**APIL YORKSHIRE REGIONAL MEETING – 26 NOVEMBER 2013**

**JACKSON: CLAIMANTS, DEFENDANTS AND THE COURT**

**JOHN McQUATER**

**INTRODUCTION**

In April 2013 Part 1 and Part 3.9 of the CPR were amended.

Part 1 now provides:

(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost.

(2) Dealing with a case justly and at proportionate cost includes, so far as is practicable –

(a) ensuring that the parties are on an equal footing;

(b) saving expense;

(c) dealing with the case in ways which are proportionate –

(i) to the amount of money involved;

(ii) to the importance of the case;

(iii) to the complexity of the issues; and

(iv) to the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly;

(e) allotting to it an appropriate share of the court’s resources, while taking into account the need to allot resources to other cases; and

(f) enforcing compliance with rules, practice directions and orders.

Part 3.9 now provides:

(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.

Pre-April 2013 case law suggested these amendments would result in the courts taking a tougher approach to relief from sanctions. For example, in Fred Perry (Holdings) Limited -v- Brands Plaza Trading Limited [2012] EWCA Civ 224 where Jackson LJ said:

‘Non-compliance with the Civil Procedure Rules and orders of the court on the scale that has occurred in this case cannot possibly be tolerated. Any further grant of indulgence to the defendants in this case would be a denial of justice to the claimants and a denial of justice to other litigants whose cases await resolution by the court.’

Lewison LJ, in support of the observations made by Jackson LJ in his report, observed:

“He regarded it as vital that the Court of Appeal supports first instance judges who make robust but fair case management decisions. I agree with both these points.”

On 22 March 2013, giving the 18th Lecture in the Implementation Programme, Lord Dyson MR made a number of observations on how these rule changes would affect the approach of the courts to case management and hence the way parties litigate claims.

“Dealing with a case justly does not simply mean ensuring that a decision is reached on the merits. It is a mistake to assume that it does. Equally, it is a mistaken assumption, which some have made, that the overriding objective of dealing with cases justly does not require the court to manage cases so that no more than proportionate costs are expended. It requires the court to do precisely that; and so far as practicable to achieve the effective and consistent enforcement of compliance with rules, PDs and court orders.”

“The tougher, more robust approach to rule-compliance and relief from sanctions is intended to ensure that justice can be done in the majority of cases. This requires an acknowledgement that the achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations. Those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure their own costs are kept within proportionate bounds. But more importantly they serve the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the court enables them to do so.”

**CLAIMANTS**

**VENULUM PROPERTY INVESTMENTS LTD v SPACE ARCHITECTURE LTD**

**Edwards-Stuart J**

**[2013] EWHC 1242 (TCC)**

*Introduction*

This was the hearing of an application by the claimant for permission to extend time for service of Particulars of Claim.

*Background*

The claimant was a property development and investment company registered in the Cayman Islands.

The claim arose out of a residential development, known as Enterprise Square in Northampton.

Planning consent was given on condition the development have 171 parking spaces.

However, the underground car park required supporting posts/pillars which resulted in the loss of about 30% of the parking spaces, with the consequence the development could not be built in accordance with the planning permission.

Consequently, the claimant alleged the value of the property was worth far less than the sum paid for it.

Although aware of the problem in 2007 the claimant did not instruct solicitors until September 2012.

A claim form was issued on 12 November 2012. That claim form was served with effect from 12 March 2013, the very last day for service.

Particulars of claim were not served with the claim form as the claimant’s solicitors thought, wrongly, there was a further 14 days in which to serve those particulars.

*The Application*

Whilst the claim was brought against 10 defendants only 2 of those defendants opposed the application seeking an extension of time for service of the Particulars of claim.

That was because a fresh action against those defendants would be statute barred.

*Judgment*

The claimant’s solicitors were mistaken in their reading of Part 7.4 (1) (ii), as the long-stop deadline for service of Particulars of claim is 4 months after the issue of the claim form (Part 7.4 (2) and 7.5 (1)).

