JEREMY FORD

MITCHELL –v- NEWS GROUP

DISPROPORTIONATE INJUSTICE

Chambers of Andrew Ritchie QC
9 Gough Square

AMENDMENTS TO CPR

(1) The Overriding Objective:

"1.1.(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..*

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

ETHOS / JUSTIFICATION

Lord Dyson (18th Implementation Lecture – March 2013)

Aims:

(1) to ensure that parties do not expend more than proportionate costs on their own litigation; and

(2) to ensure that the parties do not expend more of the court's time and resources that is proportionate given the need to ensure that all other court – users can have fair access to the courts within a reasonable time

ETHOS / JUSTIFICATION

Lord Dyson (18th Implementation Lecture – March 2013)

"Dealing with cases justly does not simply mean ensuring that a decision is reached on the merits. It is a mistake to assume 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, PD, and court orders"

ETHOS / JUSTIFICATION

Lord Dyson (18th Implementation Lecture – March 2013)

"This may mean that in some cases parties will have to be denied the opportunity to adduce certain evidence if that have failed to exchange in accordance with case management directions. Doing so may be justified in order to ensure that they do not expend more than proportionate costs on their own litigation. Equally, this might be justified in order to ensure that all other court-users have fair access…
…..This may all seem rather harsh. It may certainly appear to amount to a denial of justice to the parties…

AMENDMENTS TO CPR

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"

AMENDMENTS TO CPR

- New rule explicitly refers back to new overriding objective:
- Stresses the need in dealing with cases justly to take account of proportionate costs and need to enforce compliance
- Court has to take into account immediate litigation but also wider needs of all court users
- Move away from the CPR's "*tough rules but lax application*"

ETHOS / JUSTIFICATION

Lord Dyson (18th Implementation Lecture – March 2013)

"The revisions to the overriding objective and to Rule 3.9, and particularly the fact that rule 3.9 now expressly refers back to the revised overriding objective, are intended to make clear that the relationship between justice and procedure has changed. ***It has changed not by transforming rules and rule compliance into trip wires. Nor has it changed it by turning the rules and rule compliance into the mistress rather than the handmaid of justice****…doing justice in each set of proceedings is to ensure that proceedings are dealt with justly and at proportionate cost. Justice is now only achievable through the proper application of the CPR consistent with the overriding objective."*

ADDITIONAL CPR FIREPOWER

(1) *3.1(2)(m):* general case management powers – courts may strike out a claim *"for the purposes of managing the case and further in the overriding objective"*

(2) 3.4(2)(c): power to strike out "*where there has been a failure to comply with a rule, practice direction or court order*"

(3) *3.1(1): retain inherent jurisdiction to dismiss a claim for want of prosecution or for abuse of process*

***CPR r*ules have always been tough – just applied using an "old" definition of justice. Compliance is here to stay**

MITCHELL –v- NEWS GROUP

Breach of 3.12(2):

> "*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"**

COMPUTATION OF TIME

CRR 2.8(2):

"*A period of time expressed as a number of days shall be computed as clear days".*

CPR 2.8(3):

"In this rule "clear days" means that in computing the number of days (a) the day on which the period begins; and (2) if the day of the period is defined by reference to an event, the day on which that event occurs, **are not included**"

COMPUTATION OF TIME

Thus:

(A) Where computation of time matters:

- Filing of case summaries / skeleton arguments "at least 3 days before" – CMC on Friday, need to serve case summary on the Monday.
- Filing of witness statements in support of application / resisting application
- Filing of trial bundles - (day after Mitchell – Bow CC – FT case stuck out for failure to file trial bundles at least 3 days before hearing)

MITCHELL –v- NEWS GROUP

Key Points:

(1) If a sanction is imposed appeal the order imposing it as you will not be able to attack it at the relief hearing

(2) New drafting of the CPR show efficient conduct of litigation at proportionate cost and the compliance with orders is of paramount importance

(3) Begin by looking at the nature of the non-compliance with rule, if can be regarded as "trivial" relief will "usually" be granted provided application made promptly

(4) In non-compliance more than trivial

- Burden on defaulting party to persuade the court to grant relief
- Court will consider why default occurred
- Good reason – relief likely to be granted

TRIVIAL

How do you define trivial?

(a)Guidance in Mitchell:

(i) "insignificant failure to comply with an order"

(ii) Eg. failure in form rather than substance or party has narrowly missed the deadline imposed by the order, but has otherwise fully complied with its terms

(b) Forstater –v- Python [2013] EWHC 3759

(i) Failure to serve N251 but informed D of the additional liability by letter – policy of rule fulfilled and no discernible impact on litigation

(ii) Although judgement pre-Mitchell, handed down after and Norris J felt it complied with Mitchell principles

TRIVIAL

How do you define trivial?

