

**PROCEDURAL NON-COMPLIANCE AND RELIEF FROM SANCTIONS AFTER THE JACKSON REFORMS:
STRIKING THE BALANCE**

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**Access to Justice, Jackson Reforms, Procedural Non-compliance; Relief from Sanctions;
Substantive Justice**

ABSTRACT

This article critically analyses the new approach towards non-compliance with procedural requirements and relief from sanctions following the Jackson Reforms on civil litigation costs. It argues that the new approach falls short of providing clear guidance as to how it is to be applied in practice. It argues that these shortcomings have principally been caused by the senior judiciary's failure to clearly and consistently articulate an approach which obliges the courts to conduct an appropriate balancing exercise between the need to preserve a party's obligation to strictly comply with its procedural obligations on the one hand and the need to ensure that due consideration is given to the issue of substantive justice on the other. It also argues that the new approach fails to have regard to the potential adverse impact which is likely to result in the administration of justice in cases involving litigants-in-person.

INTRODUCTION

Prior to Sir Rupert Jackson's reforms on civil litigation costs,¹ it had become increasingly evident that, despite the many benefits which were introduced by Lord Woolf's major procedural reforms over fourteen years earlier, they had failed to tackle the thorny issue of costs and, in particular, how to prevent the escalation of disproportionate costs. Lord Clarke MR underlined this failure when he noted: 'Cost is without doubt the Woolf reform's central failing. Litigation costs are still disproportionate. They are still excessive in a significant

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¹ Lord Justice Jackson, Review of Civil Litigation Costs - Preliminary Report (London: TSO, 2009) ("Preliminary Report") and Lord Justice Jackson, Review of Civil Litigation Costs - Final Report (London: TSO, 2010) ("Final Report").

number of cases.’² Against this backdrop, Sir Rupert was required to make recommendations in order to promote access to justice at proportionate cost.³

During his extensive investigations, Sir Rupert identified non-compliance with procedural requirements (i.e. failures by parties to comply with court orders, rules and practice directions) as one of the major factors which contributed to the increase in disproportionate costs.⁴ The failure of a party to comply with its procedural obligations had the delirious effects of causing unnecessary delay during the litigation process and substantially increased costs through satellite litigation.⁵ To remedy these problems, Sir Rupert and senior members of the judiciary strongly advocated the need for a change in approach to non-compliance with procedural requirements and the granting of relief from sanctions.⁶ This approach would mean a tougher and less forgiving attitude by the courts. Such an approach was not necessarily new as the courts had, prior to the Jackson Reforms, advocated a strict approach to procedural non-compliance but that approach had not been truly implemented in practice.⁷ It was, however, new in the sense that the senior judiciary now intended to ensure that the strict approach to non-compliance would now also be *enforced*.

This article critically analyses the new approach. The first part of this article will consider the state of the civil justice system before and after the introduction of the Woolf Reforms and the approaches of the courts towards substantive and procedural justice. The second part will focus upon the Jackson Reforms and will critically consider the new approach in light of judicial and extra-judicial comments and the evolving jurisprudence. Part three will analyse the impact of the new approach upon the administration of justice and litigants-in-person (LiPs). Finally, the author will evaluate theoretical and practical changes which are required to address the weaknesses of the new approach.

² A. Clarke THE WOOLF REFORMS: A SINGULAR EVENT OR AN ONGOING PROCESS? in D. Dwyer (ed) THE CIVIL PROCEDURE RULES TEN YEARS ON 47 (Oxford: Oxford University Press 2010). See also A. Zuckerman LORD JUSTICE JACKSON’S REVIEW OF CIVIL LITIGATION COSTS – PRELIMINARY REPORT 28(4) Civil Justice Quarterly 435 (2009).

³ *supra* note 1 above page V.

⁴ As had Lord Woolf MR before him – see Lord Woolf Master of the Rolls, Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales, July 1995.

⁵ ‘Satellite litigation’ refers to litigation concerned with compliance with process requirements rather than with the substantive issues between the parties.

⁶ *supra* note 1 above, Chapter 39 par. 6.5.

⁷ See Ward LJ in *UCB Corporate Services Ltd (formerly UCB Bank Plc) v Halifax (SW) Ltd* [1999] CPLR 691 and *Arrow Nominees Inc. & Another v Blackledge & Others* [2000] CP Rep 59; [2001] BCC 591.

1. NON-COMPLIANCE PRE-WOOLF, THE OVERRIDING OBJECTIVE AND JACKSON

The principle that the courts are required to deliver justice is an obvious but fundamental one. In a system governed by law the court's function is to uphold the law. In the civil context this means principally providing remedies for wrongs and in so doing, the court is required to ensure that substantive justice is being achieved between the parties. Substantive justice, to borrow from Bentham, is concerned with the court correctly applying right law to the true facts⁸ or, putting it another way, deciding the case on its substantive merits. Procedure assists in applying the law to the facts and consists of both court rules and principles. Procedural justice, therefore, refers to both rules of the court for example the need to file statements of case, and principles such as equality, impartiality, fairness under the overarching ideal of equality before the law and equal protection of the law.⁹ Although both aspects of justice are enshrined in the English civil justice system, the courts have not always given them equal treatment.

Prior to the major civil justice reforms introduced by the Judicature Act 1873 and 1875, it was evident that procedural compliance with rules and formalities had become the main concern of the courts in the dispensation of justice. This over-emphasis on procedure was succinctly captured in William Blake Odgers' work 'Changes in Procedure and in the Law of Evidence' when he wrote that the common law courts were 'Sadly hampered in the year 1800 by cumbrous and pedantic technicalities which caused the suitor expense, delay, vexation and disgust.'¹⁰ Disputes before the courts could be defeated simply on the basis of technical failure by a party rather than on the merits of the legal arguments. To address these and other failings, the Judicature Act 1873 introduced the Rules of the Supreme Court (RSC)¹¹ with the aim of ensuring that the civil justice system was better able to dispense with substantive justice.¹² Technical failures in complying with court rules and orders, such as drafting the writ incorrectly, would no longer close the doors of the courts to a defaulting party as it did previously. But with this new philosophical shift came adverse consequences.

⁸ J. Bentham RATIONALE OF JUDICIAL EVIDENCE in Bowring (ed) THE WORKS OF JEREMY BENTHAM 212-213 Volume 6 (Edinburgh William Tait 1843).

⁹ *supra* note 8.

¹⁰ W. Odgers, CHANGES IN PROCEDURE AND IN THE LAW OF EVIDENCE in W. Odgers (ed) A CENTURY OF LAW REFORM 212 (London MacMillan & Co 1901).

¹¹ Judicature Act 1873; Judicature Act 1875, Schedule 1; SI unnumbered of 1883; SI 2145 of 1962; and SI 1776 of 1965.

¹² *Collins v The Vestry of Paddington* (1879-80) LR QBD 368, 380 and *Cropper v Smith* (1884) 26 Ch. 700 710-711.

Although the courts would consider issues of procedural non-compliance, greater weight would now be given to achieving substantive justice between the parties. An attempt to redress the balance between substantive justice and procedural justice came in the form of the Woolf Reforms.

