Neutral Citation Number: [2014] EWCA Civ 906

Case Numbers: A2/2014/0126; A3/2014/0767; and A3/2014/0870

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE QUEEN'S BENCH DIVISION OF THE HIGH COURT
BRISTOL DISTRICT REGISTRY: HHJ DENYER QC: CLAIM No. 7BS90560

AND ON APPEAL FROM THE CHANCERY DIVISION OF THE HIGH COURT
CARDIFF DISTRICT REGISTRY: HHJ JARMAN QC: CLAIM No. 3CF30143
MANCHESTER DISTRICT REGISTRY: HHJ HODGE QC: CLAIM No. 3MA30330

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/07/2014

A2/2014/0126 (appeal from HHJ Denyer QC's order dated 23rd December 2013)

BETWEEN:

Charles Graham Denton
Mary Denton
Roger Thomas Denton

Claimants/Respondents

v.

TH White Limited
De Laval Limited

Defendants/Appellants
Part 20 Defendants/Appellants

A3/2014/0767 (appeal from HHJ Jarman QC order dated 18th February 2014)

BETWEEN:

Decadent Vapours Limited

Claimant/Appellant

v.

(1) Joseph Bevan
(2) Jamie Salter

(3) Celtic Vapours Limited

Defendants/Respondents

A3/2014/0870 (appeal from HHJ Hodge QC's order dated 24th February 2014)
BETWEEN:

Utilise TDS Limited

Claimant/Appellant

v.

(1) Neil Cranstoun Davies
(2) Bolton Community College Corporation
(3) Watertrain Limited

Defendants/Respondents

Before:

THE MASTER OF THE ROLLS
LORD JUSTICE JACKSON
and
LORD JUSTICE VOS

- -

IN DENTON
Mr Andrew P McLaughlin (instructed by **BLM LLP**) for the **Defendant/Appellant**
Mr Richard Stead (instructed by **Burges Salmon LLP**) for the **Claimants/Respondents**

IN DECADENT
Mr Gerard Clarke and Mr Mark Vinall (instructed by **DWF LLP**) for the **Claimant/Appellant**
Mr Ben Blakemore (instructed by **Beor Wilson Lloyd**) for the **Defendants/Respondents**

IN UTILISE
Mr Vikram Sachdeva and Mr Jack Anderson (instructed by **Linder Myers LLP Solicitors**) for the **Claimant/Appellant**
Mr David Mohyuddin and Mr Ian Tucker (instructed by **Mills & Reeve LLP**) for the **2nd Defendant/2nd Respondent**

INTERVENERS
Mr David Holland QC (instructed by **Colemans-ctts LLP,** the **Bar Council** and the **Law Society**) **for the Bar Council and Law Society**
Dr Mark Friston (instructed by **the Bar Council)** for the **Bar Council**

Hearing dates: 16 and 17 June 2014

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Approved Judgment

The Master of the Rolls and Lord Justice Vos:

1. This is a joint judgement to which we have both contributed.

Introduction

2. These are three appeals (which we shall refer to as "*Denton*", "*Decadent*" and "*Utilise*") in which one or other party has sought relief from sanctions pursuant to CPR rule 3.9. This rule provides:

> "**Relief from sanctions**
>
> (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.
>
> (2) An application for relief must be supported by evidence."

We shall refer to the matters set out in sub-paragraphs (a) and (b) of rule 3.9(1), where convenient, as "factor (a)" and "factor (b)".

3. The correct approach to the application of this rule has given rise to much litigation and debate among practitioners and academics. As is well known, this court gave some guidance in its decision in *Mitchell v. News Group Newspapers Ltd* [2013] EWCA Civ 1537, [2014] 1 WLR 795 which has been the subject of criticism. In the light of this, the court invited the Bar Council and the Law Society to intervene in these appeals. We are grateful to them (as well as the representatives of the parties) for their submissions. For the reasons that we give later in this judgment, we think that the judgment in *Mitchell* has been misunderstood and is being misapplied by some courts. It is clear that it needs to be clarified and amplified in certain respects.

4. The history and purpose of the reforms that were proposed by Sir Rupert Jackson's *Review of Civil Litigation Costs: Final Report*, December 2009 (the "Jackson Report") are now also very well-known and have been rehearsed in a large number of cases. The relevant background is set out in *Mitchell*, and we do not propose to repeat it here.

The three appeals

5. *Denton* is a case in which the parties had served all their witness statements for use at trial by 27 July 2012, yet the claimant served six further statements in December 2013 one month before the date fixed for a 10 day trial. The further statements were said to be in response to a change of circumstances that had occurred in August 2013. The

judge granted the claimant relief from the automatic sanctions in CPR rule 32.10, which provides that: "[i]f a witness statement …for use at trial is not served … within the time specified by the court, then the witness may not be called to give oral evidence unless the court gives permission". As a result the trial had to be adjourned. The defendant and Part 20 defendant appeal with permission from Jackson LJ.

6. In *Decadent*, the claimant failed to comply with an order which provided that, unless it paid certain court fees by 4.00 pm on 19 December 2013, its claim would be struck out. A cheque for the full fees was sent to the court on the due date by document exchange, so that it could have been expected to arrive only one day late. In fact, the cheque was lost either in the DX or at court, and the non-payment only came to the attention of the parties when the judge mentioned it at a pre-trial review on 7 January 2014. They were paid on 9 January 2014. The judge refused relief from sanctions on 18 February 2014 and permission to appeal was granted by Davis LJ.

7. *Utilise* is a slightly more complicated case in that two breaches were under consideration. First, the claimant filed a costs budget some 45 minutes late in breach of an order which specifically made reference to the automatic sanctions in CPR rule 3.14 which provides that: "[u]nless the court otherwise orders, any party which fails to file a budget despite being required to do so will be treated as having filed a budget comprising only the applicable court fees". Secondly, the claimant was 13 days late in complying with an order requiring it to notify the court of the outcome of negotiations. The District Judge declined to grant relief from the sanctions in rule 3.14, holding that the second breach rendered the first breach, which would otherwise have been trivial, a non-trivial one. The judge on the first appeal held that, despite the fact that the District Judge had been wrong to think that there had been a previous default in filing a costs budget, there was no good reason for him to interfere with the exercise of her case management discretion. Accordingly, the judge dismissed the appeal. Lewison LJ granted permission for a second appeal to be brought.

