IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
BIRMINGHAM DISTRICT REGISTRY

Claim No.2BM90107

Before:

HIS HONOUR JUDGE OLIVER-JONES QC
SITTING AS A JUDGE OF THE HIGH COURT

BETWEEN :

ROBERT ADLINGTON & 133 OTHERS — **Claimants**

- and-

ELS INTERNATIONAL LAWYERS LLP
(In Administration) — **Defendant**

APPROVED RESERVED JUDGMENT

HANDED DOWN IN OPEN COURT ON THURSDAY 12th DECEMBER 2013

Counsel: **GORDON WIGNALL** appeared on behalf of the Claimants

(Instructed by Regulatory Legal Solicitors of 1 Hagley Court South, Waterfront East, Brierley Hill, West Midlands, solicitors for the Claimants)

Counsel: **GRAEME McPHERSON QC** appeared on behalf of the Defendant

(Instructed by DAC Beachcroft LLP of Sovereign House, Imperial Way, Newport NP10 8UH, solicitors for the Defendant)

His Honour Judge Oliver-Jones QC:

References in this judgment to the application bundle will be as follows: AB / (File number) / Tab number / page number). There are 5 files.

1. This judgment is given in respect of an application by notice dated 3rd July 2013 [AB/4/1/1], on behalf of seven, of a total of 134, Claimants, for relief from a sanction contained in my Order made on and dated 12th June 2013 [AB/ 4/2/15] but sealed on 19th June 2013, and which was made (although not expressed on its face) with the consent of the parties. There is a second application, dated 18th September 2013, for transfer of the claims to the Royal Courts of Justice [AB/5/1/1].

2. The application for relief from sanction was heard on 7th October 2013 when I reserved judgment. A written Draft Judgment was sent to the parties by email on 16th October 2013 with a subsequent slight revision to the final paragraph in respect of the second application only. The parties then indicated that they would need to attend when judgment was handed down (a) to deal with costs issues (b) to deal with the transfer application and (c) for a possible application for permission to appeal. Because Leading Counsel for the Defendant was unavailable until 12th December, the handing-down had to be listed for that date. In the meantime, on 27th November 2013, the Court of Appeal delivered its judgment in ***Mitchell v News Group Newspapers Limited*** [2013] EWCA Civ 1526 (hereinafter '***Mitchell***'). This judgment being so relevant to the issues in the instant case, I was invited to reconsider my Draft Judgment and to allow further written submissions. What follows is my revision of what was

only a draft judgment, taking account of ***Mitchell*** and the further written submissions of both counsel received on 4th December 2013.

3. By consent, the first application has been amended to include a further four Claimants. In respect of three of them, Mr. & Mrs. Darlaston and Ms. Macpherson, the granting of relief from sanction is not opposed. In respect of the fourth, Mr. Morgan, it is opposed, for reasons to which I will come.

3. This litigation concerns losses alleged to have been occasioned to each Claimant individually, in respect of failed investment in the purchase of 'off-plan' property in Spain, that is, property which was yet to be built. The properties were to form holiday villages. It appears that the investment was not made for the purpose of the investors ultimately owning the properties themselves but to secure a monetary return on their capital investment. Some of the Claimants became involved as individuals, some were husband and wife or members of the same family, and some invested as members of a syndicate. It is alleged that the Claimants were advised, inter alia, that their investment would be protected by a bank guarantee and returned to them should the development fail or not be completed. It is further alleged that investors were told that Spanish lawyers, identified as 'ELS' would be acting for them. It is contended that the Defendant is either the successor of the Spanish lawyer organisation to whom the obligations of the Spanish firm were transferred, or that the Spanish firm merged with the Defendant, or that the Defendant was a branch of the Spanish firm such as to give rise to duties of care on the part of the Defendant to the Claimants in contract and / or tort which were breached

and whereby the claimants suffered loss. A more detailed exposition of the background can be found in what are described as 'Generic Particulars of Claim' [AB/3/1/7].

4. The Order dated 12th June 2013, drafted and agreed by counsel, and described within its terms as a 'Final Order', provided for extensions of time for the filing and serving of "Individual Particulars of Claim" by each of the Claimants (paragraphs 1, 2 and 3), which were to contain specific information (paragraph 4), annex specific documentation (paragraph 5), and bear a statement of truth by the claimant (paragraph 6). The sanction for non-compliance in the case of any claimant, was dismissal of that claim (paragraphs 7, 8 and 9). The Claimants were divided into three groups and identified by name in one of three Schedules annexed to the Order viz:

Schedule 1 listed the names of 20 Claimants; they were each ordered to file and serve an 'Individual Particulars of Claim' by 4.00pm on 19th June 2013, failing which their claim "shall stand dismissed without further Order" and their name would be removed from that Schedule to the Claim Form. This is paragraphs 1 and 7 of my Order. Three of these Claimants were those to whom I have already referred, where relief from sanction is not opposed; it was agreed that they should be moved from Schedule 1 to Schedule 2 but this was not, as it is agreed it should have been, reflected in the sealed Order. The reason why they were moved was because they were unavailable to sign their particulars of claim due to being away on holiday;

Schedule 2 listed the names of 87 Claimants; they were each ordered to file and serve an 'Individual Particulars of Claim' by 4.00pm on 1st July 2013

failing which the same sanction applied. This is paragraphs 2 and 8 of my Order. The seven claimants on whose behalf the original (unamended) first application is made, were members of this group;

Schedule 3 listed the names of 27 Claimants; they were each ordered to file and serve an 'Individual Particulars of Claim' by 4.00pm on 15th July 2013 failing which the same sanction applied. This is paragraph 3 and 9 of my Order. Mr. Morgan was one of the Schedule 3 group of claimants.

