

**THE RIGHT HON. LORD DYSON, MASTER OF THE ROLLS**

**THE JACKSON REFORMS AND CIVIL JUSTICE**

**UNIVERSITY OF NEW SOUTH WALES LECTURE, SYDNEY**

**9 SEPTEMBER 2014**

**and**

**AIJA ORATION, QUEENSLAND, AUSTRALIA**

**22 SEPTEMBER 2014**

**(1) Introduction<sup>1</sup>**

1. It is a pleasure to have been asked to speak to you today. My subject is civil justice reform, and in particular, the recent Jackson reforms in England and Wales. It is now just over eighteen months since these reforms were brought into force. Implementation continues.
2. The reform process itself began in November 2008, when one of my predecessors as Master of the Rolls, Sir Anthony Clarke (now Lord Clarke), commissioned Sir Rupert Jackson to carry out a fundamental review of litigation costs. Sir Rupert succeeded in doing this within the extraordinarily ambitious timescale of twelve months. He gathered a huge amount of evidence, consulted widely and examined and drew on the experience of other jurisdictions. He produced both a detailed Preliminary Report<sup>2</sup>

---

<sup>1</sup> I wish to thank John Sorabji for all his help in preparing this lecture.

<sup>2</sup> R. Jackson, *Review of Civil Litigation Costs: Preliminary Report* (May 2009, Vols. I & II) <<http://www.judiciary.gov.uk/publications/review-of-civil-ligation-costs-preliminary-report/>>

and a detailed Final Report<sup>3</sup> on time and within budget. On any view, this was a magnificent achievement.

3. The principal reason why Lord Clarke asked Sir Rupert to conduct this review was his grave concern about the cost of civil litigation. Despite the Woolf reforms which were introduced in the late 1990s, the cost of litigation remained far too high. Sir Rupert's task was to make recommendations to reduce the cost of litigation and, in particular, to make it more proportionate. Most of his recommendations were accepted and have been implemented by a combination of statute (the Legal Aid and Sentencing of Offenders Act 2012) and changes to rules of court. The Woolf reforms were successful in many ways, especially in relation to case management and the idea of proportionality. But costs were still far too high.
  
4. Professor Judith Resnick of Yale University once perceptively noted that "*The history of procedure is a series of attempts to solve the problems created by the preceding generation's procedural reforms.*"<sup>4</sup> It would, however, be wrong to say that the aim of the Jackson reforms was to remedy problems created by the Woolf reforms. Sir Rupert's task was, as explained by Lord Clarke, to carry out '*a review . . . entirely consistent with the approach Woolf advocated . . .*' He would do so by looking '*for answers to the problems of costs . . . consistent with the new approach to litigation Woolf's reforms introduced.*'<sup>5</sup>

---

<sup>3</sup> ; R. Jackson, *Review of Civil Litigation Costs: Final Report* (TSO) (December 2009); <<http://www.judiciary.gov.uk/publications/review-of-civil-litigation-costs-final-report/>>

<sup>4</sup> J. Resnick, *Precluding Appeals*, 70 Cornell L.R. 603, 624 (1985). I am grateful to both Professor Resnick and Benjamin Woodring, of Yale University, for their kind assistance in tracking down this quotation.

<sup>5</sup> A. Clarke, *The Woolf reforms: A singular Event or an Ongoing Process?*, in D. Dwyer, *The Civil Procedure Rules Ten years On* (OUP) (2010) at 48.

5. The aim of Jackson was not, therefore, to turn the clock back. He was to identify particular shortcomings in the Woolf reforms and to recommend remedies. He was also required to examine the various litigation funding mechanisms which were in place at that time. One of these was a form of contingency fee agreement, known as a Conditional Fee Agreement or CFA. This type of agreement had been available for some time in England and Wales. It was the subject of statutory reform in 2000 ie at about the same time as the Woolf reforms were introduced. CFAs had nothing to do with Woolf. Sir Rupert concluded that the post-2000 CFA regime was “*the largest single cause of disproportionate costs*”<sup>6</sup>. Accordingly, in addition to making recommendations to improve the operation of the Woolf reforms, he suggested how the CFA regime could be reformed. As a result of his recommendations, a number of elaborate provisions have been enacted for the funding of civil litigation.
  
6. I hope that these reforms to CFAs will succeed, and eliminate *the* major source of excessive litigation cost. But important though this aspect of the Jackson reforms may be, I do not intend to talk about it today. I want to look at other aspects of civil justice reform. I shall concentrate on two broad themes: first, internationalism as a source for reform and secondly, the Jackson reforms to case management..

## **(2) Internationalism**

7. The common law has always been eclectic. It has always drawn upon a wide range of materials for inspiration. For example, equity procedure drew on the civil and canon law tradition from mainland Europe; in developing English commercial law, Lord Mansfield drew heavily on mercantile law; and more recently our common law has

---

<sup>6</sup> R. Jackson, *The Review of Civil Litigation Costs in England and Wales*, in G. Meggitt (ed) *Civil Justice Reform – What has it achieved?* (Sweet & Maxwell) (2010) at 137.

been considerably influenced by the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights. This eclecticism is also, I believe, a feature of the legal landscape of other countries of the common law world. This is a point which Lord Parker CJ made in *Smith v Leech Brain & Co Ltd* [1962] 2 QB 405 at 415 when he said “*it is important that the common law, and the development of the common law, should be homogeneous in the various sections of the Commonwealth.*” Lord Denning noted that it was the duty of members of the Bar to refer judges to relevant Commonwealth decisions just as they would English and Welsh decisions<sup>7</sup>.

8. This international approach has not been limited to substantive common law. It extends to the development of civil procedure. Both Lord Woolf and Sir Rupert Jackson learnt a great deal from approaches adopted in Australia, New Zealand, Canada and the United States. More recently the Australian Productivity Commission returned the compliment and visited England and Wales to discuss procedural reform. Interest in what we do in England and Wales has also been shown by others including Canada, New Zealand and Hong Kong to name a few. We learn from each other.
9. A good example of this is “hot tubbing”, or the concurrent giving of evidence by opposing expert witnesses. I Googled the phrase “hot tubbing” because it seemed such an odd phrase. One definition that I found said that to use a hot tub is “to engage in activities which are primarily centred in and around a hot tub”. “The hot tubbing experience is often made more interesting with lots of naked people”. Another contribution said: “when you talk to someone too much and go over the top to be nice

---

<sup>7</sup> Lord Denning MR cited in *The Supreme Court Practice 1999* (Sweet & Maxwell) (1999) Vol. 1 at 1480.

to them and continue the conversation until you eventually invite that person over for a hot tub that night”. I believe that Sir Anthony Clarke first used the expression in our jurisdiction in a lecture he gave in July 2007<sup>8</sup>. He noted its origin here in Australia, and Justice Heerey’s views about the advantages of it<sup>9</sup>. Sir Anthony understood that it reduced the cost of expert evidence, saved court time and, importantly, had the potential to promote impartiality in experts. He suggested that we should consider introducing it in England and Wales. Having looked at how it worked in practice in Australia, Sir Rupert Jackson concluded that it could produce cost-savings for us in England and Wales. Following a pilot study, our Civil Procedure Rules were amended to allow for “hot tubbing” in respect of expert evidence. We had learnt from developments here in Australia. In fact, Official Referees had been doing it for years in the exercise of their inherent powers to control court process. It is not obvious to me why its use should be confined to expert evidence.

10. Discovery or disclosure of documents is another example of internationalism at work. Equity derived the idea of discovery from canon law. In 1999 we changed its name to disclosure. This was one of the Woolf reforms. In recommending the change of name, Lord Woolf was influenced by reforms previously introduced in Queensland.<sup>10</sup> There had also been substantial cross-fertilisation between the common law jurisdictions so far as the *substance* of disclosure was concerned. For more than a century, the scope of the duty of discovery (as it was then called) had been that propounded by Brett MR in *Compagnie Financiere du Pacifique v Peruvian Guano*

---

<sup>8</sup> A. Clarke, *The Role of the Expert after Woolf*, (Clinical Disputes Forum lecture, 12 July 2007), published in *Clinical Risk* (2008) (14) (No 3) 85.

<sup>9</sup> Heerey, *Recent Australian Developments*, (2004) *CJQ* (23) 386.