Mitchell

8. Since *Mitchell* was decided in November 2013, there have been many first instance and appellate decisions on questions concerned with relief from sanctions. Almost all the decisions to which we have been referred have purportedly applied the guidance given in *Mitchell.*

9. The facts in *Mitchell* were that the claimant served his costs budget six days late and one day before the case/costs management conference at which it was due to be considered. The consequence was that the hearing had to be adjourned and another hearing arranged to deal with (a) the question of relief from sanctions and (b) the claimant's costs budget if relief were granted. The claimant's non-compliance caused substantial extra work and extra costs to be incurred by the defendant. It also disrupted the work of the court. The master had to vacate half a day which had been allocated to deal with asbestosis claims. She refused to grant relief from sanctions and the Court of Appeal upheld that decision. The master's decision was within the ambit of her case management discretion, so there was no proper basis upon which the Court of Appeal could set it aside.

10. At para 36 of the judgment in *Mitchell*, the court said of factors (a) and (b):

> "These considerations should now be regarded as of paramount importance and be given great weight. It is significant that they are the only considerations which have been singled out for specific mention in the rule".

11. The court continued at para 37:

> "We recognise that CPR 3.9 requires the court to consider "all the circumstances of the case, so as to enable it to deal justly with the application". The reference to dealing with the application "justly" is a reference back to the definition of the "overriding objective". This definition includes ensuring that the parties are on an equal footing and that a case is dealt with expeditiously and fairly as well as enforcing compliance with rules, practice directions and orders. The reference to "all the circumstances of the case" in CPR 3.9 might suggest that a broad approach should be adopted. We accept that regard should be had to all the circumstances of the case. That is what the rule says. But (subject to the guidance that we give below) the other circumstances should be given less weight than the two considerations which are specifically mentioned."

12. It then gave the following guidance:

> "40. We hope that it may be useful to give some guidance as to how the new approach should be applied in practice. It will usually be appropriate to start by considering the nature of the non-compliance with the relevant rule, practice direction or court order. If this can properly be regarded as trivial, the court will usually grant relief provided that an application is made promptly. The principle "*de minimis non curat lex*" (the law is not concerned with trivial things) applies here as it applies in most areas of the law. Thus, the court will usually grant relief if there has been no more than an insignificant failure to comply with an order: for example, where there has been a failure of form rather than substance; or where the party has narrowly missed the deadline imposed by the order, but has otherwise fully complied with its terms. We acknowledge that even the question of whether a default is insignificant may give rise to dispute and therefore to contested applications. But that possibility cannot be entirely excluded from any regime which does not impose rigid rules from which no departure, however minor, is permitted.
>
> 41. If the non-compliance cannot be characterised as trivial, then the burden is on the defaulting party to persuade the court to grant relief. The court will want to consider why the default occurred. If there is a good reason for it, the court will be likely to decide that relief should be granted. For example, if the reason why a document was not filed with the court was that the party or his solicitor suffered from a debilitating illness or

> was involved in an accident, then, depending on the circumstances, that may constitute a good reason. Later developments in the course of the litigation process are likely to be a good reason if they show that the period for compliance originally imposed was unreasonable, although the period seemed to be reasonable at the time and could not realistically have been the subject of an appeal. But mere overlooking a deadline, whether on account of overwork or otherwise, is unlikely to be a good reason. We understand that solicitors may be under pressure and have too much work. It may be that this is what occurred in the present case. But that will rarely be a good reason. Solicitors cannot take on too much work and expect to be able to persuade a court that this is a good reason for their failure to meet deadlines. They should either delegate the work to others in their firm or, if they are unable to do this, they should not take on the work at all. This may seem harsh especially at a time when some solicitors are facing serious financial pressures. But the need to comply with rules, practice directions and court orders is essential if litigation is to be conducted in an efficient manner. If departures are tolerated, then the relaxed approach to civil litigation which the *Jackson* reforms were intended to change will continue. We should add that applications for an extension of time made before time has expired will be looked upon more favourably than applications for relief from sanction made after the event."

Subsequent authorities

13. We shall make reference here only to the most important of the cases that followed *Mitchell*.

14. In *Adlington v. ELS International Lawyers LLP* [2013] EWHC B29 (QB); [2014] 1 Costs LR 105 there were 134 claimants in a group action. The claimants' solicitors served particulars of claim in all but seven cases by the due date specified in an unless order. In those seven cases the particulars of claim were ready in draft, but the clients were abroad on holiday and unable to sign the statements of truth. HH Judge Oliver-Jones QC granted relief from sanctions. He held that the breach was one of form rather than substance and fell into the trivial category. At para 32, the judge said:-

> "the 'nature' of non-compliance cannot, in my judgment, be divorced from consideration of the 'consequences' of non-compliance. Whether or not a failure to comply with an order is 'significant' or 'insignificant' must involve having regard to consequences. In these cases there were no adverse consequences at all, either to the Defendant or to the efficient conduct overall of this litigation; on a purely statistical basis the default affects only 6% of the claims faced by the Defendant and the granting of relief is unlikely, with robust future case management, to have any effect at all on progression of the action".

15. In *Durrant v. Chief Constable of Avon and Somerset Constabulary* [2013] EWCA Civ 1624; [2014] 2 All ER 757, the defendant was in breach of successive orders for the service of its witness statements. On 19 November 2012, Lang J ordered that statements be exchanged by 21 January 2013. Following the defendant's failure to comply, Mitting J made an unless order on 26 February 2013 requiring statements to be served by 12 March 2013. The defendant again failed to comply. Eventually, the defendant served two statements one day late and other statements subsequently. The judge granted relief from sanctions, permitting the defendant to rely on all his late statements, and then adjourned the trial so that the claimant would have time to deal with the new evidence. The Court of Appeal, applying the *Mitchell* guidance, reversed that decision. In relation to the two statements which were only one day late, Richards LJ delivering the judgment of the court said this at para 48:

> "The position concerning the two witness statements that were served only just out of time is less clear-cut. … [There follows a quotation from *Mitchell*] … As we have said, the non-compliance in relation to the two statements, taken by itself, might be characterised as trivial, as an instance where "the party has narrowly missed the deadline imposed by the order". The non-compliance becomes more significant, however, when it is seen against the background of the failure to comply with Lang J's earlier order, and the fact that Mitting J, in extending that deadline, had seen fit to specify the sanction for non-compliance".