5. The chronology of the action prior to the Order of 12th June 2013 can be summarised as follows. A Claim Form was issued on 9th May 2012 against ELS International Lawyers LLP ('the Defendant') with 'Particulars of Claim to follow'. The 'brief details of claim' were:

> "The Defendant provided the Claimants with professionally negligent legal advice, occasioning loss to the Claimants. The Defendant will seek to pass the liability of *(sic)* the advice to another party, of *(sic)* which, the Claimants have no binding relationship above and beyond the Defendant."

This was not a particularly clear endorsement either in terms of the use of English or its substance, other than there being an allegation of 'professional negligence'. The value of the claim was pleaded as "In excess of £1,000,000 (to be revised, if so required)". The Claim Form was valid for service until 9th September 2012. On 5th September 2012, before service, the Claim Form was amended to add European Legal Solutions SL (hereinafter 'SL') as Second Defendant. In addition the 'brief details of claim' were amended to add the words:

> "The Claimants causes of action arise in and/or (*sic*) breaches of contract and/or negligence."

Annexed to the Claim Form was a list of the names and addresses of the claimants. The Claim Form was served on ELS International Lawyers LLP but was never served on European Legal Solutions SL. The validity of the Claim Form for service on 'SL' expired on 9th September 2012.

6. By virtue of CPR 7.4(2), Particulars of Claim must be served no later than the latest time for serving a Claim Form. In this case the Claim Form had to be served by 9th September 2012. On 5th September 2012, the Claimants filed, but did not serve, an application notice seeking what amounted to an extension of time for serving Particulars of Claim in the claims of just five Claimants, with a stay on the requirement to serve Particulars of Claim for any other Claimant until the claims of the five were determined. By Order of His Honour Judge McKenna (sitting as a Judge of the High Court) dated 12th October 2012, this application was listed for hearing on 6th December 2012 with directions for the filing of evidence and skeleton arguments for that hearing.

7. On 6th December 2012 His Honour Judge Pearce-Higgins QC sitting as a Judge of the High Court, despite (I am told) being highly critical of the way in which the proceedings had been conducted by the Claimants, and despite no excuse or explanation for delays being offered, made an order adjourning the Claimants' application until the first open date after 1st March 2013, but also ordering that "the Claimants have permission to served **draft** Particulars of Claim on the Defendant by 11th January 2013". On 11th January draft Particulars of Claim (not bearing a Statement of Truth) were served, but these were entirely generic and contained no specific factual information in respect

of any individual claimant, merely reference to an intention to serve 'Individual Particulars of Claim'.

8. By a draft Consent Order dated 15th April 2013, which was approved and made by District Judge Davies on 26th April 2013, it was ordered that the time for service of the (generic) Particulars of Claim (inaccurately referred to as the Amended Particulars of Claim) was extended until 17th April 2013. It was further ordered that:

> "By on or before 4pm on 31 May 2013 the Claimants shall file and serve on the First Defendant case specific Particulars of Claim, which Particulars of Claim shall contain in each case the information referred to in the document annexed to this Order and marked Exhibit 2."

In addition, it was ordered that:

> "Each case specific Particulars of Claim shall have annexed to it the documents which are referred to at paragraphs 11 to 15 of the Amended *(sic)* Particulars of Claim in respect of each Claimant".

9. Thus, in effect, the Claimants having been obliged under the Civil Procedure Rules to serve Particulars of Claim by no later than 9th September 2012, each of them had secured an extension of time of almost 9 months within which to do so. The Claimants failed to comply with the Consent Order dated 15th April 2013. Consequently by an Application Notice dated 4th June 2013 the Defendant applied for 'unless orders'. It was that application that resulted in my Order of 12th June 2013. Ten of the eleven claimants on whose behalf the application before me today is now made, all being named in Schedule 2 of my Order dated 12th July, failed to file their Particulars of Claim by 1st July 2013 and the 11th (Mr. Morgan) failed to comply with my Order by 15th July. Consequently the claims of them, and each of them, stood dismissed without

the need for any further order at and after 4.00pm on those respective dates. There had been no application to extend time prior to its expiry. An application for "a relief from sanctions on behalf of 7 Claimants, further to CPR 3.9" was dated 3rd July 2013, but filed on 12th August 2013. The application was supported by the witness statement of Mr. Michael Cotter dated 3rd July 2013 and opposed in the witness statement of Clare Hughes-Williams, the Defendant's solicitor, dated 28th August 2013. Mr. Cotter responded to this witness statement by another (in fact his third), dated 30th September 2013.

10. In a second witness statement dated 25th July 2013, but without a formal application notice, Mr. Cotter also sought relief from sanction in respect of one Claimant whose name appears in Schedule 3 to my Order made on 17th June 2013. Although the Particulars of Claim for this Claimant, John Morgan, were filed and served by 15th July 2013, they did not bear a statement of truth signed by the Claimant. Mr. Cotter signed this statement of case with Mr. Morgan's express authority, Mr. Morgan being in France at the material time, namely 11th July. It is clear that, because Mr. Morgan's Particulars of Claim did not bear a statement of truth signed by him, this breached the requirement of paragraph 6 of my Order and attracted the sanction set out in paragraph 9. Consequently relief from the sanction had to be sought. The Defendant has agreed that a separate application form is not required and, as previously indicated, the existing application has thus been amended to include Mr. Morgan.

