Achieving justice

Richard Harrison looks at four recent Court of Appeal decisions on the disciplinary techniques of case management under the Civil Procedure Rules

What is the most significant case to date on the Civil Procedure Rules? My vote goes to Court of Appeal's decision in *Biguzzi v Rank Leisure Plc* on July 26, 1999, reported so far only in *The Times* (October 5, 1999).[1] Essentially, the Court of Appeal suggests to those involved in case management that there are more flexible ways to control delay and default on the part of claimants than the simple imposition of strike-outs.

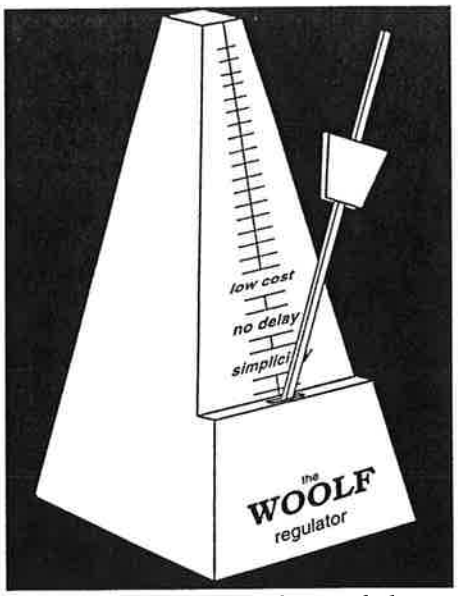
In *NLJ* on August 13, I commented on the *Mealey-Horgan* case in which Mr Justice Buckley took a realistic approach to the late service of witness statements and I expressed a hope that it was a sign of things to come. It is now refreshing to see the Court of Appeal adopting a constructive approach to the shortcomings of litigants and their advisors rather than simply encouraging the excessively penal sanction of striking-out. Another beneficial aspect of *Biguzzi* is the clear indication that the Civil Procedure Rules are to be treated as a self-contained code. Previous case law, in particular on matters such as sanctions and striking-out, should now have no application.

The context

Disputes in which the "overriding objective" is under consideration, cannot be looked at in isolation from the underlying social issues. The civil justice system was here involved in compensating a victim of criminal injury through the mechanism of employers' liability in negligence. In November 1993, Mr Biguzzi sustained severe facial injuries as a result of a fight at the Brighton night club where he was employed as a bar manager. Good social policy, as reflected in the CPR, requires claimants' cases to come on for trial as quickly as possible.

The strike-out

As a result of the defects in the old system, and the many problems which can befall litigation, Mr Biguzzi's case became bogged down. The defendant made an application to strike-out the proceedings but the district judge refused to make his decision on the basis of want of prosecution, on the law as it then stood, because a fair trial *could*



still take place. However, he struck the action out on the basis of what he found to be "wholesale disregard of the rules", a course encouraged by several Court of Appeal pronouncements in the dying days of the old regime.[2]

The district judge's decision at this stage in *Biguzzi* was consistent with a disciplinary culture which tries to regulate civil proceedings through sanctions and fear. However, the risk is that it does so without regard to the bigger picture. Here, the bigger picture was of an unfortunate claimant, through no fault of his own, being left to the uncertainties of an action in negligence against the solicitors who had acted for him.

The appeals

Fortunately, there was an appeal to the circuit judge, His Honour Judge Kennedy, who spotted the reality of the situation; there had been defaults on both sides and indeed obstructive behaviour by the defendant. The defendant's solicitors had delayed in obtaining their own expert's report. As Lord Justice Brooke said subsequently in the Court of Appeal:

"The defendant's solicitors ... then continued to withhold their willingness to give a certificate of readiness while they pursued a hopeless task of trying to trace down these old medical records which related to the period of the claimant's youth."

Apparently, they adopted the then common defendant's solicitors' tactic of believing that somehow an opponent is deliberately hiding something. The judge took the view that the case could still be tried fairly and that it was fair for it to be tried. The delay did not mean that the case should be thrown out of the system; it meant that the case should now be heard early. He identified the central issue as being: "Is there anything unfair in letting this case go to trial?"

This lets in for consideration, in accordance with the overriding objective, the question whether the defendant has suffered any relevant prejudice. Quite correctly, the judge now sought to apply the Civil Procedure Rules on the basis that none of the old authorities assisted. In a memorable passage he asserted:

"We now have to decide what is going to happen and we shall. We will not, I repeat, look over our shoulders. If the Court of Appeal tried to tell us judges at first instance that we must look over our shoulders in any way at all, we will just have to find ways of adjusting our wing mirrors".

In agreeing with him on further appeal, Lord Woolf MR said: "There is no fear that in this case this court is going to suggest the judge should 'adjust his wing mirrors'".

Lord Woolf took the view that the draconian step of striking-out, whilst available to a procedural judge in his generally wide-ranging discretion, was one which did not achieve justice in this particular case. Such an order simply led to hard-fought appeals and satellite litigation with disproportionate costs. As Lord Woolf said: "The fact that a judge has [the power to order a strike out] does not mean that in applying the overriding objectives the initial approach will be to strike-out the statement of case. The advantage of the CPR over the previous rules is that the court's powers are much broader than they were. In many cases, there will be alternatives which enable a case to be dealt with justly without taking the draconian step of striking the case out".

Lord Woolf made it clear that, under the new Rules, it is unlikely that cases will reach such a position. Lord Woolf referred to the new range of sanctions available to penalise defaults. In the case of excessive delay by a claimant, the court can require money to be paid into court. This can effectively function as a new ground of security for costs and may well be the best sanction for a defaulting claimant. It is also

[1] *But available in full along with the other cases referred to and some very helpful CPR material at the website run by Laurie West-Knights of counsel: http://www.lawonline.cc*

[2] