Butterworths Costs Services Bulletin

Bulletin Editor
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INTRODUCTION

We have reported on the most significant updates from 16 August 2013 to 27 November 2013. At the outset we set out a major landmark in the Jackson Reforms: the Court of Appeal's guidance on relief from sanction and costs budgeting. We then discuss further developments and proposals, including other recent important case-law.

Mitchell v News Group Newspapers Ltd [2013] EWCA Civ 1537 (Dyson Mr, Richards LJ, Elias LJ) 27 November 2013

The Court of Appeal's decision in *Mitchell v News Group Newspapers Ltd*, marks a true sea change in the way in which litigation will be conducted in England and Wales in the future and represents the first significant appellate decision enforcing the Jackson Reforms.

In ruling that relief from sanction should only be granted sparingly, the Court of Appeal has redressed the balance between the interests of the parties involved in the individual piece of litigation before the court on the one hand and the wider interests of the administration of justice and other court users on the other. It is now clear that in most cases where a party fails to comply with a rule, practice direction or court order, courts are required to refuse relief from sanction under CPR 3.9. The aim is to promote a culture of compliance with the rules – but the consequence may well be more painful for litigants and their advisers, in the short term at least.

The facts and decision below

On 1 August 2013 Master McCloud heard the original application for relief from sanctions in this case ([2013] EWHC 2355 (QB)). The underlying claim is a libel action brought by the former Government Chief Whip, Andrew

Mitchell, against News Group Newspapers. Mr Mitchell's solicitors failed to lodge a costs budget in due time and had as a result, pursuant to a previous judgment by the Master, been limited to a budget consisting of court fees only. An application under CPR 3.9 followed.

Adopting a plainly tougher approach compared with previous (pre-April 2013) practice, the Master refused to grant relief from sanctions. Importantly, she referred to "the right of other litigants to have a 'fair crack of the whip' 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 judgment made it clear that the stricter approach following the Jackson Reforms was central to the outcome.

The Court of Appeal's decision

The subsequent appeal was leapfrogged to the Court of Appeal such was its importance. It was heard by a panel including the Master of the Rolls Lord Dyson, responsible for the administration of civil justice in England and Wales (see [2013] EWCA Civ 1526).

The Court of Appeal robustly dismissed the appeal, sending out a clear message that non-compliance will no longer be tolerated. The key points are that:

- Although, as per Lord Justice Jackson's Reports, the new approach is not an extreme one where relief will only be granted in exceptional circumstances, nonetheless it should be granted "more sparingly than previously";
- While all the circumstances of the case must be considered, the need for litigation to be conducted efficiently and at proportionate cost (CPR 3.9(1)(a)) and the need to enforce compliance with rules, practice directions and orders (CPR 3.9(1)(b)) will be of "paramount importance";
- The requirement to act proportionately is one directed at the wider interests of achieving public justice and not exclusively at achieving justice in an individual case; and
- Relief from sanction should typically only be given where the breach is "de minimis", where there has otherwise been full compliance and where the application is made promptly, or alternatively, where there is a very good reason for the breach (which would normally require something outside of the control of the party or its lawyer). "Well intentioned incompetence", administrative errors or pressure of work will not suffice.

The court explicitly stated that its decision aims to support the change in culture that Lord Justice Jackson aspired to, and to force legal representatives to become more efficient.

Consequences

Over the course of 2013 a number of decisions have taken differing approaches to relief from sanction. Practitioners will be familiar with *Fons HF v Pillar* [2013] EWHC 1278 (Ch); *Venulum Property Investments Ltd v Space Architecture* [2013] EWHC 1242; *Wyche v Careforce Group plc* [2013] EWHC 3282 (Comm); *Rayyan v Trans Victory Marine* [2013] EWHC 2696 (Comm); *Biffa Waste v Dinler* [2013] EWHC 2582; and *Thevarajah v Riordan* [2013] HEWC 3179 (Ch). Some of these arguably muddy the waters, but to the extent that they take a more forgiving approach to the defaulting party they are unlikely to be great comfort after Mitchell, which very clearly sets a new standard which courts – and practitioners – across the country will now be held to.

The immediate consequence of Mitchell for parties and their advisers cannot be overstated. Parties who anticipate missing deadlines must take every effort to ensure that they are complied with, or, at the least, to make applications (eg for time extensions) before the relevant deadline has passed. Litigants in person may well be exposed, particularly where the default is caused by a failure to read or understand the rules. In the medium term litigators will need to take steps to implement systems and controls to ensure that rules, orders and deadlines are complied with; maladministration or oversight will not be acceptable.

Of course while the overriding aim of promoting a culture of compliance, and a smooth and efficient judicial system, is laudable, there is almost certainly going to be some short-term pain for litigants and lawyers who fall on the wrong side of the line.

PROPOSED FURTHER DEVELOPMENTS/CONSULTATIONS

66th Update to the CPR

The 66th Update to the Civil Procedure Rules came into force on 1 October 2013. The following amendments are of particular note:

- PD3E Costs Management – a revised Precedent H is substituted;
- Part 45 and PD45 – Fixed Costs – an amendment is made to r 45.29E Table D to correct a typographical error. Further amendments are made as a consequence of the reconstitution of the Patents County Court and the amendment of scale costs for proceedings in the Intellectual Property Enterprise Court;
- Part 47 – Procedure for Assessment of Costs and Default Provisions – a modification is made to clarify the amount of costs that may be recovered for matters that do not go beyond provisional assessment of costs, and whether that amount includes court fees and VAT; and
- Part 63 and PD63 Intellectual Property – amendments are made following provisions in the Crime and Courts Act 2013 to reconstitute the Patents County Court as a free-standing specialist list in the

Chancery Division, to be called the Intellectual Property Enterprise Court. Amendments to scale costs in the Intellectual Property Enterprise Court are set out in PD 45.

Whiplash claims

The outcomes of the Government's consultation "Reducing the number and costs of whiplash claims" and "Cost of motor insurance – whiplash" were published in October 2013.

The main elements of the Government's response include (taken from the Foreword):

The purpose of the response:

"The Government is determined to do more to reduce insurance premiums further to help with the cost of living. Fraudulent, exaggerated and unnecessary insurance claims continue to place a significant financial burden on each and every motorist …

So, in this response the Government sets out what action we intend to take following consultation to reduce the number and costs of whiplash claims. We also set out our response to the Transport Committee's inquiry report on the 'Cost of motor insurance: whiplash' published on 31 July 2013, as this covers many of the same issues raised in our consultation."

Independent medical panels:

"First, the Government wishes to press ahead with our consultation proposal to introduce independent medical panels, backed up by an accreditation scheme, to establish a new more robust system of medical reporting and scrutiny."

Other steps to prevent fraudulent claims:

"We also want to work with all sides to tackle together those practices which can contribute to the inflated number of whiplash claims. For example, we want insurers to end the practice of making offers to settle claims without requiring medical reports. We also want insurers to share more of their data on suspected fraudulent or exaggerated claims with claimant lawyers, and we want claimant lawyers to carry out more effective checks on their potential client before taking on claims."

Increasing the small claims track threshold:

"On the consultation options to increase the Small Claims track threshold, the Government has carefully considered responses. We believe that there are good arguments for increasing the Small Claims track to £5,000 for all road traffic accidents to raise incentives to challenge fraudulent or exaggerated insurance claims. At the same time, we have listened to the views of the Transport Committee and others

that now may not be the right time to raise the Small Claims limit because of the risks that it may deter access to justice for the genuinely injured and encourage the growth of those disreputable claims firms which so damage the industry. At this stage, we have decided to defer any increase in the Small Claims track until we can determine the impact of our wider reforms on motor insurance premiums and better safeguard against the risk identified above. We believe that this is the right thing to do for all parts of our society."

Costs protection in defamation and privacy claims consultation

The Government conducted a consultation from 13 September 2013 until 8 November 2013 in which it proposed that the qualified one way shifting rule for personal injury cases introduced in 1 April 2013 be applied to defamation and privacy claims, albeit amended. The proposed modifications are:

- There would not be full costs protection regardless of means. The party seeking costs protection would apply for it on notice to the other side, and the Government proposed to consider three groups (whether individuals or corporate):
    - Those of modest means, who should be entitled to costs protection in full as for personal injury claimants;
    - The "mid" group of those of some means – who could pay something, but not the costs in full – who should be entitled to costs protection in part; and
    - Those of substantial means, who should not get any costs protection because they would not face "severe financial hardship" if they were ordered to pay the other side's costs.

It would be open to the parties to agree the costs protection position:

- The proposed test for "modest means" is whether the litigant would face "severe financial hardship" if they had to pay the other side's costs;
- For the "mid" group, they would be required to pay "a reasonable amount", which would be capped by the judge at the first judicial hearing (or agreed). It would be based on the applicant's statement of assets and the costs budget. The opponent's assets are also a relevant factor;
- The proposed test for those of substantial means would, again, be whether they would suffer any "severe financial hardship" if they had to meet the costs of the other side in full;
- The party's statement of assets would be confidential to the party, the court and judge, unless the judge directs otherwise. The court would have power to give directions for further evidence/disclosure;

- It would be open for the parties to agree to vary the costs protection awarded if the circumstances change, or the parties could apply to court – this is likely to be if the means of the party with costs protection changes substantially, or if a reasonable offer is made such that there is no real merit in the litigation proceeding;
- The costs protection would be lost in the same circumstances as for personal injury;
- Orders for costs made against a party with costs protection may only be enforced at the end of proceedings, once the costs have been assessed or agreed; and
- Applications for costs protection to be dealt with, as much as possible, or the papers to limit the costs incurred. Generally, it is proposed that costs of oral hearings would be in the court's discretion, but it might be appropriate for the default position to be that there would be no order as to costs, and a potential penalty to an unsuccessful challenging party to pay costs on the indemnity basis.

The Government hopes to introduce the new costs protection regime through changes to the CPR in April 2014, at the same time as fully implementing the existing Jackson reforms.

Hourly rates

On 6 November 2013 the Civil Justice Council's cost committee released a Call for Evidence to enable it to make a recommendation to the Master of the Rolls for the new guideline hourly rates. The Call for Evidence runs until 6 December 2013.

Criminal costs/legal aid

There have been a number of developments for Criminal costs, including:

On 7 October 2013 the Criminal Procedure Rules 2013 and new Criminal Practice Directions made by the Lord Chief Justice came into force. The Practice Directions have been revised and re-arranged in a way that corresponds with the Criminal Procedure Rules and includes Practice Direction (Costs in Criminal Proceedings).

On 5 September 2013 the MoJ released a press release confirming that the Government has published revised proposals for criminal legal aid contracting, following agreement with the Law Society. The press release records:

> "This new consultation ensures that all those solicitors who currently provide criminal legal aid work to their own clients will continue to be able to do so, as long as they meet minimum quality requirements. The Government is also seeking views on an updated tendering model for duty work, such as in police stations. This model would be based on quality, and implementation would be timed to give the market more opportunity to prepare.

To ensure the Government is doing what it can to support lawyers through this period of reform, interim payments will be made more readily available to help overcome cashflow problems in long-running cases. We will also establish a panel of experienced defence lawyers to further examine how we can make the criminal justice system more efficient."

CASE LAW

We report below on important case-law in this period, including a seminal case on the costs consequences of failing to engage in ADR, more cases on costs budgets, and consideration of the new Pt 36 consequences.

DIVISION A – CIVIL LITIGATION COSTS

ADR

PGF II SA v OMFS COMPANY 1 LTD [2013] EWCA Civ 1288 (Lord Justice Maurice Kay, Lord Justice McFarlane, Lord Justice Briggs) 23/10/2013

Facts: the Claimant brought proceedings in October 2010 for approximately £1.9m against the Defendant for alleged breaches of the repairing covenants in a commercial lease. At or shortly before the commencement of proceedings, the Claimant made a Pt 36 offer to accept £1.125m. In April 2011 the Claimant made a second Pt 36 offer of £1.25m plus interest. The Claimant also invited the Defendant to engage in an early mediation. The Defendant made a Pt 36 offer of £700,000. The Defendant did not respond to the Claimant's invitation to mediate. On 19 July 2011 the Claimant sent a further invitation to mediate. On 20 December 2011 the Claimant made another Pt 36 offer of £1.05m. The Defendant raised a new point the day before trial and, as a result, the Claimant accepted the Defendant's Pt 36 offer of £700,000, thus settling the proceedings. The Claimant argued that the court should not order that the Defendant be entitled to the costs after expiry of the relevant period (see CPR r 36.10(4) and (5)) in reliance upon (i) the late amendment; and (ii) the Defendant's alleged unreasonable failure to mediate. The judge made no order as to costs for the period after expiry of the relevant period due to the failure to engage in ADR. Both parties appealed.

Held: dismissing both the appeal and cross-appeal, and extending the principle in *Halsey v Milton Keynes General NHS Trust* [2004] 1 WLR.3002: (1) the court endorsed the advice given in Ch 11.56 of the ADR Handbook, that silence in the face of an invitation to participate in ADR is, as a general rule, of itself unreasonable, regardless of whether an outright refusal, or a refusal to engage in the type of ADR requested, or to do so at the time requested, might have been justified by the identification of reasonable grounds; (2) there may be rare cases where ADR is so obviously inappropriate that to characterise silence as unreasonable would be pure formalism. There may also be cases where the failure to respond at all was a result of some mistake in the office, leading to a failure to appreciate that the invitation had been made, but in such cases the onus would lie squarely on the recipient of the

invitation to make that explanation good; and (3) the judge's decision to disallow the Defendant's costs for the relevant period was within the range of proper responses to the Defendant's seriously unreasonable conduct.

