



MASTER OF
THE ROLLS

LORD DYSON MR

THE APPLICATION OF THE AMENDMENTS TO THE CIVIL PROCEDURE RULES
18TH LECTURE IN THE IMPLEMENTATION PROGRAMME

DISTRICT JUDGES' ANNUAL SEMINAR

JUDICIAL COLLEGE

22 MARCH 2013

Introduction¹

1. The Jackson reforms are just over a week away. They come into force immediately after the Easter weekend. The official start date is, as I am sure you all know, 1 April. The reforms are very important. I know that some of you, maybe most of you, find the prospect of these big changes rather daunting. That is entirely understandable. The DJs are the engine room of our civil justice system. Without you, the system could not function. I am confident that you will adapt to the new regime just as you did to the Woolf reforms. I am sure that within a few months, you will feel quote at home in the new post-Jackson world. I have been asked to talk this morning about the philosophy that underpins the reforms. I am going to focus on the revisions to the overriding objective and to Rule 3.9.

The Philosophy underpinning the New Rules

2. It should come as no surprise that the philosophy underpinning the Jackson reforms is the same philosophy that underpinned the Woolf reforms. My predecessor but one as Master of the Rolls, Lord Clarke, made sure of that in setting Sir Rupert Jackson's terms of reference. He did so because those terms of reference were entirely consistent with, and required Sir Rupert to make recommendations that would further, Lord Woolf's new approach to litigation. As Lord Clarke explained in 2009 the task he set Sir Rupert, was to conduct

*'a review that is entirely consistent with the approach Woolf advocated in his two reports. . . . [to]. . . look for answers to the problems of cost consistent with the new approach to litigation Woolf's reforms introduced. That is to say, whatever conclusions [the review] reaches will be ones that are consistent with the overriding objective and the commitment to proportionality to which it gives expression.'*²

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

² A. Clarke, *The Woolf Reforms: A Singular Event or an Ongoing Process*, in *The Woolf Reforms: What's the Verdict?* in D. Dwyer (ed), *The Civil Procedure Rules Ten Years On* (Oxford) (2009) at 49.

3. Sir Rupert's task then was to consider how the Civil Procedure Rules had operated since their introduction in 1999 and to do so in order to make recommendations that would better enable litigation to be conducted consistently with proportionality. In other words, to make recommendations that would ensure that the justice system was better able to implement the aim of the Woolf reform. It was a review that was not intended to question *'the shift in judicial philosophy'* in civil litigation effected by the overriding objective, which was acknowledged and endorsed by the House of Lords in *Three Rivers*³. It was to identify why and how it had not properly taken effect and how that failure could be remedied.
4. The Review ranged wider than the rules of court. It also required a consideration of Conditional Fee Agreements, how they had operated in practice, and the effect they had had post-2000 on the justice system. It came as no surprise to many, not least those who had criticised the introduction of reformed CFAs in 2000 as a consequence of the Access to Justice Act 1999, that they caused an increase in the cost of litigation. It was a real irony that in doing so, they fatally undermined the Woolf reforms' aim of reducing cost just as the CPR was being introduced. As Sir Rupert concluded they were the major cause of disproportionality in costs⁴.
5. Having considered the recommendations of the Jackson Final Report, Parliament accepted that CFAs need to be reformed. The funding reforms – that is to say, revised CFAs and the introduction of Damages-based Agreements or DBAs – will do two things. First, and most importantly, increase access to justice as the CFA reforms in 2000 were intended to do; and secondly, unlike the CFA reforms in 2000, do so without creating disproportionate costs. It is important that this aspect of the reforms succeeds. It is for the simple reason that they are a means to secure access to the courts for individuals of limited means. It is also important that they succeed because funding arrangements that generate proportionate, rather than disproportionate, costs are consistent with the philosophy underpinning the Woolf and Jackson reforms.
6. The CFA and DBA aspects of the Jackson reforms are not matters for today. But as with the reforms to the CPR, the reforms to CFAs and the introduction of DBAs are intended to ensure that litigation is conducted consistently with the overriding objective and its articulation of the commitment to proportionality. It is to those I turn.

The overriding objective

7. The starting point is the overriding objective. As you know its wording has been revised. From 1 April we have a Mark II overriding objective. CPR 1.1 will read as follows:

*'1.1(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly **and at proportionate cost.***

*(2) Dealing with a case justly **and at proportionate cost** includes, so far as is practicable*

...

³ *Three Rivers District Council and Others v Governor and Company of the Bank of England (No 3)(Three Rivers)* [2003] 2 AC 1 at [106].