11. **The evidence in support of the application for relief from sanction**

Mr. Cotter points out that apart from the eight Claimants the subject of his (now amended) application – an order for relief having, as stated above, been conceded for three other claimants, even though, by virtue of CPR 3.8(3)[1] it cannot be the subject of agreement between the parties - all other Particulars of Claim were filed and served as ordered – that is, by 123 claimants. The breaches of my order by the eight claimants arose because they were either abroad or away from home and therefore unable to sign and return the documents by fax/scan and/or email before the deadline, notwithstanding that they were all advised on 21st June that the document would need to be returned to Mr. Cotter by 30th June (a Sunday), and would not be received by them until Friday 28th June. The Claimants were not advised of the terms of the Order of 12th June. I pause to observe (a) that the date of notification, allowing for receipt, was late - 9 days after my Order - and the method was risky viz. by post and (b) that Mr. Cotter was really tempting fate in relying upon the successful receipt both by and from his clients, particularly the return of the signed Particulars of Claim by a Sunday when they were required to be filed and served by 4.00 pm the following day, a Monday (1st July). Quite apart from this foreseeable difficulty, Mr. Cotter points to what he contends were a number of unforeseen obstacles to the successful implementation of this plan, including IT problems while moving offices during the week

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[1] **CPR 3.8(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.**

commencing 24th June 2013, and the fact that some Claimants were contactable but unable to sign documents before the due date and time.

12. Before turning to consider in detail the specific difficulties that arose in respect of the seven material Claimants (the difficulty with the eighth, Mr. Morgan, being a discrete one), it is necessary to examine exactly what was done by Mr. Cotter and his staff after my Order of Wednesday 12th June. Apart from the three Claimants to whom I have already referred, signed Particulars of Claim were filed and served on behalf of the remaining 17 Schedule 1 Claimants by the Wednesday 19th June, within the period of 7 days agreed and ordered. On Friday 21st June Mr. Cotter sent a proforma letter to all other Claimants [AB 3/2/27]; as I have already indicated it did not refer to the fact that claims would stand dismissed if my Order was not complied with.

13. In his witness statement [AB 4/2/4], Mr. Cotter relates that on the morning of Monday 24th June (that is exactly one week before the date for serving Schedule 2 claimants' 'Individual Particulars of Claim') he became aware of there being greater difficulties than he had anticipated with his offices' IT and telephone system consequent upon his firm's move from one premises to another. As a result he wrote to the Defendant's solicitor, Ms. Hughes-Williams [AB 4/2/29], seeking "*the briefest of extensions*" for service of the Schedule 2 Individual Particulars of Claim, namely four days expiring on 5th July. It is apparent to me that neither he nor Ms. Hughes-Williams realised that such an agreement was precluded by the terms of CPR 3.8(3), not least because it was proposed that there should be a(nother) 'consent order', and

Mr. Cotter finished his letter with the words "*...should we need to issue an application to be heard on an emergency basis, naturally matters will need to be in hand and with the Court by no later than tomorrow (Tuesday 25th June 2013).*" Mr. Cotter added that there was "a team of Barristers from No5 Chambers" (in Birmingham) who were drafting Individual Particulars of Claim, and that these would be completed by the morning of Thursday 27th June and then sent to clients for approval. In her long letter of response, the same day, Ms Hughes-Williams did not refer to CPR 3.8(3), as she ought to have done, but simply refused to agree to an extension of time, adding that if an extension was required "*you will have to apply*"; not, 'you have to apply whether or not my client agrees.' Ms Hughes-Williams' discouraging comment that "*we suggest a time estimate of not less than half a day together with one hour's pre-reading*" was, frankly, ridiculous, as, I should add, has been the size of the application bundle provided to me for this hearing (five XL files). Notwithstanding the position taken by the Defendant at that time, Mr. Cotter did not make an application. Instead, he allowed what he himself describes in his witness statement as "*an administrative nightmare*" to develop in an effort to ensure that he did comply.

14. Mr. Cotter, in seeking to explain why no application was made states:

> "...no such application was issued due to an assumption that no point would be taken where the Claimant was on holiday or unable to sign the documentation."

It is unclear what he means by "*no point would be taken*". If a claim is dismissed, there would be no points left to be taken by anybody! In his witness

statement Mr. Cotter asserted that at the hearing before me on 12th June, Leading Counsel for the Defendant had "*specifically stated that no silly points would be taken where individuals were on holiday*". Subsequent to this witness statement the Defendant obtained the entire transcript of the hearing, from which it is quite clear that Leading Counsel's comments in this respect were limited to Schedule 1 claimants [AB 4/4/242]. It was unnecessary to obtain the entire transcript; the relevant, relatively short, passages would have been sufficient. Mr. Cotter consequently, either mis-heard, misunderstood, mis-recorded or mis-remembered what had been said. Such has been, in my judgment, the general lack of competence in the conduct of this litigation by Mr. Cotter, that I can accept that this amounts to another 'error' on his part and not an attempt to explain away contumelious default.

