Neutral Citation Number: [2013] EWCA Civ 1537

Case No: A2/2013/2462

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT, QUEEN'S BENCH DIVISION
MASTER MCCLOUD
HQ13D01052

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/11/2013

Before:

MASTER OF THE ROLLS
LORD JUSTICE RICHARDS
and
LORD JUSTICE ELIAS

- -

Between:

ANDREW MITCHELL MP	**Appellant**
- and -	
NEWS GROUP NEWSPAPERS LIMITED	**Respondent**

- -
- -

Simon Browne QC and Richard Wilkinson (instructed by **Atkins Thomson Solicitors**) for the **Appellant**
Nicholas Bacon QC and Roger Mallalieu (instructed by **Simons Muirhead and Burton Solicitors**) for the **Respondent**

Hearing date: 7 November 2013

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Approved Judgment

Master of the Rolls: this is the judgment of the court.

1. This is an appeal from two decisions of Master McCloud in relation to the recently introduced rules for costs budgeting in civil litigation. The first was her decision of 18 June 2013 that, because the appellant had failed to file his costs budget in time, he was to be treated as having filed a costs budget comprising only the applicable court fees. The costs budget actually filed by his solicitors was in the sum of £506,425. The second decision was her refusal on 25 July to grant relief under CPR 3.9 from her first decision. This is the first time that the Court of Appeal has been called upon to decide on the correct approach to the revised version of CPR 3.9 which came into force on 1 April 2013 to give effect to the reforms recommended by Sir Rupert Jackson. The question at the heart of the appeal is: how strictly should the courts now enforce compliance with rules, practice directions and court orders? The traditional approach of our civil courts on the whole was to excuse non-compliance if any prejudice caused to the other party could be remedied (usually by an appropriate order for costs). The *Woolf* reforms attempted to encourage the courts to adopt a less indulgent approach. In his *Review of Civil Litigation Costs*, Sir Rupert concluded that a still tougher and less forgiving approach was required. His recommendations were incorporated into the Civil Procedure Rules.

The procedural history

2. On 21 September 2012, the Sun Newspaper reported that the claimant, then the Chief Whip of the Conservative Party, had raged against police officers at the entrance to Downing Street in a foul mouthed rant shouting "you're f…ing plebs". The incident, which received wide coverage, has since become known as "plebgate".

3. On 7 March 2013, he issued these proceedings alleging defamation. A defence was filed on 17 May pleading justification and a *Reynolds* defence, i.e. that the story was one of strong public interest which had been reported responsibly.

4. It is common ground that CPR PD51D Defamation Proceedings Costs Management Scheme applied to the proceedings. This was a pilot scheme which was in force until 31 March 2013. Para 4 of the practice direction provided:

> "4.1 During the preparation of costs budgets the parties should discuss the assumptions and the timetable upon which their respective costs budgets are based.
>
> 4.2 The parties must exchange and lodge with the court their costs budgets in the form of Precedent HA not less than 7 days before the date of the hearing for which the costs budgets are required."

5. On 5 June 2013, the court issued an order (which was delivered to the claimant's solicitors on 6 June) that there would be a case management and costs budget hearing on Monday 10 June. As a result of the late notification of the date to the parties, the hearing was relisted for 18 June. The defendant used outside costs lawyers to prepare its costs budget which it filed on 11 June. Its budget figure was £589,558. The

claimant's solicitors prepared their costs budget in-house. At 12.14 pm on 17 June, Master McCloud sent an email to the parties' solicitors noting that there was no budget from the claimant on the court file and asking whether the parties' budgets were agreed. The defendant's solicitor replied at 12.27 pm the same day saying: "… despite a number of written promptings from me to exchange costs budgets the Claimant's solicitors have not replied or provided us with a copy of their Costs Budget". At 12.44 pm, the claimant's solicitors emailed the Master saying:

> "Apologies, we have yet to be able to finalise the Claimant's Precedent H budget as we have been delayed in receiving Counsel's figures despite chasing for these daily since the middle of last week. We aim to file the document in the next two hours and exchange with the Defendant."

6. In the event, the claimant's solicitors filed their budget during the afternoon of 17 June.

7. The parties attended before the Master on 18 June. The claimant was represented by counsel and the defendant by its solicitor. The defendant's solicitor said that there had not been sufficient time to consider the claimant's budget. The Master had to decide what to do in view of the fact that the claimant's costs budget had not been lodged with the court at least 7 days before 18 June. She was told by the claimant's counsel on instructions that the reason why the budget had not been filed until the previous day was "to do with pressure of litigation elsewhere in the firm on another case". She noted that this explanation was at odds with what she had been told in the email. At para 9 of her judgment, she said:

> "So what we have here is a position where a defendant has attempted to comply with the rules and has produced a budget and has engaged with the process and the claimant has not produced a budget and has not engaged until the very last minute in response to prompting from myself dealing with the costs management in the afternoon of the day before. On any basis that is a breach of the Practice Direction 51D and of the overriding objective in my judgment."