16. In *Newland Shipping & Forwarding Ltd v. Toba Trading FZC* [2014] EWHC 210 (Comm); [2014] 2 Costs LR 279 the defendant in action 1213 failed to serve witness statements because it had not paid its solicitors and they had ceased to act. Hamblen J refused to grant relief from sanctions. The breach was not trivial, because "provision of timely witness statements was a matter of obvious importance given the tight trial timetable". Also there was no good reason for the default.

17. In *Lakatamia Shipping Co Ltd v. Su* [2014] EWHC 275 (Comm); [2014] 2 Costs LR 307, the defendant was 46 minutes late in giving disclosure. Hamblen J held that the breach was trivial and granted relief from sanctions. He also said that the defendant's previous defaults were a relevant general circumstance, but could not affect the characterisation of the breach in question. They could not convert a trivial default into a serious default.

18. In *Summit Navigation Ltd v. Generali Romania Asigurare Reasigurare SA* [2014] EWHC 398 (Comm); [2014] 2 Costs LR 367, the claimant was one day late in tendering security for the defendant's costs. Leggatt J held that the breach was trivial and granted the claimant's application for relief from sanctions. He criticised the defendant's conduct in opposing the application and ordered the defendant to pay the claimant's costs. At para 40 Leggatt J said:

> "In my view, the present case falls squarely within the category of case where the non-compliance with a court order can properly be regarded as "trivial". With the greatest respect to the Court of Appeal, I should prefer to use a different adjective, since the whole thrust of the new approach is to inculcate a

> culture of compliance with rules and orders and to dispel an attitude which trivialises even "minor" breaches. I would therefore prefer to say that the default in this case was not material. But whatever label is used, this case fits exactly one of the examples given by the Court of Appeal in *Mitchell* at [40] – namely, "where the party has narrowly missed the deadline imposed by the order, but has otherwise fully complied with its terms"."

19. In *Chartwell Estate Agents Ltd v. Fergies Properties SA* [2014] EWCA Civ 506; [2014] 3 Costs LR 588 both parties failed to serve their witness statements for several weeks after the due date. The judge held that the breaches were not trivial and there was no good reason for them. Nevertheless he granted relief from sanctions and an extension of time to both parties, noting that both parties were ready to exchange and the trial date could still be maintained. The defendant appealed. It was much in the defendant's interests for the court to refuse relief to both parties, thus effectively bringing the action to an end. The Court of Appeal dismissed the appeal, holding that, even where the breach was not trivial and there was no good reason for it, factors (a) and (b) will not always prevail. It was, in that case, just to grant relief from sanctions: the claimant's breaches had not affected the trial date or generated any significant extra cost. To refuse relief from sanctions would have brought the claim to an end. It was also a factor in the claimant's favour that the defendant had also failed to comply. Davis LJ (with whom Sullivan and Laws LJJ agreed) observed at para 62:-

> "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*."

20. In *Hallam Estates Ltd v. Baker* [2014] EWCA Civ 661, the Court of Appeal held that the *Mitchell* criteria do not apply to in-time applications for extensions of time. The court criticised the conduct of the respondent for refusing to grant a reasonable extension of time when requested to do so.

The criticisms of the Mitchell guidance

21. The principal criticisms may be summarised as follows. First, the "triviality" test amounts to an "exceptionality" test which was rejected by Sir Rupert Jackson in his report and is not reflected in the rule. It is unjustifiably narrow. Secondly, the description of factors (a) and (b) in rule 3.9(1) as "paramount considerations" gives too much weight to these factors and is inconsistent with rule 3.9 when read in accordance with rule 1.1. They should be given no more weight than all other relevant factors. It is said that the *Mitchell* approach downplays the obligation to consider "all the circumstances of the case, so as to enable [the court] to deal justly

with the application". Thirdly, it has led to the imposition of disproportionate penalties on parties for breaches which have little practical effect on the course of litigation. The result is that one party gets a windfall, while the other party is left to sue its own solicitors. This is unsatisfactory and adds to the cost of litigation through increases in insurance premiums. Fourthly, the consequences of this unduly strict approach have been to encourage (i) uncooperative behaviour by litigants; (ii) excessive and unreasonable satellite litigation; and (iii) inconsistent approaches by the courts.

Analysis and guidance

22. Before we examine the criticisms of *Mitchell*, we think it is important to undertake an analysis of rule 3.9 itself.

Analysis of Rule 3.9(1)

23. In understanding the correct approach to the grant of relief from sanctions, it is necessary to start with an examination of the text of rule 3.9(1) itself. The rule contains three elements (which are not to be confused with the three stages in the guidance that we give below). First, it states when the rule is engaged by providing that it applies "[o]n an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order". This makes it clear that the court's first task is to identify the "failure to comply with any rule, practice direction or court order", which has triggered the operation of the rule in the first place. Secondly, it provides that, in such a case, "the court will consider all the circumstances of the case, so as to enable it to deal justly with the application". Thirdly, it provides that the exercise directed by the second element of the rule shall include a consideration of factors (a) and (b).

Guidance

24. We consider that the guidance given at paras 40 and 41 of *Mitchell* remains substantially sound. However, in view of the way in which it has been interpreted, we propose to restate the approach that should be applied in a little more detail. A judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the "failure to comply with any rule, practice direction or court order" which engages rule 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate "all the circumstances of the case, so as to enable [the court] to deal justly with the application including [factors (a) and (b)]". We shall consider each of these stages in turn identifying how they should be applied in practice. We recognise that hard-pressed first instance judges need a clear exposition of how the provisions of rule 3.9(1) should be given effect. We hope that what follows will avoid the need in future to resort to the earlier authorities.

The first stage

25. The first stage is to identify and assess the seriousness or significance of the "failure to comply with any rule, practice direction or court order", which engages rule 3.9(1). That is what led the court in *Mitchell* to suggest that, in evaluating the nature of the

non-compliance with the relevant rule, practice direction or court order, judges should start by asking whether the breach can properly be regarded as trivial.

26. Triviality is not part of the test described in the rule. It is a useful concept in the context of the first stage because it requires the judge to focus on the question whether a breach is serious or significant. In *Mitchell* itself, the court also used the words "minor" (para 59) and "insignificant" (para 40). It seems that the word "trivial" has given rise to some difficulty. For example, it has given rise to arguments as to whether a substantial delay in complying with the terms of a rule or order which has no effect on the efficient running of the litigation is or is not to be regarded as trivial. Such semantic disputes do not promote the conduct of litigation efficiently and at proportionate cost. In these circumstances, we think it would be preferable if in future the focus of the enquiry at the first stage should not be on whether the breach has been trivial. Rather, it should be on whether the breach has been serious or significant. It was submitted on behalf of the Law Society and Bar Council that the test of triviality should be replaced by the test of immateriality and that an immaterial breach should be defined as one which "neither imperils future hearing dates nor otherwise disrupts the conduct of the litigation". Provided that this is understood as including the effect on litigation generally (and not only on the litigation in which the application is made), there are many circumstances in which materiality in this sense will be the most useful measure of whether a breach has been serious or significant. But it leaves out of account those breaches which are incapable of affecting the efficient progress of the litigation, although they are serious. The most obvious example of such a breach is a failure to pay court fees. We therefore prefer simply to say that, in evaluating a breach, judges should assess its seriousness and significance. We recognise that the concepts of seriousness and significance are not hard-edged and that there are degrees of seriousness and significance, but we hope that, assisted by the guidance given in this decision and its application in individual cases over time, courts will deal with these applications in a consistent manner.

27. The assessment of the seriousness or significance of the breach should not, initially at least, involve a consideration of other unrelated failures that may have occurred in the past. At the first stage, the court should concentrate on an assessment of the seriousness and significance of the very breach in respect of which relief from sanctions is sought. We accept that the court may wish to take into account, as one of the relevant circumstances of the case, the defaulter's previous conduct in the litigation (for example, if the breach is the latest in a series of failures to comply with orders concerning, say, the service of witness statements). We consider that this is better done at the third stage (see para 36 below) rather than as part of the assessment of seriousness or significance of the breach.

28. If a judge concludes that a breach is not serious or significant, then relief from sanctions will usually be granted and it will usually be unnecessary to spend much time on the second or third stages. If, however, the court decides that the breach is serious or significant, then the second and third stages assume greater importance.

The second stage

29. The second stage cannot be derived from the express wording of rule 3.9(1), but it is nonetheless important particularly where the breach is serious or significant. The

court should consider why the failure or default occurred: this is what the court said in *Mitchell* at para 41.

30. It would be inappropriate to produce an encyclopaedia of good and bad reasons for a failure to comply with rules, practice directions or court orders. Para 41 of *Mitchell* gives some examples, but they are no more than examples.

The third stage

31. The important misunderstanding that has occurred is that, if (i) there is a non-trivial (now serious or significant) breach and (ii) there is no good reason for the breach, the application for relief from sanctions will automatically fail. That is not so and is not what the court said in *Mitchell*: see para 37. Rule 3.9(1) requires that, in every case, the court will consider "all the circumstances of the case, so as to enable it to deal justly with the application". We regard this as the third stage.

32. We can see that the use of the phrase "paramount importance" in para 36 of *Mitchell* has encouraged the idea that the factors other than factors (a) and (b) are of little weight. On the other hand, at para 37 the court merely said that the other circumstances should be given "less weight" than the two considerations specifically mentioned. This may have given rise to some confusion which we now seek to remove. Although the two factors may not be of paramount importance, we reassert that they are of particular importance and should be given particular weight at the third stage when all the circumstances of the case are considered. That is why they were singled out for mention in the rule. It is striking that factor (a) is in substance included in the definition of the overriding objective in rule 1.1(2) of enabling the court to deal with cases justly; and factor (b) is included in the definition of the overriding objective in identical language at rule 1.1(2)(f). If it had been intended that factors (a) and (b) were to be given no particular weight, they would not have been mentioned in rule 3.9(1). In our view, the draftsman of rule 3.9(1) clearly intended to emphasise the particular importance of these two factors.

33. Our view on this point is reinforced by the fact that Sir Rupert recommended at paragraph 6.7 of Chapter 39 of his report that rule 3.9 should read as follows, including a factor (b) referring specifically to the interests of justice in a particular case:-

> "(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 including –
>
> (a) the requirements that litigation should be conducted efficiently and at proportionate cost; and
>
> (b) the interests of justice in the particular case."

This recommendation was rejected by the Civil Procedure Rule Committee in favour of the current version. In our opinion, it is legitimate to have regard to this significant fact in determining the proper construction of the rule. It follows that, unlike Jackson LJ, we cannot accept the submission of the Bar Council that factors (a) and (b) in the

new rule should "have a seat at the table, not the top seats at the table", if by that is meant that the specified factors are not to be given particular weight.

34. Factor (a) makes it clear that the court must consider the effect of the breach in every case. If the breach has prevented the court or the parties from conducting the litigation (or other litigation) efficiently and at proportionate cost, that will be a factor weighing in favour of refusing relief. Factor (b) emphasises the importance of complying with rules, practice directions and orders. This aspect received insufficient attention in the past. The court must always bear in mind the need for compliance with rules, practice directions and orders, because the old lax culture of non-compliance is no longer tolerated.

35. Thus, the court must, in considering all the circumstances of the case so as to enable it to deal with the application justly, give particular weight to these two important factors. In doing so, it will take account of the seriousness and significance of the breach (which has been assessed at the first stage) and any explanation (which has been considered at the second stage). The more serious or significant the breach the less likely it is that relief will be granted unless there is a good reason for it. Where there is a good reason for a serious or significant breach, relief is likely to be granted. Where the breach is not serious or significant, relief is also likely to be granted.

36. But it is always necessary to have regard to all the circumstances of the case. The factors that are relevant will vary from case to case. As has been pointed out in some of the authorities that have followed *Mitchell,* the promptness of the application will be a relevant circumstance to be weighed in the balance along with all the circumstances. Likewise, other past or current breaches of the rules, practice directions and court orders by the parties may also be taken into account as a relevant circumstance.

37. We are concerned that some judges are adopting an unreasonable approach to rule 3.9(1). As we shall explain, the decisions reached by the courts below in each of the three cases under appeal to this court illustrate this well. Two of them evidence an unduly draconian approach and the third evidences an unduly relaxed approach to compliance which the Jackson reforms were intended to discourage. As regards the former, we repeat the passage from the 18th Implementation Lecture on the Jackson reforms to which the court referred at para 38 of its judgment in *Mitchell*: "[i]t has changed not by transforming rules and rule compliance into trip wires. Nor has it changed it by turning the rules and rule compliance into the mistress rather than the handmaid of justice. If that were the case then we would have, quite impermissibly, rendered compliance an end in itself and one superior to doing justice in any case".