The evidence in support of the claimant’s application did not contain a single word of explanation for the “surprising long period of delay” between 2007 and 2012, nor was any explanation offered at the hearing.

The case against the relevant defendants was not pleaded in the Particulars of claim as it had been set out in the protocol letter. The judge observed:

“…I would make the general observation that where a claimant for no good reason leaves it until the last minute to issue proceedings he is under a high obligation to ensure that the claim that is finally presented is clear, coherent and properly particularised. That is particularly so if the claim involves allegations of bad faith.”

Here the allegations, as well as being different from the protocol letter, only pleaded the allegations of bad faith in a cursory fashion.

Whilst the long-stop deadline for serving Particulars of claim is not immediately apparent from the wording of the CPR and might be regarded as “a trap for the unwary claimant” the judge concluded that “solicitors acting for claimants who leave service of their claim forms until the dying weeks of the limitation period have to be wary.”

Whilst the White Book suggests the court when considering whether to extend time for Particulars of claim should adopt the relief from sanctions framework set out in Part 3.9 (on the basis of Price -v- Price [2003] 3 All ER 911 that rule has been radically amended with effect 1 April 2013.

Both parties accepted the 9 factors which had been set out in Part 3.9 should not be ignored but accepted the emphasis had shifted, as a result of April 2013 amendments to both Part 1 and Part 3.9, so the court was required to make a much stronger and less tolerant approach to failures to comply with matters such as time limits. After reviewing each of the factors formerly found in Part 3.9 (in line with Stolzenburg -v- CICB Bank Mellon Trust [2004] EWCA Civ 827) the judge concluded that, overall, the factors in that rule were fairly evenly balanced. Additionally, however, the judge held:

* It was hard to see how the claimant could succeed against the defendants who objected to the extension of time and lose against the other defendants, against whom the action could proceed.
* It was relevant that the claim against the defendants who objected to the extension of time appeared to be weak.
* The new regime towards enforcement of, and compliance with, orders and time limits was also relevant reflected by the Court of Appeal judgment in Fred Perry -v- Brands Plaza Trading [2012] EWCA Civ 224.

Although the strict rules relating to service of the claim form do not apply to service of the Particulars of claim (Totty -v- Snowden [2002] 1 WLR 1384) the approach taken in cases dealing with service of the claim form as re-inforced by the new terms of the overriding objective hence the absence of a good reason for non-compliance with the relevant time limit was also an important factor to take into account, requiring the court to take a more robust approach when exercising a discretion to extend time for service of Particulars of Claim as well as claim form.

The judge concluded:

“If all other things were equal, I would have difficulty in these circumstances in seeing how it would be either just or proportionate to visit a few days delay in the service of the Particulars of Claim, particularly in circumstances where the application for the extension of time is made promptly...”

However, all things were not equal.

First, the claimant delayed for over 5 years before instructing solicitors, with no explanation for that delay.

Secondly, the claim against the relevant defendants was not strong and as the claimant had an equally good, or better, case against other defendants preventing the claim from proceeding against the defendants who did not agree the extension of time would not result in any demonstrable prejudice.

Thirdly, the claimant sought to advance a claim for bad faith which was pleaded in vague terms did not merit indulgence.

Consequently, the judge held:

“In my judgment, when the circumstances are considered as a whole, particularly in the light of the stricter approach that must now be taken by the courts towards those who fail to comply with rules following the new changes to the CPR, this is a case where the court should refuse permission to extend time. The Claimant has taken quite long enough to bring these proceedings and enough is now enough. I therefore refuse this application.”

**DEFENDANTS**

**HENNING BERG v BLACKBURN ROVERS FOOTBALL CLUB & ATHLETIC PLC**

**Judge Pelling QC**

**[2013] EWHC** **1070 (Ch)**

*Introduction*

This was the hearing of an application by the defendant under Part 14.1 (5) for permission to withdraw an admission of liability to pay £2.25 million to the claimant, under the terms of the claimant’s contract of employment with the defendant.

*Background*

The dominant member of the defendant was a company controlling 99.9% of the issued shares, that company in turn being controlled by three individuals described in various documents as the “Owners”.