Comment: this case lays down an important general principle which all practitioners should be aware of, and goes further than the previous guidance in *Halsey*. While ADR has previously been relevant and encouraged, parties can now put real pressure on opposing parties to mediate given the general rule expounded above.

COSTS BUDGETS

STELLA WILLIS v (1) MRJ RUNDELL & ASSOCIATES LTD; (2) GROVECOURT LTD [2013] EWHC 2923 (TCC) (Mr Justice Coulson) 25/09/13

Facts: the Claimant sought to recover the sum of £1.6m from the Second Defendant which, at the time of the hearing, had been reduced to £1.1m. At the original case-management conference, each party produced a costs budget. The Claimant's costs budget was approximately £821,000 (with VAT) and the Defendant's was £616,000. Coulson J expressed the opinion then that the figures were high and appeared disproportionate. There was insufficient time for the detail of the costs budgets to be explored, and neither side chose to bring the matter back to court. Due to the parties' lack of preparedness, the trial listed for October 2012 was adjourned, and Coulson J ordered that there should be a case-management hearing dealing solely with costs. Both parties provided updated costs budgets, with the Claimant's at £897,369.67 plus VAT and the Defendant's £703,130.37. The court considered those costs budgets under PD 51G (the pilot scheme).

Held: finding that the costs budgets overall, and some specific elements, were disproportionate and unreasonable, but declining to approve either party's costs budgets or to make a costs management order: (1) the total amount of the costs in the cost budgets is about £1.6m. It will cost significantly more to fight this case than the Claimant will ever recover. On that basis alone, the costs in the costs budgets are both disproportionate and unreasonable; (2) one test of proportionality is whether the trial is likely to be an end in itself, or merely a lesser part of the process which the parties will use in order to put themselves in the strongest position to argue that, subsequently, the other side should pay all or most of their costs. When the costs on each side are much higher than the amount claimed/recovered, the latter is almost inevitable. On specific elements of the budgets: (1) the Claimant did not criticise the Defendant's overall figure or any particular overstatements or inadequacies, which makes any sort of sensible assessment of the figures almost impossible. As there were no alternative figures, it was not appropriate for the court to impose its own figures; (2) large sums had already been incurred and could not be subject to a costs management order but could be the subject of comment; (3) it is not satisfactory for costs to be said to be both incurred and estimated without a further breakdown. The costs which have been incurred must be separated out from those which are estimated; (4) while budgets can

include contingent sums, it needs to be made very clear what those contingency sums are for and how they have been calculated. It is not appropriate to put in a single lump sum by way of a contingency figure and leave it at that; (5) a lump sum for settlement costs should be broken down by reference to its component parts; and (6) the absence of an approved budget does not mean that no costs are recoverable at all, as that approach is not in accordance with the letter or the spirit of the new costs rules or PD 51G.

Comment: the court gave useful guidance on the pitfalls facing parties when completing costs budgets and the information which is required. Interestingly, the court also considered proportionality by reference to the overall costs (ie including both parties' costs as opposed to one party's costs), and appears to set down a test for proportionality, both which may be viewed as a departure from previous practice.

THE BOARD OF TRUSTEES OF NATIONAL MUSEUMS AND GALLERIES ON MERSEYSIDE v AEW ARCHITECTS AND DESIGNERS LTD [2013] EWHC 3025 (*TCC*) (*Mr Justice Akenhead*) *11/10/13*

Facts: the Claimant succeeded at trial, and the matters in issue following judgment were (i) interest; (ii) whether costs should be on the indemnity or standard basis; (iii) whether the Claimant should be entitled to an interim payment on account. Only (iii) is considered here, as it raises issues relating to costs budgets. The Defendant objected to the level of an interim payment, partly on the basis that the costs judge would not be able to depart from the Claimant's last approved budget of £492,727.57 in February 2012. The parties had both submitted revised budgets on 22 March 2013 (about £1.1m for the Claimant) for the Pre-Trial Review, but the court did not have time to approve them. At the Pre-Trial Review, neither party took issue with the other side's budget.

