The revised CPR 3.9: a coded message demanding articulation

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Civil procedure; Costs; Non-compliance; Penalties

Introduction

One of the important recommendations in Sir Rupert Jackson's *Review of Litigation Costs—Final Report* 2010, was to bring about a change in the court's approach to litigant failure to comply with rules and court orders. To that end he recommended the revision of CPR 3.9. The Civil Procedure Rules Committee has followed this proposal and a revised CPR 3.9 comes into effect on April 1, 2013. On the face of it, the revised rule says nothing that is not already in the rules or in the law generally, and can therefore be thought content free. In reality, however, it contains an important coded message. To decipher this message it is necessary to identify the mischief that the revision was meant to address.

Sir Rupert was perfectly clear about this. He found that the:

> "courts at all levels have become too tolerant of delays and non-compliance with orders. In so doing 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".[1]

Clearly, the message concerns the approach that the court should adopt towards litigant failure to comply with rules and court orders. But an exhortation to be less tolerant of litigant defaults is unlikely to reverse the former tolerant approach to delays and non-compliance unless it is accompanied by a clear articulation of a principle that can of assist the court to develop a coherent approach capable of consistent application in practice.

To articulate such a principle and thereby flesh out this coded message one first needs to examine why, despite the fact that the overriding objective contained all that is now in the revised CPR 3.9, the court grew tolerant to party failure to comply with process requirements, and with deadlines in particular. It is argued that the root of the problems lay in the court's inability to work out the full significance of the overriding objective of CPR 1.1, or, alternatively, in its unwillingness to apply in practice what the overriding objective implied in theory.

The overriding objective requires the court not just to deliver correct judgments, but to do so in a timely manner and by the use of proportionate court and litigant resource. Yet, the court has only too often overlooked these time and resource dimensions of justice. Notwithstanding the clearly articulated philosophy of the

[1] *Review of Litigation Costs—Final Report* 2010, 397.

overriding objective and of the CPR generally, the court has on numerous occasions tolerated inexcusable litigant failure to comply with deadlines, has tolerated expensive and wasteful procedural wrangling over compliance, and ignored the harmful systemic effects that a culture of sloppy practice had on the administration of justice as a whole and on the ever rising litigation costs. And all this in the misguided belief that individual disputes should be decided on their substantive merits, no matter how long it takes, how much it costs and what the long term consequences may be..

This tendency led to slack case management that the overriding objective of CPR 1.1 was meant to avoid. The Jackson revision is in effect designed to revive the importance of the overriding objective as a case management tool capable of delivering efficient adjudication of civil claims; that is, adjudication on the merits within a reasonable time and by the use of proportionate court and litigant resources. But this cannot be achieved through bland words, however well intentioned. It can only be achieved if the language of the revised CPR 3.9 is articulated into a clear and coherent principle of practical application.

The revised CPR 3.9—seemingly content free

The revised CPR 3.9 which comes into effect on April 1, 2013, states:

> "(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-
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> (a) for litigation to be conducted efficiently and at proportionate cost; and
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> (b) to enforce compliance with rules, practice directions and orders.
>
> (2) An application for relief must be supported by evidence."

On the face if it this rule says very little that is not already in the rules or the law generally. The words of the opening sentence, "so as to enable it to deal justly with the application", merely restate the overriding objective set out in CPR 1.1(1) and could be said to be redundant. The same may be said about sub-para (a) since according to CPR 1.1(2) "[d]ealing with a case justly *and at proportionate cost* includes, so far as is practicable"[2] saving expense, dealing with the case in ways which are proportionate to the amount of money involved, to the importance of the case, to the complexity of the issues, and to the financial position of each party, ensuring that it is dealt with expeditiously and fairly, and allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases. The requirements of efficiency and proportionality are clearly better set out and in greater detail in the overriding objective. Moreover, CPR 1.2 requires the court to give effect to the overriding objective when it exercises any power given to it by the Rules (which includes the power to give relief from sanctions under CPR 3.8). It follows that CPR 3.9(1)(a) imposes on

[2] The italicised words were added with effect from April 1, 2013.

the court no duty, nor does it provide it with any guidance that is not already in the CPR.

CPR 3.9(1)(b) hardly breaks new ground either. It calls on the court to take account of the need to enforce compliance with rules, practice directions, and orders. Since by their very nature rules, practice directions, and court orders, establish norms that dictate compliance, the revised rule says nothing whatever of significance. What else is the court to do with rules, practice directions and orders, other than enforce them? To say that when the court is confronted with a breach of a rule or order it should take into account the need to enforce rules and orders, is like saying that when the court deals with a claim for breach of contract it should take into consideration the need to enforce contracts. Indeed, saying that in considering whether to give effect to the rule the court should consider the need to enforce the rule implies that it is not always necessary to enforce the rule. This inevitably suggests that it is not always necessary to comply with the rule, which surely does not reflect the rule maker's intentions, or that of Sir Rupert Jackson.

It is a pity that an important rule change meant to introduce a more exacting court approach to dealing with litigant default should have been expressed in such grotesquely anodyne language. Yet, sense can be made of the coded message embedded in the rule if properly articulated.

Wasteful litigation over compliance—a perennial problem

One of the persistent reasons for high litigation costs has been wasteful litigation over process, as Lord Woolf found in his *Report on Access to Justice*. This activity is known nowadays as "satellite litigation", a term reserved for litigation concerned with compliance with process requirements rather than with the substantive issues between the parties. Although this usage is recent, the phenomenon has been plaguing English law for centuries. Satellite litigation is not a random phenomenon. Its prevalence is the product of policy choices that confront any procedural system: how to respond to party failure to comply with the rules of procedure.

As far as meeting process deadlines is concerned, several options present themselves to the rule maker or to the court. At one extreme, defaults would always be tolerated and the defaulting party would invariably be allowed to proceed whenever he happens to be ready to do so, provided that the court is still in a position to determine the underlying issue in dispute. At the other extreme, deadlines would be strictly enforced so that a default would result in the loss of the opportunity to proceed with the process in question. Under this approach, a party who has failed to file an expert report or a witness statement in time would not be allowed to call the witness or rely on the expert even if it meant certain defeat of his cause. Between these two poles there is room for a variety of compromises. A defaulting party could, for instance, be allowed to proceed only if there was a reasonable excuse for the default. Alternatively, the court could allow a defaulting party to proceed even where the default was inexcusable subject to some appropriate condition, such as the payment of costs.

It is important to appreciate that the rule or the judicial approach that is adopted for dealing with such defaults is bound to influence the forensic litigation culture, the efficiency of court case management, the cost of litigation, and its duration.

For this reason, court treatment of failure to comply with timetables is fundamental to the operation of the administration of civil justice.

Justice on the merits and its paradoxical consequences

The Rules of the Supreme Court (RSC), from which the Civil Procedure Rules 1998 were derived, represented a reaction against the earlier system of litigation. For a long period preceding the Judicature Acts of 1873 and 1875 a formalistic approach dominated civil litigation. Court proceedings were initiated by means of forms of action in which substantive law and procedure were wrapped up together. A claimant could succeed only through strict adherence with the requirements imposed by the particular form of action, which were technical and formalistic.[3] The courts of common law, Odgers wrote, "were sadly hampered in the year 1800 by cumbrous procedure and pedantic technicalities which caused suitors expense, delay, vexation and disgust. It took years for a merchant to recover a debt due to him. And half the actions were decided not on their real merits, but on questions of form and pleading".[4] The situation in the Court of Chancery was no better.

Since an action could be defeated on technicalities, a great deal of effort would go into taking up technical points. These would require a multiplicity of interlocutory court hearings, which delayed not only the resolution of the particular action but also contributed to increasing congestion in the courts. Needless to say, the amount of procedural activity which litigation involved greatly inflated the costs to the litigants.

The reform of the courts and of the procedural system culminated in the Judicature Act 1875 and in the enactment of the Rules of the Supreme Court. The RSC contained a provision that expressed the basic policy concerning procedural defects. RSC, 1883, Ord.70, r.1 stated:

> "Non-compliance with any of these rules, or with any rule of practice for the time being in force, shall not render any proceedings void unless the court or judge shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the court or judge shall think fit."

Procedural irregularities no longer rendered proceedings void. Instead, the court had discretion either to allow the defect to be cured on terms that the court thought fit or, alternatively, to set aside the defective proceedings. In addition to its general discretion to cure irregularities the court had a specific power to extend time limits under RSC Ord.3, r.5. If a party was late in performing a procedural step, the defaulter could apply to court for an order validating late compliance, or the opponent could apply for an order setting it aside.

The court adopted a simple principle for the exercise of its power to cure procedural defects, to forgive late compliance and to extend the time for compliance with process requirements. It came to be known as the justice on the merits approach. According to this principle defaults should excused and further

[3] W.B. Odgers, "Changes in Procedure and in the Law of Evidence" in *A Century of Law Reform* (1901) 203 at 212. For a comprehensive survey see W.S. Holdsworth, *History of English Law* (1924), Vols I and XV.

[4] W.B. Odgers, "Changes in Procedure and in the Law of Evidence" in *A Century of Law Reform* (1901), p.203.

opportunities to comply should be granted, provided that this can be done without injustice to the other party and that any inconvenience to the non-defaulting party could be compensated in costs.[5]

The justice on the merits approach was articulated by Lord Diplock in the context of dismissing an action for want of prosecution:

> "The power should be exercised only where the court is satisfied either (1) that the default has been intentional and contumelious, e g disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or (2)(a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party."[6]

This ruling reflected a clear policy choice: failure to comply with time limits will be tolerated as long as the passage of time has not impaired the quality of the evidence and as long as the defendant suffered no real prejudice. It meant that claimants were free to delay performance of their process obligations for long periods at no great risk to their prospects in the litigation. This approach had unfortunate and paradoxical consequences: by allowing litigation over process it diverted attention and resources from the adjudication of the underlying issues in dispute between the parties.