8. She said that there were "really no adequate excuses for this breach" (para 12). There needed to be a case plan agreed if possible by the parties as to how the litigation would proceed and how it would be costed throughout. She then said: "… that process has simply died in this case. It has simply failed notwithstanding the defendant's compliance, and attempts by it to engage the claimant in budget discussion and exchange" (para 14). She continued:

> "15. The new rules have provisions in them which are essentially in identical terms to the rules under which I am proceeding today with one exception and that is the new rules provide a mandatory sanction and that is that where a party fails to file a cost budget within seven days prior to the date of the first hearing, the party is deemed to have filed a budget which is limited to court fees. I must

> act proportionately but I must also manage cases in accordance with the new overriding objective.
>
> 16. What I consider to be the best guide to as to what is considered proportionate (subject to the power to grant relief from sanctions) is what the Rules Committee has decided it should be in the new rules given that the circumstances of the breach in this case are identical to that envisaged in the new rules and the wording of the requirement to file a budget no less than seven days before a hearing and the requirement to discuss assumptions and so on is also practically identical.
>
> 17. All that is missing in Practice Direction 51D is a stipulation as to the nature of any sanction. It is simply left at large to the court, but I consider that professionals have now had ample warning for many months that the court would adopt a strict approach to the interpretation of application and rules and orders and it should come as no surprise that, subject to any powers I have to grant relief from sanctions, the sanction I should impose is that the claimant's budget will be limited to the court fees. The claimant has the right to apply for relief from sanctions and I will adjourn the costs budgeting hearing, and matters can resume either to deal with any applications supported by evidence or to deal with costs budgeting, or both as appropriate in due course.

9. Accordingly, she made an order in the following terms:

> "1. The Claimant shall be treated as having filed a budget comprising only the applicable court fees.
>
> 2. The Claimant shall be entitled to apply for relief from sanctions, the hearing of the application to be heard at 2 pm on 25 July 2013, alongside the adjourned Case management and Cost Budget Hearing…."

10. As the Master subsequently explained, in imposing this sanction, she had regard to the new CPR 3.14 by analogy (although it was not applicable to this case) because it was "an indication as to what may be an appropriate sanction for breach of the requirement to lodge a budget no later than 7 days before a case management conference" (para 2 of her judgment of 25 July).

Judgment of 25 July

11. On 25 July, the Master heard the claimant's application for relief from the sanction imposed on 18 June that he should be treated as having filed a budget comprising only the applicable court fees. It was submitted on behalf of the claimant that she had been wrong to apply CPR 3.14 even if only by analogy. Reliance was placed on the decision in *F and C Alternative Investments Ltd (No 3)* [2012] EWCA Civ 843, [2013] 1 WLR 548. But the Master distinguished that authority. She said that she was entitled to look at CPR 3.14 as a guide to what may be regarded as a "proportionate sanction in a closely analogous situation of a failure to file a budget on

time" (para 19). In any event, she said that she was not satisfied that she was entitled to review the correctness of her original decision (para 23).

12. She then turned to the claimant's application for relief from the sanction. At paras 25 to 64 of her impressive judgment, the Master carefully considered the impact of the rule changes and the *Jackson* report. She drew attention to the "new overriding objective"(para 27), noting that as part of dealing with cases "justly", the court must now ensure that cases are dealt with at proportionate cost and so as to ensure compliance with rules, orders and practice directions. She drew attention to the fact that, in order to find time in her diary to list the application for relief within a reasonable time, she needed to vacate a half day appointment which had been allocated to deal with claims by persons affected by asbestos-related diseases. She identified the claimant's breaches as being (i) the failure to engage in discussion with the defendant as to budgets and budgetary assumptions in accordance with para 4.1 of PD51D and (ii) the failure to file a budget 7 days before the case management conference in accordance with para 4.2 of the practice direction.

13. She noted (para 34) that there had been an "absolute failure" to engage in discussion of budget assumptions "when asked" and no attempt to apply for extra time or to ask the court informally for relief before "running into time difficulties". The budget was filed at the last minute and only as a result of prompting by the court after it had reviewed the file by chance the day before the hearing. There had been an abortive budgeting exercise and now time had been taken on a relief from sanctions application at a separate hearing. This was because the claimant had not been in a position to produce evidence at the earlier hearing in support of such an application.

14. The Master was informed of the difficulties which had beset the claimant's solicitors. They were a small firm; two of their trainee solicitors were on maternity leave; the senior associate who was used to dealing with costs budgeting had recently left the firm; and the firm was engaged on work on other heavy litigation. As the Master put it at para 40, the firm was "stretched very thin in terms of resources". She noted at para 43 that none of these difficulties was notified to her on 18 June nor was an application for relief made at that time.