When Lord Woolf presented his reforms to the English civil justice system, he famously spoke of a ‘new landscape’ being created¹³ and the defining feature of the new landscape was the overriding objective of enabling the courts to do justice.¹⁴ As Sorabji remarks, the Woolfian overriding objective was truly innovative because it introduced a new concept of justice which was ‘committed to proportionality rather than...an unalloyed commitment to the achievement of what Woolf described as substantive justice...’¹⁵ The overriding objective was also innovative because, unlike previous reforms, Lord Woolf’s approach to reform of the civil justice system was driven by the need for a philosophical change in not only the manner in which the system ought to operate but also in the culture and the approaches which must be adopted by those who form part of that system – judges, the parties and their lawyers.

Thus, Lord Woolf captured what he believed to be the essence of the civil justice system’s purpose, which was going beyond the court’s duty to simply achieve substantive justice: it now included an equal commitment to procedural justice. Accordingly, procedural justice dictates that substantive justice can only be dispensed by the use of proportionate court and litigation resources and within a reasonable time.¹⁶ As Lord Woolf MR explained ‘The achievement of the right result needs to be balanced against the expenditure of the time and money needed to achieve that result.’¹⁷ Lord Woolf MR also spoke of the need to have proportionate justice and this meant that no more than proportionate costs should be expended on individual cases - the courts had to consider the rights of other litigants to have access to justice.¹⁸ This was taken further under the Jackson Reforms which amended the

¹³ *supra* note 6, para. 8.

¹⁴ The pre-Jackson Overriding Objective under Civil Procedure Rule 1.1 (1) stated: ‘These rules are a new procedural code with the Overriding Objective of enabling the court to deal with cases justly.’

¹⁵ J. Sorabji THE ROAD TO NEW STREET STATION: FACT, FICTION AND THE OVERRIDING OBJECTIVE 86 *European Business Law Review* 77-89 (2012).

¹⁶ *supra* note 1, para. 8.

¹⁷ *supra* note 1, chapter 4 para. 6.

¹⁸ See A. Clarke *supra* note 2. Also see Lord Woolf MR’s comments in *Beachley Property Ltd v Edgar* [1997] P.N.L.R. 197.

Woolfian overriding objective to give express recognition to the principle of proportionality¹⁹ and the obligation on the parties to comply with rules, practice directions and court orders. The overriding objective states:

These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly *and at proportionate cost*.²⁰

The notion of justice propounded by Lord Woolf MR stands in stark contrast with the notion of justice under the Hong Kong civil procedure rules. Following the recommendations of the Working Party on Civil Justice Reform,²¹ Hong Kong decided to adopt what it called ‘underlying objectives’ and which formed part of the new court rules which were introduced under the Rules of the High Court (Amendments) Rules 2008 (RHC). It is interesting to note that the Working Party expressly rejected adopting an ‘overriding objective’ similar to the one under the English Civil Procedure Rules because there was a concern that it downgraded or undermined the principle of substantive justice.²² RHC O.1A, r.2 (2) makes clear that, when applying the underlying objectives, the courts ‘In giving effect to the underlying objectives of these rules, *the Court shall always recognise that the primary aim in exercising the powers of the Court is to secure the just resolution of disputes in accordance with the substantive rights of the parties.*’²³ In England, however, the overriding objective was concerned with delivering substantive justice and this had to be balanced with the principles of efficiency and proportionality. Lord Neuberger M.R. noted that balancing procedural justice against substantive justice led Lord Woolf and the civil justice system to recognise that the civil justice system exists for all citizens. And when courts are called upon to actively manage cases they must, as Lord Neuberger M.R. put it, ‘strike a balance between the need to deliver substantive justice as well as procedural justice.’²⁴

Despite these venerable objectives of the Woolf reforms, the courts appeared to revert to the pre-Woolfian attitudes towards procedural non-compliance which was largely as a

¹⁹ For an interesting discussion of the concept of proportionality see J. Sorabji PROSPECTS FOR PROPORTIONALITY: JACKSON IMPLEMENTATION 32(2) Civil Justice Quarterly 213-230 (2013).

²⁰ Rule 1.1(1). Emphasis added.

²¹ Civil Justice Reform Final Report (Chief Justice’s Working Party on Civil Justice Reform, 2004) (“CJR Report”). For a discussion, see G. Meggitt and F. Aslam CIVIL JUSTICE REFORM IN HONG KONG – A CRITICAL APPRAISAL 28(1) Civil Justice Quarterly 111-131 (2009).

²² CJR Report n 29 above para. 4. See also J. Sorabji ENGLISH CIVIL JUSTICE AFTER THE WOOLF AND JACKSON REFORMS A CRITICAL ANALYSIS (Cambridge: Cambridge University Press 2014). 221-225.

²³ Emphasis added.

²⁴ Lord Neuberger M.R. in his 4th Keating Lecture May 19, 2010, Equity, ADR, Arbitration and the Law: Different Dimensions of Justice available at file:///C:/Users/Rabia/Downloads/mr-keating-lecture-19052010.pdf.

result of the mistaken understanding that the overriding objective required judges to dispense with substantive justice in priority of the principle of proportionality and efficiency. It was clear that the balance between substantive justice and the principles of proportionality and efficiency had to be re-addressed.

2. THE NEW APPROACH TO PROCEDURAL NON-COMPLIANCE: AN ANALYSIS

2.1 Jackson Reforms and the new r3.9

It was not surprising that Sir Rupert found that failures to comply with court deadlines and rules, whether through conscious disregard or mere negligence, caused costs to be disproportionately incurred. Costly satellite litigation and the courts adopting a distinctly laissez-faire approach towards procedural non-compliance and granting relief from sanctions compounded this.²⁵ To address these problems, Sir Rupert recommended the repeal and replacement of the old r3.9 with the need for the courts, when faced with an application for relief, to consider all the circumstances including:

“(a) the requirement that litigation should be conducted efficiently and at proportionate cost; and

(b) the interests of justice in the particular case.”²⁶

Sir Rupert’s recommendation is not consistent with the new approach of strict rule compliance because the reference to all the circumstances of the case, which would impliedly include the need to achieve substance justice, and the reference in (b) to the interests of justice, weighs too heavily in favour of the pre-Jackson judicial approach of seeking to do justice on the merits without appropriately balancing factors which go towards procedural justice.

Sir Rupert’s recommendation was rejected by the Civil Procedure Rules Committee in favour of the current r3.9 which provides:

(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

²⁵ *supra* note 1, Chapter 39 para. 6.5. See also Sir Rupert’s lecture Special Lecture on Achieving a Culture Change in Case Management Fifth Lecture by Lord Justice Jackson in the Implementation Programme for Recommendations in the Review of Civil Litigation Costs: Final Report 22 November 2011 The UCL Judicial Institute.

²⁶ *supra* note 1, Chapter 39 para. 6.7.

