

CONSTRUCTION IS A RISKY BUSINESS: REDUCING RISK & LIMITING LOSS

INTRODUCTION

- A review of the case law in the last 18 months and the lessons we can learn re:
 - Contractually Limiting Loss;
 - Avoiding the Consequences of Statutory Adjudication and;
 - Taking Advantage of Mitchell.

CONTRACTUALLY LIMITING LOSS

NET CONTRIBUTION CLAUSES

- Previously very little reported case law dealing with net contribution clauses. One of the few to have attracted attention before 2013:
 - **Langstane v Riverside & Others (Scotland, 3 April 2009):** The Court of Session held that the Unfair Contract Terms Act 1977 ('UCTA') did not apply to the net contribution clause in the ACE Conditions 1998 revision (a standard formulation of a net contribution clause) as it did not seek to exclude or restrict the promisors liability for breach of duty.
- There was then:
 - ***Royal Bank of Scotland v Halcrow Waterman Ltd (Scotland, 8 November 2013):***
 - The Defendant (a Structural Engineer) was appointed by the Contractor on a construction project.
 - The property was let to the Claimant who received the benefit of a collateral warranty which contained a net contribution clause which limited the Defendant's liability to the Claimants '*losses which it would be just and equitable to require the Consultant to pay having regard to the Consultants responsibility for the same and on the basis that all other Consultants shall...have provided...[similar]... contractual undertakings*'.

- The Claimant made a claim against the Defendant for, inter alia, the cost of remedying defective works.
 - The Defendant contended that responsibility for the Claimant's losses also lay with the Contractor/its Sub-Contractors, and that:
 - (i) the Contractor should be construed as falling within the scope of '*other Consultants*', or;
 - (ii) the clause should in any event restrict the Defendant's liability to that proportion of the Claimant's losses that it would be just and equitable to require the Defendant to pay.
 - The Court of Session did not agree. It held:
 - (i) A clear and well recognised distinction was drawn throughout the contractual documentation between the Contractor and the Consultants; to interpret the words '*other Consultants*' as including the Contractor would amount to re-writing it.
 - (ii) The Defendant's second argument would, in effect, require reading the clause as if it stopped after the word '*responsibility for the same*'.
- ***West -v- Ian Finlay & Associates (Court of Appeal, 27 March 2014)***
- The Claimants appointed the Defendant (Architects) in relation to the alteration and refurbishment of a property. The appointment included the following clause:

'Our liability for loss or damage will be limited to the amount that it is reasonable for us to pay in relation to the contractual responsibilities of other consultants, contractors and specialists appointed by you.'
 - The Defendant put the main contract out to tender and the Claimant appointed Armour. The Claimant's also directly procured several aspects of the works, which did not form part of the main contract.
 - There were a number of defects following completion and the Claimant commenced a claim against the Defendant. Armour was insolvent.
 - At first instance, Mr Justice Edwards-Stuart held that:
 - the net contribution clause was not unfair under the Unfair Terms in Consumer Contracts Regulations (UTCCR - which only applies to contracts with consumers) and was therefore enforceable and;
 - the losses were caused to some extent by Armour's breach of contract

BUT:

- the words 'other consultants, contractors and specialists appointed by you' could either mean: (a) everyone with whom the Claimants had entered into a contract in relation to the contract, other than the Defendant or (b) only those with whom the Claimant had contracted directly and not the main contractor who had been appointed by the Claimant through the agency of the Defendant.
 - As clause 7.2 of UTCCR requires the court to give the interpretation most favourable to the Claimants, meaning (b) applied.
- Fortunately the Court of Appeal did not agree:
- 'The first consideration in any construction exercise is to consider the normal meaning of the words. Here the normal meaning is crystal clear. We do not accept that there is any ambiguity. There was no limitation on the words "other consultants, contractors and specialists appointed by [the Claimants]" and they must be taken to mean any such persons, including the main contractor....but of course excepting... [the Defendant]...We do not therefore think that the judges construction of the NCC was an available meaning'.*
- The Court of Appeal went on to consider the questions of unfairness under regulation 5 of the UTCC Regulations and (contrary to the Scottish case of *Halcrow*) reasonableness under UCTA .
- The Court found that the net contribution clause was both 'fair' and 'reasonable' and therefore enforceable, taking into account the following:-
- the prevalence of the usage of the net contribution clause in standard RIBA forms;
 - the fact the clause would not be regarded as unusual in a commercial contract;
 - the fact that the Claimants would be taking the final decision on the choice of main contractor, very likely being alive to the fact that the contractors financial stability was a matter of importance;
 - the Claimants were in an equal bargaining position with the Defendant. They could have re-negotiated the net contribution clause, gone to another architect or protected themselves from the risk posed by the net contribution clause by some other commercial route (insurance or performance bond);

- the Claimants ought to have known of the existence of the net contribution clause, placed prominently on the third page of the Defendant's appointment.
- So, net contribution clauses are potentially 'fair' and 'reasonable'. However, it does not of course follow that every net contribution clause will be found to be 'fair' and 'reasonable'. It will depend on the circumstances in every case.
- As to the effect of the net contribution clause, the Court of Appeal held:

'The amount that it would be reasonable for...[the Defendant]...to pay should....be approached...in the same way as an evaluation of contribution under section 2(1) of the Civil Liability (Contribution) Act 1978...[which]...provides that in proceedings for contribution between persons liable for the same damage, the amount recoverable shall be "such as may be found by the court to be just and equitable having regard to that persons responsibility for the damage in question"'

LIMIT/EXCLUSION OF LIABILITY CLAUSES

- ***Elvanite Full Circle Ltd -v- AMEC Earth & Environmental (UK) Ltd (High Court, 24 May 2013):***

The Facts

- The Claimant appointed the Defendant planning consultant to complete a planning application by a specified date.
- The appointment contained the following clauses:
 - The Defendant *'shall NOT be responsible for any consequential, incidental or indirect damages'*.
 - The Defendant's liability is limited to *'the total compensation actually paid to AMEC for the services or £50,000 whichever is less'*.
 - *'All claims by the CLIENT shall be deemed relinquished unless filed within (1) year after substantial completion of the Services'*
- The Defendant failed to complete the planning application by the specified date and the Claimant brought proceedings against the Defendant to recover the profit it would have allegedly made if the application had been completed on time.