15. Mr. Cotter did not take any further step until the evening of Sunday 30th June, less than 24 hours before those 'Individual Particulars of Claim' which had not by then been signed and served, would stand dismissed. Whatever view is taken of Mr. Cotter's competence, it appears that he works hard. At 7.45pm on the Sunday evening he sent an e-mail to, inter alia, Ms Hughes-Williams [AB 4/2/52] attaching a letter [AB 4.2/44] stating that service of all Schedule 2 Particulars of Claim bar seven viz. three members of the Charlton family, Mr. & Mrs Lewis, Barry Evans and Karen Jefferson, would be delivered the following day. He explained that these seven had been unable to sign their Particulars of Claim because they were either abroad or unavailable. In his covering letter Mr. Cotter misquoted Leading Counsel for the Defence's comments at the hearing of June 12th (see above), pleaded the chaos which had

blighted his firm during the office move, and again asked for a 'consent order' transferring the seven Claimants to Schedule 3 (where service was not required until 15th July).

16. Ms Hughes-Williams received Mr. Cotter's e-mail of the previous evening early on Monday 1st July, and was able to respond to Mr. Cotter by e-mail at 9.03 am that day. She said "*...whilst we do not wish to be unreasonable I cannot recommend to my clients that we take such steps at the present on the evidence available*"; she required "evidence" in respect of the alleged difficulties of the seven claimants so that "*we will be able to advise our clients fully on your request*". This e-mail was sent under 7 hours before the seven Claimants' claims would stand dismissed. In the circumstances of which she was actually aware, I am not satisfied that it was reasonable to require further 'evidence' at that stage and, in my judgment, if an application had been made for such a short extension of time either on 1st July (as an urgent application) or earlier, it is likely that it would have been granted whether Ms Hughes-Williams contested it or not, and, consequently, the seven claims would not have stood dismissed at and after 4.00pm that day.

17. In response to the request for further 'evidence' Mr. Cotter sent another e-mail at 10.04 am in which, having expressed his "disappointment" and reiterated his belief that Leading Counsel for the Defendant had said that "silly points" would not be taken, he promised to prepare a witness statement dealing with the position of each of the seven Claimants, and giving Ms Hughes-Williams "*until close Tuesday 2nd July 2013 to respond, otherwise an application will*

be issued"... It was not clear what this 'application' would be. In a response from Ms Hughes-Williams at 1.14 pm, whilst accepting that "*we did indicate that we would take a reasonable approach as we will*", she added that this was "*primarily in relation to the Schedule 1 Claimants*" (my emphasis). This was the final e-mail before the seven claims were dismissed (stood dismissed) at 4.00pm on 1st July. However, half-an-hour AFTER the claims had been dismissed Mr. Cotter was still hoping that "*from tomorrow we can work on a more sensible collegiate level*" [AB/4/2/50]. Ms Hughes-Willams' response, at 4.56pm (1st July) was simply to say that:

> "You may serve a witness statement and I will consider it with my clients but you are now in a position where you will have to obtain an order granting relief from sanctions rather than an extension of time as you will I am sure appreciate. I do not regard my clients as taking "silly points" by expecting obedience to final orders".

18. As to the actual position of each of the seven Claimants:

(a) **Samuel Charlton, Rex Charlton and Margaret Charlton** advised on Tuesday 25th June 2013 that they could not sign until 2nd July as they were in Vienna from 27th June, and their son (Samuel) was in Japan [AB/4/2/36]. As in other cases it was submitted on behalf of the Defendant that this is an inadequate explanation to justify relief being granted without more, including evidence as to when they were first made aware of the need for signing, and why nothing was done in response to their e-mail, before they went away;

(b) **Barry Evans** had left UK for Australia (British Lions Tour) and would not be back until 8th July [AB/4/2/38: email from Mr. Evans dated 30th

June 2013]. Again criticism is levelled at the fact that there is no evidence as to when Mr. Evans left England;

(c) **Karen Jefferson** was in America until 6th July although her husband, also a claimant, was able to file and serve on time [AB/4/2/40: email from Mr. Jefferson dated 28th June 2013];

(d) **Howard Lewis and Jennifer Lewis** : an e-mail dated 26th June 2013 [AB/4/2/42] from one Simon Radley, also a Claimant [No.102] and a colleague of Mr. and Mrs. Lewis, informed Mr. Cotter that the Lewis's were "away" until the weekend of 6th/7th July in the UK "*so can pick up emails (but) I believe will not have the facility to scan a reply to you*".

It must be observed that when the order was made on 12th June 2013, one would have expected that it would have been known what the position was about availability to comply - I was assured at hearing that Mr. Cotter DID know [see AB/4/4/ 236 transcript] - but apparently this was not the case for all claimants.

19. Quite apart from the history, recited in some detail above, as to how the seven claims came to the point of being dismissed, Mr. Cotter also relies, as an important circumstance of the case, upon the fact that once the final tranche of Individual Particulars of Claim had been filed and served on 15th July 2013, there would, pursuant to the Consent Order, have been a stay of proceedings until 21st September 2013 (a period of 8 weeks) to allow the Defendant to request, if they wished to do so, further information pursuant to CPR Part 18, and that consequently the Defendant would not be prejudiced by a few cases in

Schedule 2 being a few days late, provided they were served before 15th July. In the course of submission, Mr. McPherson QC on behalf of the Defendant conceded that he was unable to point to any prejudice to the Defendant which has arisen from late 'service'. I say 'service' because although the seven (or rather 10 if one includes the three where the granting of relief is not being resisted) claims stood dismissed on 1st July, Mr. Cotter in fact sent signed copies to the Defendant on or prior to 15th July, so that the Defendant had them, as a matter of fact. I should add that despite the concession in respect of lack of prejudice, Mr. McPherson QC was not beginning to concede that relief should be granted. I will deal with the question of whether 'lack of prejudice' is any longer a relevant feature of applications for relief from sanctions, later in this judgment.