Since parties could rest sure in the knowledge that they would have further opportunities to comply if they missed a deadline, rules and court orders imposing time limits were not taken seriously. Parties and their lawyers became less than scrupulous about compliance with time limits and other obligations. Although the court had signalled a tolerant approach to non-compliance, the non-defaulting party could not just stand by and wait until he suffered prejudice or the evidence had irretrievably deteriorated. Sooner or later the non-defaulting party would have to make an interlocutory application seeking to obtain compliance from the party who was dragging his feet.

To begin with, the non-defaulting party would have to apply for an order directing the other party to comply, for instance to make disclosure. He would obtain an order for disclosure by a certain date. If disclosure was not forthcoming, a second or even a third application would have to be made. Eventually the non-defaulting party would seek an unless order which directs that failing disclosure by a certain date the claim would be struck out. If the default persisted, the non-defaulting party would have to make an application to have the claim struck out, which may or may not be successful, and which could well be followed by an appeal and possibly a further appeal.

If the claimant was in default, the defendant could wait until the ground was ripe for an application to dismiss the claim for want of prosecution. Since a whole

[5] *Clarapede & Co v Commercial Union Association* (1883) 32 WR 262 at 263, CA; *Cropper v Smith* (1884) 26 Ch. D. 700 at 710–711.

[6] *Birkett v James* [1978] A.C. 297 at 318, [1977] 2 All E.R. 801 at 805, HL.

body of jurisprudence had developed round the Diplock test,[7] the hearing of such an application could require extensive research and consume considerable court time. Resolving an argument concerning these rules could require a two-day hearing in the Court of Appeal and a judgment running into many pages.[8]

The very existence of judicial discretion to cure irregularities offered considerable advantages to those who could sustain intense interlocutory activity. It was not uncommon for litigation on points of procedure to absorb more time and resources than the adjudication of the substantive issues. The court appeared indifferent to the effect that this permissive approach had on litigant behaviour, on court and litigant resources, or on the time it took to reach a final resolution.[9]

The desire not to allow matters of procedure to stand in the way of determining the truth about the issues in dispute created extensive scope for litigation that had nothing to do with the merits but which complicated the proceedings and tended to exhaust the litigants well before they could reach a trial on the merits.

The overriding objective of the CPR—a three dimensional concept of justice designed to promote efficiency of process

Following the recommendations of Lord Woolf in the *Report on Access to Justice* 1995 the Rules of the Supreme Court were replaced by the Civil Procedure Rules 1998. The central feature of the new system was active court management of litigation founded on the overriding objective. CPR 1.1(1) boldly states: "These rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate costs" (the last 4 words added with effect from April 1, 2013). CPR 1.1(2) went on to spell out what the court had to achieve in dealing with cases justly. It had to ensure that the process adopted was proportionate to the importance of the case, its complexity and the amount of money involved. The court had to ensure that the dispute resolution process was economical and saved expense. And finally, the court had to ensure that the dispute was resolved expeditiously and by the fair allotment of court resources, bearing in mind the need to maintain sufficient capacity for resolving other disputes coming before the court.

The overriding objective introduced into English civil procedure the idea that justice involves not just rendering judgments that are correct in fact and in law but also doing so by proportionate use of court and litigant resources and within reasonable time. Justice is therefore a three dimensional concept in which time and resources play a part alongside the imperative of reaching correct results.

The court was not slow to articulate the ideas behind the overriding objective. Laws L.J. brought out this point when he wrote, extra judicially, that the CPR:

[7] The second limb of Lord Diplock's test had acquired no fewer than 15 sub-rules: *Trill v Sacher* [1993] 1 All E.R. 961, [1993] 1 W.L.R. 1379.

[8] In *Shtun v Zalejska* [1996] 3 All E.R. 411, [1996] 1 W.L.R. 1270, 15 pages were devoted to the consideration of earlier authority and to its impact on the case.

[9] Concerns about disproportionate procedural activity and costs were voiced in *Report of the Civil Justice Review Body* (1988), Cm 394, p.14.

> "involve a conceptual shift in the idea of justice, so that economy and proportionality are not merely desirable aims but are defining features of justice itself. And it is not merely aspiration; it is law."[10]

Buxton L.J. gave expression to the idea when he said that CPR:

> "1.1(1) says that the overriding objective is to enable the court to deal with cases justly; but then in 1.1(2) it explains that just dealing with a case includes not only matters such as the parties being on an equal footing but also, much more directly, management questions such as saving expense, dealing with the case in a proportionate way and ensuring that it is dealt with expeditiously. In making a decision under the overriding objective the court has to balance all those considerations that are set out under that heading without giving one of them undue weight."[11]

More recently, the connection between justice and efficiency was brought out by Rix L.J. when he said that in the eyes of the fair-minded and informed observer "there is not only convenience but also justice to be found in the efficient conduct of complex civil claims".[12]

Timely resolution, it may be said, is just as central to administering justice as it is to administering medical treatment. Effective treatment for disease must not only be appropriate for the condition but must also be delivered at a time when it can do some good. Timing is not an independent aspect of treatment but an integral part of it. The overriding objective similarly accepts that time is an integral imperative of civil justice, as is indicated by the venerable aphorism that justice delayed is justice denied.