⁴ 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.

(f) enforcing compliance with rules, practice directions and orders.’ (Post-April 2013 additions in bold.)

The rule has therefore been revised to emphasise (i) the centrality of dealing with cases at proportionate cost and (ii) the fact that the overriding objective requires the court to place a greater weight than it might have done previously on enforcing compliance.

8. Why have these changes been made? As the Jackson reforms are intended to build on, and be consistent with, the Woolf reforms and the commitment to proportionality they introduced via the overriding objective, it might be thought that such changes are superfluous or that they mark a departure from Woolf. If the former they might at best be redundant, and at worst a source of confusion and satellite litigation. If the latter, they might be said to go beyond the Jackson review’s remit. I want to stress to you that they are neither superfluous nor do they go beyond the Jackson remit, as it was described by Lord Clarke and to which I referred earlier.
9. The argument that the amendments are superfluous might be put in this way. The overriding objective, as originally drafted, was intended to ensure that the court, when applying the specific provisions of the CPR and when actively managing cases, generally did so in order to ensure that cost and delay was reduced. More specifically, it was intended to ensure that litigation costs would become proportionate. The entire thrust of the Woolf reforms, as is readily evident given the frequent references to both disproportionate costs and proportionate costs in, for instance, the Final Woolf Report, make this abundantly clear. Equally, it is evident from the fact that Lord Woolf made the very point that the concept of dealing with cases justly expressed, amongst other things, a commitment to proportionality. Given this fact, it could be said, that adding an express reference to proportionate cost is superfluous; superfluous because dealing with cases justly already requires the court to ensure that cases are managed so as to ensure no more than proportionate costs are incurred. In other words, a commitment to proportionate costs is already implicit in the overriding objective.
10. A similar argument could be made regarding the addition of the reference in CPR 1.1(2)(f), to enforcing compliance with rules, PDs and orders. It can be said that proper enforcement of rules, such as procedural time limits, or of court orders, such as unless orders, is inherent in the idea of dealing with cases justly. If an individual claim is to be dealt with justly, it requires such compliance and, if necessary, enforcement. As Lord Phillips MR put it in the *Flaxman-Binns* case, sometimes the court is faced with the question ‘. . . whether the overriding objective of dealing with this case justly calls for us to bring these proceedings to an end . . .’⁵ In order to ensure that cases are dealt with justly requires enforcement of rules and court orders. Enforcement is, like the commitment to proportionate cost, already implicit in the overriding objective.
11. Why then make explicit what is already implicit? The CPR whether they refer to the procedural case tracks, court control of expert evidence, time limits within which to serve claims or directions that specify when evidence should be exchanged and so on, serve to provide a just framework. That framework is intended to ensure that all litigants have fair access to the courts and a fair opportunity to proceed to judgment.

⁵ *Flaxman-Binns v Lincolnshire County Council* (Practice Note) [2004] 1 WLR 2232 at [41].

12. Obviously that framework must be adapted to the circumstances of the immediate case. Flexibility and discretion within that framework are always necessary. In this respect, the use of the phrase “so far as practicable” is of some significance. Such flexibility must however be applied so as to achieve two things. These are (i) to ensure that parties do not expend more than proportionate costs in conducting their own litigation and (ii) to ensure that parties do not expend more of the court’s time and resources than is proportionate given the need to ensure that all other court-users can have fair access to the courts within a reasonable time.
13. This may mean that in some cases parties will have to be denied the opportunity to adduce certain evidence if they have failed to exchange in accordance with case management directions. Doing so may be justified in order to ensure that they do not expend more than proportionate costs on their own litigation. Equally, this might be justified in order to ensure that all other court-users have fair access. In others it may mean that a claim that could otherwise continue to trial might have to be come to a premature end due, for instance, to a failure to comply with an ‘unless order’.
14. This may all seem rather harsh. It may certainly appear to amount to a denial of justice to the parties. The court’s refusal to grant relief from a sanction, for instance, may appear to be a denial of the need to ensure that justice is done as between the parties. Faced with an apparent conflict between the need to do justice to the parties, to secure a decision on the merits, and the need to secure proportionality it is easy to see why the former might – and often has – prevailed. The courts exist to do justice: where justice and proportionality come into conflict, the former should be given greater weight. Intuitively this seems obviously correct. After all, is a judge not required by his or her oath “*to do right by all manner of people, after the law and usages of this realm, without fear or favour, affection or ill will*”?
15. Here lies the answer to the superfluity question as well as the remit question. Dealing with a case justly does not simply mean ensuring that a decision is reached on the merits. It is a mistake to assume that it does. Equally, it is a mistaken assumption, which some have made, that the overriding objective of dealing with cases justly does not require the court to manage cases so that no more than proportionate costs are expended. It requires the court to do precisely that; and so far as practicable to achieve the effective and consistent enforcement of compliance with rules, PDs and court orders.
16. The Court of Appeal, has emphasised on a number of occasions that justice goes beyond simply looking at the immediate parties to the proceedings. Lord Woolf made this very point in the pre-CPR case of *Beachley Property Limited v Edgar*; pre-CPR but looking forward to the approach that would be applied post-1999. In refusing the allow a party to adduce evidence that had not been served in time, he explained how,