<sup>10</sup> H. Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO) (1995) chapter 21, paragraph 10; Matthews & Malek, *Disclosure*, Second Edition, 2001, at 16.

*Company* (1882) 11 QBD 55 at 62 – 63: in broad terms, all documents that were relevant in any way had to be disclosed. Parties were obliged to disclose any document which it was reasonable to suppose “contains information which may enable the party (applying for discovery) either to advance his own case or to damage that of his adversary”. This even included “a document which may fairly lead him to a train of inquiry which may have either of these two consequences”. The object of making discovery “*virtually unlimited*”<sup>11</sup> in scope (to use the words of Lord Woolf) in scope was to ensure that the courts were best placed to ascertain the truth and thereby “*base their decisions on a sure foundation of fact.*”<sup>12</sup> It was one of the principal means by which the courts could deliver justice on the merits. The *Peruvian Guano* test was adopted throughout the common law world. It was, however, an approach that took no account of cost or delay for the parties or for other litigants or its effect on the courts generally. In his reports, Lord Woolf rejected the test as too costly. The Australian Law Reform Commission noted in 2000 in its report *Managing Justice* how nearly all studies showed that disclosure on the basis of the *Peruvian Guano* test was too costly, too open to abuse and most in need of court control<sup>13</sup>. Similar conclusions were reached in Canada and New Zealand<sup>14</sup>. The test may have been satisfactory in the 19<sup>th</sup> century when life was less complex and sophisticated and documentation was far less voluminous than it subsequently became. But by the late 20<sup>th</sup> century, the test was causing havoc in complex litigation.

---

<sup>11</sup> H. Woolf (1995), chapter 21, paragraphs 1 and 15 – 17.

<sup>12</sup> *Tweed v Parades Commission for Northern Ireland* [2006] UKHL 53, [2007] 1 AC 650 at [2].

<sup>13</sup> *Managing Justice: a review of the Federal Civil Justice System*, ALRC 89 (2000) at 6.67.

<sup>14</sup> See <[http://www.courtsofnz.govt.nz/about/system/rules\\_committee/consultation/Discovery-Consultation-Paper-Sep-2009.pdf](http://www.courtsofnz.govt.nz/about/system/rules_committee/consultation/Discovery-Consultation-Paper-Sep-2009.pdf)>.

11. Under the Woolf reforms, the *Peruvian Guano* test became the exception. The general rule (known as “standard disclosure”) simply required litigants to disclose the documents they intended to rely on, those that were adverse to their case and those that supported their opponent’s case. Unfortunately changing rules does not necessarily bring about a change in practice. Disclosure remained a source of excess costs. This was first noted in a report prepared in 2007 by Sir Richard Aikens, at the time a High Court judge, now a judge of the Court of Appeal. It was also noted by Supreme Court of Queensland Justice Byrne, who concluded that the move away from the *Peruvian Guano* test appeared ‘*not to have had a major impact on the burdens of disclosure. . .*’<sup>15</sup>,

12. Sir Richard’s report considered problems that arose in what were known as ‘super-cases’, i.e. very complex, usually high value litigation. He said that in those cases, and commercial cases more generally, disclosure remained a blunt instrument. It led to the production in court of large numbers of documents that were generally irrelevant and useless<sup>16</sup>. A more targeted approach than that introduced by the Woolf reforms was needed. He recommended what he called a ‘shopping list’ approach to disclosure. Parties were to prepare disclosure schedules by reference to a list of issues. This was an echo of the approach previously recommended in New Zealand in 2002: to limit disclosure to matters directly in issue<sup>17</sup>.

---

<sup>15</sup> Cited in Australian Government Productivity Commission, *Access to Justice draft Report*, at 343 <<http://www.pc.gov.au/projects/inquiry/access-justice>>.

<sup>16</sup> R. Aikens, *Report and Recommendations of the Commercial Court Long Trials Working Party* (Judiciary of England and Wales) (2007) at 58ff.

<sup>17</sup> See <[http://www.courtsofnz.govt.nz/about/system/rules\\_committee/consultation/Discovery-Consultation-Paper-Sep-2009.pdf](http://www.courtsofnz.govt.nz/about/system/rules_committee/consultation/Discovery-Consultation-Paper-Sep-2009.pdf)> at 4.

