be that the defendant would be unable to call any witness evidence.

54. Mr Deacon submitted that at all events only limited weight could be attached to the potential consequential effects of refusal to grant relief from sanction. He relied on paragraph 44 of the judgment in *Durrant* for that purpose. But in my view that is a misreading of the judgment. Ms Durrant was making strong allegations of

misfeasance in public office, racial discrimination, inhumane treatment and the like against police officers. One argument raised on behalf of the defendant in support of the application for relief from sanction had been the potential effect on the careers and reputations of individuals and the police force if the officers concerned were unable to give evidence: as well as the public interest in proper scrutiny of their actions. It was those considerations which the court thought, in the circumstances of the case, could not properly "carry much weight" in deciding whether to grant relief. The court, however, was not stating the position as an invariable proposition of general application with regard to the consequences of a refusal to grant relief going beyond the specified sanction. It may also be noted, in fact, that at paragraph 55 of the judgment the court found that the defendant Chief Constable had a real prospect of successfully defending the case at trial even without witness evidence of his own.

55. I should nevertheless add that the notes to CPR 32.10 in the White Book (2014 ed.) continue to suggest that where a witness statement is served after the specified date, it would be unjust to exclude the party from adducing the evidence at trial "save in very rare circumstances" (examples given being of deliberate flouting of court orders or if an adjournment of the trial would be necessitated). In the light of the revised CPR 3.9 and the decision in *Mitchell* I think that that may state the position rather too broadly and may pay insufficient regard to the altogether more rigorous approach now required in the case of non-compliance; albeit I can accept that whether or not there has been deliberate flouting of court orders and whether or not a trial date will be required to be adjourned are most certainly circumstances to be taken into account in deciding whether permission should be given.

56. Reverting to the present case, Globe J did not, in my view, misdirect himself. He did not, moreover, decide to grant Chartwell relief from sanctions *solely* because refusal to do so would result in a disproportionately severe consequence in its being unable to pursue the claim. On the contrary, he reached his conclusion that it would be too severe a consequence when set against all the background history and the other matters listed by him.

57. In my view, that background – that is, all the circumstances of the particular case - entitled the judge in this case to depart from the expectation which otherwise ordinarily would arise. It must not be overlooked that the Court of Appeal in *Mitchell* did not say that the two factors specified in CPR 3.9 will always prevail, as a matter of weight, over any other circumstances in a case where the default is not trivial and where there is no good justification. It is true that it later stated that the expectation is that the two factors mentioned in CPR 3.9 will "usually" trump other circumstances. But it did not say that they always will. That, with respect, must be right. It must be right just because CPR 3.9 has required that all the circumstances are to be taken into account and has required that the application be dealt with justly.

58. In the present case, if relief from sanction were refused Chartwell's claim would in practice indeed come to an end. I do not think that circumstance can be entirely subordinated to the consideration that Chartwell might then have a prospective claim against its solicitors (which, ironically, would then potentially involve further satellite litigation). If, on the other hand, relief from sanction were granted, a fair trial could still be had, without any adjournment of the trial date being required and with no additional cost for the parties arising. And there was more. For one further particular factor, albeit to be coupled with the other factors listed by the judge, was the default

of the defendants. There was designed to be simultaneous exchange on 22 November 2013: but the defendants themselves (as found) were not in fact ready to exchange on that date. They did not, for example, seek to lodge at court at that time their own witness statements. In fact, their witness statements were not even finalised as at 21 January 2014, they having participated in the debate on disclosure matters in the interim. They – as much as Chartwell – also needed relief from sanction if they were to rely at trial on their witnesses. They had made no application of their own. In the event, the application eventually issued by Chartwell had sought an order in this regard relating to both parties: an order the judge in the result made. It is not, in fact, difficult to deduce that the defendants ultimately never themselves filed their own application for relief just because of the calculation that if Chartwell, as claimant on whom the burden of proof lay, was knocked out from relying on any witness evidence it would not then matter to the defendants if they were likewise knocked out. (The calculation also no doubt would have been that if Chartwell obtained relief from sanction then the defendants inevitably would also.) That, when set also in the light of the intervening correspondence, would be a most unattractive result. Overall, the judge was, in my view, entitled to attach importance to the fault of the defendants in this regard.

