INSOLVENCY BULLETIN

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Court Sanctions Too Draconian

McTear & Williams v Engelhard and Others [2016] EWCA Civ 487

Readers will recall the decision in *Mitchell v News Group Newspapers* in which a costs order was refused against the defendant because the successful claimant had been some days late in filing a costs budget. A similar order was made in the *McTear* case, in which the court refused to allow the defendant to adduce witness statements in evidence at trial because they had been filed 50 minutes late and refused to allow the defendant to rely on documents that had only been discovered a few weeks beforehand.

The Court of Appeal sharply criticised the judge's order as being wrong and unjust. The issue is actually one of the court's discretion to relieve from sanction a party who fails to comply with the strict letter of the CPR or any directions. The Court of Appeal found that the judge had been wrong to consider the above two issues as a single issue – had he considered in isolation the issue of the defendant's adducing the witness statements he would inevitably have come to the conclusion that it would have been appropriate to grant the defendant relief and to allow the evidence to be adduced.

This is a most welcome judgment and is in fact the latest in a line of Court of Appeal judgments that have criticised the lower courts' approach to a party's failure to comply with the rules following *Mitchell.* Whilst no-one should condone a general failure to comply with the CPR and the court's directions, any sanction must be tempered with a degree of proportionality which is, after all, the new buzzword in modern litigation practice.

To prevent Engelhard's adducing evidence at trial because of a minor transgression was draconian, disproportionate, unjust and ridiculous. We would also respectfully suggest that the same could be said of the decision not to award Mr Mitchell costs against News Group Newspapers. This narrow, blinkered and slavish adherence to the letter of rules is however something of a theme both in modern litigation practice and society as a whole. Whilst many of the changes to litigation practice since the *Woolfe Report* have been intended to cut costs and delay, our experience is that they have largely had the diametrically opposite effect. Litigators now routinely refuse requests for minor extensions of deadlines and the intransigent, 'tick-box' approach to compliance has led to substantial tasks being undertaken unnecessarily. Indeed, the *McTear* case mist now go for retrial at considerable expense both to the parties and the public purse.

The Court of Appeal's approach in *McTear* and other similar cases is sensible, measured and proportionate and is to be welcomed and applauded.

If you have any queries in relation to this, or any other, matter, please do not hesitate to contact us – *office@amblaw.co.uk* or 020 3651 5646.

AMB Law
46 New Broad Street
London
EC2M 1JH

T: +44 (0)20 3651 5646
F: +44 (0)20 3651 5554
office@amblaw.co.uk

18 Epsilon House
West Road
Ipswich
IP3 9FJ

T: +44 (0)1473 276103

Alistair Bacon
Principal

T : 020 3651 5647
M: 07881 554062
E: *abacon@amblaw.co.uk*

William Thompson
Trainee Solicitor

T : 020 3651 5704
wthompson@amblaw.co.uk

Stephen Carter
Consultant

T : 020 7329 4242
scarter@amblaw.co.uk