20. **Evidence in response**

The witness statement of Ms Hughes-Williams [AB/4/3/152] in response to the Claimants' application for relief from sanction, apart from reciting the history adds nothing that, in my judgment, is material to the determination of the application.

The Law

21. This application falls to be considered under the terms of CPR 1.1 and 3.9 as amended with effect from 1st April 2013

CPR 1.1 now reads (amendments underlined) :-

(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly **and at proportionate cost.**
(2) Dealing with a case justly **and at proportionate cost** includes, so far as is practicable –

(a) ensuring that the parties are on an equal footing;
(b) saving expense;
(c) dealing with the case in ways which are proportionate –
  (i) to the amount of money involved;
  (ii) to the importance of the case;
  (iii) to the complexity of the issues; and
  (iv) to the financial position of each party;
(d) ensuring that it is dealt with expeditiously and fairly; ~~and~~
(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; **and**
(f) enforcing compliance with rules, practice directions and orders.

CPR 3.9 now reads (the previous rule being shown in deleted form):

~~(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 interests of the administration of justice;~~
~~(b) whether the application for relief has been made promptly;~~
~~(c) whether the failure to comply was intentional;~~
~~(d) whether there is a good explanation for the failure;~~
~~(e) the extent to which the party in default has complied with other rules, practice directions, court orders and any relevant pre-action protocol;~~
~~(f) whether the failure to comply was caused by the party or his legal representative;~~
~~(g) whether the trial date or the likely trial date can still be met if relief is granted;~~
~~(h) the effect which the failure to comply had on each party; and~~
~~(i) the effect which the granting of relief would have on each party.~~

(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.

22. As Jackson LJ made clear in ***Fred Perry (Holdings) Ltd v Brands Plaza Trading Ltd and another*** [2012] EWCA Civ 224:

"There is a concern that relief against sanctions is being granted too readily at the present time. Such a culture of delay and non-compliance is injurious to the civil justice system and to litigants generally... After (1st April 2013) litigants who substantially disregard court orders or the requirements of the Civil Procedure Rules will receive significantly less indulgence than hitherto."

Subsequently, in ***Venulum Property Investments Ltd v Space Architecture Ltd & Another*** [2013] EWHC 1242 (TCC) (a case in which Mr. Wignall also

appeared) the ***Fred Perry*** case was cited with approval, and Edwards-Stuart J. added that in respect of CPR 1.1(2)(f):

> "I regard the addition of subparagraph (f) to the overriding objective as requiring the court to take a more robust approach when exercising a discretion to extend time for service of a claim form or particulars of claim" - as it was in that case).

23. In the 18th Implementation Lecture given on 22nd March 2013 Lord Dyson MR made a number of comments about the new rules and, in particular, CPR 3.9, which can be found between paragraphs 19 and 29. As is clear from paragraph 38 of the judgment in ***Mitchell***, courts are not only entitled to, but should, take into account the guidance that was given as to 'implementation' of the new CPR regime, in the series of lectures culminating with the 18th Lecture. Of particular note in the 18th Lecture are the following:

> "The new rule explicitly refers back to the overriding objective, stressing the need in dealing with a case justly, to take account of proportionate cost and the need to enforce rule compliance. As such it expressly refers back to the need to ensure that questions concerning relief from sanctions are not simply considered by reference to the immediate litigation, but to the wider public interest" (paragraph 19).
>
> "Tough rules but lax application; tough rules but a culture of toleration; and lax application and toleration are all fatal to the new philosophy. By emphasising the need to take account of the new explicit elements of the overriding objective, rule 3.9 is intended to eliminate lax application and any culture of toleration" (paragraph 23).
>
> ".....the relationship between justice and procedure has changed. It 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. It has changed because doing justice in each set of proceedings is to ensure that proceedings are dealt with justly and at proportionate cost. Justice in the individual case is now only achievable through the proper application of the CPR consistently with the overriding objective" (paragraph 26).

> "The tougher, more robust approach to rule compliance and relief from sanctions is intended to ensure that justice can be done in the majority of cases. This requires an acknowledgment that the achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations. Those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure their own costs are kept within proportionate bounds. But more importantly they serve the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the court enables them to do so" (paragraph 27).

24. At the hearing on 7th October 2013 counsel referred me, inter alia, to what were then only case digests in two first instance decisions, cited in the editorial notes to CPR 3.9 in the Cumulative Second Supplement to the 2013 Edition of the White Book. These cases, for which full transcripts are now available, were:

Ian Wyche v Careforce Group plc [2013] EWHC 3282

Rayyan Al Iraq Co Ltd v Trans Victory Marine Inc [2013] EWHC 2696 (Comm).

The second of these decisions was subsequently disapproved in ***Mitchell*** (supra). The former was not expressly disapproved but was the subject of comment [see paragraphs 47 and 48 of the judgment of the Master of the Rolls.]