The company had four statutory directors, none of those being any of the Owners.

In 2012 the defendant needed to employ a new club manager. Following an approach by the claimant meetings took place, attended by directors of the defendant.

The directors maintained that, during the meetings, the claimant was informed approval of the Owners would be necessary to appoint him. However, correspondence sent out following the meeting contained no such reservation.

A service agreement was eventually signed by the parties which was expressed to continue until 30 June 2015.

On 27 December 2012 the defendant terminated the agreement with the claimant.

It was common ground that if the service agreement took effect the claimant was entitled to £2.25 million.

*Proceedings*

In the absence of payment the claimant commenced proceedings against the defendant for the sum of £2.25 million, alleging the failure to make payment was a breach of contract.

The defendant responded by filing a formal admission of liability to pay £2.25 million and offering to pay that sum by instalments of £562,500 per month.

The claimant applied for summary judgment. That application should have been for judgment on the admission. In any event a hearing was arranged at which the only issue for determination by the court was whether the defendant should be given time to pay the sum admitted.

At the hearing the defendant argued the service agreement had been entered into by a director in breach of express instructions given by one of the Owners. Accordingly, it was contended any agreement with the claimant should have been subject to a 12 months notice period. Consequently, the defendant argued the director had been operating the defendant outside the control of the Owners.

On this basis the defendant no longer sought time to pay the admitted sum by instalments but sought permission to withdraw the admission.

*Judgment*

When considering Part 14.1 (5) the terms of paragraph 7.2 of the Practice Direction to Part 14 were relevant. Moreover, in exercising that discretion the Court of Appeal confirmed in Sowerby -v- Charlton [2005] EWCA Civ 1610 confirmed the court should consider all the circumstances of the case and seek to give effect to the overriding objective.

HHJ Pelling QC observed:

“On 1st April 2013, the Overriding Objective was radically amended. It now places emphasis not merely on the need to deal with cases justly but to do so at proportionate cost, expeditiously, to enforce compliance with the Rules and orders and to allot to each case an appropriate share of the Court’s resources. This amendment of the overriding objective is likely to have a significant impact on the approach to be adopted to applications of this kind, which will now be approached by courts much more rigorously than perhaps has been the practice in the past, particularly where formal admissions are made on behalf of parties represented by experienced and specialist professional advisors.”

The judge then held:

“In my judgment the correct way of approaching an application of this sort is to start by asking whether the Defendant has demonstrated that if permitted to withdraw its admission it would have a realistically arguable defence. If it has it will be necessary to consider the other factors. If it has not then clearly it will not be necessary to consider the other factors because a summary judgment application would be bound to succeed if permission to withdraw the Admission was granted and thus no useful purpose would be served by giving the permission sought.”

For these purposes whilst unable to resolve disputes of fact there was no obligation to accept without question any factual assertion made by a party asserting an arguable defence: National Westminster Bank Plc -v- Daniel [1993] 1 WLR 1453.

Having reviewed the arguments advanced by the defendant the judge concluded:

“Neither of Blackburn’s asserted defences are realistically arguable. On that basis no useful purpose would be served by permitting the Admission to be withdrawn. It follows that the application for permission to withdraw the admission is dismissed.”

**DASS v DASS**

**Haddon-Cave J**

**[2013] EWHC 2520 (QB)**

*Introduction*

This was the hearing of an appeal by the defendant against an order debarring the defendant from relying on expert medical evidence in a personal injury claim brought by the claimant.

*Background*

The claimant was injured whilst travelling in a motor car driven by the defendant, after the defendant lost control of the car and collided with a wall.

The claimant was seriously injured.

On 19 November 2010, at a CMC, the court directed that any further medical reports not already filed and served were to be filed and served by 27 May 2011.

The claimant’s solicitors wrote to the defendant’s solicitors on 27 March 2012 and then on 27 February 2013 observing that the defendant had failed to comply with the order.

*Judgment*

On 14 March 2013 the Master debarred the defendant from relying on expert medical evidence for breach of the order made on 19 November 2010.