38. It seems that some judges are approaching applications for relief on the basis that, unless a default can be characterised as trivial or there is a good reason for it, they are bound to refuse relief. This is leading to decisions which are manifestly unjust and disproportionate. It is not the correct approach and is not mandated by what the court said in *Mitchell*: see in particular para 37. A more nuanced approach is required as we have explained. But the two factors stated in the rule must always be given particular weight. Anything less will inevitably lead to the court slipping back to the old culture of non-compliance which the Jackson reforms were designed to eliminate.

Satellite litigation and non-cooperation

39. Justifiable concern has been expressed by the legal profession about the satellite litigation and the non-cooperation between lawyers that *Mitchell* has generated. We believe that this has been caused by a failure to apply *Mitchell* correctly and in the manner now more fully explained above.

40. Litigation cannot be conducted efficiently and at proportionate cost without (a) fostering a culture of compliance with rules, practice directions and court orders, and (b) cooperation between the parties and their lawyers. This applies as much to litigation undertaken by litigants in person as it does to others. This was part of the foundation of the Jackson report. Nor should it be overlooked that CPR rule 1.3 provides that "the parties are required to help the court to further the overriding objective". Parties who opportunistically and unreasonably oppose applications for relief from sanctions take up court time and act in breach of this obligation.

41. We think we should make it plain that it is wholly inappropriate for litigants or their lawyers to take advantage of mistakes made by opposing parties in the hope that relief from sanctions will be denied and that they will obtain a windfall strike out or other litigation advantage. In a case where (a) the failure can be seen to be neither serious nor significant, (b) where a good reason is demonstrated, or (c) where it is otherwise obvious that relief from sanctions is appropriate, parties should agree that relief from sanctions be granted without the need for further costs to be expended in satellite litigation. The parties should in any event be ready to agree limited but reasonable extensions of time up to 28 days as envisaged by the new rule 3.8(4).

42. It should be very much the exceptional case where a contested application for relief from sanctions is necessary. This is for two reasons: first because compliance should become the norm, rather than the exception as it was in the past, and secondly, because the parties should work together to make sure that, in all but the most serious cases, satellite litigation is avoided even where a breach has occurred.

43. The court will be more ready in the future to penalise opportunism. The duty of care owed by a legal representative to his client takes account of the fact that litigants are required to help the court to further the overriding objective. Representatives should bear this important obligation to the court in mind when considering whether to advise their clients to adopt an uncooperative attitude in unreasonably refusing to agree extensions of time and in unreasonably opposing applications for relief from sanctions. It is as unacceptable for a party to try to take advantage of a minor inadvertent error, as it is for rules, orders and practice directions to be breached in the first place. Heavy costs sanctions should, therefore, be imposed on parties who behave unreasonably in refusing to agree extensions of time or unreasonably oppose applications for relief from sanctions. An order to pay the costs of the application under rule 3.9 may not always be sufficient. The court can, in an appropriate case, also record in its order that the opposition to the relief application was unreasonable conduct to be taken into account under CPR rule 44.11 when costs are dealt with at the end of the case. If the offending party ultimately wins, the court may make a substantial reduction in its costs recovery on grounds of conduct under rule 44.11. If the offending party ultimately loses, then its conduct may be a good reason to order it to pay indemnity costs. Such an order would free the winning party from the operation of CPR rule 3.18 in relation to its costs budget.

44. We should also make clear that the culture of compliance that the new rules are intended to promote requires that judges ensure that the directions that they give are realistic and achievable. It is no use imposing a tight timetable that can be seen at the outset to be unattainable. The court must have regard to the realities of litigation in making orders in the first place. Judges should also have in mind, when making directions, where the Rules provide for automatic sanctions in the case of default. Likewise, the parties should be aware of these consequences when they are agreeing directions. "Unless" orders should be reserved for situations in which they are truly required: these are usually so as to enable the litigation to proceed efficiently and at proportionate cost.

45. We should say something about the submissions that have been addressed to the consequences of scarce public resources. This is now sadly a fact of life, as much in litigation and in the courts as elsewhere. No judicial pronouncement can improve the position. It does, however, make it all the more important that court time is not wasted and hearings, once fixed, are not adjourned.

Denton

46. In *Denton*, the proceedings were issued as long ago as 22 November 2005 alleging breaches of contract by the defendant in the design and construction of a milking parlour which it had installed at the claimants' farm. The defendant joined the manufacturer as a Part 20 defendant.

47. On 11 October 2007 the action was stayed on terms that the defendant would pay £200,000 damages plus costs in respect of certain admitted defects, and the claimants would serve re-amended particulars of claim in respect of other disputed matters. After a three year period during which the defendant carried out certain remedial works, the stay was lifted and the litigation continued. The final formulation of the claimants' case appeared in their re-re-amended particulars of claim dated 29 October 2010.

48. On 2 April 2012, Deputy District Judge Melville-Shrieve ordered the parties to file and exchange witness statements by 8 June 2012. He gave the parties permission to call expert witnesses in three fields, namely (a) milking parlour construction and operation, (b) veterinary science and (c) quantification of loss. He ordered that the milking parlour expert reports be exchanged by 27 July 2012.

49. The parties duly served their witness statements and the reports of their milking parlour experts pursuant to that order. Mr Williams, the claimants' milking parlour expert, included in his report criticisms of the dimensions inside the milking parlour. In his view these provided inadequate space for the cows. The claimants had not pleaded that allegation and did not apply for permission to amend in order to plead it.

50. On 6 February 2013 HH Judge Denyer QC ordered that the joint statements of the milking parlour experts and the reports of the other experts should be served on various dates between March and June 2013. He gave directions for the preparation of a Scott Schedule to be completed by 29 July 2013. He directed that a 10 day trial be fixed to start on the first available date between 1 October 2013 and 28 February 2014, with a pre-trial review one to two months before trial. The court subsequently

made minor adjustments to the dates for the expert evidence and the Scott Schedule. It fixed the 10 day trial to start on 13 January 2014.

51. During late November and early December 2013 the claimants served six witness statements addressing a number of issues including the allegedly unsatisfactory spacings inside the milking parlour. Their justification for doing so at such a late stage was that in August 2013 they had modified the spacings inside the parlour and the milk yield was now much improved.