The resource aspect is also central to both legal and medical services. A doctor who spends too long with one patient will have less time for others, perhaps suffering from more serious conditions and needing more urgent treatment. A court that allows too much of its resources to be invested in the case in hand, will have fewer left for other cases waiting in the queue, the resolution of which would be delayed so long that justice could no longer be done. And as for expense, making access to court unaffordable is just as important as making medical treatment unaffordable.

The court, as we have seen, was not unaware of the implications of the three dimensional overriding objective. It was not unaware of what it required the court to achieve through active case management. Lord Woolf M.R. explained in *Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd*[13]:

> "In *Birkett v James* the consequence to other litigants and to the courts of inordinate delay was not a consideration which was in issue. From now on it is going to be a consideration of increasing significance. Litigants and their legal advisers must recognise that any delay which occurs from now on will

[10] Preface to the *Civil Court Service* (Jordans, 1st edn, 1999). See also *Adoko v Jemal* , The Times, July 8, 1999 (CA), where Laws L.J. said that the "proper and proportionate use of court resources is now to be considered part of substantive justice itself".

[11] *Holmes v SGB Services Plc* [2001] EWCA Civ 354 at [38].

[12] *JSC BTA Bank v Ablyazov* [2012] EWCA Civ 1551 at [65].

[13] *Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd* [1998] 2 All E.R. 181 at 191, [1998] 1 W.L.R. 1426 at 1436. See also *Spooner v Webb*, The Times, April 25, 1997, CA. For discussion of the *Birkett* case see paras 1.63 ff and 10.28 ff.

> be assessed not only from the point of view of the prejudice caused to the particular litigants whose case it is, but also in relation to the effect it can have on other litigants who are wishing to have their cases heard and the prejudice which is caused to the due administration of justice. The existing rules do contain the limits which are designed to achieve the disposal of litigation within a reasonable time scale. Those rules should be observed."

Lord Woolf C.J. returned to this matter in *Jones v University of Warwick*[14]:

> "A judge's responsibility today in the course of properly managing litigation requires him, when exercising his discretion in accordance with the overriding objective contained in CPR Part 1, to consider the effect of his decision upon litigation generally. An example of the wider approach is that the judges are required to ensure that a case only uses its appropriate share of the resources of the court (CPR Part 1.1(2)(e)). Proactive management of civil proceedings, which is at the heart of the CPR, is not only concerned with an individual."

One can hardly fail to notice that the three imperatives of the overriding objective are capable of pointing in different directions. Cutting the resources available to a given litigation process may be incompatible with expeditious resolution, or may be at odds with the need to arrive at a correct outcome. Similarly, expedition may be achieved only by investing more resources, or by restricting disclosure and thus running a higher risk of error. As in every other context, it is the business of management to strike an appropriate balance between these three imperatives so as to establish an optimal process for the dispute in hand.

The strength of the overriding objective of the CPR lies precisely in confronting this inevitable tension. It calls for active case management by the court to ensure that disputes are resolved in a timely manner and with proportionate use of court and litigant resources. "In making a decision under the overriding objective", Buxton L.J. explained, "the court has to balance all those considerations that are set out under that heading [i.e. in CPR 1.2] without giving one of them undue weight."[15] And Lord Bingham stressed that "the judge must always bear in mind that justice requires not only that the right answer be given but also that it be achieved by a trial process which is fair to all parties".[16]

Weak application of the overriding objective in enforcing compliance with rules and court orders

Although the court was quick to articulate the demands of the overriding objective, it was less successful in implementing them in the day-to-day management of litigation. In particular, it tended to lose sight of the demands of expedition and of proportionate use of resources when it came to dealing with litigant failure to comply with rules and court orders, or when it had to deal with litigant attempts to escape the strictures of case management directions.

Case management is designed to ensure that the dispute is resolved by an efficient process. After the close of pleadings the court will give case management directions.

[14] *Jones v University of Warwick* [2003] EWCA Civ 151, [2003] 1 W.L.R. 954 at [25].
[15] *Holmes v SGB Services Plc* [2001] EWCA Civ 354 at [38].
[16] *O'Brien v Chief Constable of South Wales Police* [2005] UKHL 26, [2005] 2 All E.R. 931 at [6].

Such directions will be given on the basis of the allocation questionnaires, or, in more complex cases, following a case management hearing. The directions will be accompanied by a timetable for compliance with the court's directions. It is important to stress though that case management directions are given only after consultation with the parties or information provided by them. Both the directions and the timetable will reflect the court's assessment of the procedural needs of the case, based on the information provided by the parties and facts known at the time. If in the course of time circumstances change, the court may have to revise its directions or the timetable accordingly. For instance, if the volume of documents turns out to be greater than first assumed, parties would need more time for making disclosure. Similarly, if more extensive medical examinations turn out to be necessary, the deadline for exchange of expert reports would need to be put back.

