Relief From Sanctions – The New Overriding Objective and CPR 3.9 In Action

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In two recent credit hire cases, *Parker v Berry* and *Ruston v NFU Mutual Insurance*, both heard by District Judge Molle at Colchester County Court on the same day, the reality of the courts approach to the addition of Rule 1.1(2)(f) *'enforcing compliance with rules, practice directions and orders'* to the overriding objective, and new CPR 3.9 was made emphatically clear.

Both cases concerned claims that had been procedurally struck out with applications from the claimants to obtain relief from sanctions under the new Rule 3.9.

In *Parker v Berry* the claimant had failed to lodge the trial bundle within the 7 days prior to trial required by the directions order. As a result an order was made on 30 January 2013 vacating the trial date of 31 January 2013 and staying the claim generally for 14 days. The order made the proviso that if no application in the proper form supported by evidence to lift the stay was made by 4pm on 15 February 2013, *"…the case be thereafter and without further order struck out"*. On 15 March 2013 (one month after the automatic strike out) the court made a further order: *"Upon no application having been made to lift the stay enforced by the order dated 30 January 2013, and upon the claim having therefore been struck out; it is ordered that the claimant pays the defendants costs of the order to be assessed if not agreed"*.
The claimant lodged an application for relief from sanctions dated 25 March 2013, which was not received by the court until after 1 April 2013. The court

therefore stipulated that the new CPR 3.9 would apply. The claimant's application sought relief due to the prejudice that would otherwise apply to the claimant in being unable to pursue his claim as against the windfall to the defendant in not having to meet the claim for hire charges, repair costs and policy excess totalling more than £11,000.

At the hearing it was held that the application failed because it had not been made in good time, being made 6 weeks after the automatic strike out took effect. Further, the failure to comply with the orders of the court was such that the claimant's failures and the loss of the trial date meant that he had demonstrably failed to conduct the litigation 'efficiently and at proportionate cost'. The court was therefore constrained to enforce compliance with its orders by refusing the application for relief and ordering the claimant to pay the defendant's costs of the case.

In *Ruston v NFU Mutual Insurance* a detailed directions order was made that required, amongst other things, that the parties negotiate to try and settle the case and that the parties should by 14 June 2013 notify the court by an agreed written report the outcome of the negotiations. In addition, if no settlement had been reached then the order required that Pre-Trial Checklists should be filed by 14 June 2013. The order contained the proviso set out in bold and underlined that: *"Failure to comply constructively and fully with this Order or otherwise to engage properly in negotiations may be penalised in costs or by sanctions which may include striking out a party's Statement of Case."*

Negotiations had failed due to alleged incomplete financial disclosure by the claimant. The claimant failed to file the required negotiation report at all, and filed the PTCL 5 days late on 19 June 2013. The defendant wrote to the court on the required date setting out the failure of the negotiations and inviting the court to make: *"any appropriate directions under its own motion to try and narrow the issues between the parties."* The court then made an order of its own motion striking out the claimant's statement of case.

The subsequent application by the claimant for relief from sanctions acknowledged that it had failed to comply with the relevant parts of the order "due to administrative errors caused by a change in the file handler". Again the issues of severe prejudice to the claimant, the undesirability of satellite litigation by the claimant against his solicitors and the windfall to the defendant of avoiding credit hire charges of over £12,000 were raised. The claimant cited case of *Ryder v Beever* [2012] EWCA Civ 1737 in support, a case that dealt with relief from sanctions under the old CPR 3.9.

The facts in *Ryder* were that the claimant had failed to file and serve a costs estimate per the directions. The defendant wrote complaining of this to the court without copying their letter to the claimant. In response the court, of its own motion, made an unless order that unless the costs estimate was filed and served by 31 August 2011, the claim would be struck out. Dame Janet Smith deprecated the making of an 'unless' order by the court without giving the claimant the opportunity to make representations and without the issue of an application. In her judgment the lack of any real prejudice to the defendant or the interruption to any significant extent of the progress of the case were important factors. So too was the administration of justice, which she said included the right of access to the courts and the importance of doing justice between the parties. In the penultimate paragraph of her judgment Dame Janet stated that: *"The CPR are intended to make solicitors comply with orders or to face the consequences with their eyes open. They are not intended to create traps for the unwary or slightly incompetent."*

In his judgment DJ Molle referred to the new addition to the overriding objective and to the new CPR 3.9, and stated that the directions order given was prescient to Rule 3.9 as it was made to ensure that litigation would be conducted 'efficiently and at proportionate cost'. The case of *Ryder* was distinguished on the basis that it dealt with the old 3.9 requirements. DJ Molle stated that the overriding objective was not about the delivery of justice, but of dealing with cases justly, which required dispute resolution at proportionate

cost. He stated that, with respect, he disagreed with Dame Janet Smith's interpretation of the administration of justice in the case of *Ryder*. In this case there was no good reason why the claimant had not complied with the order and therefore the application was dismissed with costs.

In dismissing both applications DJ Molle was at pains to point out to the claimants that since 1 April 2013, the rules of the game had changed dramatically. He noted that previously the courts had frequently indulged lackadaisical and sloppy behaviour by claimants, saying that they made mistakes but in the interests of justice the claim should continue. However, such behaviour would no longer be tolerated. This was not an issue of windfalls to the defendant, it was an issue about compliance with the orders of the court. Now orders must be complied with to the letter, or there will be a 'high price to pay'. The expressed intention was that solicitors 'had to be taught a stiff lesson', and that the courts were quite happy to see 'blood on the carpet' until they got the message. To allow the application for relief in these two cases would mean that Lord Jackson might just as well not have bothered with his reforms. DJ Molle reiterated the three golden rules of litigation post 1 April:

1. Comply with all orders, rules and practice directions.
2. Comply with all orders, rules and practice directions.
3. If you cannot comply then apply within time for extra time to comply.

The message from this judge is clear and uncompromising. In the future parties can only expect to obtain relief from sanctions in exceptional circumstances. Solicitors will need to adapt and sharpen their procedures to deal with this new reality or face the consequences of having claims struck out and paying compensation to their clients for their negligent failure to comply timeously with orders, rules and practice directions.

In the case of *Mannion v Ginty* [2012] EWCA Civ 1667, The Court of Appeal, via the judgment of Lord justice Lewison at [18], took the trouble to deliver an

obiter warning of the Jackson changes to come by stating: *"It has also been said, not least by Jackson LJ, that the culture of toleration of delay and non-compliance with court orders must stop."* It seems that judges are enthusiastically embracing their new power and are up for the fight. There will indeed be 'blood on the carpet' for those who fail to follow the golden rules in the new Jackson era.

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