Supplementary paper from APIL (the Association of Personal Injury Lawyers)

Relief from sanctions

Consistency of judicial interpretation is always welcome and practitioners had been calling for a more robust enforcement of rule breaking in litigation for a while. Indeed, in 2012 in PI Focus APIL ran an article based on members' comments on the subject. Entitled, "Is the CPR different for defendants?", the thrust of the article was the assertion that the courts dealt more leniently with defendant default than claimant.

All this looked as if it would change when Lord Justice Jackson published his final report in December 2009. Widely trailed by Lord Justice Jackson, both in his December 2009 Final Report and his 5th implementation lecture in November 2011, '*achieving a culture change in case management*,' Jackson LJ referred to practitioner views on the pre-action protocol, which could be equally applied to the CPR in general, that "*both claimant and defendant solicitors have expressed concern that the courts do not police the protocol properly. They do not impose sanctions for non-compliance and this allows lax practices to flourish.*"[1]

Jackson LJ openly discussed 'the Singapore experience' in which 'shock tactics' were employed to introduce a change of culture: they had an 'electric' effect on the approach to case management there. The case management of litigation in England and Wales does not mirror the scale problems which beset Singapore by the end of 1990 when "there were 1,963 suits begun by writ and 108 admiralty suits which were awaiting hearing dates in the High Court," some of which had been set down for hearing as early as 1982[2]. This is relevant to the appropriate approach being adopted in this jurisdiction.

In April 2013, the amended civil procedure rules were introduced and at first, there was no real hint of a change in culture. This all changed following the Court of Appeal decision in ***Mitchell v NGN Ltd***.

Mitchell v NGN Ltd [2013] Court of Appeal

In ***Mitchell,*** the solicitors representing Andrew Mitchell MP in his 'Pleb-gate' action against the Sun newspaper, failed to file his costs budget in time (six days late – one day, instead of seven days before the CMC) and was treated as having filed a costs budget comprising only the court fees. (The costs budget eventually filed by his solicitors was in the sum of £506,425). The Master then refused to grant relief under CPR 3.9 from the decision to limit the costs to court fees only.

This was the first time the Court of Appeal had been asked to decide on the correct approach to the revised version of CPR 3.9 which came into force on 1 April 2013.

The Court of Appeal upheld the Master's decision to refuse relief from sanction.

[1] Review of Civil Litigation Costs: Final Report, Jackson, December 2009: para 4.14, Part 4, Chapter 23, page 241.
[2] *Civil Case Management in Singapore: of models, measures and justice*, by Foo Chee Hock [2012]

At paragraph 59 of *Mitchell*, The Master of the Rolls comments, "*Although it seems harsh in the individual case of Mr Mitchell's claim, if we were to overturn the decision to refuse relief, it is inevitable that the attempt to achieve a change in culture would receive a major setback*."

The Court of Appeal had an early opportunity to endorse the robust approach and did so.

Durrant v Chief Constable of Avon and Somerset Constabulary [2013] Court of Appeal

In ***Durrant***, the court's directions included "Witness statements are to be exchanged no later than 4 pm on 21 January 2013."

The defendant failed to comply with the direction for exchange of witness statements. On 21 January 2013 the defendant's solicitor wrote to the claimant:

"In terms of witness evidence, I am struggling to meet the deadline set by the court. This is because some of the officers involved in the incident have retired, taken a career break or have been unavailable over the Christmas period. The snow has further delayed matters. I anticipate that I will be in a position to exchange statements with you over the next 21 days at the very latest, but would be grateful if you agree to an extension."

The claimant did not agree to an extension. On 26 February 2013, Mitting J made the following order in relation to witness statements:

"Defendant do file and serve any witness statements by 4 pm on 12 March 2013. The defendant may not rely on any witness evidence other than that of witnesses whose statements have been so served."

(1) The defendant served two witness statements a day after the court deadline.

(2) The defendant then tried to serve a further four statements and made an application for relief from sanctions, two months after the original deadline.

(3) Five days before the trial the defendant made a further application for relief from sanctions, so as to allow two more officers to be called as witnesses.

On the morning of the trial the judge granted the defendant relief from sanctions and the trial was adjourned to give the claimant time to consider the defendant's evidence. The claimant appealed the defendant's grant of relief.