The Decision

- The Honourable Mr Justice Coulson found in favour of the Defendant, mainly because the most significant delays in the planning application could be attributed to the Claimant.
- Obiter, he went on to consider the clauses limiting/excluding liability. He found:
 - They were all '*reasonable*' under UCTA and therefore enforceable on the basis that :-
 - The bargaining positions of both parties were broadly equal. As per the judgement of Lord Justice Chadwick in **Watford Electronics -v- Sanderson CFL Ltd [2001]**:
'Where experienced businessmen representing substantial companies of equal bargaining power negotiate an agreement...Unless satisfied that one party has, in effect, taken unfair advantage of the other – or that the term is so unreasonable that it cannot properly have been understood or considered – the court should not interfere.'
 - The Claimant received no inducement to agree to any of the terms.
 - There was nothing to suggest that the Claimant did not know what the Defendant's terms said.
 - Terms limiting liability in various ways are not uncommon in contracts for the supply of goods and/or services.
 - Re the exclusion of consequential/indirect damages, if the loss of profit being claimed was not too remote, it would be '*indirect damages*' and therefore excluded by this clause. However, whilst loss of profit would usually be '*indirect damages*', he acknowledged that it can sometimes be categorised as direct loss. It will depend on the nature of the contract obligations.
 - Re the clause capping liability, it is not uncommon for those providing professional services to limit their liability. It is also common for those providing goods and services to seek to limit their liability to the value of the contract, particularly where their goods or services are only a small component in an otherwise much larger machine or structure. In **Shared Network Services Ltd v Nextria 1 UK Ltd [2011]**, Justice Flaux said:
'...this form of limitation of liabilityis, in my experience, quite common under various types of commercial contract, and there is nothing inherently unreasonable in this form of limitation.'

- Re the time limit clause, the requirement for 'all claims' to be 'filed' within one year, required 'the provision of something akin to a Letter of Claim in the Pre-Action Protocols'. It did not require proceedings to be commenced, as the word 'filed' is not 'apt to describe the commencement of proceedings in this jurisdiction. In particular the "filing of claims" is not a process recognised by English court procedure'.

- **SABIC UK Petrochemicals Ltd -v- Punj Lloyd Ltd (High Court, 10 October 2013):**

The Facts

- The Claimant appointed Simon Carves Ltd (SCL), a subsidiary of the Defendant, to construct a low density polyethylene plant. It included the following limit of liability:

'...the aggregate liability of the Contractor under or in connection with the Contract (whether or not as a result of the Contractor's negligence and whether in contract, tort or otherwise at law)....shall not exceed 20%of the Contract Price'.
- Under the contract SCL provided an Advance Payment Guarantee and a Performance Guarantee
- The Defendant provided a Parent Company Guarantee (PCG) to the Claimant guaranteeing the performance of SCL under the contract.
- It became apparent that SCL would not be able to meet an already revised completion date and the Claimant terminated the contract and completed the project itself, employing the same principal sub-contractors as SCL.
- SCL went into administration and the Claimant (a) called in the Advance Payment Guarantee and Performance Guarantee and (b) sued the Defendant under the PCG.
- The contract provided that if the total loss in completing the works following termination exceeded the total amount which would have been payable to SCL had they completed the works, the difference would be recoverable by the Claimant.
- An issue arose as to whether this fell within the aggregate cap of 20% of the contract price.
- An issue also arose as to whether, in calculating its losses, the Claimant should deduct the amount it had received under the Advance Payment Guarantee and the Performance Guarantee, before the cap was applied.

The Decision

- Justice Stuart Smith held, obiter (as it did not affect the amount of the judgement sum):
 - In the context of the contract as a whole, notwithstanding the very wide wording of the capping clause, the parties did not intend the cap to apply to the costs incurred by the Claimant in completing the works.

- The monies paid out under the Advance Payment Guarantee and the Performance Guarantee should be deducted from the amount recoverable by the Claimant for completing the works before the cap on liability is applied.
- As such, the Claimant was entitled to recover its losses up to the 20% cap + its costs incurred in completing the works + the amounts recovered under the Advance Payment and Performance Guarantees.

NO GREATER LIABILITY CLAUSES

- ***Oakapple Homes (Glossop) Ltd -v- DTR (2009) Ltd (High Court, 31 July 2013)***

The Facts

- The Claimant appointed the Defendant architect in connection with the conversion of a former cotton mill to residential apartments and commercial units. The appointment required the Defendant to enter into collateral warranties for the benefit of purchasers and tenants of the property containing the following '*no greater liability*' clause:

'The Consultant has no greater liability hereunder which is greater or of longer duration than it would have had if the Beneficiary had been a party to the Appointment as joint employer PROVIDED THAT the Consultant shall not be entitled to raise under this Deed any set-off or counterclaim in respect of the sums due under the Appointment'.
- The Claimant subsequently appointed Oakapple Construction, a company closely associated with the Claimant as the main contractor ('the Contractor'), and the Defendant's appointment was novated to the Contractor.
- After completion of the project the property was largely destroyed by fire. The Claimant alleged that the fire and its rapid spread was the fault of the Defendant.
- At this stage the Defendant had not executed collateral warranties in relation to the purchasers of apartments.
- Consequently, the Claimant sought an order compelling the Defendant to execute those warranties.
- One of the issues that the Court had to decide was whether the Defendant would be entitled to defend claims by beneficiaries of the residential tenant collateral warranties on the basis of the Contractor's contributory negligence.