The Master took account of a number of matters:

* The reports on which the defendant wished to rely were available between 9 and 12 months prior to the hearing but not served.
* The reason for not serving the reports was because the defendant insurers had not given permission for them to be served, hence this was a deliberate refusal to comply with the court order.
* There was an element of tactics in the delay as the defendant took advantage of that delay to carry out surveillance of the claimant meanwhile and then informed the medical experts about the results of that surveillance.
* There was some prejudice to the claimant as the case might well have been over had it not been for the delay.

The defendant appealed.

*Appeal*

The judge made the general observation that progress, as a result of the way both parties had dealt with the claim, had been unacceptably slow and contrary to the underlying principles of the CPR.

On appeal the issue was whether the decision of the Master fell outside the general ambit of discretion allowed to courts at first instance in relation to case management decisions. In particular:

* In Royal Sun Alliance Insurance Plc -v- T and N Limited (in Administration) [2002] EWCA Civ 1964 Chadwick LJ held:

“...this Court should not interfere with case management decisions made by a judge who has applied the correct principles, and who has taken into account the matters which should be taken into account and left out of account matters which are irrelevant, unless satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge.”

* In Atlantic Electronics Ltd -v- The Commissioner for HM Revenue & Customs [2013] EWCA Civ 651 Arden LJ added:

“This test as set out by Chadwick LJ does mean that, whenever a relevant consideration is wrongly excluded, the judge's exercise of discretion must be set aside. In my judgment, this case shows that there needs to be added to that test a requirement that the considerations which were wrongful must, alone or in aggregate, constitute considerations that were material in the exercise of the discretion in question.”

Although the defendant argued this was not an application for relief from sanctions, because the original order did not include any sanctions, that was rejected as Part 35.13 CPR provides:

“A party who fails to disclose an expert’s report may not use the report at trial or call the expert to give evidence orally unless the Curt gives permission.”

Consequently, as Haddon-Cave J observed:

“Where a party has failed to comply with an order that experts’ reports be disclosure by a particular time this triggers the automatic sanction under CPR 35.13. To prevent the sanction operating there has to be an application for an extension, which has not been made in this case.”

The judge concluded a number of points were pellucid. In particular, that the defendant chose to ignore the court order for tactical reasons and that the claimant did not press very hard for compliance but were not completely quiescent.

Essentially, the defendant had wantonly failed to comply with the court order for almost two and a half years. The Master was, therefore, entitled to take a dim view of that conduct. Haddon-Cave J concluded:

“The Court had made a court order; court orders are to be obeyed. If parties are unable to comply with court orders because of new developments, or for whatever reason, they must come back to the Court and seek an extension of time or a fresh order. They cannot simply blithely ignore court orders as if they are a thing writ in water. The fact that the Claimant in this case had not pressed hard or applied to the Court earlier for an unless order or a debarring order was not the point. Ultimately, it is for the Courts to exercise their case management powers to ensure that cases are properly progressed and that the Court’s orders are complied with.”

Haddon-Cave J went on to issue a general warning to parties:

“Let this be a lesson that parties who deliberately refuse to comply with court orders for tactical reasons do so at their peril. They cannot rely upon or hide behind the fact that the other side have not taken pressed heretofore, for any particular sanction.”

**CLAIMANTS AND DEFENDANTS**

**FONS HF v CORPORAL LTD**

**HHJ Pelling QC**

**[2013] EWHC 1278 (Ch)**

*Introduction*

This was the judgment giving on case management issues relating to exchange of witness statements.

*Background*

Case management directions provided for exchange of witness statements, as subsequently varied, by 18 April 2013.

The hearing took place on 9 May 2013.

The claimant was ready, willing and able to exchange, but the defendant was not.

HHJ Pelling QC observed:

“The issue which arises, therefore, is whether and, if so, to what extent I should grant an extension of time for the filing of witness statements. I note that the order made by the district judge did not in terms provide for mutual exchange but simply provided that each party was to serve on every other party the witness statements on which the party serving the statements intended to rely. Thus, in truth, both parties are in breach of the order because it was the duty of the claimant to serve the witness statements or at the very least lodge them at court and either offer them for exchange or provide them to the defendants in escrow in a sealed envelope explaining to the court at the time why that step was taken.”