59. Given that, and given all the other factors, this was one of those cases in which, notwithstanding the paramount importance and the great weight to be given to the two matters specified in CPR 3.9, those two matters could reasonably be assessed as outweighed by all the other circumstances. There is, in my view, no proper basis for interfering with the judge's evaluation of the position and his exercise of discretion.

60. Mr Deacon did also, as a further ground of appeal, object to the judge's decision to make no order as to costs. He submitted that, even if he were justified in granting relief from sanction, the judge should still have ordered Chartwell to pay the defendants' costs of the application. In my view, however, the order as to costs made by the judge was, given the circumstances, well within the range of a proper exercise of discretion.

61. One of the further stated aims of the new culture evidenced in the new CPR 3.9, is the avoidance of satellite litigation. It is an unfortunate – although it is to be hoped temporary – by-product of the new rule that satellite litigation thus far seems not to have been avoided but if anything seems to have been promoted. The present case is an example. The advantages to the defendants, if their opposition to the grant of relief from sanction succeeded, would have been enormous: the entire disposal of a doubtless unwelcome, as well as costly, legal action against them. For Chartwell, on the other hand, the consequence would in practice have been the entire loss of its claim against the defendants. With the possibilities afforded by the new CPR 3.9, and when the stakes can be so high, satellite litigation such as has occurred here is therefore perhaps not wholly surprising: albeit most unfortunate. But the one sure way to circumvent such satellite litigation is for parties to comply precisely with rules, practice directions and orders: and, where that really is not capable of being done, to seek from the court the necessary extension of time and relief from sanction at the earliest moment.

62. I would also wish to repeat the point emphasised in *Mitchell* that appellate courts will not lightly interfere with a case management decision. Robust and fair case management decisions by first instance judges are to be supported. In the present

case, Globe J had directed himself correctly. Mr Deacon's submission that the judge had failed to adopt the necessary robust approach ultimately was an exercise in, as it were, self-certification. It in essence founded itself on the proposition that the judge had not been robust in the way enjoined by *Mitchell* just because the judge had not found in favour of the defendants and refused relief from sanction. That will not do. There may be cases where, although a judge purports to direct himself in accordance with *Mitchell*, his approach thereafter does not comply with it. But that is not this case. The appellate courts will not interfere if a judge has correctly directed himself, has adopted the correct approach in principle and has taken all the circumstances into account. It is also to be emphasised that the courts in considering applications under CPR 3.9 do not have and should not have as their sole objective a display of judicial musculature. The objective under CPR 3.9 is to achieve a just result, having regard not simply to the interests of the parties but also to the wider interests of justice. As has been said by the Master of the Rolls (in his 18th lecture), enforcing compliance is not an end in itself. In the well-known words of Lord Justice Bowen: "The courts do not exist for the sake of discipline". Such sentiments have not been entirely ousted by CPR 3.9, as to be interpreted and applied in the light of *Mitchell*.

63. Accordingly, the enjoinder that the Court of Appeal will not lightly interfere with a case management decision and will support robust and fair case management decisions should not be taken as applying, when CPR 3.9 is in point, only to decisions where relief from sanction has been refused. It does not. It likewise applies to robust and fair case management decisions where relief from sanction has been granted. If parties understand this then at least satellite interlocutory appeals should be avoided and at all events will get no encouragement from the appellate court.

Conclusion

64. I can see no error in the judge's approach in the present case. It cannot be said that he did not deal with this application justly in deciding to grant the parties relief from sanction. I would therefore dismiss this appeal.

Lord Justice Sullivan:

65. I agree.

Lord Justice Laws:

66. I agree that this appeal should be dismissed but I have found this case more finely balanced than my Lords. I think it important to emphasise that the result (driven of course by the particular facts) is an unusual one.