15. It was submitted on behalf of the claimant that relief should be granted. It was said that the defendant had suffered no prejudice as a result of the claimant's defaults; and that, if relief were refused, the defendant would receive a windfall in the form of cost protection. It was submitted that post *Jackson* the rules were not about "no tolerance", but about "low tolerance". The new regime should be administered justly and the sanction imposed in this case was far too high.

16. The Master explained her reasons for refusing relief at paras 53 to 62 of her judgment. She said (para 53) that the explanations put forward by the claimant's solicitors were not unusual: "pressure of work, a small firm, unexpected delays with counsel and so on". Such explanations carry even less weight in the post-*Jackson* era than they did before. She recognised, however, that she was not bound to dismiss an application for relief merely because there had been no good excuse for the default (para 55). At para 56, she said:

> "There is no evidence before me of particular prejudice to Mr Mitchell arising from my order: it would be for him to

> demonstrate that and it would be wrong of me to make assumptions about the wording of his CFA agreement with his solicitors which may or may not mean that my sanction affects him financially or in terms of legal representation. Even if it did affect him financially and as to representation, there are many claimants who manage without lawyers and it could not be said that he would be denied access to a court more than is the case for others if they have to represent themselves. Art 6 rights are engaged but a proportionate sanction can be a legitimate interference with Art 6 and in this instance Mr Mitchell is not driven from the court. "

17. At pars 57, she recognised that it was obvious that the sanction was "something of a windfall" for the defendant, but "that is the way with sanctions". She then said:

> "58. This is a claim about reputation and about freedom of the press to report news stories. It is important to Mr Mitchell and it is important to the Defendants too. Cases are usually important to the parties but if such considerations weighed too heavily one would be unable to implement the objectives of the new rules. One would be unable to prevent some claims from taking unfair amounts of judicial resources away from other claims at the very moment when it is common knowledge that budgetary constraints may lead to fewer judges in the courts, and to reduced non-judicial resources to operate those courts.
>
> 59. Judicial time is thinly spread, and the emphasis must, if I understand the *Jackson* reforms correctly, be upon allocating a fair share of time to all as far as possible and requiring strict compliance with rules and orders even if that means that justice can be done in the majority of case but not all. Per the Master of the Rolls in the 18th Lecture quoted above:
>
> > "*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 acknowledgment that the achievement of justice means something different now.*"
>
> 60. I have given close consideration to the amount of time which the Claimant had to produce his budget. Was there procedural unfairness? On the face of it 4 days is short and even shorter when one considers that two days were weekend days. But having considered this carefully, because it was a point which troubled me, the view I have taken is that the parties were well aware that this was a case for which budgeting would be required from the start and that the mere fact that a date is set for CMC is not supposed to be the starting gun for proper consideration of budgeting.

> 61. Budgeting is something which all solicitors by now ought to know is intended to be integral to the process from the start, and it ought not to be especially onerous to prepare a final budget for a CMC even at relatively short notice if proper planning has been done. The very fact that the Defendants, using cost lawyers, were well able to deal with this in the time allotted highlights that there is no question of the time being plainly too short or unfairly so.
>
> 62. I have also given close consideration as to the stated objective of PD 51D and notably the concept of equality of arms referred to there but my conclusion is that the objective stated there relates to decisions made as part of cost budgeting, rather than sanctions for failure to engage with the process at all. Moreover the new overriding objective and the identical wording in rule 3.9 highlight the emphasis to be placed, now, on rule compliance and one has to give effect to that."

18. Finally, at para 65 she said:

> "The stricter approach under the *Jackson* reforms has been central to this judgment. It would have been far more likely that prior to 1/4/13 I would have granted relief on terms, and in view of the absence of authority on precisely how strict the courts should be and in what circumstances, I shall grant permission to appeal to the claimant of my own motion."

The appeal lay to a High Court Judge, but was transferred to the Court of Appeal pursuant to CPR 52.14(1). The grant of permission to appeal was subsequently extended to cover the Master's original decision of 18 June as well as her refusal of relief from sanction.

The relevant provisions of the Civil Procedure Rules

19. Rule 22(12) of the Civil Procedure (Amendment) Rules 2013 expressly continued the application of CPR PD51D to defamation proceedings issued before 1 April 2013. The requirement for parties to prepare, discuss and exchange costs budgets in advance of any case management conference was set out in paras 4.1 and 4.2 (which we have quoted at para 4 above). For cases commenced after 1 April 2013, new costs budgeting provisions are provided by CPR 3.12 to 3.18. These did not apply directly to the present case, but they are central to the issues that arise on this appeal.

