

A Depp Recovery Exercise

Mr John Christopher Depp II will be familiar to many. You may have seen his work in Edward Scissorhands, the Pirates of the Caribbean films in which he starred (one of which was filmed in the Temple) or caught his take on Fleet Street's own Sweeney Todd.

Mr Depp finds himself the Claimant in [ongoing proceedings](#), in which he alleges that the Sun newspaper and its editor defamed him by suggesting that he assaulted his former wife, Amber Heard, such that it would be wrong for him to be cast in a JK Rowling adaptation. A trial is currently scheduled for July 2020 following its adjournment in March.

The recent developments in [Depp v News Group Newspapers Ltd and Wootton \[2020\] EWHC 1237 \(QB\)](#) centred around preparation for that trial and particularly issues concerning case management and witness statements.

In March 2020, Mr Depp's solicitors applied for permission to rely on four additional statements, being those of his former partners Vanessa Paradis and Winona Ryder, and those of David Killackey Snr (a mechanic) and Kate James (Ms Heard's former PA). MGN (The Sun's publishers) objected to the admission of the statements of Mr Killackey and Ms James.

The late admission of statements, relative to the court's directions, engages [CPR3.9](#) filtered through the tests set out in [Denton v TH White Ltd \[2014\] EWCA Civ 906](#). In other words, Mr Depp would have been sanctioned for their late service as [CPR32.10](#) would have prevented his relying on the witnesses' oral evidence at trial. He sought relief from that sanction to give full weight to that evidence.

When the CPR were revised in 2013, the requirements for relief were considered very harsh and restrictive indeed, with little slack for the defaulter suggested by such cases as [Mitchell v News Group Newspapers Ltd \[2013\] EWCA Civ 1537](#). However the position was slightly mollified, and certainly clarified, in *Denton*, which identified a three-stage test which has taken on quasi-statutory force. The court is required to:

1. Assess the seriousness or significance of the breach
2. Consider what the default occurred
3. Consider all of the circumstances of the case and particularly the factors set out in CPR3.9(1)(a) and (b) (i.e. the need to conduct litigation efficiently and at proportionate costs, and the need to enforce compliance with rules, practice directions and orders).

It should be noted in this case that although the COVID-19 'lockdown' was about to begin, the application was made on 10th March 2020, before [Practice Direction 51ZA](#) required the courts to take into account the effects of the pandemic when considering application to extend time. That PD was therefore not relevant in this case.

If the court considers a breach not to be serious or significant, then it need not dwell on the second or third factors and relief will ordinarily be granted (*Denton* para.38).

In several cases the court has expressed a view that late service of witness evidence will generally not be considered so lacking in seriousness that the court need not concern itself with the other two

elements of the test. However if an adequate explanation is advanced and the circumstances of the case merit it, then relief will nevertheless be granted.

Mr Depp's Counsel accepted that *any* breach of a direction had a serious element, but argued that the delay had been short (barely a day), and that the Defendants had had or would have plenty of time to deal with the new evidence, particularly given the interposition of an adjournment during which time any necessary additional disclosure could be made. The court agreed that the new trial date would not be jeopardised by the admission of the evidence.

It followed that whilst deference demanded the Claimant to acknowledge some seriousness, the court did not itself consider the breach to have been either serious or significant. The court therefore granted relief in relation to both statements without having to consider Denton Stages 2 and/or 3.

This was not, however, the end of the story.

The court has a specific power under [CPR32.1](#), beyond its general case management powers, to control evidence, to decide what it will and what not hear and to exclude evidence which is otherwise admissible.

Mr Killackey had been asked to overhaul Ms Heard's vintage Mustang, and in his proposed statement had said that an employee of Mr Depp had told Mr Killackey to send the bill to Ms Heard after their relationship had ended. He also said that Ms Heard's father had threatened him. All of this was said to have been relevant to the question of whether Mr Depp had been controlling and abusive towards her. The court did not accept this to be of relevance to the pleaded issues.

So although the court granted relief in relation to Mr Killackey's evidence, it then excluded it in its entirety on the basis that its relevance was at best marginal.

The court then took a scalpel to Ms James' evidence, admitting some parts and excluding others in a paragraph-by-paragraph analysis, again testing its relevance against the pleaded issues.

This case is a good example of the factors the court applies in its current approach to late witness evidence. Although it may pass the test of whether or not the breach was serious, this is far from any guarantee that it then will pass a test of relevance.