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...*²⁷

The rule firmly brings to the fore the need for the courts to carefully consider the issues of proportionality of costs and compliance with rules and orders. The explicit reference to the principle of proportionality and the reference back to the overriding objective represents a new emphasis upon the need to ensure that procedural justice is also achieved. But the rule appears to simply reiterate what already exists in the overriding objective: dealing with the application justly, at proportionate costs and the need to enforce rules. Zuckerman has argued that the rule contains a coded message which 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.²⁸

Speaking extra-judicially and before the new r3.9 was due to take effect, Lord Dyson MR drew out the policy rationale which underpinned the amended overriding objective and r3.9.²⁹ Dealing with cases justly did not simply mean ensuring that a decision is reached on the merits of the case (i.e. substantive justice) but rather it required the courts to deal with cases justly and at proportionate cost. This involved consideration of the needs of all litigants who engage with the civil justice process. Lord Dyson explained the change in the relationship between substantive justice and procedure when he said:

Doing justice in each set of proceedings is to ensure that proceedings are dealt with justly and at proportionate cost... Those obligations served the purpose of ensuring their litigation was conducted at proportionate cost as well as serving the wider public interest of ensuring other litigants can obtain justice efficiently and proportionately.³⁰

²⁷ Emphasis added.

²⁸ A. Zuckerman THE REVISED CPR 3.9: A CODED MESSAGE DEMANDING ARTICULATION 32(2) Civil Justice Quarterly 123-138 (2013).

²⁹ Lord Dyson MR, The Implementation of the Amendments to the Civil Procedure Rules, 18th Lecture in the Implementation Programme, District Judges' Annual Seminar, Judicial College, 22 March 2013, Lord Dyson THE APPLICATION OF THE AMENDMENTS TO THE CIVIL PROCEDURE RULES 33(2) Civil Justice Quarterly 124 – 132 (2014)

³⁰ *supra* note 29.

Although the Master of the Rolls' comments are illuminating, there are a number of inherent weaknesses in his approach. First, there is a great deal of emphasis on one aspect of the overriding objective – procedural justice. Although his Lordship advocates an approach by acknowledging the wider concept of justice beyond simply doing justice on the merits of the case (and therefore follows the orthodox Woolfian philosophy, albeit to a limited extent) the focus of Lord Dyson MR's comments concentrate entirely upon the need for courts to achieve procedural justice. Clearly, there is force in the argument that previously judges did not carefully consider (or simply ignored) the issue of proportionality which meant disproportionate costs and court resources were being incurred and, therefore, the explicit reference to these principles now brings greater focus of the judicial mind to the overriding objective. But Lord Dyson MR's focus is on one element of justice within the context of the overriding objective and r3.9 and thereby fails to acknowledge the need to consider and balance substantive justice with considerations of proportionality in cases where, as will be considered later, this will be relevant.

The second problem is interrelated with the first and is considered in greater detail later. Although Lord Dyson MR subsequently made clear in *Denton, Decadent and Utilise*³¹ that the new approach and the guidance provided in *Mitchell v New Group Newspapers*³² also applied to LiP, he failed, in both cases, to explain or consider the potential difficulties which the impact the new approach is likely to have upon LiP; a type of litigant increasingly becoming a significant part of the civil justice system. LiPs are significant for two principal reasons. First, they are rapidly increasing in number as a result of the recent legal aid reforms³³ and secondly, they characteristically lack knowledge of the law and lack legal skills to manage their disputes through the adversarial process. As a result, LiPs are causing significant challenges to the civil justice process, not least to the judiciary. Will judges enforce rule compliance strictly against a LiP and refuse him relief from sanctions and thereby shut him out of the court process despite the complex nature of these types of litigants? Or is there a danger that judges may adopt an overly sympathetic approach when dealing with LiP which may risk judges compromising the sacred principle of judicial impartiality?

2.2 Jurisprudence

³¹ *Denton, Decadent and Utilise* [2014] EWCA Civ 906

³² *Mitchell v New Group Newspapers* [2013] EWCA Civ 1537.

³³ Legal Aid, Sentencing and Punishment of Offenders Act 2012.

The inherent weaknesses of the new approach are illustrated by analysing the complex and inconsistent jurisprudence surrounding r3.9. Sir Rupert, in his judicial capacity, was presented with an opportunity to introduce a change in approach to achieving justice in the context of the old r3.9 in the cases of *Fred Perry (Holdings) Ltd v Brands Plaza Trading Ltd*³⁴ and *Mannion v Ginty*.³⁵ Those cases concerned a series of procedural defaults which eventually resulted in various sanctions against the defaulting parties. On appeal, the defaulting parties' application for relief was refused. In *Fred Perry*, Lewison LJ noted Sir Rupert's comments in his Final Report that non-compliance should no longer be tolerated. In his short but concise judgment, Jackson LJ took the opportunity to advocate the need to adopt a stricter approach to non-compliance. Any further grant of indulgence to the defendant would, Jackson LJ argued, be a denial of justice to the claimants and a denial of justice to other litigants whose cases await resolution by the court.³⁶ In *Ginty* Lewison LJ reiterated the need for a change in culture when he stated 'It has also been said, not least by Jackson LJ, that the culture of toleration of delay and non-compliance with court orders must stop.'³⁷

It should also be noted that both *Fred Perry* and *Ginty* were cases in which the appellants were guilty of *severe* procedural defaults. It is not surprising, therefore, that the Court refused the applications for relief. It is also interesting to note that, at this point in the judicial shift towards procedural justice, the rhetoric is consistent from the Court of Appeal. However, there was no attempt on behalf of the Court of Appeal to provide a more balanced approach in introducing the new approach. There was no attempt to distinguish between consistent breaches of procedural obligations, which should be punished and which should be refused relief, and those instances where there may be a breach on a single occasion but which may be as a result of a legitimate and valid reason.

Despite *Fred Perry* and *Ginty*, the Court of Appeal went on to adopt a wholly inconsistent approach to non-compliance in the case of *Ryder plc v Dominic Beever*³⁸. *Ryder* concerned the failure of the appellant to comply with an 'unless order' by eight days. Giving the leading judgment, Dame Janet Smith held that the failure to comply was short lived and was made good by the appellant which justified granting relief from sanction. Her Ladyship's view on the concept of 'administration of justice' was not confined to the loss of court time,

³⁴ *Fred Perry (Holdings) Ltd v Brands Plaza Trading Ltd* [2012] EWCA 224, 1.

³⁵ *Mannion v Ginty* [2012] EWCA Civ 1667; 2012 WL 6151794.

³⁶ *Fred Perry (Holdings) Ltd v Brands Plaza Trading Ltd*, 48 and 49 respectively.

³⁷ *supra* note 34, para. 18.