*‘It is no use the party coming forward and saying, “The evidence will help our case. . . You have to consider the position not only from the plaintiff’s point of view, but also from the point of view of the defendant, and with a view to doing justice between other litigants as well.’*⁶

⁶ (CA 21 June 1996) at (6).

The court has to consider three things: the claimant's perspective, the defendant's perspective and, importantly, the perspective of other court-users. It is not enough to consider the need to secure justice as between the parties. The same point was made by Lord Justice Ward in *UCB Corporate Services Ltd (formerly UCB Bank Plc) v Halifax (SW) Ltd*, when he explained that, when considering a party's failure to prosecute claims timeously, the court had not just to take account of the effect of any decision on the parties, and thus their claim to obtain justice. The court also had to

*'take into account the effect of what has happened on the administration of justice generally (which) involves taking into account the effect of the courts ability to hear other cases if such defaults are allowed to occur.'*⁷

Lord Justice Ward emphasised this point again in *Arrow Nominees Inc & Another v Blackledge & Others*. In that decision he made the point that, when considering whether a claim should be struck out for rule non-compliance, the court had to go beyond the question of securing a decision on the merits for the parties. It had to consider the need to ensure that sufficient court resources were allotted not just to the immediate parties but also to other court users⁸. As he went on to say,

*"The trend of the authorities before C.P.R. was increasingly to support the notion that as the court became more pro-active, so greater importance was given to the need to emphasise and protect the court's interest in administering justice fairly not only as between the parties before the court but to all other others using the court service. Access to the courts was open to all but the time of the courts was a precious resource which needed to be managed rigorously in order to be fair to all. The C.P.R. is the apotheosis of those ideals."*⁹

17. Doing the proper administration of justice goes beyond the immediate parties to litigation. It requires the court to consider the needs of all litigants, all court-users. This idea finds expression in the overriding objective. Unfortunately the courts have not always acted consistently with this idea. Perhaps this is not surprising, as the court does not address case management questions, questions of relief from sanctions and so on in the abstract. It does so in the context of a particular case.
18. In such circumstances it is easy to see why, not least given the long heritage we have of striving to secure justice on the merits in each case and the intuitive understanding that doing justice is to reach a decision on the merits, mistaken assumptions took hold. This was compounded by the failure to make explicit in the overriding objective that it includes a duty to manage cases so that no more than proportionate costs are incurred and so as to enforce compliance. By making these features explicit the Rule Committee has clarified the meaning of the overriding objective. And they have done so exactly as Sir Rupert was required: the reform to the rules will improve practice and procedure consistently with Woolf's commitment to proportionality. They are as such neither superfluous nor beyond the Jackson remit. They are in fact necessary to underline the requirement that both courts when actively managing cases and litigants in assisting the court to do so, are required to do so consistently with the need to further the proper

⁷ [1999] C.P.L.R. 691.

⁸ [2000] CP Rep 59; [2001] BCC 591 at [73].

⁹ [2000] CP Rep 59; [2001] BCC 591 at [69].

administration of justice, where that goes beyond the interests of the immediate parties. We have a managed system. That system must be managed for the needs of all litigants. The new emphasis in the overriding objective on proportionate cost and compliance is intended to make sure the wider public interest remains at the forefront of all our minds.

CPR 3.9

19. This takes me to the revision to rule 3.9. The famous – or perhaps I should say infamous – checklist has gone. The rule will now read as follows:

‘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.’*

The new rule thus explicitly refers back to the overriding objective, stressing the need in dealing with a case justly to take account of proportionate cost and the need to enforce rule compliance. As such it expressly refers back to the need to ensure that questions concerning relief from sanctions are not simply considered by reference to the immediate litigation, but to the wider public interest. Why has this change to been made to rule 3.9?

