Stricter approach by courts to non-compliance with rules and orders in post-Jackson litigation

Co-operative Group Ltd v Birse Developments Ltd [2013] EWHC 3145 (TCC)
Murray v Neil Dowlman Architecture Ltd [2013] EWHC 872 (TCC)

Two recent TCC decisions on case management issues involving members of 4 Pump Court have underlined the shift in culture following the Jackson Reforms. The impact of these reforms continues to be felt, with a greater emphasis on enforcing compliance with rules and orders, and a much stricter approach to procedural defaults.

Co-operative Group Ltd v Birse Developments Ltd. & Ors concerned an action brought by the Claimant (Co-Op) against the contractor Defendant (Birse) in respect of alleged defects arising out of the construction of a warehouse. Birse had, in turn, issued proceedings against the Third Party (Stuarts Industrial Flooring Ltd), a subcontractor, and the Fourth Party (Jubb & Partners), a firm of consulting engineers. This was the hearing of Co-Op's application to amend its Particulars of Claim. Following objections from the other parties, Akenhead J refused permission for it to do so. **Benjamin Pilling** represented the Fourth Party.

The background to the application was that there had been an earlier attempt by Co-Op to obtain permission to amend its pleadings. It had originally claimed for the costs of undertaking 'patch' repairs to the warehouse floor, but by this earlier amendment had sought to claim very substantial damages arising out of its decision to replace the flooring, claiming the material that had been used was too thin. On that earlier application, Akenhead J found that Co-Op was in principle entitled to amend and was not barred from doing so by an earlier Court of Appeal decision in the litigation refusing another amendment by Co-Op on limitation grounds. However, before allowing this amendment, Akenhead J imposed as a condition that Co-Op should "*spell out in pleading form (supported by the key contemporaneous documents) how, why, when, in what terms, on what basis and by whom the decision was taken to replace the floor slabs*". Co-Op failed to provide information sufficient to meet the requirements of this condition, and permission to amend was refused.

In this present application, Co-Op again sought permission to amend, this time providing the information the Court initially requested but which it had previously failed to supply. However, Akenhead J considered that allowing the amendment would be contrary to the newly revised Overriding Objective. He said that the "*change of emphasis is deliberate and is clear*": the Court was now required to ensure that there was compliance with rules and orders. There was "*nothing inappropriate in the Court taking a robust approach, provided that it is fair and within the ambit of the overriding objective*". The reforms were "*not mere verbiage*".

In light of this, Akenhead J refused permission to amend. Of particular importance was the fact that Co-Op "*could and should*" have pleaded its true case much earlier in the course of the proceedings. There was also a "*real risk*" that the trial date would be jeopardised if the amendment was allowed. Another factor, albeit not one which was determinative, was that Co-Op had failed to comply with the conditions the Court had previously imposed for allowing the amendment. There was "*no good reason*" for that failure. It was said that "*the proper administration of justice should generally require, in the absence of good excuse, parties broadly to get right their applications to amend.*"

The message, therefore, is that parties should apply to amend early. The Court will not be readily persuaded to allow a party another chance to amend where it had previously been given the opportunity to do so, but failed to comply with a condition imposed by the Court.

The importance of complying with rules and orders was also emphasised in ***Murray & Anor v Neil Dowlman Architecture Ltd***. Coulson J indicated that a Court would generally be unwilling to allow a party to avoid the consequences of filing an inaccurate Costs Budget, albeit that on the facts a different conclusion was reached. **Luke Wygas** appeared for the Defendant.

The background was that the Claimants and their solicitors had entered into a CFA. ATE insurance was also taken out. Proceedings were started in the TCC, which at that time was one of the Courts piloting the Costs Budgeting scheme. The Claimants exchanged their Costs Budget with the Defendant, but failed to use the correct form. Nonetheless, Stuart-Smith J approved the Claimants' Budget at the first CMC. Soon after the CMC the Defendant drew to the Claimants' attention that the approved Costs Budget did not allow recovery of the CFA success fee or ATE premium as the relevant part of the form (a tick box) had not been completed. It said that it would argue that the Claimants were therefore not entitled to recover these.

Prompted by this, the Claimants issued an application for relief from sanctions under CPR r3.9, with the aim of clarifying that the approved Budget was exclusive of the success fee and ATE premium. The Claimants relied on the fact that it was simply a mistake that the relevant tick box had not been completed. Coulson J considered that this application was not one to which CPR r3.9 "*obviously applies*" and it was instead akin to seeking permission to revise the approved budget. He referred to earlier statements in case law discussing the need for (and meaning of) a "*good reason*" for allowing a departure from an approved Costs Budget. Coulson J concluded that this test was to be a "*rigorous approach…mirrored*" by other CPR amendments, which "*place much more emphasis on the importance of complying with the orders of the court*". In particular, "*the courts will generally be less ready than before to grant relief from sanctions for procedural defaults*".

Coulson J concluded that "*in an ordinary case, it will be extremely difficult to persuade a court that inadequacies or mistakes in the preparation of a costs budget, which is then approved by the court, should be subsequently revised or rectified*", because "*any other approach could make a nonsense of the whole costs management regime*." On the facts, however, there were three factors which made this a "*very special case*". The first was that the Defendant was not misled or prejudiced by the omission of the success fee or ATE premiums from the Budget. The second was that the Costs Budget form which the Claimants should have filled in made provision for the exclusion of success fees and ATE premiums, which was effected by ticking a box. The Claimants' mistake could therefore effectively be seen as "*merely*" failing to tick the correct box. Third, had the budgeting exercise been carried out after 1 April 2013, the newly revised form would have made clear that the default position was that the Budget was exclusive of success fees and premiums. Coulson J held that it was not appropriate to "*penalise*" the Claimants in those "*unusual*" circumstances, particularly since the form it should have filed had been superseded. The Court accordingly revised the Budget.