The Court of Appeal allowed the claimant's appeal. They concluded that the initial judge had granted relief from sanctions in circumstances which did not justify relief under CPR 3.9. It found that as a whole, the defendant's failure to serve witness statements had, had a very detrimental effect on the proceedings and led to a waste of court time.

Additionally, no good reason was given for the defaults, and the Court held that relief from sanctions will not be granted for trivial breaches, if there are other significant breaches and

an application for relief had not been made promptly – “this makes the delay all the more inexcusable.”

The Chief Constable was unable to rely on any witness evidence, as all of his witness statements had been served after the court ordered deadline. As a result, his defence was struck out and judgment entered for the claimant.

M A Lloyd v PPC International Ltd [2014] High Court

This case demonstrates a further example of, and perhaps extension to, the robust approach directed in Mitchell. In ***M A Lloyd v PPC International Ltd*** the facts of this particular case demonstrated inordinate delay (delay of 3 months providing disclosure and witness statement). The comments of Mr Justice Turner made it clear that in his view, CPR 3.8 ‘trumps’ CPR 2.11, rendering ineffective any attempts by the parties to agree matters by consent.

The approach to CPR 3.8(3) indicates that the parties may not have the power to vary the time for any order where the rules provide a sanction, including the exchange of witness statements.

He said (at 27) “...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. This court is under a duty under CPR 1.4 not simply to adjudicate passively upon the applications of the parties or to rubber stamp their reciprocal procedural indulgences but actively to manage cases. To this end, the court has power under CPR 3.3 to make orders of its own initiative.” In this case, the claimant was debarred from raising issues as to jurisdiction and on the entitlement to litigate in England and Wales. This decision has made practitioners doubtful about the extent of their ability to agree variation in directions for fear of that agreement being overridden by the Court. In turn this has lead to a large increase in interlocutory applications and consumption of court time.

Thavatheva Thevarajah v John Riordan and others [2014] Court of Appeal

In ***Thevarajah*** insufficient disclosure was deemed by the Court of Appeal to be a failure to comply with an unless order which provided that “the defendant shall be debarred from defending the claim and any defence that they might have filed shall be struck out.”

The appellant issued an application on 10 June 2013 for an “unless” order on the grounds that the respondents had failed to provide sufficient disclosure. Henderson J concluded that the respondents’ disclosure remained inadequate. He made an order that unless the

respondents provide certain information by 4pm on 1 July 2013 then the respondents "shall be debarred from defending the claim and any defence that they might have filed shall be struck out". The respondents provided further documentary disclosure on 28 June 2013, but the appellant maintained that there had been a failure to comply with the unless order.

The appellant issued an application seeking a declaration that the sanction in the unless order had come into effect and an order should be made striking out the defence and counterclaim. The respondents cross-applied for relief from sanction.

Hildyard J heard the applications and concluded that the terms of the order had been breached in a number of respects in relation disclosure. He concluded that serious failures to comply with the unless order had been established and made an order that the respondents were debarred from defending the claim and ordered that their defence and counterclaim be struck out.

The robust approach is here to stay, what should practitioners do to ensure compliance?

Issues and practitioner actions:

Highly technical points are inevitable in the post-*Mitchell* era, and a cautious approach is required:

- If compliance with directions is in doubt, make an application **in advance** and **promptly:** ***Thavatheva Thevarajah v John Riordan and others, Lloyd v PPC International*** *and more recently:* ***Wahid and Shadkam v Skanska UK*****.** [2014] High Court. See also ***Samara v MBI & Partners UK Ltd and Ajwa Rmti Co*** [2014] EWHC 563 (QB) where there was a delay of 15 months between default judgment being entered and an application to set it aside. The court robustly criticised the delay: "this was a clear case of a serious, sustained and inexcusable failure by the first defendant and its legal adviser ... to comply with the well-known and important obligations to make a prompt application to set aside judgment entered in default..."
- 'Leaving matters to the last minute is inconsistent with conducting litigation efficiently ...' Early preparation is key. ***Burt v Linford Christie*** [10/02/2014] county court***.***
- It's not enough to just read the directions. In the county decisions of ***Linford Christie*** and also ***Porbanderwalla v Daybridge*** there was no mention on the face of the form N149C (allocation questionnaire) of the need to file budgets. So make sure you read the rules too, particularly in relation to when Form H should be filed.
- Do not assume that extensions/variations agreed by consent will be approved by the Courts. In ***Lloyd v PPC International Ltd*** the court held that it can override consent by the parties using CPR 3.9 although the Master of the Rolls (MR) has since varied the standard clinical negligence model directions to allow variations by agreement. Similarly model directions for multi-track cases have provision 'to allow variation by agreement too.
- It is hoped courts will start to get tough on opportunistic technical *Mitchell* arguments. In ***Summit Navigation v Marin Taknik and others*** (Commercial QBD) on 21 Feb, the message was "woe betide a respondent who tries to get a free ride on the back of a minor default, merrily watching the time table being derailed while thinking they're at no costs risk" says James Watthey, claimant's counsel. The court ordered the