One of the key tests of effective case management is whether the court adheres to its own case management timetable. Of course, adherence must be sufficiently flexible to accommodate material changes in the circumstances of the litigation. That said, good management practice requires that the court should insist on timely compliance and refuse postponements or extension of time where the circumstances have not materially changed.

Unfortunately, the court has been far too reluctant to hold litigants to their process obligations even when the circumstance did not justify giving them more time. The rules themselves provide the court with ample opportunities to do so. As noted earlier, the court's powers under the CPR to forgive party default, to allow further opportunities to comply and to grant extensions of time for compliance remained unchanged compared with the RSC. As before, CPR 3.10 provided that:

> "[w]here there has been an error of procedure such as a failure to comply with a rule or practice direction—(a) the error does not invalidate any step taken in the proceedings unless the court so orders; and (b) the court may make an order to remedy the error."

As before the court is vested with discretion to:

> "extend or shorten the time for compliance with any rule, practice direction or court order (even if an application for extension is made after the time for compliance has expired)"(CPR 3.1(2)).

However, unlike under the previous system, CPR 3.8(1) provides that:

> "[w]here a party has failed to comply with a rule, practice direction or court order, any sanction for failure to comply imposed by the rule, practice direction or court order has effect unless the party in default applies for and obtains relief from the sanction".

The exercise of discretion to grant relief from sanctions was governed by CPR 3.9, which has been revised with effect until April 1, 2013. As it stood before its revision, it required the court to consider all the circumstances including the following: (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; (e) the extent to which the party in default has complied with other rules, practice

directions, court orders and any relevant pre-action protocol; (f) whether the failure to comply was caused by the party or his legal representative; (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.

In a series of cases the Court of Appeal refused to articulate a general policy concerning the exercise of discretion under CPR 3.9. It refused to provide guidance as to the relative importance of the different factors listed in the rule. It merely insisted that the court had to have regard to each of the listed factors and that none of the factors had precedence over others. Thus, for instance, the court was not to give greater weight to the absence of a good explanation for the default. Rather the court had to consider each factor and explain its significance in the particular circumstances.[17] Having done so, the court had "to stand back and assess the significance and weight of all relevant circumstances overall, rather than to engage in some form of 'head-counting' of circumstances".[18]

No principle had been established to guide the exercise of discretion, the most careful consideration of each factor could not lead to any particular conclusion. Indeed, the multiplicity of the factors listed in CPR 3.9 made it very difficult to articulate a coherent approach capable of rendering the exercise of discretion reasonably predictable (an aspect discussed by Inbar Levy in "Lightening the overload of CPR Rule 3.9" in the present issue). For one thing, the longer the list of considerations that must be taken into account, the less each of them is likely to count and the more open ended the court's freedom of choice is likely to be. Consequently, the multiplicity of the factors and the fact that they stood in no particular relative order of importance meant that the court had almost unfettered discretion. The outcome of applications for relief from sanctions was therefore unpredictable.

In some cases the court considered that relief should be granted if its refusal would deprive the defaulter of an opportunity to obtain judgment on the merits. In others it considered the defaulter's cavalier attitude to court orders and the absence of excuse critical. Since sloppy practice was not consistently punished, deadlines were not scrupulously met. When this happened, one or other of the parties felt obliged to apply to court. In hotly contested applications for relief from sanctions it was not unusual for the first hearing to be followed by an appeal, and sometimes by more than one.

As before the CPR, the sheer volume of satellite litigation gave rise to a whole jurisprudence about the different factors listed in CPR 3.9, which meant that application hearings could consume considerable time and expense.[19] To make matters worse, the CPR 3.9 checklist was used not just to decide questions of relief

[17] *Bansal v Cheema* (March 2, 2000, unreported) at [22], CA. See also *Moon v Kent County Council* [2001] EWCA Civ 1877 at [23]; *Meredith v Colleys Valuation Services Ltd* [2001] EWCA Civ 1456, [2002] C.P. Rep. 10 at [16]; *R C Residuals Ltd v Linton Fuel Oils Ltd* [2002] EWCA Civ 911 at [13], [20]–[21], [2002] 1 W.L.R. 2782 at [13], [20]–[21].

[18] *Hansom v E Rex Makin & Co* [2003] EWCA Civ 1801 at [20].

[19] See for instance the lengthy discussion in *Hansom v E Rex Makin & Co* [2003] EWCA Civ 1801; (2004) 148 S.J.L.B. 57.

from sanctions but in many situations also where a party applied for an extension of time.[20] This practice magnified the disruptive effect of the CPR 3.9 approach.

A further factor that contributed to satellite litigation was the lengthy process involved in of getting to the point where the court would finally lose patience and draw the appropriate conclusion. Prior to the CPR it was thought that an unless or peremptory order should not normally be made in the first instance.[21] It was thought that an unless order stipulating a striking out consequence should only be made where the party in default had already been responsible for persistent failure to comply with deadlines or other process requirements.[22] Whether such principle was ever supportable, it could not be justified under the CPR since the court has to actively manage cases. To have to wait until the period for performance has elapsed and then give the litigant a further period to comply on pain of a sanction, would effectively compel the court to allow litigants substantially more than reasonable time for compliance.[23] Nonetheless, the court was reluctant to refuse defaulting litigants a further opportunity to comply when the default concerned a bare order, with the result that bare orders were not taken as seriously as they should.