Whilst the outcome of this case was unusual, Coulson J made clear that the emphasis on an unwillingness to revise the Budget was not. He said that, whilst this case concerned the pilot Costs Budgeting Scheme, he was providing guidance on how courts would approach amendments to costs budgets under the current scheme. The point to note is that it will be rare for a Court to allow non-compliance with the Budgeting rules. Parties should therefore ensure that they get budgets right first time. It is highly unlikely they will be given a second chance.

The emphasis on the enforcement of rules and orders in these two cases foreshadowed the approach taken by the Court of Appeal in ***Mitchell v News Group Newspapers Ltd*** [2013] EWCA Civ 1537. There, the Court upheld a Master's refusal to grant a party relief from sanctions where it had failed to file a Costs Budget on time, which led to it being treated as if it had filed a Budget only in respect of Court Fees. The Court emphasised that there was to be a "*new more robust approach*". Relief should

now be granted "*more sparingly*" and "*the courts will adopt a firm line on enforcement*". The conclusion to be drawn from these cases is that, post-Jackson, non-trivial breaches of rules and orders will rarely go without consequence.

Costs Budgets and proportionality following the Jackson Reforms

Finesse Group Ltd v Bryson Products & Bostik Ltd [2013] EWHC 3273 (TCC)
Stella Willis v MRJ Rundell & Associates Ltd & Anr [2013] EWHC 2923 (TCC)

Two further case management decisions in the TCC involving members of 4 Pump Court demonstrate the robust approach that the Court is now taking to the assessment of parties' costs budgets following the Jackson Reforms. CPR rule 1.1 was amended to require the court to deal with cases not only justly but also "*at proportionate cost*". By placing proportionality at the heart of the Court's duty to manage cases actively, the Jackson Reforms have introduced a more interventionist culture in costs management.

In ***Finesse Group Ltd v Bryson Products & Bostik Ltd***, Akenhead J considered various applications which were made at the first CMC. **Allen Dyer** represented the Claimant (Finesse); **Michael Taylor** represented the First Defendant (Bryson).

This was a multi-party claim relating to the supply of allegedly defective adhesive (used for building exhibition stands) by Bryson to Finesse, said ultimately to have been manufactured and supplied by Bostik. The claim was for £170,000. It appeared that a number of similar claims had been brought against Bostik or other sub-suppliers in other courts, and the present case was therefore viewed as a sort of test case, although there was little information before the court about those other claims.

Akenhead J observed that, taken together, the parties' costs budgets totalled over £600,000. He commented that this appeared to be "*extremely disproportionate*". He therefore declined to approve any of the costs budgets, and invited the parties' solicitors to "*give very serious consideration*" to reducing the costs substantially, and to "*seek sensible and imaginative solutions, such as the sharing of certain types of expert, to achieve this*". He warned that, if they failed to do so, the court may fix a maximum proportionate budget for each party at a level far lower than the current costs budgets, even though this might make it "*commercially...unrealistic*" for the parties to fight the case.

Coulson J took a similarly robust approach in a case management decision in ***Stella Willis v MRJ Rundell & Associates Ltd & Anr***, where **Luke Wygas** represented the Defendant.

That case concerned a claim by a private individual against a construction professional for the cost of rectifying defects in building works and overpayment of monies. The total value of the claim as originally pleaded was £1.6m, reduced to £1.1m on amendment. The Judge described this as "*relatively modest*" by the standards of most TCC litigation.

The background was that, at the first CMC in the case, the Judge expressed concern at the level of the parties' costs budgets, but there was insufficient time to explore that further. At the PTR (at which the date originally set for the trial was put back), and due to those original concerns, the Judge ordered that there be a hearing devoted solely to costs management.

At the costs management hearing, the Judge analysed the parties' costs budgets in some detail. The claimant's costs budget was nearly £900,000. The defendant's was just over £700,000. The Judge concluded that a total cost of £1.6m on a claim worth, at most, £1.1m was "*disproportionate and unreasonable*". The Judge accepted that professional negligence claims can involve costs that other commercial claims may not, such as increased expert evidence. He also recognised that, when

assessing proportionality in such cases, allowance must be given to the potentially serious damage to the professional's reputation that may be caused. However, he nevertheless declined to approve either party's costs budget, and warned that it was likely that the successful party at trial would recover "*only some of its costs*".

It is of particular note that Coulson J held that "*one test of proportionality is whether the trial is likely to be an end in itself, or merely a lesser part of the process which the parties will use in order to put themselves in the strongest position to argue that, subsequently, the other side should pay all or most of their costs. When the costs on each side are much higher than the amount claimed/recovered, the latter is almost inevitable.*" It is not uncommonly the case in professional negligence claims in the TCC that the costs of the action even for one party may exceed the value of the claim due to the technical nature of the issues and the high costs of multiple experts. Mr Justice Coulson's decision casts doubt over whether the successful party in such circumstances would be able to recover costs greater than the value of the award or of the claim.

These two decisions confirm that the TCC judges are taking a robust and pro-active approach to costs management following the changes to the CPR introduced by the Jackson Reforms. In particular, ***Willis v Rundell*** sounds a warning shot to those litigants for whom the case has essentially become a dispute about costs that their victory may prove to be pyrrhic.

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