See also *Vivek Rattan v UBS AG* [2014] EWHC 665 (comm) where the defendant agreed, at the claimant's suggestion, to file its costs budget six clear days before the CMC. The claimant then contended at the CMC that as the budget was a day late, the defendant should be treated pursuant to CPR 3.14 as having filed a budget comprising only the relevant court fees and needed to apply for relief from sanction. The judge said that he preferred 'to think this was a misguided piece of opportunism by the claimant..." rather than 'a cunning trap for the defendant to fall into" and observed that the claimant had not only increased the expense of the CJC but had probably "damaged the relationship of co-operation and trust" between the parties' legal representatives. He ordered the claimant to pay the defendant's costs on an indemnity basis by way of penalty.

- The Court of Appeal in *Mitchell* says that "If [it] can properly be regarded as trivial, the court will usually grant relief provided that an application is made promptly". So what counts as trivial and what does not?
    - **Lotus cars v Mecanica Solutions**: filing revised budget 1 day before CMC when part of claim had settled to reflect changed budgets: **trivial.**
    - **Mitchell v NGN:** filing costs budget six days late – one day, instead of seven days before the CMC: **not trivial.**
    - **Forstater v Python (Monty) Pictures Ltd:** where multiple CFAs existed, failure to file N251 in respect of one of them: **not trivial,** but part relief from sanction granted.
    - ***Durrant v Chief Constable of Avon & Somerset:*** serving two witness statements a day after the court deadline, trying to serve four more statements and making an application for relief from sanctions, two months after the original deadline, then five days before the trial making a further application for relief from sanctions, so as to allow two more officers to be called as witnesses: **not trivial**. Against the background of other failure and delay, what might otherwise be judged trivial may well not be.
    - ***Thevarajah v Riordan:*** insufficient disclosure deemed to be a failure to comply with an unless order which provided that "the defendant shall be debarred from defending the claim and any defence that they might have filed shall be struck out.": **not trivial**.
    - ***Lloyd v PPC International:*** failure to serve witness statements in accordance with court order and only serving a statement which was insufficient on the day of the hearing: **not trivial**.
    - ***Newland v Toba Trading*****:** inadequate disclosure of lists, failure to file separate disclosure lists for joined proceedings, failure to serve witness statements on time. The Court conceded some of the defaults were trivial, but combined, were not (see also **Durrant** above). To compound the problem the application for relief was not made promptly: **not trivial**.
    - ***SET Select Engineering GMBH v F&M Bunkering:*** late application for a stay of proceedings under CPR 11 (jurisdiction) for a day or mere 'days' plus a 'good reason' – Cyprus court procedures were taken into account: **trivial.**
    - ***Devon County Council v Celtic Bioenergy:*** service of costs schedule 18 minutes late, with no apparent prejudice to parties: **trivial**.

- ***Burt v Linford Christie:*** where one party managed to file budgets on time, but the other side didn't and clearly hadn't even starting looking at them less than two weeks before due date and then missed the deadline by 3 days: **not trivial.**
- ***Associated Electrical Industries Ltd v Alstrom UK:*** particulars of claim served 20 days late, no timely application for relief and an 'indifference to compliance' led to claim being struck out: **not trivial**.

There will be more examples which come to court following the *Mitchell* decision, and it is welcome that the CJC should examine these issues to ensure consistency and that the Jackson LJ objective is met with clarity of sanction, a proportionate reaction to each breach or default consistent with the overriding objectives, and appropriate use of consent orders without court approval, to avoid the wasting of court time through another route.

