Dead and buried

After *Mitchell*, the principles of civil litigation as we know them must rest in peace, suggests **Dominic Regan**

Buried alive. In the case of the century, the Court of Appeal in *Mitchell v News Group* ruthlessly jettisoned the civil litigation principles that we had all grown up with. Compliance is paramount – as we shall see.

The claimant had failed to abide by two requirements of the defamation budgeting pilot. There had been no attempt to discuss the spend and, critically, the budget was delivered late. The costs judge decided that the correct sanction was to limit the claimant, if successful, to the recovery of court fees only. This is, of course, the draconian penalty specified by Civil Procedure Rule 3.14 which arrived on 1 April 2013 under the general budgeting measures for the bulk of multi-track cases. But there was no provision for this within the pilot.

An immediate application for relief from sanctions was launched. This was caught by the revised CPR 3.9 which applies to any application made, as this was, after 1 April 2013. *Mitchell* is a decision about relief, and not budgeting.

Absent authority, the costs judge concluded that the claimant had failed to produce any compelling excuse or explanation and so declined to reverse her decision. She remarked that the Jackson reforms were intended to bring about a change in the culture of litigation. No one can doubt that under the old rules, relief would have been granted here, where the delay was at the very outset of the litigation, obviously, and prejudice to the innocent party was non-existent.

Heavyweight silks were instructed for the inevitable appeal. The master of the rolls presided, sitting with Richards LJ and the stellar Elias LJ. One vital, and, I suggest, proper concession was made by the defendants, which has perhaps been overlooked. The decision would have no impact upon the six-figure costs bill which the claimant had already incurred. This makes sense, for budgeting is not retrospective. The language of the rule is unequivocal. It is about what is to be done, what is to be spent. The belief that a triumphant Mr Mitchell, if a winner, will get no costs is just plain wrong.

The appeal was dismissed, and *Mitchell* is not being taken any further. At the heart of the decision, delivered by the master of the rolls alone, is that litigation has changed for good. The Jackson report advocated a fundamental revision of practice. The Court of Appeal backed Sir Rupert, who by good timing was on holiday, to the hilt.

Every practitioner should read and reread the judgment. It should be taken to every application. The old CPR 3.9 checklist, previously called 'infamous' by the MR, has gone. The new rule now states:

On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need:

a) for litigation to be conducted efficiently and at proportionate cost; and

b) to enforce compliance with rules, practice directions and orders.

Since the rule begins by requiring the court to have regard to all circumstances of the case, it was contended by the appellant that this obliged the court to look at factors such as lack of prejudice, even though these were no longer spelt out explicitly. Not so. At best, these were now distant incidentals. The beef, centre stage, were the two explicit considerations; namely, the necessity for orders, rules and directions to be obeyed, coupled with the aspiration to conduct cases efficiently and at proportionate cost. The mischief that the latest measures are designed to remedy was the flouting of rules – and that is where one must one concentrate, not upon the adverse consequences, if any, of the breach.

THE NEW REGIME

Noble Denning-like references to justice and the golden thread are thus consigned to history. Do what you are told to do within the timescale set, and all will be well. Otherwise, your client – and so in turn, you – will suffer dire consequences.

The continued existence of CPR 3.9 means that there will be some cases where relief will be available. At the *Mitchell* appeal, Elias LJ injected a degree of wriggle room when he said that minor, trifling breaches should be forgiven – and this made its way into the transcript. The great unknown is when does a modest breach become significant? Satellite litigation to define the divide is an inevitability.

Some will be tempted to take points because of the potentially disproportionate benefit they might hope to secure. The new overriding objective requires that cases now be dealt with at proportionate cost, and part one has always required the parties to help in furthering that objective. I anticipate a dim view will be taken of opportunistic applications based upon a minor slip.

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Pressure of work was expressly rejected as a good excuse for the delay in *Mitchell*, although absence on account of illness might pass the test.

Cynically, had those acting for Mr Mitchell cobbled something vaguely looking like a budget together, they would have been infinitely better off, even though the court would then spend precious time testing, chopping and changing it.

From now on, there are certain steps I urge every litigator to take:

1. Spell out in writing to every client that you must have their full and prompt co-operation at every turn or else, no matter how strong their case, there will be a real risk of it being dismissed.

2. Diarise and monitor every deadline. This applies to all orders, and not just the nuclear unless order.

3. When seeking directions, give yourself some leeway where you can. Do not make a rod for your own back by assuming that things will always flow smoothly.

4. *Mitchell* draws an almighty distinction between an application for more time made when the deadline has yet to expire, compared to a desperate plea where the limit has been breached. Anticipate problems and jump if you see one looming.

On 17 December 2013, another division of the Court of Appeal reinforced the tough *Mitchell* mantra, demolishing any belief that *Mitchell* was a solitary aberration. In *Durrant v Chief Constable of Somerset And Avon* [2013] EWCA Civ 1624, the legally represented