25. The judgment of the court given by the Master of the Rolls in ***Mitchell***, provides clear guidance as to how the 'new approach', identified in the 18th implementation lecture (see above), should be applied in practice. The following is a summary of that guidance with reference to the paragraphs in the judgment in which that guidance appears:-

(a) when dealing with applications under CPR 3.9, the need (i) for litigation to be conducted efficiently and at proportionate cost and (ii) to enforce compliance with rules, practice directions and court orders ....should now be regarded as of paramount importance and be given great weight, these being the only considerations which have been singled out for specific mention in the rule [paragraph 36];

(b) although regard should be had to all the circumstances of the case, the other circumstances should - subject to points set out below - be given less weight than the two considerations which are specifically mentioned [paragraph 37];

(c) it will usually be appropriate to start by considering the nature of the non-compliance. If this can properly be regarded as trivial, for example "*if there has been no more than an insignificant failure to comply with an order, the court will usually grant relief provided the application is made promptly*". This will include cases 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 [paragraph 40].

(d) if the non-compliance cannot be characterised as trivial, then the burden is on the defaulting party to persuade the court to grant relief. In these circumstances the court will want to consider why the default occurred. If there **is good reason** for it, the court will be likely to decide that relief should be granted [paragraph 41];

(e) mere overlooking a deadline, whether on account of overwork or otherwise, is unlikely to be a good reason. Pressure of work will rarely be a good reason [paragraph 41];

(f) good reasons are likely to arise from circumstances outside the control of the party in default [paragraph 43];

(g) "*well-intentioned incompetence, for which there is no good reason, should not usually attract relief from a sanction unless the default is trivial*" [paragraph 48];

(h) 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 [paragraph 41];

(i) the new approach seeks to have regard to a wide range of interests and judges should not focus exclusively on doing justice between the parties in the individual case [paragraph 51];

(j) thus the question will be : was the default by the party or their solicitor minor or trivial and, if not, was there a good excuse for it? [see paragraph 59].

The Submissions of the parties in the light of *Mitchell*

26. Within the written supplemental submissions made on behalf of the claimants seeking relief, Mr. Wignall makes the following points:-

(a) that "in this case all of the 134 Particulars of Claim had been compiled before the applicable deadlines but not signed (in the relevant cases), the Order having required a statement of truth to be appended by the claimant his- or herself. In the context of the fact that (a) the stay of

proceedings applied to 21st September for the Defendant's consideration, (b) Mr. Cotter's misunderstanding as to the nature of the concession made by Mr McPherson QC, (c) the fact that the signed statements of case were all submitted on or before 15th July (the final deadline for tranche 3), (d) the fact that the vast proportion of the statements of case were signed by the stipulated deadlines, then the breach is one caught by the maxim" '*de minimis non curat lex*'. In other words, Mr. Wignall submitted that the breaches could properly be regarded as trivial;

(b) that even if the breaches cannot be considered trivial then the following factors, in addition to those set out in (a) above, are sufficient for the defaulting claimants to satisfy the burden of demonstrating that relief should be granted:

(i) although there should be a 'no-nonsense approach' to the enforcement of orders, the rules whether as formerly expressed or as now revised, do not make compliance an end in itself which is superior to doing justice in any case. "*It has not changed the CPR into tripwires for the unwary or incompetent*". Much of the problem that arose in this case was a consequence of either Mr. Cotter's naivety, over-optimism or incompetence, at least in his approach to organising what was required for compliance. Although (barely arguably) he did 'well' to deliver 100 Particulars of Claim by 1st July there should have been no stragglers. The fact that there were, was the product of human error in terms of organisation of work,

coupled with a lack of planning to guard against the eventuality that some claimants might not physically be able to sign their Particulars of Claim;

(ii) Given the two month period of stay and the lack of specific requests for information during that time, the dismissal of the 8 Claimants' claims amounts to no more than a pure windfall to the Defendant, as they must have known when default was anticipated. Reinstating these Claimants would cause no prejudice at all either to the Defendant or to the Court or the litigation generally, particularly given that the time for filing a Defence has not yet expired;

(iii) Had an extension of time been sought on 1st July it would almost certainly have been granted. Mr. Cotter's error was to believe that Defendant would agree to this;

(iv) To refuse relief would be a disproportionate response. Mr. Cotter's error or errors were regrettable but not egregious;

(v) It would be bizarre if, as is the case with some of these claimants, they could not proceed but members of their family/syndicate could. It merely serves to underline the windfall to the Defendant and lack of prejudice, particularly given the likelihood of evidence being given by one family or syndicate member on behalf of another;

(vi) The difficulty faced by the relevant claimants on the 1st July could, and should, have been dealt with on 1st July with

minimal expense and on paper. The Defendant's stance was unreasonable;

(vii) Although the 'efficient' conduct of litigation is expressly identified in subparagraph (a) of CPR 3.9(1) as a factor that needs to be taken into account, this is not (yet) a case where 'proportionate cost' is a factor which tips the balance against relief being granted. Whilst there has been serious inefficiency in the conduct of the litigation since (as well as before) 12th June, the 'fault' has now been corrected and the future conduct of this litigation following service of defences will be the subject of robust case-management directions, potentially involving 'unless orders' as baseline case-management. The fact that the litigation has got off to a bad start does not mean that it cannot be controlled efficiently and at proportionate cost hereafter;

(viii) Again, although the need to enforce compliance with (in this case) orders of the court also is explicitly identified as being a circumstance which must be considered, this cannot, of itself, preclude the granting of relief in a case where it is just to do so; otherwise there would be no need for a rule permitting 'relief' to be granted at all.