Held: allowing an interim payment of £700,000: (1) Akenhead J saw no reason to disagree with the principles laid down by Coulson J in *Elvanite Full Circle Ltd v AMEC Earth & Environmental* (*UK*) *Ltd* [2013] EWHC 1643 (TCC), but noted that para 6 of PD 51G requires parties to file and serve budget revisions when its previous budget is no longer accurate with the court at the next procedural hearing to approve or disapprove departures from the previous budget. That suggests that no formal application needs to be issued; (2) there were important differences between the present case and *Elvanite*, as: (i) there was simply an oversight by both parties and by the court at the Pre-Trial Review, and there was no suggestion that either party was challenging the other side's budget; (ii) there were some very obvious reasons why the costs budgets had substantially increased since early 2012 (and identified some specific areas); (3) as the trial judge and at this late stage, it would not be appropriate as such to revise the Claimant's only formally approved costs budget. However, it is a very obvious case for a substantial upward departure from the approved budget, and it is most appropriate to leave the detail to the costs judge to take into account what Akenhead J found.

Comment: parties may seek to rely on the type of factors which Akenhead relied upon to distinguish the case from *Elvanite* as examples of situations which justify the approval of an increased budget.

PART 36 OFFERS

LORRAINE FELTHAM v FREER BOUSKELL [2013] EWHC 3086 (*Ch*) (*Mr Charles Hollander QC*) *15/07/2013*

Facts: the Claimant succeeded in the claim and recovered over £700,000. The Claimant made a Pt 36 offer on 10 May 2013 for £700,000, with the trial commencing on 4 June 2013 (ie after expiry of the relevant period). The parties disagreed about the level of interest and whether, given that the Claimant had beaten her Pt 36 offer, she should be entitled to a further £75,000 as damages (calculated in accordance with the table in the new CPR r 36.14(3)(d)). The Defendant argued it would be unjust to do so, particularly given: (i) the lateness of the offer; (ii) the fact that the offer was only just beaten; (iii) the late amendment to the Claimant's case; and (iv) the failure to disclose relevant documents. The Defendant also sought an order that the Claimant be deprived of some of her costs on similar bases.

Held: in respect of the uplift to the damages/costs; (1) it would be unjust to award the uplift of £75,000 bearing in mind: (i) the lateness of the offer; (ii) the amended case; and (iii) the failure to disclose relevant documents; (2) when the lump sum uplift is in issue, the court can only adopt an all-or-nothing approach; (3) the fact that the Claimant only just beat the offer makes no difference; (4) however, the court would not reduce the recoverable costs on similar bases, as it would be unfair to penalise the Claimant twice. If the court had not disallowed the uplift to damages, it would have reduced the recoverable costs.

Comment: this case demonstrates the factors which the court will take into account under the new CPR Pt 36, and interestingly sets a precedent of whether the court will apply a double reduction.

DIVIDER L – SOLICITOR'S REMUNERATION

CLEMENTINE BENTINE v SERENA SUSANNAH BENTINE and THE OFFICIAL SOLICITOR v WILSONS SOLICITORS LLP [2013] EWHC 3098 (*Ch*) (*Mrs Justice Proudman, with assessors*) *17/10/13*

Facts: the Claimant was represented by a litigation friend (the Official Solicitor) for the latter part of proceedings due to losing capacity. Wilsons LLP, solicitors, were retained throughout the proceedings. The Claimant's claim settled, and the judge ordered a detailed assessment of the Claimant's costs pursuant to CPR r 48.3. Some of Wilsons LLP's costs were disallowed for want of retainer for the period after the Claimant lacked capacity but before the Official Solicitor became her litigation friend. The Costs Judge determined that the one-fifths rule in s 70(9) applied before deduction of those fees due to a want of retainer. However, the Costs Judge took that

factor into account under s 70(10) of the Solicitors Act 1974 in deciding that there were "special circumstances" to disapply the general rule, and only allow 60% of the Claimant's costs of the assessment. Wilsons LLP appealed. The issues on appeal were: (i) whether, pursuant to s 70(9), the "one-fifths rule" applied to the costs claimed before or after the deduction of those fees disallowed for want of retainer; and (ii) whether special circumstances existed to disapply the general rule in any event.

Held: dismissing the appeal, although Wilsons LLP succeeding on issue (i): (1) the decision in *Re Taxation of Costs* [1936] 1 KB 523 was binding authority for the proposition that costs disallowed for want of retainer were not to be included in the application of the one-fifths rule; (2) there were, however, special circumstances relating to the assessment. The rule in s 70(9) does not allow a solicitor free rein with his bills, and he is to be appropriately penalised in costs for claiming want of retainer costs which should not have been claimed in the assessment at all.

Comment: although the harsh consequences of *Re Taxation* on the client are still good law, the court mitigated the effect of that decision to reach a just outcome by more readily finding "special circumstances" to disapply the general rule in s 70(9) of the Solicitors Act 1974.

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