³⁸ *Ryder plc v Dominic Beever* [2012] EWCA Civ 1737; 2012 WL 6151906.

something which Lewison LJ and Jackson LJ had previously emphasised was a major factor when considering applications for relief. Dame Janet Smith expressed her understanding of doing justice in the context of the old r3.9 in the following manner:

“the interests of the administration of justice” are concerned with wider and potentially more important issues than simply the loss of court time. I would not wish to propose a list of factors which might be relevant to the interests of the administration of justice but I do suggest that they might well include such matters as the right of access to the courts and the importance of doing justice between the parties.³⁹

Dame Janet Smith’s notion of what is meant by the ‘administration of justice’ includes the principle of access to justice as well as the need to do justice between the parties (i.e. seeking to achieve substantive justice). This is clearly at odds with the previous Court of Appeal authorities. The notion of justice according to Dame Janet Smith here is wider and encompasses more than simply procedural justice. This is not an orthodox understanding of the concept of justice. With respect, Dame Janet Smith appears to have gone to the opposite extreme in emphasising substantive justice as being the primary concern of the court. Although she acknowledges that court time may be a relevant factor, her focus is primarily upon seeking to achieve substantive justice between the parties without attempting to balance this with factors which go towards procedural justice.⁴⁰

The new approach was given force by the landmark case of *Mitchell v New Group Newspapers*. In that case, the claimant breached a procedural obligation by failing to file his costs budget on time⁴¹ and, as a consequence, the Master hearing the application imposed a sanction restricting the claimant’s recoverable costs to court fees. The claimant’s solicitors’ subsequent application for relief was refused by the Master who reasoned that the new changes introduced by the Jackson Reforms and, in particular, the need not only to do justice but the need to do justice at proportionate cost meant that non-compliance with court orders

³⁹ *supra* note 37, para. 50.

⁴⁰ See also *Johnson v Berkshire Healthcare NHS Foundation Trust* [2013] EWHC 2439 (QB); *Rayyan al Iraq Co Ltd v Transvictory Marine Inc.* unreported 25th July 2013; *Wyche v Care Force Group plc* [2013] EWHC 3282 (Comm); and *Thevarajah v Riordan* [2013] EWHC 3179 (Ch); 2013 WL 5336720 in which the courts found in favour of achieving substantive justice.

⁴¹ Paragraph 4.1 and 4.2 CPR PD51D Defamation Proceedings Costs Management Scheme.

could no longer be tolerated.⁴² On appeal by the claimant, the Court of Appeal upheld the Master's orders.

Turning his attention to the issue of relief from sanction, Lord Dyson MR, who gave the Court of Appeal's reasoned judgment, endorsed the approach which he had advocated in his 18th Implementation Lecture and observed that the emphasis in r3.9 on proportionality and rule compliance, "should be regarded as of *paramount importance* and be given *great weight*"⁴³ and, although the rule requires the court to consider "all the circumstances of the case" the factors of proportionality and rule compliance would be given more weight.⁴⁴ He then provided guidance as to how the new approach should be applied. First, the nature of the non-compliance will have to be considered. If this can be regarded as trivial, the court will grant relief provided the application is made promptly.⁴⁵ In circumstances where non-compliance cannot be regarded as trivial, then the burden will be on the defaulting party to show that relief should be granted. If there is good reason for the default, the court will be likely to decide that relief should be granted. However, work pressure would "rarely be a good reason"⁴⁶ because, as Lord Dyson MR explained:

If departures are tolerated, then the relaxed approach to civil litigation which the *Jackson* reforms were intended to change will continue.⁴⁷

His lordship proceeded to reinforce the new stricter approach to non-compliance by stating that relief from sanctions 'should be granted more sparingly than previously.'⁴⁸ A more robust and firm line taken by the courts will, Lord Dyson MR argued, discourage not encourage satellite litigation. Lord Dyson MR hoped that his decision would send out a clear message and if it did then legal representatives would become more efficient and will comply with rules, practice directions and court orders. This will mean that satellite litigation would become a thing of the past.

The judgment in *Mitchell* resulted in a number of difficult and inconsistent decisions which were due to diverging judicial interpretation and application of Lord Dyson MR's guidance. First, Lord Dyson MR's reference to the issues of costs and proportionality being

⁴² *supra* note 32, para 17.

⁴³ Emphasis added.

⁴⁴ *supra* note 32, para. 36 and 37.

⁴⁵ *supra* note 32, para. 40.

⁴⁶ *supra* note 32, para. 41.

⁴⁷ *supra* note 32, para. 41.

⁴⁸ *supra* note 32, para. 46.

of ‘paramount importance’ which should be given ‘great weight’ clearly placed emphasis upon the need to achieve procedural justice without any consideration or reference to the need to balance this with substantive justice. Lord Dyson MR’s words were, in the opinion of the author, open to two principle interpretations. One way of interpreting the words would be that judges should *exclusively* consider proportionality and efficiency in complete isolation to other factors, including substantive justice. This is a very restrictive and extremely narrow interpretation which would require judges to dismiss application for relief regardless of whether circumstances existed which would justify granting relief. This interpretation is supported by a number of decisions which followed *Mitchell*. In *Associated Electrical Industries Limited v Alstrom UK*⁴⁹ the claimant breached the time limits for service of the particulars of claim. The defendant sought an order from the court that the claim be struck out. The claimant had argued that, *inter alia*, some of the delay in trying to comply with the deadline was due to the court having failed to notify the claimant that an acknowledgement of service had been filed by the defendant. Allowing the defendant’s application, Andrew Smith J said this:

If my decision depended only on what would be just and fair between AEI and Alstrom, I would not strike out the claim form and I would grant a retrospective extension of time for service of the particulars.....I would consider an order striking out the claim form to be a disproportionate response to AEI’s non-compliance....This assessment is reinforced by the uncertainties about limitation and whether new proceedings would be struck out.⁵⁰

Andrew Smith J went on to follow the Court of Appeal’s position in *Mitchell* but his comments provide an insight into the tensions between the need to achieve fairness between the parties and the need to uphold procedural compliance as advocated by the senior judiciary. There were clearly relevant issues in the case which would have justified the claimant’s claim not being struck out – this is something which Andrew Smith J admits. The judge pointed out that the delay did not prejudice the defendant and there were uncertainties surrounding the application of the law to the particular facts of the case. But these legitimate issues required the court to fairly and appropriately balance substantive justice with procedural justice and to arrive at a decision which was just on the particular facts of the case. But Andrew Smith J went on to focus upon what he referred to as the ‘CPR’s disciplinary

⁴⁹ *Associated Electrical Industries Limited v Alstrom UK* [2014] EWHC 430.

⁵⁰ *supra* note 49, para. 41.

framework.’⁵¹ The judge’s focus remained on the need to uphold procedural fairness, despite his own conclusions that factors existed which favoured not striking out the claim.⁵²

The High Court case of *Harrison v Black Horse*⁵³, which was also decided very shortly after *Mitchell*, reinforced the difficulties experienced by the judiciary in applying the guidelines. *Harrison* concerned a failure by the claimant to serve a notice of funding which resulted in sanctions. Applying *Mitchell*, the claimant’s application for relief was dismissed because the breach was not trivial and the claimant had failed to provide good reasons for the breach. The Master said ‘This may seem harsh, particularly given my view that the failure was not intentional. But the claimants’ solicitors should have known of the change that was coming....’⁵⁴ Thus, the guidance provided by the Court of Appeal in *Mitchell* seems to have been applied rigidly by the Master in *Harrison* with the consequence that the Master himself admits that the decision may be harsh given the fact that the breach was not intentional.