20. CPR 3.12(2) provides that "the purpose of costs management is that the court should manage both the steps to be taken and the costs to be incurred by the parties to any proceedings so as to further the overriding objective". CPR 3.13 provides:

> "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."

21. CPR 3.14 provides:

> "Unless the court otherwise orders, any party which fails to file a budget despite being required to do so will be treated as having filed a budget comprising only the applicable court fees."

22. CPR 3.17(1) provides:

> "When making any case management decision, the court will have regard to any available budgets of the parties and will take into account the costs involved in each procedural step."

23. CPR 3.9(1) provides:

> "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."

24. This should be contrasted with the previous version of CPR 3.9(1) which was in these terms:

> "On an application for relief from any sanction imposed for failure to comply with any rule, practice direction or court order the court will consider all the circumstances including—
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> (a) the interests of the administration of justice;
>
> (b) whether the application for relief has been made promptly;
>
> (c) whether the failure to comply was intentional;
>
> (d) whether there is a good explanation for the failure;
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> (e) the extent to which the party in default has complied with other rules, practice directions, court orders and any relevant preaction protocol;
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> (f) whether the failure to comply was caused by the party or his legal representatives;

> (g) whether the trial date or the likely trial date can still be met if relief is granted;
>
> (h) the effect which the failure to comply had on each party; and
>
> (i) the effect which the granting of relief would have on each party."

25. Finally, it is always necessary to have regard to CPR 1.1 and the "overriding objective" of enabling the court to deal with cases "justly and at proportionate cost". CPR 1.1(2) states that this includes, so far as is practicable:

> "(a) ensuring that the parties are on an equal footing;
>
> (b) saving expense;
>
> …..
>
> (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"

The grounds of appeal

Challenge to the order of 18 June 2013

26. Mr Browne QC submits that the decision of 18 June was wrong because (i) CPR 3.14 should not have been applied by analogy when it had not yet come into force; (ii) if it was appropriate to apply CPR 3.14 by analogy, the Master was wrong to interpret it as referring to a failure to file a budget *within the time prescribed by CPR 3.13* rather than a failure to file a costs budget *at all;* and (iii) the decision imposed a sanction that was disproportionate and contrary to the overriding objective.

Discussion

27. As regards the first question, we consider that the Master was entitled to apply CPR 3.14 by analogy. She correctly understood that it did not apply directly because the proceedings continued to be governed by PD 51D (see para 19 above). Mr Browne accepts that the Master was entitled in the exercise of her discretion to impose such sanction as she considered appropriate to satisfy the overriding objective. In our judgment, she was entitled to be guided by CPR 3.14 since this represented the considered view of the Civil Procedure Rule Committee as to what constituted a proportionate sanction for failure to file a costs budget in time unless the court otherwise ordered.

28. Mr Browne says that the Master's approach was unfair since the parties did not know that they were at risk of the sanction of the new scheme being applied to their case.

But they knew that they were at risk that some sanction would be imposed even if they did not know what sanction would actually be imposed. Moreover, CPR 3.14 did not come as a bolt out of the blue. There had been a good deal of publicity of the new reforms, including CPR 3.14.

29. We do not consider that the decision in *F & C* compels a different conclusion. In that case, the judge had awarded indemnity costs to a party which had made an offer which did not comply with the relevant provisions of CPR Part 36. His reasoning was that CPR 36.14 should be applied by analogy. The Court of Appeal said that the analogy was wrong in principle. CPR 36.14 represents a departure from otherwise established costs practice. It imposes a draconian costs sanction on a claimant who fails at trial to beat a defendant's Part 36 offer. There is no justification for indirectly extending Part 36 beyond its expressed ambit. As Mr Bacon QC points out, in the present case there was no question of a codified regime providing unusual benefits in return for a party acting in a distinct way. Rather, the court was considering what sanction to impose for breach of particular rules. The Master was not, therefore, applying a distinct regime by analogy. Instead, she was having regard to how the regime had been revised and how a breach would be addressed in the light of the new regime as to rule compliance. She was right to distinguish *F & C.*

30. The second question is whether the Master was wrong to construe CPR 3.14 as referring to a failure to file a budget within the time prescribed by CPR 3.13 (in the present case, seven days). Mr Browne says that it is significant that the words "within the time prescribed by CPR 3.13" are absent from CPR 3.14 and that CPR 3.14 is directed to the case of a party who does not file a budget *at all.* In our judgment, this is not a sensible interpretation and it cannot have been intended. If it were right, it would mean that CPR 3.14 would not apply to a party who filed a budget just before the hearing of the first case management conference, but would apply to a party who had filed the budget immediately after the conclusion of the hearing. The mischief at which CPR 3.13 and 3.14 are directed is the last-minute filing of cost budgets. As CPR 3.12(2) makes clear, the purpose of costs management (including costs budgets) is to enable the court to manage the litigation and the costs to be incurred so as to further the overriding objective. This cannot be achieved unless costs budgets are filed in good time before the first case management conference. No less important is the requirement that parties should discuss with each other the assumptions and timetable on which their respective costs budgets are based. This is to enable the hearing for which the costs budgets are required to be conducted efficiently and in accordance with the overriding objective. The history of what happened in the present case shows how important it was to comply with *both* of the obligations in PD 51D. As a result of the defaults of the claimant's solicitors, no costs budgeting or case management was possible on 18 June 2013. Having imposed the CPR 3.14 sanction, the Master was unable to do anything other than adjourn the hearing.