The Decision

- Mr Justice Ramsay held:
 - Under the '*no greater liability*' clause, the Defendant's liability to the Beneficiary would be no greater or of longer duration than it would have been if the Beneficiary had been a party to the Appointment as joint employer. The Appointment is the agreement between the Claimant and Defendant and not the Appointment '*as novated*'.
 - The Defendant could not allege against the Claimant that the damages due to the Claimant fell to be reduced to take account of contributory negligence by Oakapple Construction:

'An employer, under a contract is not liable... for the negligence of the contractor. In this case there is no basis for saying that the connected company relationship....alters that position.'
 - As the damages due to the Claimant could not be reduced to take account of the alleged contributory negligence, the '*equivalent rights of defence*' clause would not reduce the damages payable to a Beneficiary.
 - Furthermore, the position would not change, even if the collateral warranty referred to the Appointment '*as novated*'. If Oakapple Construction was contributory negligent, that would still mean that the Defendant was liable to Oakapple Construction. That liability would not be affected, but the damages recoverable for that liability would be reduced:

'.....under s.1 of the Law Reform (Contributory Negligence) Act 1947, the fault of Oakapple Construction would not defeat the claim, that is go to liability, it would reduce the damages, recoverable by Oakapple Construction "to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage"'
- If the warranty had also included an equivalent rights in defence clause, which (a) applied to the appointment as novated and (b) was not limited to equivalent rights in defence of liability (as in some standard warranties), then the Defendant may have been able to rely upon a defence of contributory negligence against the Contractor.

CONCLUSION

- There are various contractual clauses that can be used to limit exposure;

BUT:

- they may be less effective or even ineffective if not carefully drafted.

AVOIDING THE CONSEQUENCES OF STATUTORY ADJUDICATION

WHY SHOULD YOU WANT TO AVOID THEM?

- Whilst Statutory adjudication is a way of dealing expeditiously and relatively cheaply with construction disputes, it is well recognised that adjudication is a rough and ready process.
- As Lord Chadwick put it in *Carillion Construction Ltd –v- Davenport Royal Dockyard Ltd (2005)*, “the need to have the ‘right’ answer has been subordinated to the need to have an answer quickly”.

HOW MIGHT YOU AVOID THEM?

- where the adjudicator lacked or exceeded his jurisdiction;
- where the adjudicator breached the rules of Natural Justice and ;
- where the receiving party is in liquidation or receivership or there is serious doubt about its ability to repay an adjudicators award, obtaining a stay of execution;
- As an adjudicator’s award is not final and binding, you can also pay the award and have the dispute heard afresh in arbitration or proceedings.

JURISDICTION

- Two instances where an adjudicator will lack jurisdiction have recently been looked at by the Courts:
 - where there is no construction contract and;
 - where there is a construction contract, but it is with a residential occupier.

Is a Collateral Warranty a Construction Contract?

- Construction contract is defined in section 104 of the Housing Grants, Construction and Regeneration Act 1996 as an agreement with a person for any of the following:-
 - carrying out of construction operations;
 - arranging for the carrying out of construction operations by others, whether under sub-contract to him or otherwise;
 - providing his own labour, or the labour of others, for the carrying out of construction operations.

- to do architectural, design, or surveying work, or to provide advice on building, engineering, interior or exterior decoration or on the laying-out of landscape, in relation to construction operations.
- In ***Parkwood Leisure Ltd v Laing O'Rourke Wales & West Ltd (29 August 2013)***, Mr Justice Akenhead held that the warranty the Defendant had provided to the Claimant was a construction contract on the following basis:-
 - In Clause 1 of the Collateral Warranty the Defendant warranted, acknowledged and undertook that, inter alia, *'it has carried out and shall carry out and complete the Works'*.
 - As such, Mr Justice Akenhead held that the Defendant was *'not merely warranting or guaranteeing a past state of affairs'* it was providing an undertaking that it would *'actually carry out and complete the Works'*
 - *'Thus, this Collateral Warranty is clearly one "for the carrying out of construction operations by others"....'*
- However, it does not follow that all collateral warranties given in connection with construction developments will be construction contracts. According to Mr Justice Akenhead:-

'One needs primarily to determine in the light of the wording and the relevant factual background each such warranty to see whether, properly construed, it is such a contract for the carrying out of construction operations. A very strong pointer to that end will be whether or not the relevant Contractor is undertaking to the beneficiary of the warranty to carry out such operations. A pointer against may be that the works are completed and that the Contractor is simply warranting a past state of affairs as reaching a certain level, quality or standard.'

The Residential Occupier Exception

- ***Westfields Construction Ltd v Clive Lewis (27 February 2013)*** concerned refurbishment works to a dwelling house.
- A dispute arose, the Claimant referred the matter to adjudication and the adjudicator made an award to the Claimant. The award remained unpaid and the Claimant applied to enforce the adjudicator's decision.
- Mr Lewis argued that because he occupied the property at the time that the parties contracted (although he did not do so subsequently), the residential occupation exception applied, and the adjudicator's decision was not therefore enforceable.
- The Honourable Mr Justice Coulson did not agree. He held:

- *'...occupation is not to be tested by a single snapshot in time...,but instead requires on going occupation (including, if appropriate, an intention to occupy in the future)'*
- As the Defendant *'did not occupy the property as his residence after the contract was made...., neither did he intend to occupy the property as his residence thereafter'*, the residential occupation exception did not apply.

WHAT ABOUT HUMAN RIGHTS?

- Numerous challenges have been made to adjudicator's decisions under Article 6 (the right to a fair hearing).
- However, they have consistently been rejected on the basis that the adjudicator does not finally determine the parties' rights and obligations.

However:

- In the Scottish case of ***Whyte and Mackay –v- Blyth & Blyth (9 April 2013)***, one of the reasons Lord Malcolm refused to enforce the adjudicator's decision was because he found that it would have breached Protocol 1 Art.1 (the right to peaceful enjoyment of your possessions) of the European Convention of Human Rights (ECHR).