27. On behalf of the Defendant, Mr. McPherson QC, in his supplemental written submissions made in the light of ***Mitchell***, contended:

(a) "there is simply no way that their non-compliances (ie their failures to serve Individual Particulars of Claim in the face of an Unless Order

that they do so) can be said to have been 'trivial'" even if regard is had solely to terms of the order itself and the conduct in failing to comply";

(b) utilising the expressions to be found in the judgment in ***Mitchell***, the failures cannot be said to have been ones of 'form not substance', nor can they be said to have been the equivalent of 'narrowly missing a deadline'. The failures cannot be said to have been 'insignificant';

(c) the absurdity of any suggestion that the non-compliance was trivial becomes more plain when considering the conduct against the repeated woeful failures of those claimants to comply with rules, orders and practice directions, every step taken having been either defective or late;

(d) the position of Mr. Morgan was no different to that of the seven claimants, even though the nature of the default was different;

(e) there is no good explanation for the instances of non-compliance that resulted in the claims of 8 claimants being struck out. Paragraph 41 of the judgment in ***Mitchel***l must apply equally to a solicitor who, as in the instant case, takes on work that, for whatever reason, is beyond his capabilities and management skills;

(f) having regard to paragraph 58 of the judgment in ***Mitchell***:

> "...The expectation is that the sanction will usually apply unless (i) the breach is trivial or (ii) there is a good reason for it. It is true that the court has the power to grant relief, but the expectation is that unless (i) or (ii) is satisfied, the two factors mentioned in the rule will usually trump other circumstances"

there is no exceptional reason in this case to disapply the sanction imposed by the June 2013 Order and the Claimants have no submitted that their cases are in any way exceptional for such purposes;

(g) matters such as lack of prejudice to the Defendant and the fact that the 'response' of dismissal of the eight claims might appear disproportionate to their individual instances of non-compliance, cease to have any, or any significant, relevance, given that the approach should no longer be on doing justice between the parties in the individual case';

(h) it would be bizarre to conclude that provided any non-compliance is not committed by all or most of the claimants in this litigation, the defaulting claimants should be granted relief from sanction so that they can remain part of the larger pool of claimants. "Large scale litigation such as this needs to be conducted efficiently on behalf of all claimants, and a defaulting claimant should not be better off simply because he or she stands alongside non-defaulting claimants";

(i) Whatever stance was taken at material times by the Defendant or its solicitors, that is not a factor of relevance to the question of whether or not relief should be granted.

I will now apply this guidance in determining the application for relief in the present case.

28. There is no doubt that this case has an unhappy history. Procedurally it began badly by service of the Claim Form, before its validity for service expired, on only one of two named Defendants and without any Particulars of Claim as required by CPR 7.4. Through the history I have set out, the Claimants achieved what amounted to a 9 month extension of time for filing their

Particulars of Claim. I do not ignore the fact that this case had been 'bubbling away' since 2010 and it is difficult to understand why, when proceedings were issued, the claimants were not 'ready to go'.

29. In my judgment the Claimants and their solicitors have not been well-organised and have not had a clear command of the Civil Procedure Rules or the management of the case when breach of an 'unless order' (let alone earlier orders) became almost inevitable. This is nowhere more apparent than in the way in which they approached compliance with my Order of 12th June 2013.

30. Of course, as Mr. MacPherson QC urged on me, and as the decision in ***Mitchell*** now underscores, we are now in a new 'era' or 'culture' that must take a 'no-nonsense approach' as Jackson LJ made clear in paragraph 1.5 of the 5th Implementation Lecture. However, the starting point in an application for relief from sanctions is to consider the nature of the non-compliance. In the instant case, all of the Schedule 1 Claimants complied with the 'unless order' that applied to them. Of the 87 Schedule 2 Claimants all but seven complied with the 'unless order' as it applied to them. All but one of the 27 Schedule 3 claimants complied with the 'unless order' as it applied to them; the failure in the case of the one, Mr. Morgan, was that his Particulars of Claim bore his solicitor's signature rather than his own.

31. As to the failure of the seven out of 87 Schedule 2 Claimants to file and serve their Individual Particulars of Claim by 4.00 pm on 1st July, I have no doubt that the Particulars of Claim for each of these claimants had been drafted

before 1st July, and that each claimant was unable to sign their statement of case because they were abroad or otherwise unavailable to do so within the relevant time-frame. I am also satisfied, because it is not disputed, that signed Particulars of Claim were in fact filed and served before the deadline for the Schedule 3 Claimants. Thus, had the Defendant agreed to transfer these seven Claimants to Schedule 3, just as they had agreed to transfer three claimants from Schedule 1 to Schedule 2, then there would have been full compliance with my order.

32. Having carefully considered the submissions summarised above and the guidelines provided by ***Mitchell***, also summarised above, in my judgment, exercising the undoubted discretion which I have in making what is a case-management decision, relief should be granted in the eight contentious cases for the following reasons:

(a) the failure in these cases was, in my judgment a failure of form rather than substance, and, as such, was an insignificant failure that, in the context of my order as a whole and the reasoning underlying the sanction, can properly be regarded as trivial. Particulars of Claim had, as a matter of fact, been produced before the time expired. They were, as a matter of fact, served very shortly thereafter and thus only "narrowly missed the deadline" because of the need for signatures. Application for relief was made promptly. In my judgment, had application been made before 4.00 pm on 1st July (or 15th July in the case of Mr. Morgan), it would almost certainly have been granted, and, I would venture to add, would probably not have been opposed.

