

Civil Procedure: Courts – Arbiters of Justice or Injustice?

The Case of Andrew Mitchell MP -v- News Group Newspapers Ltd [2013] EWCA Civ 1537

The Facts

On 21 September 2012, the Sun Newspaper ('the Defendant') reported that Mr Andrew Mitchell MP, the then Chief Whip of the Conservative Party ('the Claimant'), had raged against police officers at the entrance to Downing Street in a foul mouthed rant shouting '*you're f...ing plebs*'.

The incident, which received wide coverage, has since become known as '*plebgate*'. Furthermore, and for the reasons set out below, the case has concentrated the minds of many lawyers since the Court of Appeal handed down its Judgment on 27 November 2013.

On 7 March 2013, the Claimant issued defamation proceedings against the Defendant which it subsequently defended.

On 1 April 2013, new Civil Procedural Rules came into force and previously-existing Civil Procedural Rules were amended.

Rules 3.13 and 3.14 entitled '*Filing and exchanging budgets*' and '*Failure to file a budget*' respectively were introduced and read:

3.13 ... all parties ... must file and exchange budgets as required by the rules ... Each party must do so ... seven days before the first case management conference.

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

Rule 3.9 entitled '*Relief from Sanctions*' was amended to read:

On an application for relief from any sanction imposed for a failure to comply with any rule ..., 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 ...

Rule 1.1 entitled '*The Overriding Objective*' already defined how to deal with a case justly but the Rule was amended to include:

- (2) Dealing with a case justly *and at proportionate expense* includes, so far as reasonably practicable:
- f) *Enforcing compliance with rules ...*

On Wednesday 5 June 2013, the Court listed a case management hearing thirteen days later on Tuesday 18 June 2013 and the Court's order was delivered to the Claimant's solicitors on Thursday 6 June 2013.

The parties were required to file their respective cost budgets not less than seven days before the cost budget hearing i.e. by Tuesday 11 June 2013 at the latest. This provided the parties with four clear days to file their budgets of which two days were weekend days.

The Defendant filed its cost budget on Tuesday 11 June 2013 in the sum of £589,558 but the Claimant's solicitors did not file the Claimant's cost budget until the afternoon on Monday 17 June 2013 i.e. six days late. The Claimant's cost budget was in the sum of £506,425.

At the case management hearing on 18 June 2013, Master McCloud treated the Claimant's cost budget as one comprising court fees only because the Claimant's solicitors filed it late (and court fees would have been up to around £2,000). As the Claimant was not in a position at that time to produce evidence to support an application for relief from this sanction, the matter was adjourned to 25 June 2013.

At the hearing on 25 July 2013, Master McCloud was informed that the Claimant's law firm had experienced difficulties (encountered by other law firms from time-to-time and, in my opinion, any other business) that resulted from (a) two of its three trainee solicitors being absent on maternity leave (b) the senior associate responsible for dealing with cost budgeting recently leaving the firm and (c) the firm being engaged on other heavy litigation.

Master McCloud stated that, prior to changes that came into force on 1 April 2013, it would have been far more likely that she would have granted the Claimant relief from sanctions. That said, Master McCloud she went on to refuse relief.

The significance of the Master McCloud's decisions to the Claimant and his solicitors cannot be underestimated because they handed the Defendant cast-iron protection against costs – if, at trial, the Defendant succeeded, it would recover its costs from the Claimant as usual but if the Claimant succeeded, he would only recover court fees.

The Claimant appealed to the Court of Appeal against the decisions made by Master McCloud on 18 June and 25 July 2013.

The Court of Appeal's Decision

The Master of the Rolls gave the Court of Appeal's decision on 27 November 2013 to which Lord Justices Richards and Elias agreed.

At paragraph 1 of the Judgment, the Court identified that the question at the heart of the appeal was how strictly it should now enforce compliance with rules and whether a less forgiving approach was required.

With regard to Master McCloud's decision on 18 June 2013 to treat the Claimant's cost budget as one comprising court fees only because it was filed late, the Court dismissed the Claimant's submissions that:

1. The sanction set out in Rule 3.14 was aimed at litigants who failed to file and exchange budgets *at all* and not litigants who filed and exchanged their budgets *late*.
2. Master McCloud's decision was disproportionate taking into consideration (a) the late exchange of the budget did not cause the Defendant any prejudice and had no lasting effect on the conduct of the litigation (b) the late exchange of the budget was a minor breach of the rules and the Claimant had no history of default and (c) the Claimant was prejudiced by the sanction imposed.

With regard to Master McCloud's decision on 25 July 2013 to refuse relief to the Claimant, the Court endorsed paragraphs 25, 26 and 27 of the 18th implementation lecture delivered by the Master of the Rolls on 22 March 2013 which included the following statements:

26. ... the relationship between justice and procedure has changed. ... Doing justice in each set of proceedings is to ensure that proceedings are dealt with justly and at proportionate cost. Justice in the individual case is now only achievable through the proper application of [the Civil Procedure Rules] consistently with the overriding objective.
27. ... This requires an acknowledgment that the achievement of justice means something different now. ...

The Court concluded that the sanction will usually apply unless (a) the breach is trivial or (b) there is a good reason for it. The Court was not persuaded as to either and so it dismissed the Claimant's appeal despite recognising that it seems '*harsh*'.

The Message

The Court of Appeal's decision, regretfully, places the issue of compliance higher than the issue of ensuring the parties are on an equal footing and the most important issue of doing justice between the parties.

Further, the level of compliance is almost absolute – only a remarkably small margin is allowed where a breach is trivial (such as ‘... a failure of form rather than substance’) or where there is a good reason for it (such as ‘... a debilitating illness or ... an accident’ and, even then, ‘... that may constitute a good reason’ (emphasis added)).

Finally, the sanction for not meeting the requisite level of compliance results in the affected party being deprived of justice. Unless Mr Mitchell MP is prepared to pay over £500,000 in the knowledge that he will not be able to recover that sum even if his claim against News Group Newspapers Ltd is successful, then he has no option but to discontinue his claim resulting in the newspaper company escaping justice.

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