The process of striking out the case of a persistent defaulter could be lengthy and expensive. *Marine Rescue Technologies Ltd v Burchill*[24] illustrates this point. The action was commenced in September 2001. There was protracted delay and inactivity. In 2004 the court made a standard disclosure order. It produced no compliance. In 2006 the defendants applied to strike out the proceedings for delay (the claimant was found to be responsible for six and a half months of delay during that time). The judge dismissed the application because the delay had not amounted to abuse of process. In December 2006 the defendants applied for specific disclosure. The judge concluded that there had been inadequacies in the standard disclosure given, but decided to give the claimants a further opportunity to make good the deficiency. The court therefore reinstated the 2004 standard disclosure order and gave the claimants until January 19, 2007 to comply. The deadline passed without compliance. At a hearing on February 19, 2007 the judge gave the claimants a further 14 days to comply with the order made in December 2006. This time the order was an unless order directing that the claim would be struck out in the event of non-compliance. The claimants did not comply but instead applied in July 2007 for relief from the striking out sanction. The application was refused, but only after detailed and lengthy court consideration of the various CPR 3.9 factors. The court gave as one of its reasons for the refusal of the application that the claimants had still not complied. It took six years and at least four fruitless applications to obtain this result. Had the court taken seriously its own orders it would not have that long to bring the litigation to an end and it would not have cost as much.

[20] *Sayers v Clarke Walker (a firm)* [2002] EWCA Civ 645, [2002] 3 All E.R. 490, [2002] 1 W.L.R. 3095 at [21]. See also *Price v Price (t/a Poppyland Headware)* [2003] EWCA Civ 888, (June 26, 2003, unreported); *Short v Birmingham City Council* [2004] EWHC 2112, Q.B.; *Yeates v Aviva Insurance UK Ltd* [2012] EWCA Civ 634.

[21] An unless order, Auld L.J. stated, "is by its nature intended to mark the end of the line for a party who has failed to comply with it and any previous orders of the court": *Hytec Information Systems Ltd v Coventry City Council* [1997] 1 W.L.R. 1666 at 1676, CA.

[22] *Star News Shops Ltd v Stafford Refrigeration Ltd* [1998] 4 All E.R. 408 at 415, [1998] 1 W.L.R. 536 at 545, CA.

[23] *In Circuit Systems Ltd v Zuken-Redac (UK) Ltd* [2001] EWCA Civ 481, [2001] B.L.R. 253, it took 11 years before the tardy claim was finally struck out.

[24] *Marine Rescue Technologies Ltd v Burchill* [2007] EWHC 1976 (Ch).

However, the most serious obstacle to rigorous enforcement of case management directions was the lingering judicial attachment, by no means universal, to the justice on the merits approach and a commensurate tendency to disregard the resource and time dimensions of justice. Some judges believed that while "the interests of good administration of justice were important, the rights of claimants were more important".[25] Not infrequently, the court tolerated late compliance for the sake of doing justice on the merits, provided that the non-defaulting party had not suffered prejudice and that the defaulting party could make costs amends.[26] Although the Court of Appeal reiterated from time to time that timetables must be kept and court orders must be observed,[27] the binding effect of timetables and court orders kept being undermined by the notion that as long as no prejudice had been done all would be forgiven provided costs were paid. The court's reluctance to enforce case management directions, and in particular process deadlines, did much to undermine the overriding objective and thereby obstruct efficient case management.

Articulating the coded meaning of CPR 3.9

The revised CPR 3.9, as already noted, merely repeats the material parts of the overriding objective of CPR 1.1 and states the obvious point that rules and court orders should be enforced. The fact that the rule maker considered it necessary to reiterate these already long established principles is of itself significant. It is indicative of rule maker's belief that the overriding objective had not been given adequate effect in decisions to grant relief from sanctions. It is an indication that the rule maker shared Sir Rupert Jackson's concern that relief against sanctions was being granted too readily and that it encouraged a culture of delay and non-compliance which was injurious to the civil justice system and to litigants generally.[28]

It is therefore clear that the mischief that the revised rule seeks to redress is not a deficiency in the law as it stood but its flawed application by the court. Consequently, the coded message urges the court to take their case management responsibilities more seriously so as to give effect to the overriding objective and make litigants understand that the court will enforce rules, practice directions and court orders more rigorously.

Anticipating the revision of CPR 3.9, Lewison L.J. observed that:

> "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. It has also been said, not least by Jackson L.J., that the culture of toleration of delay and non-compliance with court orders must stop".[29]

[25] *Fay v Chief Constable of Bedfordshire Police* , The Times, February 13, 2003, Q.B. See also *IBS Technologies Ltd v APM Technologies SA*, Ch (April 7, 2003, unreported).