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Links to cases and citations

Mitchell v NGN Ltd [2013] EWCA Civ 1537:
http://www.bailii.org/ew/cases/EWCA/Civ/2013/1537.html

Durrant v Chief Constable of Avon and Somerset Constabulary [2013] EWCA (Civ) 1624 http://www.bailii.org/ew/cases/EWCA/Civ/2013/1624.html

M A Lloyd v PPC International Ltd [2014] EWHC 41 (QB)
http://www.bailii.org/ew/cases/EWHC/QB/2014/41.html

Other cases referred to (alphabetical order)

Associated Electrical Industries Ltd v Alstrom UK [[2014] EWHC] 430 (Comm)
http://www.bailii.org/ew/cases/EWHC/Comm/2014/430.html

Burt v Linford Christie [10/02/2014] Birmingham county court***.***

Devon County Council v Celtic Bioenergy Ltd [2014] EWHC 309 (TCC)
http://www.bailii.org/ew/cases/EWHC/TCC/2014/309.html

Forstater and Mark Forstater Productions Ltd v Python (Monty) Pictures Ltd and Freeway Cam (UK) Ltd [2013] EWHC 3759 (Ch)
http://www.bailii.org/ew/cases/EWHC/Ch/2013/3759.html

Lotus Cars v Mecanica Solutions [2014] EWHC 76 (QB)
https://www.dropbox.com/s/y3mvuhjnfs8mpqz/Lotus%20Cars%20Limited%20-v-%20Mecanica%20Solutions%20Inc.pdf

Newland Shipping and Forwarding ltd v Toba Trading FZC [2014] EWHC 210 (Comm)
http://www.bailii.org/ew/cases/EWHC/Comm/2014/210.html

Porbanderwalla v Daybridge [30/01/2014] Birmingham County Court

SET Select Engineering GMBH v F&M Bunkering Ltd [2014] EWHC 192 (Comm)
http://www.bailii.org/ew/cases/EWHC/Comm/2014/192.html

Summit Navigation v Marin Taknik and others [2014] EWHC 398 (Comm)
http://www.bailii.org/ew/cases/EWHC/Comm/2014/398.html

Thavatheva Thevarajah v John Riordan and others [2014] EWCA (Civ) 15
http://www.bailii.org/ew/cases/EWCA/Civ/2014/15.html:

Vivek Rattan v UBS AG **[2014] EWHC 665 (comm)**
http://www.bailii.org/ew/cases/EWHC/Comm/2014/665.html

Wahid and Shadkam v Skanska UK PLC and Riverstone Insurance [2014]EWHC 251 (QB)
http://www.bailii.org/ew/cases/EWHC/QB/2014/251.html

There is set out below in tabular and summary form the consequences flowing from the robust approach in cases decided so far:

Rule	Summary of rule	Effect / relevant case
2.11	Unless these Rules or a practice direction provide 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. But the notes add the following: (Rules 3.8 (sanctions have effect unless defaulting party obtains relief), 28.4 (variation of case management timetable – fast track) and 29.5 (variation of case management timetable – multi-track), provide for time limits that cannot be varied by agreement between the parties).	This is a potential trap which creates difficulties when both parties are in agreement, but the court decides otherwise. Particularly since 20 January when in ***M A Lloyd v PPC International Ltd*** [2014] EWHC 41 (QB) http://bit.ly/1hOzIJs the court held that it can always override consent by the parties using CPR 3.9 (see notes on case below). Note that since Lloyd, the MR has varied the standard clinical negligence model directions to allow variations by agreement. Similarly model directions for multi-track cases.
3.1 (7)	Late compliance with an order is not a material change of circumstances. Applications for relief from sanction should be made promptly	This applies to any rule/ practice direction or court order as described. See ***Thavatheva Thevarajah v John Riordan and others*** [2014] 2-3 months' delay in complying was too long. Application for relief made 2 months after the order complained of, and only 2 days before the trial – this was not 'prompt'.
3.4(2)	The court may strike out a statement of case if it appears to the court – ... (c) that there has been a failure to comply with a rule, practice direction or court order..	In **Associated Electrical Industries v Alstrom** [2014] the claimant serves particulars of claim 20 days late and therefore not in accordance with CPR 58.5 (commercial court). Also there was failure to make a timely application for relief and