(C) Aldington –v- Els International Lawyers LLP [2013] EWHC B29

Breach of an unless order for service of individual POC (134 claimants / 8 failed)
No application to extend time before expiry
Breach arose because claimants abroad or away from home when asked to sign
D conceded no prejudice
PoC filed 14 days late
Application made promptly

"Failure was a failure of form not substance….insignificant failure….can properly be regarded as trivial…only narrowly missed the deadline"

"Nature of non-compliance cannot be divorced from the consequences of non-compliance – "significant or insignificant" must involve having regard to the consequence"

TRIVIAL

How do you define trivial?

(D) **Lakatamia Shipping –v- Nobu Su** [2014] EWHC 275

- Unless order for standard disclosure on or before 17/01/14
- No time specified in the order
- Under Commercial Court Guide – need to serve by 4:30pm
- Emailed 46 minutes late
- D applied for relief the next working day
- Held to be trivial
- Also – "triviality also borne out by its effect" – no prejudice

(E) **Bank of Ireland –v- Philip Rank** [2014] EWHC 284

- failure to sign a costs budget before deadline for service (not unless order)
- still served in time and nothing to say this was a nullity rather than an irregularity
- No need for relief
- **In any event if it was needed, failure of form not substance**

TRIVIAL

How do you define trivial?

(f) Durrant –v- Chief Constable of Avon & Somerset [2013] EWCA 1624

- two previous orders for witness evidence
- Second order expressed as an unless order
- 2 witness statements on day due for service – deemed to arrive 2 days after deadline
- Relief from sanctions 2 months later (1 months before trial)
- D also served 6 witness statements
- Application allowed for relief – trial adjourned

- **Accepted that service of the two statements likely to be trivial but seen in light of previous orders (?) but mainly no prompt application**

GOOD REASON

How do you define Good Reason?

(a) Guidance in Mitchell:

(i) Court will consider the reasons for the default

(ii) If "good reason" for default court likely to decide relief should be granted

(iii) Good Reason "document not filed at court was because solicitor suffered from a debilitating illness or involved in an accident"

(iv) 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, although the period seemed to be reasonable at the time and could not realistically have been the subject of an appeal

(v) Overlooking a deadline due to overwork or otherwise unlikely to be "good reason"

(vi) Likely to arise from circumstances outside the control of the party in default

GOOD REASON

ASSOCIATED ELECTRICAL INDUSTRIES –v- ALSTOM [2014] EWHC 430

- late service of a PoC in commercial court proceedings
- due to be served on or before 29th October 2013
- was an initial court caused delay informing C of this date
- on 29th October at 5:20 pm C's sols asked for extension of time of 14 days
- 18th October 2013, PoC served (realistically 20 days late)

Smith J:

- breach not trivial (in Mitchell delay of 5 days was not regarded as trivial)

- Not Good Reason despite:

    - 7 days being lost due to the court's error
    - difficulty aspects of the claim concerning dated documents

- Was sufficient time for the sols to serve POC – failed to apply for extension

SANCTIONS – Impact on the Everyday

(1) Witness Statements / Experts Reports

See: **Karbhari –v- Ahmed [2013] EWHC 4042**
Lloyd –v- PPC International [2014] EWHC 41

CPR 32.10: Consequences for failure to serve witness statement:

> "If a witness statement or a witness summary for use at trial is not served 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: Consequences for failure to disclose expert's report:

> "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"

SANCTIONS – Impact on the Everyday

(1) Witness Statements / Experts Reports

(a) Accordingly, failure requires the Court's permission

(b) This is a sanction – case law pre-dates Mitchell but never been an issue because old version CPR 3.9 / prejudice

(c) Pursuant to CPR 3.8(3) the parties cannot agree to extend time:

> "**Where a rule, practice direction or court order:**
>
> **(a) requires a party to do something within a specified time; and**
> **(b) specifies the consequences of failure to comply,**
>
> **the time for doing the act in question may not be extended by agreement between the parties**

(d) Thus, in the realms of trivial breach / good reason

SANCTIONS – Impact on the Everyday

(2) Witness Statements / Experts Reports

Pre-empting the default:

(1) Attempt to agree an extension, before the date for compliance:

- CPR 2.11:

"**Unless these Rules or a practice direction provides otherwise or the court orders otherwise, the time specified by a rule or by the court for a person to do any act may be varied by the written agreement of the parties"**

(2) It must be in writing (Thomas –v- Home Office [2006] EWCA Civ 1355)

SANCTIONS – Impact on the Everyday

(3) Witness Statements / Experts Reports

BUT – CPR 3.8:

> "**Where a rule, practice direction or court order:**
>
> **(a) requires a party to do something within a specified time; and**
> **(b) specifies the consequences of failure to comply,**
>
> **the time for doing the act in question may not be extended by agreement between the parties**

Turner J in **Lloyd**:

"Even if the parties had purported to reach a concluded agreement on an extension of time this would not have been effective unless the court were to be persuaded formally to endorse it"

Why even if there is agreement – still need a court order
WHAT IS THE POSITION RE: EXTENSIONS YOU HAVE PREVIOUSLY AGREED?