52. At the pre-trial review on 23 December 2013, the judge granted relief from the sanction contained in rule 32.10. He permitted the claimants to rely upon the six further witness statements. He adjourned the trial so that the defendant could have a proper opportunity to answer that evidence. He directed that there should be a case management conference in February 2014, in order that the court could set a new timetable for the service of factual and expert evidence. The defendant now appeals against that order.

53. In our view the judge's order was plainly wrong and was an impermissible exercise of his case management powers.

54. The judge's first task was to consider the seriousness and significance of the claimants' breach in filing new witness statements so long after they had been ordered to do so. This was a significant breach, because it caused the trial date to be vacated and therefore disrupted the conduct of the litigation. The next question was whether there was good reason for the breach. There was not, because the issue as to the spacings for the cattle had been known about since Mr Williams's first report in 2012. The effect of the modifications made in August 2013 was not a justification in itself; and even, if relevant, there was significant delay imperilling the trial caused by the claimants' failure to respond quickly to that development.

55. In the light of the answers at the first and second stage of the inquiry, it was very likely that relief would be refused. But that did not mean that the third stage did not have to be undertaken. In addressing the third stage, the judge ought to have considered all the circumstances of the case, but given particular weight to factors (a) and (b). Factor (a) militated heavily in favour of refusing relief from sanctions and holding the trial date. Factor (b) also militated strongly in favour of refusal, because the delay was a most serious or significant breach of the court's earlier orders for the exchange of witness statements, which impacted upon the orderly progress of the litigation.

56. There was very little to weigh in the balance on the other side under the heading of "all the circumstances of the case" and the need to deal with the application justly. The claimants had had ample opportunity to serve their additional evidence long before December 2013. Moreover, the judge's idea that allowing the trial to go ahead would mean conducting it on an "artificial basis" was, in our view, incorrect. It was the claimants' own fault that they had not chosen to serve such evidence earlier, and to admit such evidence at that late stage necessitated the adjournment of the 10 day trial. Six experts and numerous factual witnesses were due to attend the trial. An adjournment would result in the protraction of proceedings which had already dragged on for far too long. It would cause a waste of court resources and generate

substantial extra costs for the parties. It would cause inconvenience to a large number of busy people, who had carved out space in their diaries for the anticipated trial.

57. Accordingly, the third stage analysis ought to have weighed heavily in favour of refusing relief from sanctions. The judge's order of 23 December 2013 must, therefore, be set aside. The action must be listed for trial at the earliest practicable date in Bristol or Birmingham.

Decadent

58. Decadent Vapours Limited produces and develops vapours for electronic cigarettes. In August 2013 it issued proceedings alleging that the first defendant employee was developing, together with the second defendant, a product to compete with the claimant, using a corporate vehicle (the third defendant) for the purpose. The court gave directions leading to a pre-trial review on 7 January 2014 and a trial starting on 11 February 2014. There were various slippages on both sides.

59. On 12 December 2013 the court ordered:

> "The 1st Claimant, 1st Defendant, 2nd Defendant and 3rd Defendant having failed to file completed pre-trial checklists by the date required.
>
> 1. The claim be struck out unless the claimant files a completed pre-trial checklist, pays the £1090.00 hearing fee and the £110.00 checklist fee with the court on or before 4:00pm 19th December 2013.
>
> 2. The defence be struck out unless the defendants file completed pre-trial checklists with the court on or before 4:00pm 19th December 2013."

60. The claimant completed the pre-trial checklist in time, but did not make payment of the court fees by the appointed date. The explanation was that the claimant's then solicitors put their cheque in the DX on 19th December 2013. In the ordinary course of events, the cheque would have arrived the next morning, but in fact it never reached its destination. It is not known whether it was lost in the DX or mislaid within the court building. The mishap came to light on 7 January 2014 during the pre-trial review before HH Judge Jarman QC, at which the parties presented agreed directions including the vacation of the trial date. The judge pointed out that the claimant had not complied with the unless order, so that the claim was automatically struck out, leaving the claimant to apply for relief from the sanction, which it duly did. On 7 January 2014, the claimant's solicitor sent a second cheque for the hearing fee by recorded delivery. That cheque too was delayed in the post. Accordingly on 9 January 2014, a partner in the claimant's solicitors paid the hearing fee using his credit card.

61. The judge heard the application for relief from sanctions on 18 February 2014. He held that the claimant's failure was not trivial. After reviewing *Mitchell* and subsequent authorities, he rejected the claimant's application for relief. The action having come to an end, the judge ordered the claimant to pay the costs.

62. In our view, the judge fell into error. His first task was to consider the seriousness and significance of the claimant's failure to pay the fees. The gravamen of the claimant's conduct was (i) sending the cheque by DX on 19 December 2013, so that it would inevitably arrive one day late and (ii) running the small risk (which unfortunately materialised) that the cheque would go astray. All failures to pay court fees are serious, because it is important that litigants pay court fees on time. But some failures to pay fees are more serious than others. The failure in this case was near the bottom of the range of seriousness.

63. At the second stage, the judge ought to have considered whether there was good reason for the breach. There was not, since the solicitor knew in advance that his method of payment would inevitably give rise to a breach of the court order.

64. At the third stage, however, the judge should have concluded that factor (a) pointed in favour of relief, since the late payment of the fees did not prevent the litigation being conducted efficiently and at proportionate cost. Factor (b) also pointed in favour of the grant of relief since the breach was near the bottom of the range of seriousness: there was a delay of only one day in sending the cheque and the breach was promptly remedied when the loss of the cheque came to light. It only affected the orderly conduct of the litigation, because of the approach adopted by the defendants and the court.

65. On a consideration of all the circumstances of the case, the only reasonable conclusion in this case was to grant relief. If relief were not granted, the whole proceedings would come to an end. It is true that the claimant had breached earlier court orders (as indeed had the defendants). As discussed at paras 27 and 36 above, previous breaches of court orders may be taken into account at the third stage. Nevertheless, even taking account of the history of breaches in the *Decadent* litigation, this was not a case where, in all the circumstances of the case, it was proportionate to strike out the entire claim. In our judgment, the defendants ought to have consented to relief being granted so the case could proceed without the need for satellite litigation and delay.

66. We will therefore allow the claimant's appeal and set aside the judge's order of 18 February 2014.

Utilise

67. On 11 June 2013, the claimant issued proceedings in the Chancery Division of the High Court at Manchester, claiming declaratory and other relief concerning its shareholding in a company called Watertrain Ltd, which was the third defendant. The claimant asserted that the first and second defendants as majority shareholders had wrongfully prevented the third defendant company from allotting shares to the claimant, and had wrongfully excluded the claimant from the management of the third defendant.