Having regard to Part 1.1 (2) (f) CPR the judge concluded:

“I have come very close to refusing an extension to either of the parties. As I have explained the amended Civil Procedure Rules now require the court to pay close attention on the failure of parties to comply with rules, directions and orders. A failure to comply with a rule, direction or order is of itself a clear breach of the overriding objective and is likely to result in severe sanctions.”

The judge went on to observe that exchange of witness statements was important because it was likely to have a bearing on the issues and thus the length of trial, so failure ran the risk of wasting a “valuable national resource”, namely court sitting days.

The judge concluded:

“In the end I am only persuaded to extend the time for the filing of witness statements because this hearing is taking place only a very short while after the amendment of the CPR and because the period that has elapsed since the final extension expired is relatively short. However, all parties and the wider litigation world should be aware that all courts at all levels are now required to take a very much stricter view of the failure by parties to comply with directions, particularly where the failure to comply is likely to lead into a waste of the limited resources made available to those with cases to litigate.”

Consequently, time for filing witness statements was extended until 4 pm on the date after judgment was given.

**MITCHELL v NEWS GROUP NEWSPAPERS LTD**

**Master McCloud**

**[2013] EWHC 2355 (QB)**

*Introduction*

This was an application by the claimant for relief from sanctions consequent on breaches of the Defamation Proceedings Costs Management Scheme.

*Background*

The claimant Member of Parliament commenced defamation proceedings against the defendant medial organisation in relation to the reporting of an incident involving the claimant when cycling along Downing Street.

On 18 June 2013 there was a costs management hearing in the proceedings.

The claimant was in breach of the Defamation Proceedings Costs Management Scheme in failing to engage in attempts to discuss budgets and budgetary assumptions as well as filing and exchanging a budget no later than 7 days prior to the CMC.

The judge, when imposing the sanction, had regard to the new Part 3.14, not applicable to the case but which the judge considered was an indication as to what an appropriate sanction for breach of the requirement to lodge a budget should be.

Consequently, at that hearing the judge imposed a sanction, namely limiting the claimant to a budget consisting of the applicable court fees for the claim but also adjourned the costs budgeting hearing so the claimant could apply for relief from that sanction.

*Judgment*

It was common ground between the parties the Defamation Proceedings Costs Management Scheme, found in the Practice Direction to Part 51, applied to the case and that Part 1 and Part 3.9, as amended in April 2013, applied to the application for relief from sanctions.

The judge rejected an argument by the claimant that she had misdirected herself by having regard to the sanction under Part 3.14 because that uses the wording “fails to file a budget” and that this was inapplicable because the claimant, though late, had filed a budget. That was because Part 3.14 referred to Part 3.13, which imposes a 7 day limit, and where application is made for an extension of time, in circumstances when the party applying seeks waiver for the breach of a time limit that has already expired, the application should be approached by reference to Part 3.9: Sayers -v- Clarke Walker [2002] 1 WLR 309; Robert -v- Momentum Services Ltd [2003] EWCA Civ 299. Consequently, the claimant had to address the matters in Part 3.9 whether the application was in strict terms for relief from sanctions or an application to waive breach of the time limit.

The judge also rejected an argument by the claimant it was wrong to apply Part 3.14 by analogy, as a guide to what might be regarded as a proportionate sanction.

Could the judge, in any event, legitimately either vary or set aside the order imposing the sanction, even if satisfied it was wrong to have approached matters, when imposing the sanction, as the judge did. The judge concluded the power to vary or set aside an order under Part 3.1(7) could not be used to correct, if that were necessary, the original decision nor to take into account any such error for the purposes of granting relief under Part 3.9. The court applied the views of Rix LJ in Tibbles -v- SIG Plc [2012] EWCA Civ 518 where he said:

“… the jurisprudence has laid down firm guidance as to the primary circumstances in which the discretion may, as a matter of principle, be exercised, namely normally only (a) where there has been a material change of circumstances since the order was made, or (b) where the facts on which the original decision was made were (innocently or otherwise) misstated.”