31. The third question is whether the Master's decision to impose the CPR 3.14 sanction by analogy was in accordance with the overriding objective. Mr Browne says that it did not give effect to the overriding objective, because it was not a proportionate decision. That is because (i) it did not reflect the fact that the breach of PD 51D was easily remedied; (ii) the breaches caused no prejudice to the defendant; (iii) they had

no lasting effect on the conduct of the litigation; (iv) the breaches were minor; (v) the claimant had no history of default; and (vi) the order caused prejudice to the claimant.

32. As we have said, the costs management hearing of 18 June proved to be abortive. The claimant was not in a position to invoke the saving provision in CPR 3.14 ("unless the court otherwise orders") and ask the Master to make an order relieving him from the sanction imposed by the rule itself. That is because his solicitors had not produced evidence which might have persuaded the court to adopt that course. We should add that in our view the considerations to which the court should have regard when deciding whether it should "otherwise order" are likely to be the same as those which are relevant to a decision whether to grant relief under CPR 3.9. In each case, in deciding whether to "otherwise order", the court must give effect to the overriding objective: see rule 1.2(a).

33. We have concluded that the Master was entitled to make the order that she made on 18 June. She did so in the knowledge that the claimant would have the opportunity to apply for relief at the adjourned hearing and that she would then be able to decide what response the court should give to the claimant's defaults so as to give effect to the overriding objective.

Challenge to the order of 25 July 2013

General comments on CPR 3.9

34. Much has been said about the *Jackson* reforms and in particular on the question whether the court is now required to adopt a more "robust" approach to granting relief to defaulting parties from the consequences of their defaults. The amendment to CPR 3.9 followed the recommendations made in Sir Rupert Jackson's Final Report Ch 39. At para 6.5, he said:

> "First, the courts should set realistic timetables for cases and not impossibly tough timetables in order to give an impression of firmness. Secondly, courts at all levels have become too tolerant of delays and non-compliance with orders. In doing so, they have lost sight of the damage which the culture of delay and non-compliance is inflicting upon the civil justice system. The balance therefore needs to be redressed. However, I do not advocate the extreme course which was canvassed as one possibility in [the Preliminary Report] paragraph 43.4.21 or any approach of that nature".

35. The "extreme course" to which he was referring was that non-compliance would no longer be tolerated, save in "exceptional circumstances". Instead, he recommended that sub-paragraphs (a) to (i) of CPR 3.9 be repealed and replaced by the wording that is to be found in the current version of the rule. He said that the new form of words

> "does not preclude the court taking into account all of the matters listed in the current paragraphs (a) to (i). However, it simplifies the rule and avoids the need for judges to embark upon a lengthy recitation of factors. It also signals the change of balance which I am advocating."

36. As Sir Rupert made clear, the explicit mention in his recommendation for the version of CPR 3.9 of the obligation to consider the need (i) for litigation to be conducted efficiently and at proportionate cost and (ii) to enforce compliance with rules, practice directions and court orders reflected a deliberate shift of emphasis. These considerations should now be regarded as of paramount importance and be given great weight. It is significant that they are the only considerations which have been singled out for specific mention in the rule.

37. We recognise that CPR 3.9 requires the court to consider "all the circumstances of the case, so as to enable it to deal justly with the application". The reference to dealing with the application "justly" is a reference back to the definition of the "overriding objective". This definition includes ensuring that the parties are on an equal footing and that a case is dealt with expeditiously and fairly as well as enforcing compliance with rules, practice directions and orders. The reference to "all the circumstances of the case" in CPR 3.9 might suggest that a broad approach should be adopted. We accept that regard should be had to all the circumstances of the case. That is what the rule says. But (subject to the guidance that we give below) the other circumstances should be given less weight than the two considerations which are specifically mentioned.