SANCTIONS – Impact on the Everyday

(4) Witness Statements / Experts Reports

(a) Any order of the court extending time will be made pursuant to CPR 3.1(2)(a) – power to extend or shorten the time for compliance with any rule, PD or court order (even if the application is made after the time for compliance has expired).

(b) Pre-April 2013 case law – when exercising its discretion under this rule, Court must have regard to the Overriding Objective and the matters listed in the (old) CPR 3.9

(c) The chains of Mitchell are therefore rattled again here - a party may well resist an application suggesting there is "no good reason" to allow an extension even if made before the expiry of the time for compliance

(d) Extensively discussed in **AEI –v- Alstom.** Despite finding that striking out the claim form would be disproportionate to the non-compliance the court must still give effect to the overriding objective which includes enforcing compliance.

NOT ALL SANCTIONS ARE CREATED EQUAL?

Summit Navigation Ltd –v- Generali Romania [2014] EWHC 398

(1) C failed to provide a suitable bond by 5th Dec 2013 – bond offered for £100,000 on 28th November to include previous bond of £25,000 rather than a single bond of £125,000. D refused such a bond.

(2) Single bond needed to be issued by broker – eventually available on morning of 6th December – D refused to accept it – case stayed

(3) Stay was a sanction "any consequence adverse to the party to whom it applies" but a stay does not operate as a sanction in the ordinary sense because it does not prevent the party from pursuing the claim

(4) It does not follow that all sanctions are equal and are to be treated as equivalent to one another for the purposes of CPR 3.9 – is a distinction between application to lift a stay and breach of an unless order that strikes out a claim. Thus, considerations of CPR 3.9 do not carry the same weight in such a case.

SELF - HELP

(1) Front load cases

AT CASE MANAGEMENT CONFERENCES:

(2) Ensure a realistic timetable /provide directions to experts

(3) Directions to allow updated witness and medical evidence if this is envisaged (certainly when directions are listed to a hearing)

(4) If listed to further CMC – specify in the order that Court will then consider the need for further or updating witness and/or medical evidence

(5) Include a "Mitchell Buffer" direction

SELF - HELP

(1) Ensure a realistic timetable:

(a) Para 34, Mitchell quotes Jackson:

"*First the courts should set realistic targets for cases and not impossibly tough timetables in order to give an impression of firmness*"

(b) send the order for directions to your expert ensuring (s)he is aware of your need to take instructions before service

SELF - HELP

(2) Directions accommodate updating evidence:

Turner J, **Karbhari** (para 29):

"*In cases where there is a realistic possibility that there will be evidential developments between the dates upon which witness statements are to be served and the trial date, this ought to be anticipated in the orders of the court.* ***In such cases the wisest course would be to seek to persuade the court to make two orders relating to the service of witness statements. The first would provide for a date which would give a realistic opportunity for all sides to comply with respect to matters which have arisen beforehand. A later backstop date could be ordered for the service of supplementary statements limited in content to matters which occurred, or were reasonably discoverable, only after the first date.....****I would expect the same to apply to expert reports*"

SELF - HELP

(3) "Mitchell Buffer"

Two distinct formulations I have seen in orders:

(a) "Subject to Rule 29.5, the parties may by prior agreement in writing extend time in respect of any direction up to 21 days without application to the court or court order".

CRP 29.5 – parties cannot vary a date for a direction if the variation would make it necessary to vary the date for a CMC; PTR; return of PTC; trial; trial period

SELF - HELP

(3) "Mitchell Buffer"

(b) "The parties may, by prior agreement in writing, extend the time for compliance with the directions in this Order by up to 28 days without the need to apply to the Court. Beyond that 28 day period, any agreed extension of time must be submitted to the Court by email, including a brief explanation of the reasons, with confirmation that it will not prejudice any hearing date and without a draft consent order in Word format. The Court will then consider whether a formal Application hearing is necessary".

SELF - HELP

(3) "Mitchell Buffer"

- Clear tension between this direction and 32.10?
- Further CoA guidance on the issue but can't help thinking the Judge led approach will be ratified

The FUTURE

(1) Compliance is here to stay

(2) Court of Appeal has considerable number of appeal in the system – expect more guidance

(3) Focus will be on "Trivial" and "Good Reason"

(4) Likely to be arguments about whether expert's reports served late are "outside the control of a party"

(5) "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, although the period seemed to be reasonable at the time and could not realistically have been the subject of an appeal"

(6) Surveillance Evidence(?)

JEREMY FORD

MITCHELL –v- NEWS GROUP

DISPROPORTIONATE INJUSTICE

Chambers of Andrew Ritchie QC
9 Gough Square