[26] *Roberts v Williams* [2005] EWCA Civ 1086, [2005] C.P. Rep. 44 at [27]; *Moy v Pettman Smith (a firm)* [2005] UKHL 7, [2005] 1 All E.R. 903 at [42], [61] *per* Lord Carswell, *obiter* (for comment on this decision see Zuckerman, "A Colossal Wreck—The BCCI—Three Rivers Litigation" (2006) 25 C.J.Q. 287, 307).

[27] See for example *Smith v Brough* [2005] EWCA Civ 261; *Thomson v O'Connor* [2005] EWCA Civ 1533.

[28] *Fred Perry (Holdings) Ltd v Brands Plaza Trading Ltd (t/a Brands Plaza)* [2012] EWCA Civ 224; [2012] 6 Costs L.R. 1007 at [49].

[29] *Mannion v Ginty* [2012] EWCA Civ 1667 at [18]. See also *Byrne v Poplar Housing and Regeneration Community Association Ltd* [2012] EWCA Civ 832.

However, as Lewison L.J. acknowledged, there had been no shortage of similar statements in the past. On numerous occasions since the introduction of the CPR, the court stressed the need for effective case management, for timely resolution of disputes, for proportionate use of court resources and for saving costs. Ten years ago Brooke L.J. emphasised that:

> "judges at every level must be astute to correct sloppy practice and to avoid at all costs slipping back to the bad old days when courts took a relaxed attitude to the need for compliance with rules and court orders, so that expensive and time-consuming satellite litigation was only too apt to flourish".[30]

Yet, notwithstanding such periodic exhortations, the court failed all too often to give effect to the overriding objective. Relief from sanctions was instead granted in a manner that was liable to disrupt effective case management and lead to a lax culture of compliance with timetables. The question therefore arises: How is the revised rule going to put an end to such flawed practices? In his judicial capacity Sir Rupert said that "litigants who substantially disregard court orders or the requirements of the CPR will receive significantly less indulgence than hitherto".[31] While it is good to know that less indulgence will be shown to litigant default in future, this hardly sets out a coherent policy or principle about enforcing compliance.

Experience demonstrates that exhortation is not enough. Instead, what is required is a coherent and consistent approach to relief from sanctions, and indeed to case management generally, including enforcing compliance with time limits. It is necessary to articulate a concrete approach to applications for relief in order to enable the court to withstand the temptation of granting relief from sanctions too easily.

In this regard, some help may be derived from the fact that the revised CPR 3.9 frees the court of the need to consider the old CPR 3.9 factors, most of which had little to do with case management or with the reasons for the default. The revised CPR 3.9 directs the court to focus first on the need to conduct litigation efficiently and at proportionate cost. This means that when considering whether to grant relief from sanctions the court no longer needs to consider whether the party in default has a history of defaults, whether the default was caused by the party or his lawyers, what effect the failure to comply had on each party, and what effect that granting relief would have on each party. Instead the court's starting point is to promote efficient case management and ensure that the litigation is conducted at proportionate cost.

The second matter to which the revised CPR 3.9 draws attention is the imperative of enforcing compliance with rules, practice directions, and court orders. Despite the fact that this merely states the obvious, it does provide an important indication as to how the jurisdiction must be exercised, especially when it comes to enforcing compliance with deadlines. Insisting on compliance with deadlines is crucial to efficient case management because where the court tolerates the missing of

[30] *Southern & District Finance Plc v Turner* [2003] EWCA Civ 1574 at [34].
[31] *Fred Perry (Holdings) Ltd v Brands Plaza Trading Ltd (t/a Brands Plaza)* [2012] EWCA Civ 224; [2012] 6 Costs L.R. 1007 at [50].

deadlines it effectively encourages the disruption of its own case management plans. So, when the revised rule draws attention to the need to enforce rules and court orders it thereby stresses the need to uphold case management plans put in place by the court rather than allow them to be subverted by litigant failure to comply in time.

The considerations of efficiency, proportionality of costs, and the need for rule and court orders enforcement are brought to the fore in order to enable the court to deal justly with an application for relief from sanction. Two matters in particular will influence the justness of a decision whether or not to grant relief. The first is whether the time allocated to the performance of the particular process was reasonable when the case management direction was given. The second matter is whether the applicant has faced unavoidable obstacles to compliance. If the deadline for compliance was unreasonably short, or if the applicant has been prevented by circumstances beyond his control from complying in time, it would generally be unjust to deny relief. These two matters deserve some elaboration.

As to the first matter, the reasonableness of court management direction, it is pertinent to note that time tables for the pre-trial process are normally devised on the basis of information provided by the parties and in consultation with them. If a party considers that the time allowed by a court order for compliance is insufficient, he should make representation to the court that made the order or appeal it. It would normally be too late to raise such objection at the hearing of an application for relief from sanctions.[32] It follows that on an application for relief from sanction the court will normally assume that the case management direction that was not complied with, and in particular the relevant deadline, was reasonable when made.

The next matter that the court will need to consider is whether there was a reasonable excuse for the failure to meet the deadline. Sometimes later developments in the course that the litigation takes may render the original time allocation insufficient. It may happen, for instance, that the disclosure process turned out to be more extensive than originally envisaged. At other times it may happen that the party has encountered unforeseen obstacles that prevented timely compliance, as where a party has been prevented by debilitating illness from complying with an asset disclosure order.