38. In the 18th implementation lecture on the Jackson reforms delivered on 22 March 2013, the Master of the Rolls said in relation to CPR 3.9 that there was now to be a shift away from exclusively focusing on doing justice in the individual case. He said:

> "25. In order to achieve this, the Woolf reforms and now the Jackson reforms were and are not intended to render the overriding objective, or rule 3.9, subject to an overarching consideration of securing justice in the individual case. If that had been the intention, a tough application to compliance would have been difficult to justify and even more problematic to apply in practice. The fact that since 1999 the tough rules to which Lord Justice Brooke referred have not been applied with sufficient rigour is testament to a failure to understand that that was not the intention.
>
> 26. 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. If that were the case then we would have, quite impermissibly, rendered compliance an end in itself and one superior to doing justice in any case. It has changed because doing justice is not something distinct from, and superior to, the overriding objective. Doing justice in each set of proceedings is to ensure that proceedings are dealt with justly and at proportionate cost. Justice in the

> individual case is now only achievable through the proper application of the CPR consistently with the overriding objective.
>
> 27. 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."

39. We endorse this approach. The importance of the court having regard to the needs and interests of all court users when case managing in an individual case is well illustrated by what occurred in the present case. If the claimant had complied with para 4 of PD 51D, the Master would have given case management and costs budgeting directions on 18 June and the case would have proceeded in accordance with those directions. Instead, an adjournment was necessary and the hearing was abortive. In order to accommodate the adjourned hearing within a reasonable time, the Master vacated a half day appointment which had been allocated to deal with claims by persons who had been affected by asbestos-related diseases.

40. We hope that it may be useful to give some guidance as to how the new approach should be applied in practice. It will usually be appropriate to start by considering the nature of the non-compliance with the relevant rule, practice direction or court order. If this can properly be regarded as trivial, the court will usually grant relief provided that an application is made promptly. The principle "*de minimis non curat lex*" (the law is not concerned with trivial things) applies here as it applies in most areas of the law. Thus, the court will usually grant relief if there has been no more than an insignificant failure to comply with an order: for example, where there has been a failure of form rather than substance; or where the party has narrowly missed the deadline imposed by the order, but has otherwise fully complied with its terms. We acknowledge that even the question of whether a default is insignificant may give rise to dispute and therefore to contested applications. But that possibility cannot be entirely excluded from any regime which does not impose rigid rules from which no departure, however minor, is permitted.

41. If the non-compliance cannot be characterised as trivial, then the burden is on the defaulting party to persuade the court to grant relief. The court will want to consider why the default occurred. If there is a good reason for it, the court will be likely to decide that relief should be granted. For example, if the reason why a document was not filed with the court was that the party or his solicitor suffered from a debilitating illness or was involved in an accident, then, depending on the circumstances, that may constitute a good reason. 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. But mere overlooking a deadline, whether on account of overwork or otherwise, is unlikely to be a good reason. We understand that solicitors may be under pressure and have too much work. It may be that this is what occurred in the present case. But that will rarely be a good reason. Solicitors cannot take on too much work and expect to be able to persuade a court that this is a good reason for their failure to meet deadlines. They should either delegate the work to others in their firm or, if they are unable to do this, they should not take on the work at all. This may seem harsh especially at a time when some solicitors are facing serious financial pressures. But the need to comply with rules, practice directions and court orders is essential if litigation is to be conducted in an efficient manner. If departures are tolerated, then the relaxed approach to civil litigation which the *Jackson* reforms were intended to change will continue. We should add that applications for an extension of time made before time has expired will be looked upon more favourably than applications for relief from sanction made after the event.

42. A similar approach to that which we have just described has been adopted in relation to applications for an extension to the period of validity of a claim form under CPR 7.6. In *Hashtroodi v Hancock* [2004] EWCA Civ 652, [2004] 1 WLR 3206, this court said that (i) the discretion to extend time should be exercised in accordance with the overriding objective and (ii) the reason for the failure to serve the claim form in time is highly material. At para 19, the court said:

> "If there is a very good reason for the failure to serve the claim form within the specified period, then an extension of time will usually be granted….The weaker the reason, the more likely the court will be to refuse to grant the extension."

43. This approach should also be adopted in relation to CPR 3.9. In short, good reasons are likely to arise from circumstances outside the control of the party in default: see the useful discussion in *Blackstone's Guide to The Civil Justice Reforms 2013* (Stuart Syme and Derek French, OUP 2013) at paras 5.85 to 5.91 and the article by Professor Zuckerman "*The revised CPR 3.9: a coded message demanding articulation"* in Civil Justice Quarterly 2013 at pp 9 to 11.

44. Mr Browne sought to rely on certain factors which, he contended, showed that the sanction should not have been imposed by the Master in the first place. That was in our view a misguided submission. An application for relief from a sanction presupposes that the sanction has in principle been properly imposed. If a party wishes to contend that it was not appropriate to make the order, that should be by way of appeal or, exceptionally, by asking the court which imposed the order to vary or revoke it under CPR 3.1(7). The circumstances in which the latter discretion can be exercised were considered by this court in *Tibbles v SIG Plc (trading as Asphaltic Roofing Supplies)* [2012] EWCA Civ 518, [2012] 1 WLR 2591. The court held that considerations of finality, the undesirability of allowing litigants to have two bites at the cherry and the need to avoid undermining the concept of appeal all required a principled curtailment of an otherwise apparently open discretion. The discretion might be appropriately exercised normally only (i) where there had been a material change of circumstances since the order was made; (ii) where the facts on which the original decision was made had been misstated; or (iii) where there had been a

manifest mistake on the part of the judge in formulating the order. Moreover, as the court emphasised, the application must be made promptly. This reasoning has equal validity in the context of an application under CPR 3.9.