The concern regarding the imbalance which was created after *Mitchell* and the potential unfairness which may result is also supported by a recent decision of the High Court of Singapore. In *Kraze Entertainment v Marina Bay Sands*⁵⁵ the claimant, pursuant to a court order, was required to provide security for costs by 5 February 2013 but on 1 February 2013 an application was made by the claimant for an extension of time to comply with the court order. The hearing for the application was held on 5 February 2013. At the hearing, the Assistant Registrar dismissed the extension application which was upheld by Choo Han Teck J in the High Court. However, Choo Han Teck J noted, on more than one occasion in his judgment, that the decision to strike out the claim was harsh especially given that there was no intentional breach of the court order:

I am of the view that it is indeed harsh for an action to be struck out without trial... There was no record of intentional breaches (other than not paying costs) so it seemed to me that to have the action struck out for non-compliance with the Order was probably too harsh in the first place.⁵⁶

⁵¹ *supra* note 49, para. 43.

⁵² *supra* note 49, para. 47.

⁵³ *Harrison v Black Horse* [2013] EWHC B28 (Costs).

⁵⁴ *supra* note 53, para. 47.

⁵⁵ *Kraze Entertainment v Marina Bay Sands* [2013] SGHC 39. For an account of case management in Singapore, see L. Leo CASE MANAGEMENT: DRAWING FROM THE SINGAPORE EXPERIENCE 30(2) Civil Justice Quarterly 143-162 (2011).

⁵⁶ *supra* note 55, para. 3 and 7 respectively.

The decision does, indeed, seem harsh. It is clear that the claimant failed to provide affidavit evidence in support of its application for an extension and it was also clear that it would not be able to comply with the order in time. But the claimant did notify the court and the defendant of its intention to make an application for an extension of time to comply with the order and that application was made before the deadline was due to expire. Given these circumstances, the court should have adopted a more cautious approach and balanced the above factors with the need to comply with procedural requirements. Rather, Choo Han Teck J placed heavy reliance on the need to only achieve procedural and this is clear when he said ‘...but before justice is the law. The law is explicit on the rules and regulations and the orders of the courts.’⁵⁷

A second interpretation of *Mitchell* which appears to contradict Lord Dyson MR but which was later embraced by the Court in *Denton* is that given by Davies LJ in *Chartwell Estate Agents Limited v Fergies Properties SA, Hyam Lehrer*⁵⁸ in which the Court of Appeal upheld the High Court’s decision to grant relief from sanction. In that case Davies LJ gave greater weight to factors which went to the issue of substantive justice (such as the claimant’s substantial claim coming to an end if relief was granted)⁵⁹. These were, Davies LJ explained, factors which fell within r3.9’s reference to ‘all the circumstances of the particular case’. Davies LJ held:

In my view, that background – that is, all the circumstances of the particular case - entitled the judge in this case to depart from the expectation which otherwise ordinarily would arise. It must not be overlooked that the Court of Appeal in *Mitchell* did not say that the two factors specified in CPR 3.9 will always prevail....⁶⁰

Although Davies LJ’s interpretation contradicts Lord Dyson MR’s it is one which should be welcomed. Lord Dyson MR’s reference to the factors of proportionality and efficiency being of paramount importance and having great weight supports the first interpretation and one which reinforces the underlying philosophy of the new approach. Davies LJ, however, presents a far more flexible approach to the application of r3.9 and *Mitchell* and one which requires the courts to balance all of the relevant factors, including factors which go to the issue of substantive justice, when considering an application for relief.

⁵⁷ *supra* note 55, para. 7.

⁵⁸ *Chartwell Estate Agents Limited v Fergies Properties SA, Hyam Lehrer* [2014] EWCA Civ 506.

⁵⁹ See, in particular, par. 58 of Davies LJ’s judgment.

⁶⁰ *supra* note 58, para. 57.

A further difficulty created by *Mitchell* was Lord Dyson MR's reference to a 'trivial' breach. The term 'trivial' was ambiguous and, contrary to His Lordship's belief, has fuelled costly satellite litigation which resulted in the conjoined appeals in *Denton*. Indeed, Lord Dyson MR admitted to the potential of satellite litigation arising when he stated, 'But that possibility cannot be entirely excluded from any regime which does not impose rigid rules from which no departure, however minor, is permitted.'⁶¹ Parties did, in fact, engage in more satellite litigation and incurred substantial costs on appeals, especially where the consequences for non-compliance were severe. An alternative and more effective approach in assessing the impact of a breach would have been to measure the impact of that breach against the existing court directions and whether there was likely to be an adverse impact on the trial window. If the breach is likely to adversely impact on the parties' abilities to meet any outstanding court directions or where it would impact on the trial window then the breach would not be characterised as trivial. It would then be for the court to consider and balance any factors which go to the issue of substantive justice with the principles of proportionality and efficiency.

Finally, Lord Dyson MR's comments that work pressure will not be a good reason for granting relief from sanctions is sensible. The obligation for ensuring that deadlines are complied with and litigation proceeds according to court rules is an obligation which rests on the shoulders of legal representatives. It is their responsibility to ensure that they are capable to take on work and to carry out work competently and efficiently. However, Lord Dyson MR's subsequent reference to work pressures 'rarely [being] a good reason' implies that, in some cases, albeit rare cases, it may be a valid reason for non-compliance. In a case of such importance, it is unfortunate that the Court of Appeal appears to have left the door ajar on an issue which should be been firmly put to rest.

Less than 12 months after its decision in *Mitchell*, the Court of Appeal in the conjoined appeals in *Denton* attempted to address what it perceived as the courts' misunderstanding and misapplication of *Mitchell*.⁶² The appeals concerned various breaches of court orders and rules which resulted in inconsistent and contradictory judgments being given by the courts. In the light of the importance of issues which the appeals presented, the Court of Appeal in *Denton* invited the Bar Council and the Law Society to intervene.

⁶¹ *supra* note 32, para. 40.

⁶² *supra* note 31, para. 3.

Lord Dyson MR and Vos LJ gave the leading judgment. The court analysed r3.9(1) and noted that it contained three elements. First, the rule required that the court must identify the ‘failure to comply with any rule, practice direction or court order’. Secondly, the court must consider all the circumstances of the case, so as to enable it to deal justly with the application. Thirdly, when considering the second element, the court must have regard to the need for efficient litigation at proportionate costs (factor (a)) and the need to enforce compliance with rules, practice directions and orders (factor (b)).⁶³

The Court then reaffirmed that the guidance given in *Mitchell* was “substantially sound” but stated that that approach should be restated in more detail.⁶⁴ The Court held that an application for relief from sanctions should be approached by a court in the following three stages. First, the court must identify and assess the seriousness or significance of the failure to comply and the Court conceded that triviality, as discussed in *Mitchell*, was not part of the test described in r3.9. The Court rejected the Law Society and Bar Council’s assertion that the test should be one of immateriality and that any immaterial breach should be defined as one which ‘neither imperils future hearing dates nor otherwise disrupts the conduct of litigation. Such a test would not, the Court held, cover breaches, such as the payment of court fees, which would not impact on the efficient progress of litigation. Secondly, the court must consider why the default occurred. In this regard, the Court simply referred back to its guidance in *Mitchell* in which it gave some examples of reasons such as where the period of compliance originally imposed was unreasonable. Thirdly, the court must consider ‘all the circumstances of the case, so as to enable it to deal justly with the application’.