The principle derivable for the coded message of CPR 3.9 is, therefore, that where a litigant has had sufficient opportunity to comply, and failed to do so without reasonable excuse, he will not normally be given a further opportunity to comply, unless the default was insignificant. The seriousness of the default is a relevant consideration to the justice of refusing relief. For instance, the court will not be dealing justly with the application for relief from sanction where the applicant fully complied but narrowly missed the deadline. Relief from sanction should normally be granted, for instance, to an applicant who filed a disclosure list shortly after the time stipulated by the court order.

However, the purpose of CPR 3.9 would be defeated if the court considered any delay that merely added to the duration or to the cost of litigation as insignificant provided that did not deprive the court of the ability to hold a fair trial. Such an approach would surely turn the clock back to the position prior to the revision.

[32] *Marcan Shipping (London) Ltd v Kefalas* [2007] EWCA Civ 463, [2007] 3 All E.R. 365.

This is why only a truly minor default, and crucially only one which has been remedied by the time of the application for relief should be considered insignificant. In the absence of good reason for the default, relief should not be granted, as happened in the past, where an applicant applies for relief still not having complied with the unless order.

It is only by determining to uphold case management directions in the absence of a good reason for departing from them that the court would be able avoid sliding back to the situation where rules and court orders did not necessarily mean what they said. Only in this way would the court be able to withstand the temptation, which proved so beguiling in the past, to grant relief to a defaulting party because the other party suffered no prejudice or because any inconvenience caused by the default could be compensated in costs. An appeal court should no longer be justified in overturning a case management decision because the judge gave excessive weight to the interests of the administration of justice and to the desirability of promoting awareness amongst litigants of the importance of complying with time limits.[33] Nor would it be right for the court to brush aside the significance of failure to provide an explanation for the default as it did in the past.[34]

Conclusion

The revised CPR 3.9 makes sense only as a coded message advocating consistent enforcement of rules and court orders. Coded messages are unsuitable as legal norms because the law should be transparent to all and not just to the expert few. Furthermore, since the words of CPR 3.9 do not establish a clear standard there is a risk that different judges may interpret the rule differently. It must also be noted that CPR 3.9 does not confine the court's attention to efficiency, proportionality and the need to enforce rules and court orders. It requires the court to consider all the circumstances of the case so as to enable it to deal justly with the application. It would therefore be quite easy for a court, which does not like denying adjudication on the merits notwithstanding litigant failure to comply with rules and orders, to justify relief from sanctions on general and ill-defined grounds of justice. In the absence of a clear standard, sympathy for a litigant may, as in the past, sway a court to forgive default even where it disrupts the efficient determination of the case and even though it tends to undermine the binding force of case management directions. Were the court to remain free to go down this route, little by little the old tolerant culture would be re-established.

It is therefore important to give the coded exhortation embedded in CPR 3.9 meaningful articulation capable of providing guidance for the exercise of discretion. For the reasons set out in this article there is only one principle capable of delivering consistent decisions which are both just and likely to promote efficient management of litigation. It consists in holding that relief would not be granted where the default was more than negligible, if the defaulter had a reasonable opportunity to comply and has no reasonable excuse for the default.

[33] *R C Residuals Ltd (formerly Regent Chemicals Ltd) v Linton Fuel Oils Ltd* [2002] EWCA Civ 911, [2002] 1 W.L.R. 2782.

[34] *MacDonald v Thorn Plc* [1999] C.P.L.R. 660, CA; see also *Finnegan v Parkside Health Authority* [1998] 1 All E.R. 595, [1998] 1 W.L.R. 411.

Such a principle should then apply not just to applications for relief from sanctions under CPR 3.8 and CPR 3.9 but to any application to vary case management directions. The court should no more allow efficient case management to be undermined by ill-founded applications for extension of time for compliance with case management directions then it should grant relief from sanctions. All applications that impact on case management arrangements should be scrutinised with a view to promoting efficiency, economy of costs and a culture of compliance with rules and court orders. If this principle is accepted, then applications for extension of time would not be granted unless the applicant has shown that the time for compliance proved insufficient or that the applicant has faced some unforeseen obstacles.

The revision of CPR 3.9 is aimed at putting an end to the culture of easy tolerance of procedural defaults. But, it merits reiterating that this aim can only be achieved if the new rule is transformed into a coherent principle of practice. CPR 3.9 mentions three imperatives: dealing justly with applications for relief; promoting efficiency and proportionate costs; and enforcing compliance with rules, practice directions and orders. There is only one principle that can fairly accommodate all three imperatives: the court will not grant relief from sanctions in respect of significant defaults, unless (a) the directions that were not complied with were inadequate when made, or (b) the directions required revision due to later developments, or (c) the applicant encountered unavoidable obstacles. The same principle should be followed with respect to any application for a significant departure from case management directions. This is not a draconian principle. It represents the minimum necessary to ensure that rules, practice directions, and court orders are taken to mean what they say.