When considering whether to grant relief from sanctions the judge took into account a number of matters.

* This had to be considered against a backdrop of not only the rule changes but the non-binding but relevant guidance expressed in the Jackson implementation lectures, especially the 18th in the series.
* Nevertheless, the court still had to consider fairness, access to justice (including Article 6) and proportionality as well as adhering to the new overriding objective. Drawing this together the judge observed:

“The new overriding objective is in marked contrast to the old one in form and, in my judgment, in substance. The court must now, as a part of dealing with cases justly, ensure that cases are dealt with at proportionate cost and so as to ensure compliance with rules, orders and practice directions. In that sense what we now mean by ‘*dealing with cases justly’* has changed, or if it has not changed then at the very least there is a significant shift of emphasis towards treating the wider effectiveness of court management and resources as a part of justice itself. (For which see the quotation below from the 18th *Jackson* implementation lecture).”

* The quote, from Lord Dyson, is:

“… The tougher, more robust approach to rule-compliance and relief from sanctions is intended to ensure that justice can be done in the majority of cases. This requires an acknowledgement that the achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations.” (para. 27)

* Those lectures were not applied as in judgments, but the policy position was taken note of. Also relevant were the observations of the Court of Appeal in Fred Perry -v- Brands Plaza Trading Ltd [2012] EWCA Civ 224.
* The judge noted that to deal with argument about non-compliance with rules in a defamation claim it was necessary for a half day in the judges’ list to be vacated which had pre-allocated to deal with the expedited list for those affected by asbestos related diseases, many with short life expectancy. This was not about one type of claim being more important than another but, as the judge explained, the right of other litigants:

“…where judicial and court resources are very limited, and the right not to be delayed while the courts dispose of matters which ought not to arise in the first place if rules are complied with.”

The judge then considered the breaches on the part of the defendant:

* There was an absolute failure to engage in discussions about budgets and no attempt to apply for extra time or even as the court informally for relief before running into time difficulties.
* Whilst simple to describe the breaches were serious, given the new emphasis on compliance.

Evidence in support of the application for relief from sanctions was in the form of a statement from the claimant’s solicitor explaining his firm was a small one, in contrast to the defendant’s representatives, who, at the time, were particularly busy and stretched in terms of resources.

The court had to consider the terms of the new Part 3.9. Judgment in Ryder Plc -v- Beever [2012] EWCA Civ 1737, although pre-dating the new rule, was still relevant given that the observations in Fred Perry were before the court.

The judge’s decision was that:

* The explanations put forward by the claimant’s solicitors were not unusual, but even before the advent of the new rules the failings by solicitors were not generally treated as a good excuse for non-compliance and must carry even less weight now.
* Nevertheless, the application was not bound to be dismissed merely for lack of good excuse for the breach.
* There was no evidence of any particular prejudice to the claimant, for example how the sanction might affect him financially or in terms of legal representation.
* The sanction was something of a windfall for the defendant, but that was often the way with sanctions.
* Budgeting was something all solicitors ought now to know is intended to be integral to the litigation process and it should not be especially onerous to prepare a budget for a CMC.
* In all the circumstances it was not just, within the meaning of the rules, to grant relief from sanctions.

*Appeal*

The judge gave the claimant permission to appeal and an early decision is expected from the Court of Appeal.

**COURTS?**

Does this tough new approach towards time limits apply to the Court itself?

Early experience suggests practitioners have encountered a number of problems which could be said to reflect non-compliance by the courts with the new regime. For example:

* Delays in issuing and dealing with applications.
* Delays in drawing up orders (which are sometimes sent out to the parties after the initial time limits have already elapsed).
* The inconsistent approaches to applications for relief from sanctions.

**CONCLUSIONS**

Claimants expected the changes to the CPR to have a significant effect on how civil litigation was conducted.

It would seem defendants, and perhaps the courts, have been less ready.

A consistent approach is essential if the procedural reforms are to have the desired effect of reducing costs.