The Facts

- In 2004, the Defendant designed the structure of a new bottling plant on the Claimant's Grangemouth premises. The Claimant has a lease of the premises which expires in 2036.
- The works were completed in January 2006 and cracks were subsequently discovered. In or about June 2009, the Claimant was advised that the cracking was caused by a lack of adequate piling, resulting from defective design.
- To avoid business interruption, the Claimant proposed carrying out interim remedial works and then, as they were required to return the building in a satisfactory condition at the end of the lease, to vacate the premises one year early, to allow the reinstatement of the main production area floor slab.
- In January 2011, the Claimant intimated a claim against the Defendant and, on 2 March 2012, they referred the dispute to adjudication.
- They claimed the cost of their proposed scheme of remedial works as well as for the loss of use of the premises for the final year of the lease, when the main works would be carried out.
- On 9 April 2012, the adjudicator issued his decision, which required the Defendant to pay the Claimant almost £3M *'forthwith'*. On the adjudicator's findings, the cost savings enjoyed by the Claimant in not incurring the cost of the additional piling

works could be set against almost all of the works to be done prior to the final year of the lease.

The Decision: Protocol 1 Art. 1 of the ECHR

- Protocol 1 Art 1 of the ECHR states *'Every natural person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest....'*
- There were therefore two questions for the Court to decide:
 1. *Would enforcement of the award amount to an interference with the Defendant's possessions?*
 - Lord Malcolm found that it did:
 - the fact that the Defendant enjoyed the benefit of PI Insurance was an *'irrelevant circumstance'*, which the law is *'traditionally....blind to....'*.
 - In any event there could be no guarantee that the Defendant's assets would *'remain wholly unaffected'*. Their PI policy had an excess, there could be an impact on their future insurance arrangements and problems could emerge as to the validity of the cover or the insurers themselves.
 2. *Was that interference justified as being in the public interest?*
 - Lord Malcolm found that it was not:
 - Adjudication does not purport to reflect the parties' true legal rights and obligations. It provides a provisional award pending a final determination by litigation, arbitration or agreement. *'There was no pressing need for a speedy provisional decision'* in this case. Mackay would not incur major losses for many years and in the meantime they were *'considerably in pocket, in the sense that they did not incur the extra costs involved in the piling works'*.
 - If the Defendant was ultimately successful, there was no guarantee that they would recoup any monies paid to the Claimant
 - *'None of the public interest justifications which underpin the compulsory statutory scheme'* (to encourages co-operation between the parties to construction contracts, preserve the cash flow of contractors and sub-contractors and improve the efficiency of the construction industry) were present in this case.

The Impact in England & Wales

- Even if followed in England and Wales its impact is likely to be limited in light of the particular facts of this case. As Lord Malcolm stated in his judgement:

'I do not consider that this will upset the proper working of the well-established statutory scheme of compulsory adjudications....The court should be careful not to undermine the undoubted benefit of many, if not most adjudications, by an over-willingness to uphold objections to enforcement.'

HOW LONG HAVE YOU GOT TO GET YOUR MONEY BACK?

Jim Ennis Construction Ltd v Premier Asphalt Limited (24 July 2009)

The Facts

- On 9 April 2002, the Claimant appointed the Defendant to carry out the laying and rolling of bituminous macadam surfacing. The contract contained no express adjudication provision, so the adjudication provisions of Part I of the Scheme for Construction Contracts were incorporated as implied terms of the contract.
- The Claimant was appointed by the Main Contractor, Taylor Woodrow, who was in turn appointed by the Employer, Lancashire County Council.
- The Defendant laid the base core and, on 29 May 2002, the Employer's Engineer complained about this work.
- Consequently, the Claimant removed the base core and on 18 June 2002 the Defendant replaced it. At that stage there was no agreement as to who should bear the cost of the work.
- On 17 December 2002, the Defendant made a final application for payment which included a sum for the replacement works.
- The Claimant:
 - refused to pay for the replacement works, asserting that the Defendant was not entitled to be paid because they were necessary to remedy the Defendant's original defective work and;
 - claimed to be entitled to deduct from the Defendant's final account, its cross claims for loss and damage alleged to have been caused by the laying of the original defective work.
- Almost 6 years later, on 15 September 2008, the Defendant referred the dispute about the deduction to adjudication.
- The Adjudicator upheld the Defendant's claim and the Claimant paid the award.

- On 15 April 2009, the Claimant issued proceedings seeking a final determination of the dispute.
- The Defendant made an application to strike out the claim on the basis that limitation had expired as, on the Claimant's pleaded case, the breaches of contract complained of against the Defendant must have occurred before 29 May 2002 i.e. more than 6 years before proceedings were issued.
- The Claimant argued:
 - it was an implied term of the contract that where a dispute arises which is referred to adjudication then the losing party who complies with the adjudicator's decision and pays sums to the winning party is entitled to reclaim those sums in legal proceedings or, to re-argue the dispute in subsequent court proceedings and, if successful, to be repaid all sums of money (the 'implied term').
 - As such, the cause of action arises no earlier than either the date of the adjudicator's decision or the date of payment in compliance with that decision.

Relevant Legislation

- S108 of the Housing Grants Construction and Regeneration Act 1998 states:

'(3) The contract shall provide that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement....

(5) If the Contract does not comply....the adjudication provisions of the Scheme for Construction Contracts apply.'
- The Scheme provides:

'2 Where a construction contract does not comply....the adjudication provisions in Part I of the Schedule to these Regulations shall apply.'
- The Schedule provides:

'23(2) The decision of the adjudicator shall be binding on the parties and they shall comply with it until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement....'

The Decision

- His Honour Judge Stephen Davies held:
 - *'Both s.108(3) of HGCRA and paragraph 23(2) of the Scheme make it clear that the decision of the adjudicator is only binding on the parties until the dispute is finally determined by legal proceedings, by arbitration (if provided for) or by agreement.'*
 - *'It seems to me that the implied term is necessary to make fully workable the concept of the temporary finality of the adjudicator's decision which lies at the heart of the policy behind the adjudication provisions of the HGCRA.'*
 - *'...the cause of action under the implied term can only arise when the losing party pays monies to the winning party in compliance with the adjudicator's decision....because it is a claim founded on a simple contract...the losing party has 6 years from the date of payment in which to bring legal proceedings to recover that payment'*

Aspect Contracts (Asbestos) Ltd v Higgins Construction Plc

The Facts

- In 2004, the Defendant instructed the Claimant to carry out an asbestos survey, which they did later that year.
- In 2005, an asbestos removal sub-contractor identified asbestos which had not been picked up in the Claimant's survey.
- The Defendant alleged the Claimant had failed to carry out the survey properly and, in 2009, referred the dispute to adjudication. The Scheme for Construction Contracts 1998 applied as there was no express adjudication clause in the contract.
- The adjudicator found the Claimant liable and the Claimant paid the adjudicator's award later that year.
- In 2012, the Claimant commenced proceedings, arguing there was an implied term in their contract with the Defendant entitling them to have the dispute determined by litigation and, if those proceedings were successful, to a repayment of monies paid.