45. On an application for relief from a sanction, therefore, the starting point should be that the sanction has been properly imposed and complies with the overriding objective. If the application for relief is combined with an application to vary or revoke under CPR 3.1(7), then that should be considered first and the *Tibbles* criteria applied. But if no application is made, it is not open to him to complain that the order should not have been made, whether on the grounds that it did not comply with the overriding objective or for any other reason. In the present case, the sanction is stated in CPR 3.14 itself: unless the court otherwise orders, the defaulting party will be treated as having filed a budget comprising only the applicable court fees. It is not open to that party to complain that the sanction does not comply with the overriding objective or is otherwise unfair. The words "unless the court otherwise orders" are intended to ensure that the sanction is imposed to give effect to the overriding objective. As we have said, the principles by which the court should decide whether to order "otherwise" are likely to be the same as the principles by which an application under CPR 3.9 is determined. In most cases, the question whether to relieve a party who has failed to file a costs budget in accordance with CPR 3.13 from the CPR 3.14 sanction will therefore be dealt with under CPR 3.14. That did not happen in the present case. That is why the question of relief from sanctions was dealt with under CPR 3.9.

46. The new more robust approach that we have outlined above will mean that from now on relief from sanctions should be granted more sparingly than previously. There will be some lawyers who have conducted litigation in the belief that what Sir Rupert Jackson described as "the culture of delay and non-compliance" will continue despite the introduction of the *Jackson* reforms. But the Implementation Lectures given well before 1 April 2013 were widely publicised. No lawyer should have been in any doubt as to what was coming. We accept that changes in litigation culture will not occur overnight. But we believe that the wide publicity that is likely to be given to this judgment should ensure that the necessary changes will take place before long.

47. We recognise that there are those who will find this new approach unattractive. There may be signs that it is not being applied by some judges. In *Ian Wyche v Careforce Group Plc* [2013] EWHC 3282, the defendant had failed to comply in all respects with an "unless" order. Walker J acceded to an application for relief under CPR 3.9 for two failures which he described as "material in the sense that they were more than trivial". But he said that they were "unintentional and minor failings in the course of diligently seeking to comply with the order". At para 61 of his judgment, Walker J said:

> "The culture which the court seeks to foster is a culture in which both sides take a common sense and practical approach, minimising interlocutory disputes and working in an orderly and mutually efficient manner towards the date fixed for trial. It would be the antithesis of that culture if substantial amounts of time and money are wasted on preparation for and conduct of satellite litigation about the consequences of truly minor

> failings when diligently seeking to comply with an 'unless' order."

48. We have earlier said that the court should usually grant relief for trivial breaches. We are not sure in what sense the judge was using the word "unintentional". In line with the guidance we have already given, we consider that well-intentioned incompetence, for which there is no good reason, should not usually attract relief from a sanction unless the default is trivial. We share the judge's desire to discourage satellite litigation, but that is not a good reason for adopting a more relaxed approach to the enforcement of compliance with rules, practice directions and orders. In our view, once it is well understood that the courts will adopt a firm line on enforcement, litigation will be conducted in a more disciplined way and there should be fewer applications under CPR 3.9. In other words, once the new culture becomes accepted, there should be less satellite litigation, not more.

49. The other decision to which we wish to refer is that of Andrew Smith J in *Raayan Al Iraq Co Ltd v Trans Victory Marine Inc* [2013] EWHC 2696 (Comm). The claimant applied for an extension of two days for the service of its particulars of claim. In substance, the application was for relief from sanctions under CPR 3.9. The judge acknowledged that the list of circumstances that was itemised in the earlier version of the rule had gone. Nevertheless, he proceeded "somewhat reluctantly" to apply the old checklist of factors. We accept that, depending on the facts of the case, it will be appropriate to consider some or even all of these factors as part of "all the circumstances of the case". But, as we have already said, the most important factors are the need for litigation to be conducted efficiently and at proportionate cost and to enforce compliance with rules, practice directions and orders.

50. Having examined the case by reference to the old checklist of factors, Andrew Smith J concluded at para 18 that the "overriding objective demands that relief be granted and I grant it". But it seems to us that he may not have recognised the particular importance of the two elements of the overriding objective that are mentioned in the revised version of CPR 3.9. It is true that at para 15 the judge referred to the culture of delay and non-compliance and what Sir Rupert Jackson had said about that in his Final Report. As to the effect of the revision to CPR 3.9, he said:

> "Nor do I accept that the change in the Rule or a change in the attitude or approach of the courts to applications of this kind means that relief from sanctions will be refused even where injustice would result."