13. The approach ultimately endorsed in the Jackson review was in many ways an extension of the Aikens and New Zealand approaches. Disclosure would be tailored to the individual needs of the case, whilst being kept within the bounds of proportionality. Rather than a shopping list, a new menu approach to disclosure was to be adopted. This would enable the court to order no disclosure at all; disclosure only of documents relied on by the parties; disclosure only of specific documents; or disclosure by reference to issues, or standard disclosure (the Woolf approach) or the full *Peruvian Guano* approach (including train of inquiry disclosure). As Sir Rupert Jackson noted in a lecture given in 2011, New Zealand had led the way having adopted a similar approach in 2011. Its 2011 reforms were, I believe, inspired by the recommendations of the Jackson reports<sup>18</sup>. This is another example of the countries of the common law world learning from each other.
14. This new tailored approach to disclosure requires far greater consideration to be given to the nature and extent of any disclosure than before. The process should be started (if not completed) before the first case management conference. Decisions taken at that stage will shape the extent of disclosure throughout the life of the proceedings.
15. Disclosure will, therefore, in future match the claim to a greater extent than it did in the past. It will be more proportionate. We should learn from the approach to discovery that is followed in the United States. I have in mind the effect of the introduction of proportionality into the discovery process by rule 26 of the Federal

---

<sup>18</sup> See <[http://www.courtsofnz.govt.nz/about/system/rules\\_committee/consultation/Discovery-Consultation-Paper-Sep-2009.pdf](http://www.courtsofnz.govt.nz/about/system/rules_committee/consultation/Discovery-Consultation-Paper-Sep-2009.pdf)>; R. Jackson < *Controlling the Cost of Disclosure*, (7<sup>th</sup> Implementation Lecture) (24 November 2011) <http://webarchive.nationalarchives.gov.uk/20131202164909/http://judiciary.gov.uk/Resources/JCO/Documents/Speeches/controlling-costs-disclosure.pdf>>.



Rules of Procedure. This reform was introduced as long ago as 1983.<sup>19</sup> The rule imposes an obligation on the court to limit discovery through the application of a cost-benefit analysis. This involves consideration of a number of factors that should be familiar to all jurisdictions that have embraced the concept of proportionality: *‘the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake . . .’*<sup>20</sup>. These considerations are echoed in the “overriding objective” which is enshrined in our Civil Procedure Rules as well as the procedure rules of other common law jurisdictions.

16. The main benefit of the US reform is that it focuses the minds of the parties on the real issues and on cost.<sup>21</sup> The same considerations underpin our new disclosure rule and, I would suggest, similar disclosure rules in other jurisdictions. Parties should identify the real issues in the case at an early stage. In most cases, this should be done before the first case management conference. They should also attempt to agree what level of disclosure is reasonably necessary to deal with these issues and what is the most cost effective means of providing it. Can it be done by limited e-disclosure? Can it be done by party A providing specific documents or classes of document to party B, or can it be best achieved by party B simply being invited to search all of party A’s documents? The right approach will vary from case to case.

17. In deciding which course to adopt, the court and the parties will have to consider what budget should be allocated to the exercise. The budgeted cost should not outweigh the likely benefit of the chosen approach. An assessment of the cost benefit should be

---

<sup>19</sup> See, for instance, J. Carroll, *Proportionality in Discovery: A Cautionary Tale*, [2010] Campbell Law Review [Vol. 32] 455.

<sup>20</sup> *Ibid.* at 458.

<sup>21</sup> *Ibid.* at 460.

made at as early a stage as possible. One of the problems identified with the US approach was that proportionality in discovery was not considered early enough in the process. One of the complaints that was made about the Woolf reforms on disclosure was that they did not take account of the need for proportionality. In practice, little had changed. Both in the United States and England and Wales, the benefits of proportionality were lost.<sup>22</sup> Some US courts are now, I believe, moving towards early intervention. One of the real advantages of Sir Rupert's approach has been to bring discussions about the scope of disclosure to an early stage of the pre-trial process. I hope that the new approach will reduce the scope and cost of disclosure and make it more proportionate.