68. On 9 August 2013 the court sent the parties a notice of proposed allocation to the multi-track. This required the parties to complete directions questionnaires by 9 September 2013, which they duly did. On 2 October 2013, District Judge Matharu made an order ("the October order") which included the following:

> "1. The claim is stayed until 8 November 2013 during which period the parties must attempt to settle the matter or to narrow the issues.
>
> 2. By 4.00pm on 15 November 2013 the Claimant must notify the court, in writing, of the outcome of negotiations.
>
> **IT IS RECORDED THAT** the parties have fails [sic] to file Forms H [cost budgets] in accordance with CPR 3.13 … the parties are referred to CPR 26.3(6A)
>
> 4. They shall do so by 4:00pm on 11 October 2013, in default of which the provisions of CPR 3.14 shall apply."

69. All parties filed their budgets by 11 October 2013, but in the claimant's case the budget arrived by fax at 4.45 pm which was 45 minutes late. On 18 October 2013, Mr Stephen Topping, the solicitor who was handling the matter on the claimant's behalf resigned. Mr Stephen Boyd took over the file, but did not spot that the costs budget had been lodged 45 minutes late.

70. Thereafter, discussions between the parties continued in accordance with the district judge's direction. The parties did not achieve a settlement, but they did agree to mediate. The claimant's solicitors notified the court of this fact on 28 November 2013, which was thirteen days beyond the date for such notification specified in paragraph 2 of the October order.

71. On 11 November 2013, the district judge made an order (not formally drawn up until a week later) that the claimant was in breach of paragraph 4 of the October order, with the result that rule 3.14 applied (so that the claimant would be treated as having filed a budget containing only the applicable court fees).

72. Mr Boyd received that order on 21 November 2013. He promptly issued an application for relief from sanctions on the ground that the claimant had complied with paragraph 4 of the October order. On 28 November 2013, Mr Boyd spotted that the costs budget had been filed 45 minutes late. He thereupon accepted that there had been a breach of paragraph 4. In an email to the defendants' solicitors dated 28 November 2013 and in a witness statement dated 18 December 2013 Mr Boyd contended that the claimant's breach was trivial.

73. On 2 January 2014 the district judge heard the claimant's application for relief from sanctions. She refused that application, noting that the claimant was in default in three respects: first, it had failed to file a costs budget by 9 September 2013, as required by the rules (the district judge was wrong in saying that the rules required this); secondly, it was 45 minutes late in complying with paragraph 4 of the October order; thirdly, it was in breach of paragraph 2 of the October order. The district judge held that, seen in context, the claimant's 45 minute delay in filing the costs budget was not trivial.

74. On appeal, HH Judge Hodge QC accepted that the district judge was wrong to hold that the claimant should have filed its costs budget by 9 September 2013. Nevertheless he upheld the district judge's decision. He held that, viewed in isolation, the 45 minute delay was a trivial breach, but the court was entitled to have regard to

other breaches: see *Durrant supra* at para 48. Since the claimant was in breach of paragraph 2 as well as paragraph 4 of the October order, the cumulative effect was that the 45 minute delay was not trivial. There was no good reason for the non-compliance. The claimant had not applied for relief promptly, since it did not put its application for relief on the proper basis until 18 December 2013.

75. In our view both the district judge and HH Judge Hodge were wrong.

76. At the first stage, the district judge ought to have considered that the delay in filing the costs budget in breach of the October order was neither serious nor significant. On any view, the 45 minute delay was trivial. The breach did not imperil any future hearing date or otherwise disrupt the conduct of this or other litigation.

77. Having regard to this assessment of the breach, we do not consider that the district judge needed to spend much time on either of the second or third stages in this case.

78. There was, however, no good reason demonstrated for the delay in filing a costs budget. As regards the third stage, neither factor (a) nor factor (b) pointed towards a refusal of relief for the simple reason that, as we have said, the breach did not prevent the litigation from being conducted efficiently and at proportionate cost, and did not imperil any future hearing date or otherwise disrupt the conduct of this or any other litigation.

79. At the third stage, the district judge would also have considered the fact that Mr Boyd applied for relief as soon as he became aware of the position. Both she and the judge were wrong to castigate the claimant's solicitors for the failure of the new fee earner to realise that the costs budget had been served 45 minutes late, when this was only apparent on a close inspection of the fax header details. It was also at the third stage that the district judge and the judge ought to have considered the effect of the additional breach – the failure to notify the court timeously of the outcome of negotiations. We think that they were wrong to think that this later breach of paragraph 2 of the October order, which was itself neither serious nor significant, turned what was neither a serious nor a significant breach into something worse.

80. We consider that the Defendants in *Utilise* ought to have consented to the grant of relief from sanctions. We will set aside the orders of the judge and the district judge, and make an order relieving the claimant from the sanction imposed by rule 3.14.

Conclusion

81. For the reasons that we have given, all three appeals must be allowed. It is clear that the guidance in *Mitchell* needs to be clarified and further explained. It seems that some judges have ignored the fact that it is necessary in every case to consider all the circumstances of the case (what we have characterised as the third stage). This may be the reason for the decisions in *Decadent* and *Utilise.* But other judges have adopted what might be said to be the traditional approach of giving pre-eminence to the need to decide the claim on the merits. That approach should have disappeared following the *Woolf* reforms. There is certainly no room for it in the post-*Jackson* era. It seems, however, that this approach must have been applied in *Denton.*

82. Useful amplification of the *Mitchell* guidance has already been given in some of the authorities to which we have referred at paras 14 to 20 above. But we hope, as we have said, that it will now be unnecessary to refer to earlier authorities in future and that the guidance we have given will assist in reducing the need for satellite litigation and will be conducive to a reasonably consistent judicial approach to the application of rule 3.9.

Lord Justice Jackson:

83. I am grateful to the Master of the Rolls and Vos LJ for setting out the facts of the three cases under appeal. I am also grateful for their clear and accurate summary of *Mitchell* and the post-*Mitchell* decisions. I agree that all three appeals should be allowed.

84. As the Master of the Rolls and Vos LJ state in their joint judgment, it is helpful to approach the application of rule 3.9 in three stages. I agree with what they say about the first and second stages.