The Decision

- At First Instance (23 May 2013), Mr Justice Akenhead declined to follow *Jim Ennis Construction Ltd v Premier Asphalt Limited* and found:
 - there was no such implied term;
 - the usual limitation of 6 years from breach of contract applied;
 - Aspects claim was therefore out of time.

- He stated:

'The reality is that, as here, the party ultimately found by the adjudicator to be in breach.. has to pursue a claim for what is in essence, practice and effect a claim for a negative declaration which it could have brought any time after performance; it does not have to wait until the adjudicator issued his decision...

The only risk on analysis which theoretically exists is that, if a party...waits to see what the result of an adjudication started against it just before expiry of a limitation period will be...its later claim for a negative declaration may well fail if the limitation defence is run against it. Of course in the commercial world and in real life.....adjudications are started usually well within the limitation period...so that the losing party will, almost invariably, be well within the limitation period to initiate its own proceedings....The risk therefore is not only very small but is one for which each party...does have a remedy, which is to commence its proceedings...within the limitation period.'

- Fortunately, the Court of Appeal did not agree (29 November 2013) and followed *Jim Ennis Construction Ltd v Premier Asphalt Limited*. Lord Justice Longmore states:-

'First, it is counter-intuitive to expect a person who says he is not liable to have to take the initiative and himself start legal proceedings. If a wily claimant begins an adjudication (as he is apparently entitled to do) shortly before any relevant 6 year period of limitation expires and himself issues (but does not serve) precautionary proceedings for the full amount of his claim in case he does not get all he wants from the adjudicator, it is asking a lot to expect a perhaps less wily defendant to appreciate that he must immediately himself issue proceedings claiming he is not liable to the claimant, if he wishes to preserve his own position.

Secondly it is not at all clear (at least to me) on what juridical basis it can be said that a declaration of non-liability will automatically carry with it a right (on this view not given by the contract) to claim repayment of what he has overpaid.

Thirdly the difficult question is raised whether a declaration of non-liability is liable to be time-barred at all. The judge has held that it is time-barred because Aspect have a cause of action of "non-liability" which accrued when they supplied their report to Higgins. This is at best controversial since a cause of action is usually an assertion of entitlement....

None of these difficulties arise if the contract is construed in accordance with what it appears to say namely that any overpayment can be recovered. The accrual of that cause of action is

the date of overpayment since the losing party is (on this hypothesis) "entitled" to have the overpayment returned to him.'

TAKING ADVANTAGE OF MITCHELL

NEW CPR 3.8 AND 3.9

- 3.8

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

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

(2) Where the sanction is the payment of costs, the party in default may only obtain relief by appealing against the order for costs.

(3) Where a rule, practice direction or court order –

(a) requires a party to do something within a specified time, and

(b) specifies the consequence of failure to comply,

the time for doing the act in question may not be extended by agreement between the parties except as provided in paragraph (4).

(4) In the circumstances referred to in paragraph (3) and unless the court orders otherwise, the time for doing the act in question may be extended by prior written agreement of the parties for up to a maximum of 28 days, provided always that any such extension does not put at risk any hearing date.

(Paragraph (4) only came into force on 5 June 2014)

- 3.9

(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.

THE POSSIBLE SANCTIONS

- A specific sanction may be set out in a rule, practice direction or court order e.g.
 - **CPR 3.14:** Unless 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 fee.
 - **CPR 32.10:** If a witness statement or a witness summary for use at trial is not served in respect of an intended witness within the time specified by the court, then the witness may not be called to give oral evidence unless the court gives permission.
 - **CPR 35.13:** A party who fails to disclose an expert's report may not use the report at the trial or call the expert to give evidence orally unless the court gives permission.
 - **CPR 44.3B** (in its pre 1 April 2013 form, which still applies to additional liabilities entered into before that date): Unless the court orders otherwise, a party may not recover as an additional liability...any additional liability for any period during which that party failed to provide information about a funding arrangement in accordance with a rule, practice direction or court order.
- If a specific sanction is not set out in a rule, practice direction or court order, the Court may still impose its own sanction:
 - ***Mitchell -v- News Group Newspapers Ltd (Court of Appeal, 27 November 2013):***
 - CPR PD51D Defamation Proceedings Costs Management Scheme applied.
 - It does not stipulate the nature of any sanction, so the Court applied CPR 3.14 by analogy.
 - ***Webb Resolution Ltd and E-Surv Ltd (High Court, 20 January 2014):***
 - CPR 52.3(5) provides that a request to renew an application for permission to appeal '*must be filed within 7 days of the notice that permission has been refused*', but it does not provide for a specific sanction in the event that an application is served out of time.
 - Nevertheless, Mr Justice Turner, held that the Defendant's appeal was out of time and refused to grant an extension. He justified his approach on the basis that:

'(i) The wording of CPR 52.3(5) is unequivocally expressed in mandatory terms;

(ii) The time limit of 7 days is deliberately short thereby emphasising the need for very prompt action and;

(iii) There is clear and compelling priority for there to be an end to litigation and for the parties to know when that end has been reached.'

- ***Baho & Ors and Meerza (Court of Appeal, 10 April 2014)***, subsequently applied the approach in ***Webb*** to an application out of time to have a committal order set aside.

