The new 28 day buffer rule

A new 28 day buffer rule, in force from 5 June, allows parties to agree up to 28 day time extensions without having to seek the Court’s permission and will provide considerable comfort to litigants concerned about the zero tolerance approach brought in by the Court of Appeal in *Mitchell*.

This development will no doubt trigger a collective sigh of relief for all those parties involved in court proceedings having to comply with court timetables for completing various steps such as disclosure or witness statements. The zero tolerance approach ushered in by the decision of the Court of Appeal in *Mitchell* has led litigants to understand that even the slightest breach of a deadline e.g. by as little as an hour, could risk the party being sanctioned by the Court.

This new liberty for parties to agree up to a 28 day extension will mean that where parties are “up against it” so to speak, such that a deadline is about to expire, they are now likely to obtain their opponent’s consent to an extension of time. Prior to this change, we have seen opponents routinely resisting last minute requests for extensions, taking the view that it would be unwise to lose the strategic advantage of the breaching party possibly being sanctioned by the Court. In contrast however, we have also seen some evidence that the Courts have little tolerance for opponents unreasonably withholding consent to extension requests and with a touch of irony, that party being penalised in costs instead of the breaching party.

So, it is gratifying to note that *Mitchell* has on occasion been turned on its head where the Court spots that a party is simply using *Mitchell* to gain a tactical advantage. This welcome new rule provides formal confirmation that parties are now free to agree extensions of up to 28 days.

The statutory instrument giving effect to the change from 5 June is the Civil Procedure (Amendment No. 5) Rules 2014. Prior to 5 June, parties must adhere to the version of CPR 3.8 which provides that where a rule, practice direction or court order requires a party to do something within a specified time and specifies the consequences of failure to comply (which is widely construed, e.g. under CPR 32.10 the consequence of failing to serve a witness statement in time is that the witness may not be called to give oral evidence at trial unless the court gives permission), the parties must seek the Court’s permission to extend the deadline.

From 5 June, CPR 3.8 is amended such that where the conditions of that rule apply, the parties may, by prior written agreement, unless the Court orders otherwise, agree to extend the deadline. A similar rule change was brought in a couple of months ago in respect of clinical negligence cases however legal practitioners were not certain whether the Civil Procedure Rules Committee would consent to the same liberty being introduced for non-clinical negligence cases. It is now clear that they have. Hopefully, this will bring an end to the sudden rise in the recent months following the *Mitchell* decision, in parties making formal court applications for extensions of time on the back of the
fear that if they failed to do so, they might suffer a sanction for breaching the original deadline set. This should ease the burden on Courts dealing with these applications and enable trials and more important applications to be listed more easily. All in all, this is a sensible and much welcomed development, which goes some way to mitigating the zero tolerance litigation landscape that the Mitchell decision brought in.

The full text of the statutory instrument giving effect to this change can be accessed at this web address: http://www.legislation.gov.uk/uksi/2014/1233/contents/made