Unsurprisingly, the third stage attracted the greatest amount of commentary from the Court. The court held that, although factors (a) and (b) may not now be of ‘paramount importance’, they were of “particular importance should be given particular weight at the third stage when all the circumstances of the case are considered.”⁶⁵ That was why, the court noted, these factors were singled out for mention in the rule.⁶⁶

The Court rejected the Bar Council’s submission that factors (a) and (b) should “have a seat at the table, not the top seat at the table”. It was the opinion of the court that where factor had not been met then this would weigh in favour of refusing relief. Factor (b), rule

⁶³ *supra* note 31, para. 23.

⁶⁴ *supra* note 31, para. 24.

⁶⁵ *supra* note 31, para. 32.

⁶⁶ *supra* note 31, para. 32.

compliance, had received little attention in the past and so its inclusion in r3.9 meant that the old lax culture of non-compliance was no longer tolerated.⁶⁷

Jackson LJ, although agreeing with Lord Dyson MR and Vos LJ on the first two stages, dissented on the court's approach to the third stage. According to Jackson LJ, r3.9 did not require factors (a) and (b) to be given greater weight than other considerations but that these should be specifically considered in every case. Agreeing with the Bar Council's submission, His Lordship argued:

“As the Bar Council put it in their submissions, factors (a) and (b) should “have a seat at the table, not the top seats at the table”. Ultimately what rule 3.9 requires is that the court should “deal justly with the application”.”⁶⁸

Finally, the concerns over the increase in satellite litigation were, according to the Court, a result of the misapplication of *Mitchell*. Efficient litigation cannot be conducted at proportionate cost without fostering a culture of rule compliance and cooperation between the parties and this applied to the parties, their lawyers and LiPs.⁶⁹ The courts would, in the future, be more ready to penalise opportunism through heavy costs sanctions.⁷⁰ Where the failure is neither serious nor significant, where there is a good reason or where it is obvious that relief from sanctions is appropriate, parties should agree that relief from sanctions should be granted and, any event, the parties should agree reasonable extensions of time up to 28 days as provided for by r3.8(4).⁷¹

The Court's three stage test and, in particular, its interpretation of r3.9 requires careful examination. The court's replacement of the term 'trivial' with a test of 'seriousness or significance' is a positive step in towards tackling the uncertainties associated with the term 'trivial'. However, the test of seriousness and significance must be considered within a framework or measured in some way. One way, as previously argued, is to assess the breach by considering its impact on court directions and the trial window. The argument against this approach is the one put forward by the court in *Denton* – it does not take account of serious breaches that may not have an impact on the court process. However, the counter argument is that both the Woolf and Jackson Reforms were concerned with the need to conduct litigation

⁶⁷ *supra* note 31, para. 34.

⁶⁸ *supra* note 31, para. 85.

⁶⁹ *supra* note 31, para. 40.

⁷⁰ *supra* note 31, para. 43.

⁷¹ *supra* note 31, para. 41.

at proportionate cost and, as a consequence, all court users should only be entitled to their share of court resources. If a breach occurs which results in further court resources being incurred then that breach would be serious and relief should be denied. Any valid reasons for the breach can be taken into account at stage two of the exercise as well as at stage three when the courts are required to consider all the circumstances of the case.

A number of concerns arise when considering the courts third stage and its construction of r3.9. The replacement of the terms ‘paramount importance’ and ‘great weight’ with ‘particular importance’ and ‘particular weight’ does not alter in any great respect the court’s original guidance in *Mitchell*. By simply substituting the terms continues to require the courts to pay greater attention to factors (a) and (b) when considering all of the circumstances of the case. The court seems to have retained its original stance as advocated in *Mitchell* and there is a danger that courts will continue to give too much weight, or greater focus to factors (a) and (b) at the expense of other considerations, including trying to do justice on the merits of the case. Further, both the *Mitchell* approach and the approach in *Denton* fail to conform to the need for the courts balance the principle of substantive justice with the principle of procedural justice. Thus, there is a real danger that some courts will simply revert to unreasonably refusing relief on the basis that factors (a) and (b) hold more weight.

The Court’s interpretation regarding the inclusion of factors (a) and (b) appears to be misconceived when it said “If it had been intended that factors (a) and (b) were to be given no particular weight, they would not have been mentioned in rule 3.9(1). In our view, the draftsman of rule 3.9(1) clearly intended to emphasise the particular importance of these two factors.” It is submitted that the inclusion of factors (a) and (b) as well as reference to ‘all the circumstances of the case’ are all factors which should be equally balanced without one factor taking precedent over the other factors. It is this balancing exercise which is required to truly reflect a just outcome when courts consider applications for relief. This approach also holds true to the aims and purpose of the overriding objective of dealing with cases justly and at proportionate cost.

Upon first reading Jackson LJ’s dissenting judgment on the construction of r3.9 one can be forgiven for concluding that it provides a better alternative to that advanced by the majority in *Denton*. Unfortunately, it does not. It provides an interpretation which reverts back to the pre-Jackson era of giving greater weight to substantive justice at the cost of

procedural justice. Jackson LJ endorsed the submissions of the Bar Council that “factors (a) and (b) should “have a seat at the table, not the top seats at the table”. His Lordship went on to argue that, ultimately, what rule 3.9 required was that the court should “deal justly with the application”. But Jackson LJ’s approach gives privilege to substantive justice. By downgrading factors (a) and (b) by arguing that they should not have the “top seat at the table” Jackson LJ, by implication, elevates substantive justice above factors (a) and (b), and thereby poses two dangers. First, it contradicts and undermines the new approach of promoting a culture of rule compliance and may cause the judicial mind to focus upon achieving substantive justice. Secondly, there is a danger that Jackson LJ’s comments will fuel satellite litigation in circumstances where a defaulting party faces severe sanctions.

3. THE ADMINISTRATION OF JUSTICE: BALANCING SUBSTANTIVE JUSTICE AND LITIGANTS-IN-PERSON

Apart from the adverse effects on the administration of justice, the other major concern the new approach has created is the potential injustice which may result when courts are required to deal with cases involving LiPs. The Court in *Denton* simply stated that the culture of compliance also applied to LiPs. However, this is over simplifying the issue.

There are potentially two situations which may occur in cases involving LiPs. The first relates to decisions by courts in which LiPs are punished for breaching procedural requirements. The second situation concerns those cases in which a judge may exercise his discretion and not punish LiPs for a breach and grant relief from sanctions. In order to fully appreciate these two issues, we need to briefly consider the nature of LiPs.