MITCHELL

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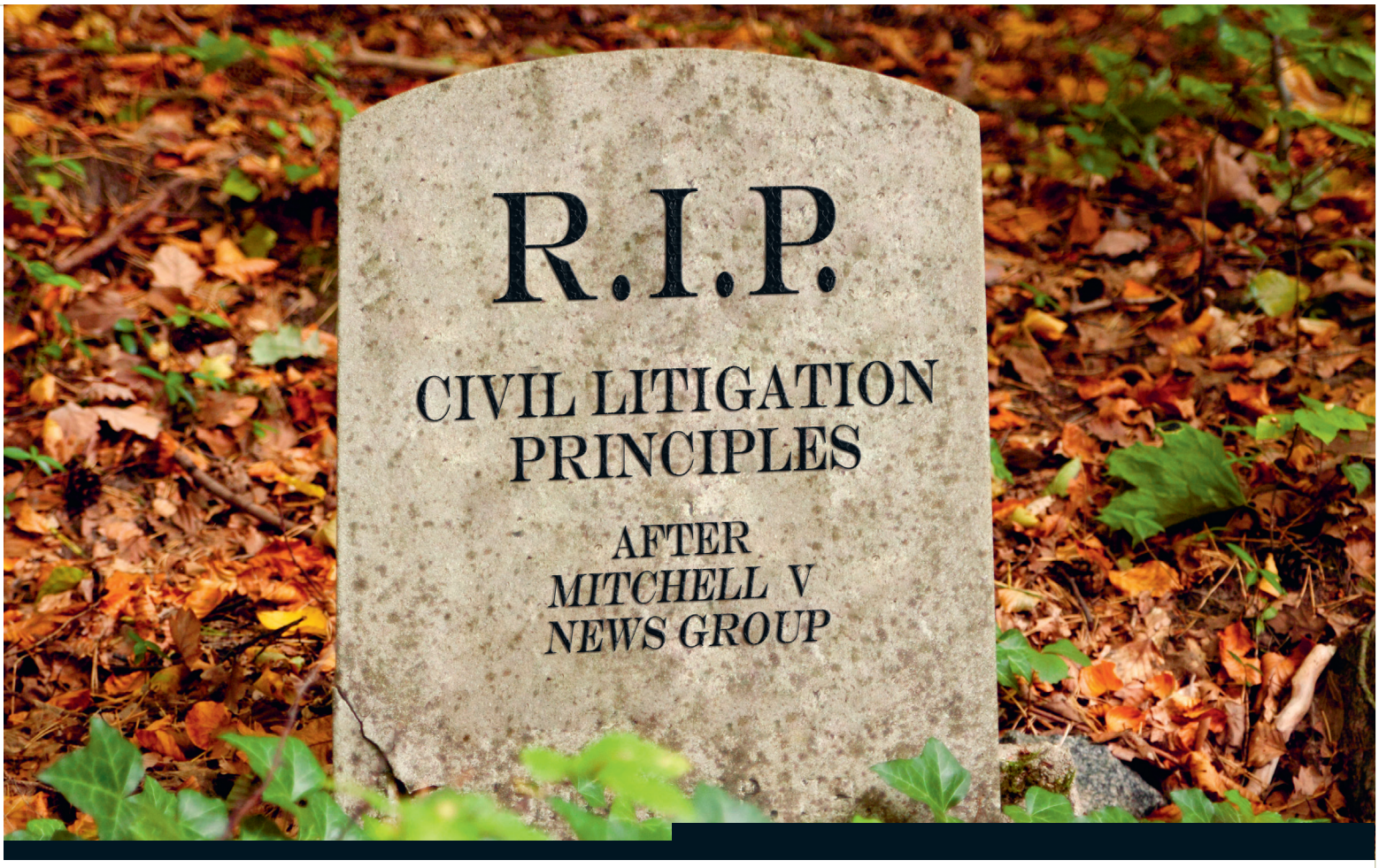

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defendant was confronted by your worst nightmare: an intelligent and organised litigant-in-person who had religiously adhered to the court timetable, unlike her opponent. Deadlines were missed, albeit in one respect by just a day. Sadly, this did not attract relief under the *Mitchell de minimis* concession, because the defendant waited two months to seek relief. A prompt application must be made. Since this was not done, even a modest infraction which *Mitchell* stated could be forgiven would not be overlooked, unless relief was sought with alacrity.

This raises the intriguing question of how should the court react where the culprit is a litigant-in-person. All will know that in the past, courts granted these people outlandish concessions. Have a look at *Tinkler v Elliot* [2012] EWHC 600 (QB) though, where the Court of Appeal admirably enforced the prompt requirement against a litigant-in-person, and furthermore gave invaluable guidance on how to deal with them. A modest degree of appreciation only should be bestowed upon the litigant-in-person. Rules are to be obeyed by all. From now on, I urge you to write to your unrepresented opponent in the clearest of terms specifying what the court requires them to do, and when. Tell them that if they do not comply, there is a real probability that they will be penalised and could find that their case will not be allowed to continue.

Both *Mitchell* and *Durrant* serve to prove the Jackson thesis about breach in one place causing damage elsewhere. Whereas *Mitchell* was concerned with a decision to refuse to grant relief, *Durrant* went to the Appeal Court because of the first instance decision to override an unless order. The former hearing led to the court being unable to attend to a series of mesothelioma cases, while the latter meant that the trial date was lost.

Several practitioners are seething because they have filed budgets in time, only to turn up and see the court decline to budget. The expectation is indeed that budgeting will occur, but it is not an absolute obligation for the court to do so. For example, a desperate judge might decline because they simply do not think they have the available time on the day. Those who repeatedly duck out will, I understand, be spoken to in indelicate terms.

Again, budgeting is not a rehearsal for a detailed assessment. It is a broad and speedy review of prime steps and expenditure. Some defendants have asked me whether the effort to compile a budget is worthwhile, given the probability that they will settle the claim. The answer is always an emphatic 'yes'. How is the court to get any sense of proportion without comparables before it? Also, a defendant without a leg to stand on can secure a significant costs recovery on the back of an intelligent part 36 offer.

It has taken very little time for the Court of Appeal to send out the signal that times have changed, and for good. Welcome to the new world.

Professor Dominic Regan of City Law School is an expert on costs reform