51. It seems to us that, in making this observation, the judge was focusing exclusively on doing justice between the parties in the individual case and not applying the new approach which seeks to have regard to a wide range of interests.

The application for relief in the present case

52. We start by re-iterating a point that has been made before, namely that this court will not lightly interfere with a case management decision. In *Mannion v Ginty* [2012] EWCA Civ 1667 at para 18, Lewison LJ said:

> "It has been said more than once in this court, it is vital for the Court of Appeal to uphold robust fair case management decisions made by first instance judges."

53. We have set out the Master's reasoning at paras 16 to 18 above. Mr Browne makes a number of detailed criticisms of her reasoning. First, he says that she was wrong to state at para 35 that it was only as a result of being chased by her that the claimant's solicitors filed the budget at the last minute. In our judgment, this was a reasonable view for the Master to hold. She did not know that, during the days before 18 June, the defendant's solicitors were chasing the claimant's solicitors for their costs budget and that their filing of the budget was probably in response to pressure from them rather than the court.

54. Secondly, Mr Browne criticises the finding at para 38 of the judgment that the defendant's solicitors sought to engage the claimant's solicitors in discussion of budget assumptions. We accept that there was no specific evidence before the Master to support this finding. But as early as 11 June, the defendant's solicitors had been chasing the claimant's solicitors for their costs budget with a view to exchange. It is true that the defendant's solicitors did not spell out that, following exchange, they wished to discuss the budget assumptions. It can, however, properly be said that, until there had been an exchange, a discussion on assumptions would have been impossible.

55. Thirdly, Mr Browne criticises para 62. The aim of ensuring that the parties are on an equal footing is not only mentioned in PD 51D para 1.3, but also generally as part of the overriding objective. Mr Browne submits, therefore, that the Master erred in saying that this aim related to decisions made as part of cost budgeting, rather than sanctions for failure to engage with the process at all. There is some force in this criticism, but the Master correctly stated at para 62 that the new versions of the overriding objective and CPR 3.9 "highlight the emphasis to be placed, now, on rule compliance and one has to give effect to that".

56. In our view, even if there is some force in all three of these criticisms, they do not go to the heart of the Master's reasoning. Her main finding was that the claimant's solicitors had been in breach of two provisions of PD 51D and that, in the light of the new approach mandated by the *Jackson* reforms, the case for granting relief from the CPR 3.14 sanction was not established.

57. Finally, Mr Browne submits that the decision to refuse relief did not give effect to the overriding objective. His main points are the same as those summarised at para 31 above. It is not suggested that the Master failed to have regard to any of these points in her comprehensive judgment. They would have carried considerable weight if the application had been considered under the earlier version of CPR 3.9. The Master was right to recognise that the emphasis has now changed. In these circumstances, we consider that there is no proper basis for interfering with her decision. On the question of prejudice, we wish to highlight the fact that there was no evidence to show what prejudice (if any) the claimant would suffer as a result of a refusal to grant relief.

58. A central feature of Mr Browne's submission was that, whenever a sanction is imposed, the court must have regard to considerations of proportionality. In this case,

he says that a more proportionate response would have been to grant partial relief from the sanction, for example, by making an order that the costs budget should be 50% of the actual estimated figure or should not include the costs connected with the budget itself. We accept that the Master had the power to make such an order. But we do not consider that the grant of partial relief from CPR 3.14 will often be appropriate. The merit of the rule is that it sets out a stark and simple default sanction. The expectation is that the sanction will usually apply unless (i) the breach is trivial or (ii) there is a good reason for it. It is true that the court has the power to grant relief, but the expectation is that, unless (i) or (ii) is satisfied, the two factors mentioned in the rule will usually trump other circumstances. If partial relief were to be encouraged, that would give rise to uncertainty and complexity and stimulate satellite litigation.

Conclusion

59. We therefore dismiss the appeals against both orders. The Master did not misdirect herself in any material respect or reach a conclusion which was not open to her. We acknowledge that it was a robust decision. She was, however, right to focus on the essential elements of the post-Jackson regime. The defaults by the claimant's solicitors were not minor or trivial and there was no good excuse for them. They resulted in an abortive costs budgeting hearing and an adjournment which had serious consequences for other litigants. 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.

60. In the result, we hope that our decision will send out a clear message. If it does, we are confident that, in time, legal representatives will become more efficient and will routinely comply with rules, practice directions and orders. If this happens, then we would expect that satellite litigation of this kind, which is so expensive and damaging to the civil justice system, will become a thing of the past.