

THE OAK CASH & CARRY DECISION.

1. The Court of Appeal (Jackson, King and Lindblom LJ) has provided further guidance post Mitchell¹ and Denton² on relief from sanctions. In this case the guidance is specific to non-compliance with Unless Orders: Oak Cash & Carry Ltd v British Gas Trading Ltd [2016] EWCA Civ 153.
2. In applications for relief from sanctions from non-compliance with an Unless Order the Court should review and take into account the conduct that led up to the making of the Unless Order, and the size and capacity of the solicitors acting for the defaulting party, at stages 1 and 2 of the Mitchell/Denton guidance. Further, at stage 3 a failure to act promptly (delaying 33 days to apply for relief), and so by losing a trial date, was a fatal failure.

3PB'S ANALYSIS.

3. **The Facts.** The case is a tragic victory of procedure over substance. The Defendant's solicitor failed to serve a Pre-Trial Checklist in compliance with an Order to do (and having had 3 months' warning to do so). The District Judge made an Unless Order striking out the Defence unless a Pre-Trial Checklist was filed. The Defendant's solicitor filed (in error) a Directions Questionnaire then, 2 days late on the Unless Order, a Pre-trial Checklist. The Unless Order had by then taken effect and no relief from sanctions was sought until a month later after a default Judgment had been entered. The cause of this failure was that the solicitor was under personal difficulties arising from his wife's health and had delegated the form to a trainee, who made an understandable error.
4. A first appeal to HHJ Harris QC saw the relief given but that decision was reversed by McGowan J. The Defendant appealed.
5. **The Court of Appeal.** Jackson LJ analysed the case applying the majority decision in Denton. His decision is that:

5.1. **Mitchell Stage 1.** In cases where there is an Unless Order, the Court must look not only at the breach of

the actual order, but also at past conduct leading up to the Unless Order. That is relevant (on a textual analysis of Denton) because an Unless Order is not unrelated to the previous conduct leading to it being made. Consequently, the breach of an Unless Order is likely to be considered serious at stage 1.

5.2. **Stage 2.** Jackson LJ rejected the submission that whilst a firm with 40 solicitors could devote further resources to cover one of its solicitors, it had devoted a reasonable resource to the filing of the form, and that this was an excusable error at stage 2.

5.3. **Stage 3** was a no-win situation given the loss of the trial date.

All this reached on a review of the discretion of HHJ Harris QC, with the conclusion no reasonable decision maker could have decided otherwise.

6. **Proportionality.** It is obvious that a Pre-Trial Checklist is at the lowest end of procedural value, typically without consequence or importance. Why then the harsh approach of striking out a Defence to a Claim of about £200,000? The answer lies in paragraph 44 of Mitchell – it is not open to a party applying for relief from sanctions to contest the validity of the sanction itself (which must be challenged if at all by appeal against its imposition on an Unless Order). It was not open to this Court to hold, or the Appellant to argue, that a draconian strike out was an improper sanction, but the argument and decision was confined to the 3 stage approach of Mitchell/Denton.

IMPACT OF THE DECISION

7. First and foremost practitioners need be aware that a failure to comply with an Unless Order will meet with the consequences it imposes, from which relief will not be given unless a stage 2 or stage 3 defence can be mounted.

¹ Mitchell MP v. News Group Newspapers Ltd [2013] EWCA Civ 1537

² Denton v. TH White Ltd [2014] EWCA Civ 906

8. More practically these points arise:
- 8.1. An Unless Order should be placed immediately upon receipt under the control of a Partner.
 - 8.2. An Unless Order, if not justified, should be challenged by appeal, or complied with immediately.
 - 8.3. A firm with more than a few solicitors must take steps to ensure that Orders (Unless Orders or those with default sanctions) under the control of the sick, infirm or reasonably distracted are monitored for compliance.
 - 8.4. Pointing to the plain injustice of a strike out against the loss of a trial date does not cut the mustard under the brave new Denton/Mitchell world.

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This article intends to state the law at the date indicated. Although every effort is made to ensure accuracy, this article is not a substitute for legal advice.

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Louis acted for *Oak* in the Court of Appeal. Martin Strutt acted for *Oak* in the successful application to HHJ Harris QC.