18. Hot tubbing and disclosure are two examples of similar approaches being adopted in various countries of the common law world. They are areas where reforms in one jurisdiction are being developed under the influence of developments in others. We are influencing and learning from each other. This is greatly to be welcomed.

19. Another important change in England and Wales has been the development of active case management by the court. We introduced it in 1999. We were not the first to do so. Lord Woolf recommended it following the Australian lead. In his Interim Report, Lord Woolf noted how the introduction of case management in the *'Higher Courts of Australia'* had led to a *'quiet but enormously significant revolution'*, one which produced a *'dramatic shift from the laissez faire approach in conducting court business to an acceptance by the courts of the philosophical principle that it is their*

---

<sup>22</sup> Ibid. at 462.

*responsibility to take an interest in cases from a much earlier stage in the process and to manage them . . .*<sup>23</sup>,

20. The common law world is constantly seeking to update its civil procedure processes. We share many problems and have much to learn from each other. Case management underpinned by a common commitment to proportionality provides the framework within which the individual aspects of our systems operate. Inevitably the nature of these changes will, to some extent, differ from system to system. The differences may be attributable to matters which lie outside procedure altogether, such as differences of substantive law, different approaches to litigation funding, different approaches to out-of-court settlement, the availability of ombudsmen and so on. In other cases the differences will be matters of differing judicial interpretation. But on the whole what unites us is far greater than what divides us.
21. It seems to me that there is plenty of scope for further cross-fertilisation. We should be constantly looking to see how problems of civil procedure are tackled in other jurisdictions. We are always facing new problems. In England and Wales, we are currently facing problems generated by the seemingly endless reduction in public funding for civil justice. In particular, the huge reduction in the availability of legal aid for civil and family litigation has resulted in a massive increase in the numbers of litigants-in-person who are now litigating in our courts. This presents difficult challenges for our judges as well as for the advocates who appear against the unrepresented parties. The complexities of our civil procedure rules are often totally impenetrable to litigants-in-person. This is by no means a problem uniquely faced by our country where real efforts are now being made to accommodate the needs of these

---

<sup>23</sup> Professor Sallman cited in H. Woolf (1995) at chapter 5 paragraph 19.

litigants. More needs to be done to help them. But what should we do about our rules? It is tempting to say that we should scrap the Civil Procedure Rules and produce something far shorter and simpler. But civil litigation is an inherently complicated business; and if there are great gaps in the rules, it is likely that the interstices will have to be filled by decisions of the court. That would lead to more litigation. Even worse for the litigant-in-person, it would lead to a state of affairs in which there were two sources of procedural law: the rules and the decisions of the court. We are feeling our way in this difficult area. I believe that the problem of how to meet the needs of the litigant-in-person is likely to occupy centre-stage in the next few years. This is a particular area in which common law countries may be able to help each other.

22. But it is time that I returned to the Jackson reforms and to case management and recent developments in our approach to it England and Wales.

### **(3) Case Management and the *Mitchell* case**

23. Over the last twenty years there has been a distinct shift in the approach to litigation across the common law world. The traditional approach that left the control of litigation in the hands of litigants has been replaced by court-controlled case management. This development has been accomplished by the introduction of a series of explicit overriding objectives that govern the operation of procedural rules and practices in a number of jurisdictions.

24. These overriding objectives are explicitly provided for in rule 1 of our Civil Procedure Rules which requires the court to deal with cases justly and at proportionate cost; also in rule 1 of the Supreme Court Rules of South Australia; rule 5 of the Queensland Uniform Civil Procedure Rules; and rule 1.04 of the Ontario Rules of Civil Procedure. There are many other examples. There has also been some discussion in the United States (which pioneered the use of explicit overriding objectives in rule 1 of its Federal Rules of Procedure) about introducing proportionality into a revised version of that rule<sup>24</sup>. Again we can see an international current of activity, and one that has come about through the study of reforms across the common law world.

25. It is one thing to introduce active case management into procedural rules and to say how it should be done. It is another to ensure that it is carried out effectively and consistently in accordance with the rules. An issue of central importance to the effectiveness of case management is what approach the court takes to the failure by a party to comply with rules and court orders; and how generous the court is to a party who seeks the indulgence of a variation of a court order where, for example, it fails to serve documents on time or where it seeks an adjournment in order to obtain further evidence or to amend its pleading.