85. I take a somewhat different view, however, in relation to the third stage. Rule 3.9 requires the court to consider all the circumstances of the case as well as factor (a) and factor (b). The rule does not require that factor (a) or factor (b) be given greater weight than other considerations. What the rule requires is that the two factors be specifically considered in every case. The weight to be attached to those two factors is a matter for the court having regard to all the circumstances. The word "including" in rule 3.9 means that factors (a) and (b) are included amongst the matters to be considered. No more and no less. As the Bar Council put it in their submissions, factors (a) and (b) should "have a seat at the table, not the top seats at the table". Ultimately what rule 3.9 requires is that the court should "deal justly with the application".

86. The reason why the rule has been amended to require courts to give specific consideration to factors (a) and (b) is that previously courts were not doing so. This is a point which Professor Zuckerman makes in his article *The revised CPR 3.9: a coded message demanding articulation* (2013) 32 CJQ 123 at 134, although he criticises the wording of rule 3.9 as being anodyne and saying nothing that is not already in the rules.

87. As the Master of the Rolls and Vos LJ demonstrate, it is legitimate to have regard to the *Review of Civil Litigation Costs Final Report* ("*Final Report*") as part of the background when construing the new version of rule 3.9.

88. Chapter 39, paragraph 6.5 of the *Final Report* identifies the mischief at which this particular reform is directed:

> "The conclusions to which I have come are as follows. First, the courts should set realistic timetables for cases and not impossibly tough timetables in order to give an impression of firmness. Secondly, courts at all levels have become too tolerant of delays and non-compliance with orders. In so doing they have lost sight of the damage which the culture of delay and non-compliance is inflicting upon the civil justice system. The balance therefore needs to be redressed."

The paragraph then goes on to reject the "extreme course" of refusing relief save in exceptional circumstances.

89. *Denton* is a good illustration of how courts used to operate under the former rule 3.9 (but should not operate under the new rule). In his concern to enable the claimants to deploy their full case the judge did not consider factor (a) or factor (b). If he had considered all the circumstances of the case as well as factor (a) and factor (b), he would have refused relief. The judge's order that the claimants pay "the defendant's costs thrown away by the vacation of the trial" does not begin to meet the justice of the case. There are many hidden costs flowing from adjournment of the trial: witness statements and reports need updating; fee earners handling the litigation may change with a need for newcomers to read into the case; both legal teams continue to work upon the litigation and so forth. In addition to the increased costs there is wastage of resources. Lawyers, experts, factual witnesses and other busy people who had cleared their diaries to attend the trial (probably cancelling other commitments) will have to clear their diaries yet again for another trial a year later. There is also the continuing strain on the parties to consider. What litigants need is finality, not procrastination. Quite apart from its impact on the immediate parties in *Denton*, the judge's order has caused unnecessary delay for many other litigants awaiting their day in court.

90. The parties in *Denton*, *Decadent* and *Utilise* are either small businesses or businessmen. Litigation is a massive drain on management time and an unwelcome diversion of resources for any business. It is important for the economy that the courts provide swift and just resolution of disputes involving SMEs: see *Preliminary Report* chapter 29 and *Final Report* chapter 25. Hence the need to minimise delay and avoid adjournments or satellite litigation.

91. Although adjournments pose a particular problem, as illustrated by *Denton*, they are not the only vice inherent in a culture of delay and non-compliance. Depending upon the circumstances, a failure timeously to make disclosure or to serve evidence or to take some other step in the action might have a serious impact on the litigation or on opposing parties.

92. As Mr Holland QC has reminded us, in its written submissions to the Civil Litigation Costs Review, the Law Society stated:

> "The Law Society considers that the overriding objective is not applied as rigorously or as consistently as it should be. The most infrequently applied rules are those that are available to control the progress of a case. Lord Woolf introduced a number of ways in which this could be achieved (most notably CPR Parts 1.1, 1.4 and 3.1), but the experience of practitioners suggests that in practice these are not used fully or at all. Therefore we question whether further rules would bring any benefit unless they are applied fully. We suggest there needs to be a change in the attitudes of the judiciary and court users so that court rules are fully complied with and applied in practice."

93. In the light of this and similar submissions, the first part of recommendation 86 of the *Final Report* stated:

> "The courts should be less tolerant than hitherto of unjustified delays and breaches of orders. This change of emphasis should be signalled by amendment of CPR rule 3.9."

94. Recommendation 86 needs to be understood in its proper context. It is part of a large package of interlocking reforms which were designed to promote access to justice at proportionate cost. Recommendation 86 was necessary for two reasons. First, the culture of delay and non-compliance was one of the (numerous) causes of high litigation costs. This cause needed to be tackled along with all the others. Secondly, as the Law Society pointed out in the passage quoted above, the (then anticipated) package of civil justice reforms would not bring any benefit unless the new rules were actually enforced.

95. The new rule 3.9 will not play any part in promoting access to justice at proportionate cost if it continues to generate satellite litigation on the present scale or if it leads to results such as we have seen in each of the three cases under appeal. I agree with the Master of the Rolls and Vos LJ that co-operation should be encouraged and satellite litigation should be discouraged by the means that they propose.

96. If rule 3.9 is construed as I propose above, this accords with the natural meaning of the language used and also gives proper effect to recommendation 86. The rule becomes an aid to doing justice. The new rule 3.9 is intended to introduce a culture of compliance, because that is necessary to promote access to justice at proportionate cost. It is not intended to introduce a harsh regime of almost zero tolerance, as some commentators have suggested.

97. My approach to the construction of rule 3.9 leads to the same result in the three cases under appeal as that reached by the Master of the Rolls and Vos LJ. These three cases are all extreme examples of judges misapplying rule 3.9, albeit at opposite extremes. There will be other less clear cut cases where the difference of opinion between my colleagues and myself may matter. That is why I am delivering this separate judgment agreeing in the result, but dissenting on the issue of construction.

98. Finally, for the avoidance of doubt, although I was not a member of the court which decided *Mitchell*, I am not criticising the actual decision in that case. The master made a very tough order in *Mitchell*, as demonstrated by Professor Sime in his article *Sanctions after Mitchell* (2014) 33 CJQ 133. Nevertheless that order was not outside the permissible range of her case management discretion, as the Master of the Rolls and Vos LJ explain in paragraph 9 of their judgment.

99. For the reasons set out above I agree that all three appeals must be allowed.