Extensive research has also been conducted as to how LiPs fare in the adversarial system. Cameron and Kelly contend that LiPs appear to be at an immediate disadvantage in an adversarial system because of their lack of skills and knowledge, leaving them ill-equipped to protect their interests.⁷² Further, before the changes to legal aid reforms in April 2013, the Civil Justice Council⁷³ reported that the number of LiPs will increase on a considerable scale with the consequence that ‘Such litigants will be the rule rather than the

⁷² C. Cameron and E. Kelly LITIGANTS IN PERSON IN CIVIL PROCEEDINGS: PART I 32 Hong Kong Law Journal 318 (2002).

⁷³ Knowles et al, ‘Access to justice for Litigants-in-Person (or self-represented litigants)’ Civil Justice Council 2011 available <http://www.judiciary.gov.uk/> [Accessed 19 July 2014]. See also R. Moorhead and M. Sefton, ‘Litigants in Person – Unrepresented Litigants in First Instance Proceedings’ DCA Research Series 2/05 (Department for Constitutional Affairs: London, March 2005); P. Lewis LITIGANTS IN PERSON AND THEIR DIFFICULTIES IN ADDUCING EVIDENCE: A STUDY OF SMALL CLAIMS IN AN ENGLISH COUNTY COURT 11(1) Journal of Evidence and Proof 24-48 (2007).

exception.’⁷⁴ More recently, in 2012 the Judicial Working Group on Litigants in Persons⁷⁵ was formed to investigate judicial preparedness for the substantial increase in LiP and to make recommendations on how best to deal with this phenomena. One of the Group’s recommendations was for the Judicial Office to assess the merits of amending court rules to give judges sufficient flexibility when dealing with LiPs.⁷⁶

The complex and difficult nature of LiPs has caused difficulties for the judiciary. Members of the senior judiciary have expressed their frustration with the increase in LiPs and the adverse impact this continues to have on the court process. Sir Alan Ward expressed his concerns when he opened a judgement by stating:

This judgement will make depressing reading....What I find so depressing is that the case highlights the difficulties increasingly encountered by the judiciary at all levels when dealing with litigants in person.⁷⁷

Turning to the two scenarios concerning LiPs, the first concerns the potential harshness of the new approach towards LiPs. Given that LiPs, generally speaking, lack sufficient knowledge of the court process, including rules of procedure and the importance of complying with process requirements and deadlines, there is a danger that the principle of access to justice will be undermined if a single breach of a court order or rule occurs. This is not to say that LiPs who persistently breach process requirements should be allowed to continue on the litigation process – to do so would equally undermine the civil justice system. To illustrate this point, take, for example, *Tinkler v Elliott*⁷⁸ which concerned an LiP who had breached a court deadline by 18 months. Notwithstanding the substantial delay, the judge at first instance allowed the application, partly on the grounds that the applicant was a LiP and was therefore at a disadvantage as compared to his counterpart who was legally represented. The Court of Appeal disagreed. Maurice Kay V.P. held:

⁷⁴ <http://www.judiciary.gov.uk/> [Accessed 19 July 2014].

⁷⁵ The Judicial Working Group on Litigants in Person Report 2013 available at http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/lip_2013.pdf [Accessed 19 July 2014].

⁷⁶ *supra* note 75, 33.

⁷⁷ *Wright v Michael Wright Supplies and another* [2013] EWCA Civ 234.

⁷⁸ *Tinkler v Elliott* [2012] EWCA Civ 1289.

It seems to me that...the fact that a litigant in person ‘did not really understand’ or ‘did not appreciate’ the procedural courses open to him for months does not entitle him to extra indulgence.⁷⁹

However, given the imbalance which has been created by courts now focusing heavily upon procedural justice, there is a real danger that LiPs who are found to have breached a deadline on one occasion will face sanctions such as strike out which will be unduly harsh and will have the consequence of denying them access to the courts. The counter argument is that judges will continue to maintain a sufficient degree of discretion and therefore they will adopt a slightly more cautious, possibly lenient, approach when dealing with LiPs. However, this counter argument is defeated by considering the second scenario. If judges do exercise their discretion in favour of LiPs then this will create a number of undesirable consequences. Justice and fairness will be undermined if judges were to take a more relaxed approach when dealing with LiPs as compared with those parties who are legally represented. It has the real danger of severely eroding the principle of judicial impartiality and will, ultimately, cause a loss of public confidence in the judiciary. As Arden LJ put it when considering the issue of judicial recusal in *Mulugeta Guadie Mengiste and Other v Endowment Fund for the Rehabilitation of Tigray and Others* ‘...to maintain society’s trust and confidence, justice must not only be done but be seen to be done.’⁸⁰

4. THE WAY FORWARD

It has been argued that the new approach fails to guide judges to carry out an appropriate balancing exercise of the principles of proportionality and efficiency with substantive justice. Judicial and extra-judicial guidance is unclear and pull in two opposing directions of trying to achieve substantive and procedural justice. Further, the potential adverse consequences in cases involving LiP cannot be underestimated. There is a real danger that LiPs as well as those who are legally represented will become victims of unfair decisions. And ultimately, there is a real threat to judicial impartiality.

The underlying rationale of the new approach is to be welcomed. There was a need to redress the balance in judicial approaches to the notion of justice and the application of the overriding objective so that the principles of proportionality and efficiency were given proper

⁷⁹ *supra* note 78, para. 32. See J. Sorabji, *TINKLER v ELLIOTT: PROMPTLY SETTING ASIDE A JUDGMENT GIVEN IN A PARTY’S ABSENCE* 32(1) Civil Justice Quarterly 9 (2013).

⁸⁰ *Mulugeta Guadie Mengiste and Other v Endowment Fund for the Rehabilitation of Tigray and Others* [2013] EWCA Civ 1003.

effect. However, by making these aspects of the overriding objective explicit within the rules should not be translated by the courts as the only aspects of justice which should be given disproportionate weight when considering procedural defaults. These are aspects of the overriding objective which require judges to carefully balance, in appropriate cases, against substantive justice. Therefore, the following changes are required:

1. A change in judicial understanding and approaches to the overriding objective and therefore r3.9 so that all aspects of the overriding objective (substantive justice, proportionality and efficiency) are considered and appropriately balanced;
2. Placing a positive obligation on the parties to keep the court informed of progress with procedural requirements; and
3. Robust enforcement of unless orders where they are granted.