26. Historically, the court's approach to such applications was heavily coloured by the idea that its sole function was to secure justice for the parties. Applications of this kind would usually be granted unless the opposing party had suffered prejudice which could not be compensated by an order for costs. This approach was usually adopted in

---

<sup>24</sup> See, for instance, Institute for the Advancement of the American Legal System, *Pilot Rules Project*, (University of Denver), at 2.

relation to applications for relief from sanctions as well as in relation to applications to amend proceedings. It was supported by a series of English and Welsh Court of Appeal decisions in the 1870s and 1880s<sup>25</sup>. The most famous of these decisions was *Cropper v Smith* in 1884 in which Bowen LJ said:

*‘Now, I think it is a well established principle that the object of Courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights . . . I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or of grace.’*<sup>26</sup>

As the High Court of Australia noted in 2009 in *AON v Australian National University*, this was the traditional approach in Australia as well.

27. The Woolf and Jackson reforms were intended to bring about some departure from this way of conducting civil litigation. Rather than simply focus on individual litigants and on the need to secure justice as between the parties, court process was now to be managed to ensure that individual claims, the pursuit of individual justice, must be achieved economically, efficiently and at proportionate cost as between the parties. It was also to be managed so that the courts were able to secure a more distributive form of justice than in the past: in managing individual cases, they were to ensure that the needs and rights of other litigants to enjoy access to due process expeditiously and at proportionate cost were respected too.

28. This shift required a change in approach by our courts to how they dealt with applications for relief from the consequences of breaches of rules and court orders.

---

<sup>25</sup> *Tildesley v Harper* (1876) 10 ChD 393; *Collins v The Vestry of Paddington* (1879 – 1880) LR 5 QBD 368.

<sup>26</sup> (1884) 26 ChD 700 at 710 – 711.

The principle articulated in *Cropper* could not survive. A tougher approach was needed so that individual litigation costs were proportionate and no more than a proportionate share of the total court resources available to all litigants was expended on a single claim. Lord Woolf articulated this idea in 1996, when he stated how case management was to be carried out, in order to ‘. . . *preserve access to justice for all users of the system [so that] it [was] necessary to ensure that individual users [did] not use more of the system's resources than their case require[d]. This means that the court must consider the effect of their choice on other users of the system.*’<sup>27</sup> The Court of Appeal articulated this idea in a number of cases following implementation of the Woolf reforms<sup>28</sup>; the point was also articulated here in the *Aon* decision which emphasised the need to secure justice to all litigants and not simply to those involved in a particular piece of litigation<sup>29</sup>.

29. This change in approach did not however take hold in England and Wales in the post-Woolf era. The courts failed to adopt a stricter approach to non-compliance despite a number of reminders from the Court of Appeal. Sir Rupert Jackson decided that the time had come for more than reminders. A stricter approach had to be introduced. This was achieved by revising the definition of the overriding objective to include an explicit reference to the need to deal with cases at “proportionate cost” and to say that dealing with cases “justly” includes “enforcing compliance with court rules, practice directions and orders”. The rule governing relief from the consequences of procedural non-compliance was revised so as to provide that, on an application for

---

<sup>27</sup> Woolf (1996) at 24.

<sup>28</sup> E.g., *UCB Corporate Services Ltd (formerly UCB Bank Plc) v Halifax (SW) Ltd* [1999] C.P.L.R. 69; *Worldwide Corporation Limited v. GPT Ltd* (CA 2 December 1998, unreported); *Arrow Nominees Inc & Another v Blackledge & Others* [2000] CP Rep 59; [2001] BCC 591; *Savings & Investment Bank Ltd v Fincken* [2003] EWCA Civ 1630.

<sup>29</sup> [2009] HCA 27, (2009) 239 CLR 175 at [23] – [24] and [92] – [95] for instance.

relief, the court would consider all the circumstances of the case so as to enable it to deal justly with the application, including specifically the need for litigation to be conducted ‘*efficiently and at proportionate cost*’ and so as to ‘*enforce compliance with rules, practice directions and orders*’<sup>30</sup>.