20. First of all the rule change implements an often-forgotten aspect of the Woolf reforms, the need to simplify the rules. The previous checklist approach was less than ideal. It was cumbersome, and often difficult to apply in practice. I have no doubt that it often became an exercise in ticking-off the various elements. That was almost inevitable. As the Court of Appeal’s recent decision in *Ryder Plc v Dominic James Beever* [2012] EWCA Civ 1737 shows, it was not a means of securing clarity in decision-making, which in itself is a recipe for satellite litigation. The removal of the check-list should improve things.

21. Secondly, and more importantly it is intended to underline and reinforce the importance of conducting and managing litigation so as to ensure that no more than proportionate costs are incurred as between the parties and that no one piece of litigation is permitted to utilise more of the court’s resources than is proportionate, taking account of the needs of other litigants. It thus requires the court to focus much more clearly and consistently than it has in the past on these essential aspects of case management in the light of the overriding objective. This point has of course rightly been emphasised by Lord Justice Jackson (who else?) in the recent Court of Appeal in *Fred Perry (Holdings) Ltd v Brands Plaza Trading Ltd* [2012] EWCA 224¹⁰ where he said this,

‘Non-compliance with the Civil Procedure Rules and orders of the court on the scale that has occurred in this case cannot possibly be tolerated. Any further grant of indulgence to the defendants in this case would be a denial of justice to the claimants and a denial of justice to other litigants whose cases await resolution by the court.’

¹⁰ [2012] EWCA Civ 224 at [1].

22. As I have said, one of the problems that has undermined the efficacy of case management has been too great a desire to err on the side of individual justice without any real consideration of the effect that has on the justice system's ability to secure effective access to justice for all court-users. The Court of Appeal has been as guilty of this error as any other court. That the Court of Appeal could in 2011 in *Swain-Mason & Others v Mills & Reeve LLP* [2011] 1 WLR 2735 comment that early, robust, decisions by the Court of Appeal that emphasised the need to take account of the needs of all court-users and not just those of the immediate parties had been lost from view makes the point. The revised rule 3.9, by referring back to the overriding objective, is intended to ensure that such issues cannot become lost again post-April.
23. Thirdly, consistently with this, the revised rule is intended to put a stop to what Lord Justice Jackson referred to recently in *Mannion v Ginty* as the '*culture of toleration of delay and non-compliance with court orders*. . .'¹¹ That the Court of Appeal could call for such a culture to be brought to an end, as Jackson LJ did in that case, demonstrates just how far we have moved away from the approach that the CPR and the overriding objective were intended to establish in 1999. In this regard it is another irony that five years earlier than the *Mannion* decision Lord Justice Brooke felt the need to remind the courts and practitioners that, as he put it,

*'The Civil Procedure Rules, with their tough rules in relation to requiring compliance with court orders, were introduced to extinguish the lax practices which existed before the rules were introduced . . .'*¹²

Tough rules but lax application; tough rules but a culture of toleration; and lax application and toleration are all fatal to the new philosophy. By emphasising the need to take account of the new explicit elements of the overriding objective, rule 3.9 is intended to eliminate lax application and any culture of toleration.

24. I should deal with one specific criticism of a tough approach to relief from sanctions at this point. It has been said by some that a tough approach, one which hardens its heart and refuses to allow a party to adduce probative evidence that has not been exchanged at the required time, or which strikes out a claim or defence for non-compliance with an unless order, is one which is inimical to justice. It has been said that such an approach improperly deifies compliance; and that it transforms rules into tripwires for the unwary and the incompetent, as Dame Janet Smith recently put it in the *Ryder* case¹³, or equally into procedural weapons for the unscrupulous. It has also been said such an approach is fundamentally at odds with the position outlined in Lord Esher MR's famous dictum in *Coles v Ravenshear* (1907)¹⁴. Lord Esher MR said this,

*' . . . a Court cannot conduct its business without a code of procedure, I think that the relation of rules of practice to the work of justice is intended to be that of handmaid rather than mistress, and the Court ought not to be so far bound and tied by rules, which are after all only intended as general rules of procedure, as to be compelled to do what will cause injustice in the particular case.'*¹⁵

¹¹ [2012] EWCA Civ 1667 at[18].

¹² *Thomson v O'Connor* [2005] EWCA Civ 1533 at [17].

¹³ [2012] EWCA Civ 1737 at [62].

¹⁴ [1907] 1 KB 1.

¹⁵ [1907] 1 KB 1 at (4).