THE TEST FOR RELIEF FROM SANCTION

THE MITCHELL TEST

Mitchell -v- News Group Newspapers Ltd (Court of Appeal, 27 November 2013):

- Finding that:
 - *'regard should be had to all of the circumstances of the case'* but that:
 - the two considerations specifically mentioned in CPR 3.9 *'should now be regarded as of paramount importance and be given great weight'*,

the Court of Appeal set out the following test:-

1. Is the non-compliance trivial?

- Yes – *'the court will usually grant relief provided that an application is made promptly'*
- No - go to step 2

2. If the non-compliance is not trivial, is there a good reason for it?

- Yes – *'the court will be likely to decide that relief should be granted'*.
- No – *'the weaker the reason, the more likely the court will be to refuse to grant...'* relief from sanction.

THE MITCHELL TEST RE-INTERPRETED

Denton and Others v TH White Ltd Denton & Another; Decadent Vapours Ltd v Bevan and Others; Utilise TDS Ltd v Davies and Others (Court of Appeal 4 July 2014)

- *'...the guidance given ...[in]...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 sanction in three stages':*

1. Is the non-compliance serious or significant?

- Yes – ‘the second and third stages assume greater importance’
- No – ‘relief from sanction will usually be granted and it will usually be unnecessary to spend much time on the second and third stages.’

2. Is there a good reason for it?

- Yes or No – go to stage 3

3. In all of the circumstances of the case, would it be just to grant relief from sanction?

WHEN DOES THE TEST APPLY?

- There needs to be a sanction requiring relief.
 - **Bank of Ireland v Pank (High Court, 12 February 2014):**
 - The parties exchanged costs budgets. The Claimant adopted Precedent H, but on the first page failed to include a full Statement of Truth. Instead the document had the words ‘[Statement of Truth]’ and was signed and dated. The Claimant should have deleted the words in square brackets and inserting the prescribed wording.
 - CPR 3.13 and 3.14 provide:
 - 3.13** *Unless the court otherwise orders, all parties except litigants in person must file and exchange budgets as required by the rules or as the court otherwise directs. Each party must do so by the date specified in the notice served under rule 26.3(1) or, if no such date is specified, seven days before the first case management conference.*
 - 3.14** *Unless 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.*
 - PD 3E provides that the budget must be ‘verified by a statement of truth’ and PD 22 specifies the form it should take.
 - The Defendant argued that the Claimant was in breach of CPR 3.13, that it needed relief from the sanction otherwise imposed by CPR 3.14 and that CPR 3.9 applied.
 - The Honourable Mr Justice Stuart-Smith disagreed:
‘CPR 3.14 provides for a sanction in the event that a party “fails to provide a budget” but does not include the additional words “complying in all respects

with the formal requirements laid down by PD 3E" or any other words to similar effect. There is nothing in the rules or practice directions which requires any and every failure to comply with the formal requirements for budgets as rendering the budget a nullity, as opposed to being one which is subject to an irregularity. The logical consequence of the Defendant's argument would be that any failure to comply with the form of Precedent H or PD 22 would render the filing of a budget a complete nullity.....

Such a conclusion would, in my judgement, serve only to bring the rules of procedure and the law generally into disrepute...

Since I do not accept that this is a case where CPR 3.14 applies, it follows that it is unnecessary to consider whether relief from sanction should be granted'

- There needs to be an application for relief from sanction, as distinct from:
 - an application to vary or revoke under CPR 3.1 (7) ('A power of the Court under these Rules to make an order includes a power to vary or revoke an order'), the order imposing the sanction:

Thevarajah v Riordan (Court of Appeal, 16 January 2014): When the Court is dealing with an application to set aside an order imposing the sanction under CPR 3.1(7) it should apply the criteria set out in the case ***Tibbles v SIG Plc***. In that case it was held that the discretion might appropriately be normally exercised only where (i) there had been a material change of circumstances since the order was made; (ii) the facts on which the original decision was made were misstated; or (iii) there had been a manifest mistake on the part of the judge .

- 'An application for an extension of the time allowed to take any particular step in litigation....provided that the applicant files his application notice before the expiry of the permitted period. This is the case even if the court deals with the application after the expiry of the relevant period' (***Hallam Estates -v- Baker (Court of Appeal, 19 May 2014)***). As stated in ***Mitchell***:

'... applications for an extension of time made before time has expired will be looked upon on more favourably than applications for relief from sanction made after the event'.

WHEN IS NON-COMPLIANCE 'SERIOUS OR SIGNIFICANT'?

- It will depend on the facts of every case, but we do have some guidance.

- Guidance in ***Denton, Decadent, Utilise***:

- *'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 ...is a failure to pay court fees.'*
- *"... 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" (i.e. it should not at this stage consider other unrelated failures or the defaulter's previous conduct).*

SERIOUS OR SIGNIFICANT BREACHES

- ***Denton***:

- Proceedings were issued on 22 November 2005 alleging breaches of contract by the defendant in the design and construction of a milking parlour.
- The Court ordered witness statements to be exchanged on 8 June 2012 and milking parlour expert reports to be exchanged by 27 July 2012
- The parties complied with the order. The Claimant's milking parlour expert included in his report criticisms of the dimensions inside the milking parlour. The Claimant had not pleaded that allegation and did not apply for permission to amend.
- After a ten day trial had been fixed to start on 13 January 2014, during late November and early December 2013, the Claimant's served six witness statements addressing a number of issues including the allegedly unsatisfactory spacing inside the milking parlour.
- The judge granted relief from sanction, permitted the Claimant's to rely on the witness statements and adjourned the trial so that the defendant could have a proper opportunity to answer that evidence.
- The Court of Appeal held; *'This was a significant breach because it caused the trial date to be vacated and therefore disrupted the conduct of the litigation.'*

- **Decadent:**

- On 12 December 2013 the court ordered the Claimant to file a completed pre-trial checklist and pay the hearing fee and checklist fee by 19 December 2013, failing which the claim would be struck out.
- The Claimant completed the pre-trial checklist in time, but failed to pay the fee in time. The cheque had been put in the DX on the due date, but never reached its destination.
- The judge rejected the Claimant's application for relief.
- The Court of Appeal held; *'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 riskthat the cheque would go astray'. All failures to pay court fees on time are serious....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'*.