30. The new stricter approach was first considered by the Court of Appeal last November in *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537. I sat together with Richards LJ, the deputy Head of Civil Justice and Elias LJ. We attempted to explain how the courts should approach applications for relief from non-compliance under the new rule.

31. The facts of *Mitchell* were straightforward. Andrew Mitchell MP issued defamation proceedings against News Group Newspapers Ltd. The alleged defamation arose from an incident which became known as the ‘Plebgate’ scandal. The Sun newspaper had reported that Mr Mitchell MP, who was at the time the Conservative Party’s Chief Whip, had ‘*raged against police officers at the entrance to Downing Street in a foul mouthed rant shouting “you’re f...ing plebs”*’.<sup>31</sup> Mr Mitchell MP has always denied use of the word ‘pleb’ or ‘plebs’.

32. As part of the Jackson reforms both the court and litigants are required to engage in costs management and, to this end, to prepare and exchange budgets of their litigation costs at the start of the proceedings and to file their budgets with the court seven days

---

<sup>30</sup> CPR r. 3.9(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need-

(a) for litigation to be conducted efficiently and at proportionate cost; and  
(b) to enforce compliance with rules, practice directions and orders.’

<sup>31</sup> [2013] EWCA Civ 1537 at [2].



before the date fixed for a costs budget hearing. Mr Mitchell's solicitors failed to file their costs until the day before the date of the hearing. The rules provide that a party who does not file his costs budget in time is to be treated as having filed a costs budget comprising only the amount of the applicable court fees. Unsurprisingly, Mr Mitchell applied for relief from this draconian sanction. The explanation given by the solicitors was pressure of work.

33. If the traditional *Cropper* approach had been adopted, the application for relief would inevitably have been successful. But this would have done nothing to discourage a lax attitude to compliance with rules and court orders and nothing to promote the need to ensure that parties expend no more than proportionate resources on their own case and use no more than a proportionate amount of the court's overall resources.

34. The Master who dealt with the application refused to grant relief from the consequences of non-compliance. She noted that the main object of the Jackson reforms was to eliminate the previously lax approach to rule-compliance. She also said that the solicitor's failure to file the budget on time had had an adverse impact on other court users and on their right to receive justice: the hearing date had to be adjourned with the consequence that the date fixed for a hearing in a different case also had to be adjourned.

35. Mr Mitchell appealed. We upheld the Master's decision. The guidance that we gave did not, however, meet with universal approval. Some commentators described it as too harsh and as turning rule compliance into an end in itself. One described it as unconstitutional. We said that it would usually be appropriate to start by considering the nature of the non-compliance. If it could properly be regarded as trivial, the court

would usually grant relief if the application was made promptly<sup>32</sup>. We gave as examples of trivial default cases where there was a failure of form rather than substance and where a deadline had only just been missed but the defaulting party was otherwise fully compliant. If the default could not be characterised as trivial, then the burden was on the defaulting party to persuade the court to grant relief. A good reason had to be shown why the default occurred. We provided some examples of good and bad reasons. We said:

*‘ . . . 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.’<sup>33</sup>*

36. This tough approach was followed by subsequent Court of Appeal decisions. These showed that the court was now insisting on a new strict approach to the grant of relief from sanctions for non-compliance<sup>34</sup>. This was not, however, the end of the story. The guidance led some courts to apply it too strictly, taking the view that the triviality test meant that relief from non-compliance would only be granted in exceptional circumstances. It led some lawyers to adopt what was described by judges as an “opportunistic” approach to litigation. The prize of successfully opposing an

---

<sup>32</sup> Ibid at [40].

<sup>33</sup> Ibid. at [41].

<sup>34</sup> *Durrant v Chief Constable of Avon And Somerset Constabulary* [2013] EWCA Civ 1624; *Thevarajah v Riordan and others* [2014] EWCA Civ 15

application for relief and potentially achieving a great windfall (of having a claim struck out altogether, if that was the sanction imposed for default) was worth taking the risk of having to pay the relatively modest costs of unsuccessfully opposing the application. Some went so far as to say that lawyers would be in breach of duty to their own clients if they did not advise them to oppose applications for relief from sanctions in almost any circumstances. It was inevitable that the court would be asked to revisit the guidance it had given in *Mitchell*. And we did so in July in the three conjoined appeals of *Denton v TH White Ltd & Others* [2014] EWCA Civ 906. Vos LJ and I gave the majority judgment. We endorsed the approach in *Mitchell* but amplified and explained our guidance in more detail. We propounded a three stage approach.