Judges must redress the balance between substantive and procedural justice in order that fairer decisions are reached and harsh decisions are avoided. This can be achieved by judges adopting a more balanced approach when applying the overriding objective and dealing with non-compliance as was Andrew Smith J's approach in *Alstrom*. Although Andrew Smith J upheld the need to have 'procedural discipline' over issues between the parties which justified not striking out the claim, he appeared to take a sensible approach in identifying key factors which could impact on the balancing of substantive justice with procedural justice. Judges need to appreciate that, although an explicit reference to the need to consider costs and proportionality now exists in the overriding objective and r3.9, there is also a continuing need to pay careful attention to the concept of substantive justice. The Court of Appeal's approach in *Chartwell* is also to be welcomed and illustrates how the balance may be achieved. In that case, it will be remembered, Davies LJ was of the opinion that the words 'all the circumstances of the particular case' in r3.9 entitled the judge to 'depart from the expectation which otherwise would arise' - that expectation would be that the claimant's application for relief would be refused. Despite Lord Dyson LJ's explicit reference in *Mitchell* to the need to give proportionality and efficiency great weight and being of 'paramount importance' Davies LJ's approach in considering all relevant factors (including those which go towards substantive justice) and his Lordship's conclusion that r3.9 'required that the application be dealt with justly' allowed a more careful and reasoned conclusion to be reached. On the facts, the defendant, although not the defaulting party, was taken to have contributed to the severe disruption which had been caused to the court timetable as well as a 'disproportionately severe consequence' in the claimant being unable to pursue its claim.

Aside from a theoretical change, there must also be a practical change, a change in procedure and the manner in which the parties interact with the court and each other when dealing with process requirements. What is evident from the vast majority of the cases concerning non-compliance and r3.9 is a party's failure to inform the court that a deadline will not be met before the default actually occurs. Indeed, the claimant's solicitors in *Mitchell* were prompted to inform the court that they would file a costs budget only when an email was sent by the Master. The jurisprudence also indicates the court's frustration in the defaulting party's failure to make an application for an extension of time before the default actually occurs. This frustration is understandable. Parties to litigation will be fully aware of the actual and potential challenges in terms of resources and other factors which will impact on their cases. They will also be aware of the need to comply with court rules and orders and the time frames within which this must occur. A party in active litigation will be in the best position to foresee whether or not it will be able to comply with an order or court rule. Where a party decides to make an application to the court after a deadline has lapsed obviously runs the risk that its application will be dismissed and sanctions will be exercised against it. Any subsequent application for relief will also be unsuccessful.

Sir Rupert noted that, in some jurisdictions, a telephone call to the parties has the desired effect when dealing with compliance with court deadlines. However, such an approach places an obligation on the wrong party in litigation: it should not be the court that is expected to chase litigating parties. The obligation to keep the court informed of progress with litigation should be one which rests on the shoulders of the parties themselves. Therefore, the parties should be placed under a positive obligation to keep the court informed of progress with compliance with court orders and rules on a regular basis. Where, for example, a court order is made which sets out a specific deadline, the parties must keep the court informed of how they are progressing towards that deadline. This practice would be similar to the existing practice of requiring parties to complete and file pre-trial checklists.⁸¹ There the parties are under a duty to complete a form which informs the court of their progress on case management directions and their readiness (or not) for trial. A similar 'progress checklist' would also allow parties to keep the court informed of compliance with process requirements. Take the following simple example by way of illustrating how a progress checklist would operate. Party A and Party B have a contractual dispute which has been issued in the Queen's Bench Division. In the course of the proceedings, Party B makes an application to the court

⁸¹ Form N170 Pre-trial checklist.

for an order for security for costs against A. At the interim hearing, the court decides that Party A should provide security and that it should be paid into court within 21 days of the date of the order. As well as setting out details of the obligation on Party A to provide security, it will also expressly state that Party A is under a positive obligation to keep the court informed of progress with complying with the order. Now, one of two scenarios may occur following the making of the court order. First, Party A may make full payment into court the day following the hearing. In such a situation Party A will inform the court that it has met the deadline and discharged its obligations. In the second scenario Party A struggles with raising the monies in time and then finds itself breaching the deadline and incurring sanctions. As soon as Party A (who is currently within the deadline) realises that it is struggling to raise the money and therefore is likely to breach the deadline then it must immediately inform the court. By doing this the court will be kept aware of whether the parties have complied or will be able to comply with process requirements and, more importantly for our purposes, it will require the potential defaulting party to inform the court of the reasons for this. This will keep the court and the other party fully informed of the position and any potential or actual impact on the court timetable and will allow the defaulting party to make any necessary applications for extensions of time to comply in good time before the expiry of the necessary deadline. Such an approach would be in-line with Lord Dyson MR's guidance in *Mitchell* when he stated '...applications for an extension of time made before time has expired will be looked upon more favourably than applications for relief from sanctions made after the event.'⁸²

A criticism of the progress checklist approach may be that it simply adds another layer of bureaucracy and possible cost and that if a party foresees that it will be unable to comply with a deadline it will simply make an application to the court with supporting evidence explaining the reason for an extension. However, the jurisprudence indicates that the vast majority of applications for relief from sanctions fail to explain or provide evidence for the reasons for requesting an extension.⁸³ Also, applications are made far too late in the day and in circumstances when any potential extension of time is in danger of upsetting other procedural deadlines such as the trial date. This would not be the case if there were a rule within the CPR which clearly and expressly provided that parties must keep the court informed of compliance with process requirements on a more regular basis. The approach advocated would provide

⁸² *supra* note 32, para. 41.

⁸³ This was certainly the position in *Kraze Entertainment v Marina Bay Sands*.

sufficient evidence to the court and the non-defaulting party of what has gone wrong, why the deadline cannot be complied with and therefore provide the court with the necessary information and evidence to come to a more reasoned and fair decision when considering r3.9 and seeking to apply the overriding objective.

If Party A, who is in danger of breaching a deadline, has informed the court why it is unlikely to comply with a process requirement and the court is unsatisfied with a Party A's explanation, the court should immediately make an unless order against Party A rather than entertain an application for an extension of time. If an unless order is made then this should be strictly enforced against Party A. The Court of Appeal in the case of *Marcan Shipping (London) Ltd v Kefalas*⁸⁴ was of the view that the sanction embodied in an unless order took effect without the need for any further order if the party to whom it was addressed failed to comply with it in any material respect. As Moore-Bick LJ explained, it must be assumed that at the time of making the order the court considered all the relevant factors and reached the decision that the sanction should take effect in the event of default.⁸⁵

The advantage of this approach is twofold. First, the court will continue to implement a strict approach towards non-compliance by enforcing unless orders. Secondly, a party in potential default will have an opportunity to comply with a deadline but this time within the strict framework of an unless order. The order would be clear as to what must be done and by when as well as setting out the consequences for failing to comply. This will also strike a fair balance in cases where one of the parties to a dispute is a litigant-in-person because it will mean that regardless of whether a court makes an unless order in favour of a litigant-in-person or a party who is legally represented, both will be subject to the same treatment by the court but both will be afforded the opportunity to comply before a sanction takes effect.

The post-Jackson era has created welcome changes in the manner in which parties are required to conduct litigation and the ways in which the courts and parties to litigation must now seek to control the escalation of disproportionate costs. Nevertheless, there is a danger that, similar to the courts' approach to substantive justice after the 1870-75 reforms and before Jackson, the courts will give disproportionate weight to some aspects of the overriding objective rather than seeking to carry out a balancing exercise of all aspects of the overriding objective.

⁸⁴ *Marcan Shipping (London) Ltd v Kefalas* [2007] EWCA Civ 463; [2008] 3 All E.R. 365.

⁸⁵ *supra* note 84, para. 34.