		there was no good excuse for doing this failure. This was neither trivial nor prompt: the claim was struck out, and the application for retrospective relief was refused.
3.8.3	**Directions which cannot be extended by Agreement:** Where a rule, practice direction or court order - a) requires a party to do something within a specified time, and b) specifies the consequence of failure to comply ***the time for doing the act in question may not be extended by agreement between the parties.***	***M A Lloyd v PPC International Ltd*** [2014] EWHC 41 (QB) http://bit.ly/1hOzIJs. The limit of the application to this rule appears extensive following this decision.
3.14	Failure to comply with this rule to file and exchange budget – sanction: unable to rely on the budget: restricted to relevant court fees only.	See **Lotus Cars v Mecanica Solutions**: defendants' failed application that relief from sanction be denied to the claimant (see details below). See also **Porbanderwalla v Daybridge**: a FT case where N149C indicated it would be transferred to the multi-track: neither side served budgets by date of allocation hearing – The DJ found that as there were no budgets – no costs other than court fees were recoverable. Claimant appealed and relief from sanction was granted by the higher court. See also **Burt v Linford Christie** which had similar facts, but where the court held that filing Form H **4 days late was not trivial**. Relief from sanction not granted.
CPR PD 44 CPR 9.5(4)(b) and 9.6	**9.5** **(4)** The statement of costs must be filed at court and copies of it must be served on any party against whom an order for payment of those costs is intended to be sought as soon as possible and in any event – (a) for a fast track trial, not less than 2 days before the trial; and **(b)** for all other hearings, not less than 24 hours before the time fixed for the hearing. **9.6** The failure by a party, without reasonable excuse, to comply with paragraph 9.5 will be taken into account by the court in deciding what order to make about the costs of the claim, hearing or application, and about the costs of any further hearing or detailed assessment hearing that may be necessary as a result of the failure.	See **Devon County Council v Celtic Bioenergy Ltd**: schedule of costs was served 18 minutes late (ie: 23 hours, 42 minutes before the hearing). Defendant relied upon *Mitchell*, arguing costs should be allowed. Court took into account both parties' conduct and the 'complete absence of any disadvantage' to the defendant, anddeclined to disallow costs. **18 minutes late = trivial.**
11	(1) A defendant who wishes to …	

	(b) argue that the court should not exercise its jurisdiction may apply to the court for an order declaring that it has no such jurisdiction or should not exercise any jurisdiction which it may have. ... (4) An application under this rule must – (a) be made within 14 days after filing an acknowledgment of service; and (b) be supported by evidence.	See **SET Select Engineering GMBH v F&M Bunkering:** Application for a stay in order to dispute jurisdiction under CPR 11 was made '**days' or 'one day'** (depending on calculation) late – the court held this was 'not very late' and relief from sanction was granted, although ultimately the jurisdiction challenge was dismissed.
29.1.2	When drafting multi track directions – practitioners must adapt model directions/ must endeavour to agree directions at least 7 days before CMC.	All three of these (listed left) are subject to 3.9: 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. This means that a) and b) are of greater significance than all the circumstances of the case (Compare with the pre April 2013 rule 3.9.
31.5.5	At least 7 days before CMC, must discuss and seek to agree a proposal in relation to disclosure that meets the overriding objective.	
35.4	No party may call an expert, put in as evidence or adduce evidence in an expert's report without the court's permission. Also a party must provide an estimate of proposed expert cost, evidence, field of expertise, name of expert.	
32.10	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.	See ***Durrant v Chief Constable of Avon and Somerset Constabulary*** [2013] EWCA Civ 1624 http://bit.ly/1asvMhK where 21 hours delay in filing witness statements (within the context of a much broader pattern of defendant default) left defendant unable to adduce any evidence: defence struck out, judgment for claimant.
35.13 & 31.21	Failure to disclose expert's report. Failure to serve witness statement or summary.	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. See ***Dass v Dass***: [2013] EWHC Mr Justice Haddon-Cave refused defendant permission to rely upon medical expert evidence because it had not been served in accordance with court directions. CPR 3.9 sanctions - defaulting party denied relief. The witness may not be called to give oral evidence unless the court gives permission. See also **Newland v Toba Trading** where inadequate disclosure, failure to file separate lists of documents for joined actions and failure to serve witness statements on time led to judgment being

		entered against defendants and relief from sanction being refused.

25 February 2014.