37. The first stage is to assess the seriousness or significance of the default. The focus should no longer be on the question of the triviality of the default, which had given rise to problems. Rather, it should be on whether the default has been material i.e. on whether it has imperilled a future hearing date or otherwise disrupted the conduct of the litigation in which the application is made or litigation generally. We also made clear that a serious breach might arise even where it was not material in this sense, for example in the case of a failure to pay court fees. If the court concludes that the default is not serious or significant, then relief from sanctions will usually be granted. If, however, it concluded that the default is serious or significant, then the second and third stages assume greater importance.

38. The second stage is to consider why the default occurred and whether there is a good reason capable of excusing the default.

39. Finally, the third stage. We said that the misunderstanding that had occurred was the belief that *Mitchell* was authority for the proposition that, if there is a trivial (now serious or significant) breach and there is no good reason for the breach, then the application for relief from sanctions will automatically fail. I hope that we have laid this misunderstanding to rest. Rule 3.9(1) provides that on an application for relief from any sanction 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. In *Mitchell*, we had said that these two factors were of “paramount importance”. In *Denton*, we were told that the use of the phrase “paramount importance” in *Mitchell* had encouraged the idea that the factors other than the need (a) for the litigation to be conducted efficiently and at proportionate cost and (b) to enforce compliance with rules, practice directions and orders were of little weight. In fact, we had said that the other factors were to be given “less weight” than the two that had been singled out for mention. In *Denton*, the majority of the court maintained this view. To my regret, the third member of the court who was Jackson LJ (the master himself) dissented on the proper interpretation of the third stage. He preferred the view that the two factors singled out for specific mention were not to be given particular weight, but were to be regarded as having no more weight than all the other factors.

40. We also emphasised that the overriding objective required parties to co-operate with each other in the conduct of litigation. Opportunistic behaviour by lawyers was to be deprecated. For example, it was unacceptable for a party to take advantage of a minor

inadvertent error by the other side. Heavy costs sanctions would be imposed on parties who behave unreasonably in refusing to agree an extension of time, or unreasonably oppose applications for relief from sanctions. An order to pay the costs of the application in such circumstances may not always be sufficient. The court could, in an appropriate case, also record in its order that the opposition to the relief was unreasonable conduct to be taken into account when costs are dealt with at the end of the case.

41. We shall have to see how the revised guidance works in practice. Early indications are that it has been received more favourably than the guidance which we gave in *Mitchell*. Time will also tell whether, despite the guidance which we have given, the courts will slip back into the pre-Woolf and pre-Jackson lax approach to case management. Our experience has been that changing litigation culture is not easy. I fear that a number of our judges still favour the *Cropper* approach

#### **(4) Conclusion**

42. Having talked a little about developments in procedural law in England and Wales and having touched on the benefits that the continuing influence that common law jurisdictions have on each other, I thought I would conclude by calling to mind something that the great US Supreme Court Justice Louis Brandeis once said. He noted that it was ‘*one of the happy incidents of the [US] federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.*’<sup>35</sup> This sentiment can with equal force be applied to the common law world and to our civil justice systems. Each can serve as a laboratory of jurisprudential invention. As we

---

<sup>35</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932).

seek in my country to implement our latest set of reforms, I hope we will do so with an eye to further developments elsewhere in the common law world and possibly even beyond. All democratic societies aspire to providing a fair and efficient system of civil justice. The rule of law has little practical relevance unless it is underpinned by meaningful access to justice. In many countries, access to justice is under strain as a result of a reduction in public funding. But however meagre the provision of public resources may be, an effective civil procedure system is a pre-requisite for proper access to justice. History has shown that we have much to learn from each other in our endeavour to improve our processes and to achieve our goal of securing justice for all litigants who wish to use our courts. International meetings such as this can do nothing but good. Thank you for inviting me to address you.