These words must be viewed with great caution in the 21st century. They are based on an idea that was rejected by the Woolf reforms – that justice is not subject wider policy considerations. If the justice system, and the public interest in the proper administration of justice, was solely concerned with one set of proceedings that approach might be justifiable. It is not. It is a system that has to command public confidence through securing for the majority, many of whom have limited resources, access to a system that itself must operate with limited resources. Doing justice in the individual case can only be achieved through a fair procedure operated in a way that is fair to all.

25. In order to achieve this, the Woolf reforms and now the Jackson reforms were and are not intended to render the overriding objective, or rule 3.9, subject to an overarching consideration of securing justice in the individual case. If that had been the intention, a tough application to compliance would have been difficult to justify and even more problematic to apply in practice. The fact that since 1999 the tough rules to which Lord Justice Brooke referred have not been applied with sufficient rigour is testament to a failure to understand that that was not the intention.
26. The revisions to the overriding objective and to rule 3.9, and particularly the fact that rule 3.9 now expressly refer back to the revised overriding objective, are intended to make clear that the relationship between justice and procedure has changed. It has changed not by transforming rules and rule compliance into trip wires. Nor has it changed it by turning the rules and rule compliance into the mistress rather than the handmaid of justice. If that were the case then we would have, quite impermissibly, rendered compliance an end in itself and one superior to doing justice in any case. It has changed because doing justice is not something distinct from, and superior to, the overriding objective. 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 CPR consistently with the overriding objective.
27. The tougher, more robust approach to rule-compliance and relief from sanctions is intended to ensure that justice can be done in the majority of cases. This requires an acknowledgement that the achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations. Those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure their own costs are kept within proportionate bounds. But more importantly they serve the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the court enables them to do so.
28. This may mean that in some cases, or some classes of case (such as those allocated to the small claims or fast track), that the court must reach a decision at trial on less evidence than it might have done in the past. To some extent, this has already been happening as a result of the introduction of case tracks. It also means that, where we exclude evidence because of a failure to comply with rules, PDs or orders, we must determine the cases on less evidence than we would have done in the pre-Woolf and pre-Jackson days.
29. That we have to do so stems from our commitment to proportionality, and the need to secure a fair distribution of court resources amongst all those who need to come to the courts in order to vindicate their rights. We have limited resources. Demand for those resources outstrips that limit. We have to cut our cloth accordingly. The wider public

interest in the proper administration of justice requires us to do so. For that reason we have no choice but to take a more robust approach to rule compliance and relief from sanctions than previously. Our approach in the case immediately in front of us has consequences wider than for the parties themselves.

Conclusion

30. Where does this leave us as far as the underlying philosophy of the Jackson reforms is concerned?

31. It seems to me that we can draw a number of conclusions:

- (i) first, that the revisions to both the overriding objective and rule 3.9 are designed to ensure that the courts, at all levels, take a more robust approach to ensuring that proceedings are managed so that no more than proportionate costs are incurred by the parties to those proceedings. They do so because proceedings must be managed in the public interest to ensure that individual parties do not expend more than is proportionate on their own claims; but as importantly, that they do not, through being permitted to expend more than a proportionate amount of the court's time and resources, impinge on the rights of other litigants to have fair access to the courts;
- (ii) secondly, that those revisions require a more robust approach to the enforcement of compliance and a more restrictive approach to relief from sanctions. This is not based on a dogmatic insistence on compliance for its own sake. It is done because, again I stress, the wider public interest demands it. The effective administration of justice requires it; and
- (iii) thirdly, the approach required by the overriding objective will not simply apply to questions of rule-compliance and relief from sanctions. It will apply to case management, costs management and costs budgeting. Those commentators who perceive, for instance, the decision in *Henry v News Group Newspapers Ltd* [2013] EWCA Civ 19 as some form of signal from the Court of Appeal that the new rules will not be applied robustly are wrong. *Henry* was decided under the Mark I overriding objective. As Lord Justice Moore-Bick made clear in *Henry* future decisions on costs budgeting etc will take place under the new rules that come into force on 1 April. As he put it

'(Those rules) impose greater responsibility on the court for the management of the costs of proceedings and greater responsibility on the parties for keeping budgets under review as the proceedings progress.'^{16,}

They do and so does the Mark II overriding objective.

32. Thank you.

Please note that speeches published on this website reflect the individual judicial office-holder's personal views, unless otherwise stated. If you have any queries please contact the Judicial Office Communications Team.

¹⁶ [2013] EWCA Civ 19 at [28].