Non-Trivial Breaches which are also likely to be 'Serious or Significant':

- **Mitchell:**

- Cost budget filed the afternoon before a costs management hearing, instead of 7 days before, causing the hearing to be aborted, a new hearing to be arranged, substantial extra work and extra costs to be incurred by the Defendant and disruption to the work of the Court (the master had to vacate half a day which had been allocated to deal with asbestos claims).

- **Durrant v Avon & Somerset Constabulary (Court of Appeal, 17 December 2013):**

- Four witness statements served over two months after the deadline and two served only a few days before trial, causing the trial to be adjourned so that the Claimant would have time to deal with the new evidence.

- **Karbhari -v- Ahmed (High Court, 17 December 2013):**

- A supplementary witness statement produced on the morning of the second day of the trial, over 7 months after the Court had ordered witness statements to be exchanged, which was *'no mere formality but sought to introduce wholly new (and inconsistent) material to the case as originally presented.'*

- **MA Lloyd & Sons Ltd -v- PPC International Ltd (High Court, 20 January 2014):**

- Almost 3 months after the deadline for serving a witness statement, the Claimant had failed to either serve the statement or apply for relief from sanction, requiring a 'revised timetable' Mr Justice Turner stated:

'This case provides yet another example of a litigant treating an order of the court as if compliance were an optional indulgence'.

- **Samara -v- MBI & Partners UK Ltd (High Court, 4 March 2014)**
 - A delay of over 15 months from judgement being entered in default to the application to overturn it.

NOT SERIOUS OR SIGNIFICANT BREACHES

- **Utilise:**
 - The filing of a costs budget 45 minutes late as *'the breach did not imperil any future hearing date or otherwise disrupt the conduct of this or other litigation'*.
 - A failure to notify the Court of the outcome of negotiations (which was an agreement to mediate), 13 days later than notified in the order.

Trivial Breaches which are also unlikely to be 'Serious or Significant':

- **Aldington & 133 others v- ELS International Lawyers LLP (High Court, 12 December 2013)**
 - The Claimants were required to serve Particulars of Claim in relation to; (i) 20 Claimants by 19 June 2013; (ii) 87 Claimants by 1 July 2013 and; (iii) 27 Claimants by 15 July 2013, failing which their claims *'shall stand dismissed without further order'*. There was then to be a two month stay.
 - 10 of the Claimants in (ii) failed to file their Particulars of Claim by 1 July 2013 and one of the Claimant's in (iii) failed to comply by 15 July 2013.
 - An application for relief from sanction was filed on 12 August 2013.
 - His Honour Judge Oliver Jones QC held relief should be granted for the following reasons:

'(a) the failure... was....a failure of form rather than substance and....can properly be regarded as trivial. Particulars of Claim had...been produced before the time expired. They were....served very shortly thereafter and therefore only "narrowly missed the deadline" because of the need for signatures. Application for relief was made promptly.

(b) ...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.... the default affects only 6% of the claims....and the granting of relief is unlikely....to have any effect at all on progression of the action, particularly as it is unlikely all 134 claims will proceed to trial together....Further....There were no 'stragglers' at the time the stay commenced and the 'breaches' had been remedied in terms of their substance....'

- **Durrant v Avon & Somerset Constabulary (Court of Appeal, 17 December 2013):**
 - Two witness statements posted on the day that they were due for service, but received shortly after the deadline '*might be categorised as trivial*' (although this was found not to be the case where; (i) the Defendant had failed to comply with an earlier order for exchange; (ii) when extending the deadline, the Court had seen fit to specify the sanction for non-compliance and; (iii) where an application for relief from sanction was not made for over two months, by which time the trial was imminent, a factor on which the Court placed '*particular weight*').
- **Summit Navigation Ltd -v- Generali Romania (High Court, 21 February 2014):**
 - Providing security 18 hours later than the deadline provided for in a Court Order, which resulted in an automatic stay.

WHAT IS A GOOD REASON?

- Again, it will depend on the facts of every case. As The Court of Appeal said in **Denton, Decadent & Utilise:**

'It would be inappropriate to produce an encyclopaedia of all good and bad reasons to comply with rules, practice directions or court orders.'

- However, we do have some guidance:

GOOD REASONS

- Guidance in **Mitchell:**
 - '*...ifa 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 at the time and could not realistically have been the subject of an appeal.*'
 - '*In short, good reasons are likely to arise from circumstances outside the control of the party in default.*'
- **Aldington:**
 - '*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 Cotters control.*

I am unable to conclude that his lack of knowledge of his clients' holiday arrangements can be attributed to incompetence.....Moreover, I am satisfied that he had a genuine belief that it would be possible to move claimant's [from (ii) to (iii)] if holidays interfered with signing, of which he was not positively disabused by the responses of the Defendant's solicitors prior to default'.

- **Summit:**

- The inability of the brokers to obtain the underwriters signature on the security in time for it to be provided to the Defendant in accordance with the Court Order.

BAD REASONS

- **Guidance in Mitchell:**

- *'...mere overlooking a deadline, whether on account of work or otherwise, is unlikely to be a good reason...'*
- *'well intentioned incompetence for which there is no good reason should not normally attract relief from a sanction...'*

- **Durrant :**

- The reason given by the Defendant's solicitor was that when she had suggested a period for witness evidence, it was *'a huge error on her part, made in haste without reference to the file and without thought to the fact that many of the witnesses involved had left the organisation and others were operational officers with many commitments'*. In addition she had *'underestimated her own commitments'* and blamed the *'Christmas period'* and *'adverse weather'*.
- The Court of Appeal found *'the failure to meet the final deadline was not the result of any unforeseeable event. It was due to incompetence...and was simply inexcusable'*.

- **Karbhari:**

- Serving a late supplemental witness statement once it was clear that the trial was going to go ahead, because the Defendant was concerned when he made his original statement that if he told the full story, *'he would get a number of other people in trouble in connection with money laundering'*. Mr Justice Turner described this as *'a thoroughly bad reason'*.

- **Samara:**

- Delaying in applying to overturn judgement in default because the Defendant was waiting to see if the Claimant would agree to the discharge of judgement.