Consequently, on this issue I accept the Claimant's submissions and reject those advanced on behalf of the Defendant;

(b) 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, particularly as it is unlikely that all 134 claims will proceed to trial together, as was submitted, in my view correctly, by Mr. Wignall. Further, it was part of my order that there would be a stay for a period of two months following service of the Particulars of Claim for Schedule 3 Claimants; this was to allow the Defendant the opportunity of considering all 134 Particulars of Claim before either admitting the claims or filing a defence. There were no 'stragglers' at the time the stay commenced and the 'breaches' had been remedied in terms of their substance;

(c) given my conclusion that the default is trivial in these cases, then my criticisms of competence on the part of those handling these claims does not fall to be considered;

33. If I am wrong in concluding that the non-compliance "*can properly be regarded as trivial*", then, in any event, I would have been persuaded to grant relief in the circumstances of this case. I have already detailed why the default occurred. Applying the guidelines in ***Mitchell***, the question then becomes, was there a good reason for the default? The Claimant's solicitor does not suggest he overlooked or otherwise disregarded the deadline; on the contrary, he was very acutely aware of it. Nor does he rely on 'pressure of work' as an excuse, although he clearly was under great pressure. If he had advanced these excuses then it would have been likely that they would have been rejected. The real reason for the failure to comply was the fact that Mr. Cotter did not realise that a few of his clients would be simply unavailable to sign their Particulars of Claim when the time to do so arrived. The arrangements for holidays made by the eight relevant claimants were outside Mr. Cotter's control. I am unable to conclude that his lack of knowledge of his clients' holiday arrangements can be attributed to incompetence, even though, as I have said, there is evidence of some general lack of competence in the overall management of the claims. Moreover, I am satisfied that he had a genuine belief that it would be possible to move claimants from Schedule 2 to Schedule 3 if holidays interfered with signing, of which he was not positively disabused by the responses of the Defendant's solicitors prior to the default. In my judgment the reason for failure which I identify is a 'good reason' having regard to all the circumstances of this case and, consequently, would justify the granting of relief sought. Again I accept and adopt the submissions made on behalf of the relevant Claimants and reject that made on behalf of the Defendant.

34. This has been a very hard-fought application for relief from sanctions. I am mindful of the fact that having concluded that relief from sanction should be granted in a case involving clear failure to comply with the requirements of an Unless Order, it might be argued that I have not had sufficient or proper regard to (a) the "*wide range of interests*" identified by the Master of the Rolls in paragraph 51 of the judgment in ***Mitchell*** and founded upon his quotations from Sir Rupert Jackson's Final Report and the 18th Implementation Lecture in paragraphs 34, 36 and 38 of the judgment and/or (b) "*the new more robust approach*" referred to in paragraph 46 and outlined in the paragraphs which preceded it. I make it clear that I have not ignored these important principles nor focused exclusively, or even primarily, on doing justice between the parties in this individual case, although clearly I have had to consider the latter in the context of the former. I bear in mind that in reaching the conclusions he did in his Final Report, Sir Rupert Jackson rejected what he described as "*the extreme course which was canvassed as one possibility in [the Preliminary Report] paragraph 43.4.21 or any approach of that nature*" (my emphasis added), namely that non-compliance would no longer be tolerated save in "exceptional circumstances". Thus the circumstances do not have to be exceptional to attract the granting of relief, but a decision as to whether or not relief should be granted does involve the 'change of balance' implicit in the new wording of CPR 3.9. I have undertaken that balancing exercise and given great weight to the two factors identified expressly in the rule. However, bearing in mind that the relationship between justice and procedure has not changed so as to transform rules and rule compliance into trip wires, and "*nor has it changed it by turning the rules and rule compliance into the mistress*

rather than the handmaid of justice", I am satisfied that relief should be granted in all the circumstances of this case.

35. Although I have not heard any submissions as to costs, I understood Mr. Wignall to be accepting that success in the application would not be leading to him making any application for costs in his client's favour. Nor, as the successful party, could the Claimants be expected to pay the Defendant's costs, particularly in the light of what I have said about the part played by the Defendant when the default was looming as an inevitable consequence of the difficulties in which Mr. Cotter found himself and had explained to Ms. Hughes-Williams.

However, notwithstanding the above comments, I will clearly consider any submissions as to the appropriate costs order if the parties attend on the occasion when this judgment is handed-down.

36. As to the second application, namely that the case be transferred to London, although I have yet to hear formal or full submissions, and subject to them, I tentatively indicate (given that there was some discussion about it) that the application is arguably premature because, as yet, it is not known whether or not these claims will be defended or whether, as has been suggested, the parties will agree to attempt to resolve the matter through mediation. The proper time to consider any issue of transfer may be at First Case Management hearing when the issues between the parties will be much clearer. If this application cannot be resolved by agreement, then I will determine it, in the light of further submissions, on the occasion this judgment is handed down.

37. Consequently, the Claimants' application is granted and the Defendant's application is adjourned.

His Honour Judge Oliver-Jones QC

12th December 2013