- **Denton:**
 - Producing witness statements in November/December 2013 to address an issue which came to light in July 2012, after the original date for exchange in June 2012.

HOW DOES STAGE 3 OF THE TEST OPERATE?

- **Denton, Decadent & Utilise** did not introduce the requirement to consider all of the circumstances of the case. It was stated in Mitchell that *'regard should be had to all of the circumstances of the case'*. This is particularly apparent in:
- **Chartwell v Fergies Properties (Court of Appeal, 16 April 2014):**
 - Both parties failed to exchange witness statements by the deadline in a Court Order. The Claimant maintained that it could not do so until it had additional disclosure from the Defendant.
 - Over 2 months later, the Claimant made an application to extend the time for exchange of witness statements.
 - It was found that the non-compliance on the part of the Claimant was not trivial and that no good reason had been advanced to explain this. They simply appeared to have a *'lack of the real understanding of the requirements of the revised rules'*.
 - Nevertheless, considering all the circumstances of the case, the parties were granted relief from sanction. As Lord Justice Laws stated:

'...this was one of those cases in which, notwithstanding the paramount importance and great weight to be given to the two matters specified in CPR 3.9, those matters could reasonably be assessed as outweighed by all the other circumstances'.
 - The *'other circumstances'* included:
 - the trial date would not be lost and a fair trial could still be had;
 - no significant extra cost would be occasioned if relief were granted;
 - a refusal to grant relief would effectively mean the end of the claim: since the Claimant would have no evidence to prove its case and;
 - the Defendants were also in default, having failed to serve their witness evidence on time and having failed to make their own application for relief.

- Guidance from the Master of the Rolls and Lord Justice Von in **Denton, Decadent & Utilise:**

- *'...the court must, in considering all of the circumstances of the case so as to enable it to deal with the application justly, give particular weight to the two considerations specifically mentioned in CPR 3.9' (i.e. (a) the need for litigation to be conducted efficiently and at proportionate cost and (b) to enforce compliance with rules, practice directions and orders).*
- *In giving particular weight to these two important factors, '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 good reason for it. Where there is 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'.*
- *'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'.* Factors that may be relevant include:
 - the promptness of the application and;
 - other past or current breaches of the rules, practice directions and court orders.

- Conflicting Guidance from Lord Justice Jackson:

- *'I take a somewhat different view...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).... 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...factors (a) and (b) should "have a seat at the table, not the top seat at the table".'*

- **Denton:**

- *'Factor (a) militated heavily in favour of refusing relief from sanctions and holding the trial date.'*
- *'Factor (b) also militated heavily in favour of refusing relief from sanctions, because the delay was a most serious or significant breach of the courts earlier orders for the exchange of witness statements, which impacted upon the orderly progress of litigation.'*
- *'There was very little to weigh in the balance...under the heading of "all the circumstances of the case". The claimants had had ample opportunity to serve*

their additional evidence long before December 2013....An adjournment of proceedings would result in the protraction of proceedings which had already dragged on 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.'

- **Decadent:**

- *'...factor (a) pointed in favour of relief, since the late payment of 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.'*
- *'...even taking account of the history of breaches...this was not a case where, in all the circumstances of the case, it was proportionate to strike out the entire claim.'*

- **Utilise:**

- Re the filling of the costs budget 45 minutes late *'neither factor (a) nor factor (b) pointed towards a refusal of relief for the simple reason that ...the breach did not prevent the litigation 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.'*
- *Other circumstances to be taken into account included:*
 - the fact the Claimant applied for relief as soon as he became aware of the position and;
 - The fact of the additional breach – the failure to notify the court timeously of the outcome of negotiations

SHOULD THE NON-DEFAULTING PARTY CO-OPERATE?

- **Summit:**

- Where the Claimant provided security 18 hours later than the deadline provided for in a Court Order, resulting in an automatic stay, Mr Justice Leggatt found that the Defendant's conduct in refusing to consent to the Claimant's application to lift the stay was unreasonable and that their arguments that the Claimant's default was material were without merit. Consequently he ordered the Defendant to pay costs:

'The Defendant's stance disregarded the duty of the parties and their representatives to co-operate with each other in the conduct of proceedings and the need for litigation to be conducted efficiently and at proportionate cost. It stood Mitchell on its head'.

- Guidance in **Denton, Decadent & Utilise**:
 - *'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...'*
 - *'The court will be more ready in the future to penalise opportunism....Heavy costs sanctions should...be imposed on parties who behave unreasonably.....'*
 - *'An order to pay the costs of the application under rule 3.9 may not be sufficient. The court can....also record in its order that the opposition to the relief application was unreasonable conduct to be taken into account ...when costs are dealt with at the end of the case. If the offending party...wins, the court may make a substantial reduction in its costs recovery....If the offending party... loses, then its conduct may be a good reason to order it to pay indemnity costs.'*
- In both **Decadent** and **Utilise**, the Court of Appeal considered that the Defendants ought to have consented to the grant of relief from sanctions.

OUR EXPERIENCE

- Following Mitchell our experience has been mixed e.g.
 - The Claimant applied 3 weeks before trial to adjourn as new evidence was needed on loss of earnings. We didn't oppose the adjournment as it would give us time to reach a negotiated settlement (we had already admitted liability). The judge called a CMC, was critical of the Claimant for having repeatedly missed directions and struck out the claim.
 - The Claimant attempted to admit new witness evidence shortly before trial in breach of the Court ordered directions. The judge said that he had not even heard of **Mitchell** and allowed the evidence.
- We will have to wait and see what our experience is following **Denton, Decadent & Utilise**.

HOW CAN YOU TAKE ADVANTAGE OF MITCHELL?

- There are clearly opportunities to see sanctions imposed on other parties, which could be devastating to their case, reducing your losses.
- To maximise those opportunities (and to avoid being on the receiving end) you should try and ensure that you are not also in breach (see *Chartwell*).
- **BUT BE WARNED:** you should carefully consider whether it is right tactic in any given case to refuse to agree an extension to a deadline or to oppose an application for relief from sanction, as you could put yourself at risk of an adverse costs order (see *Summit; Denton, Decadent & Utilise*).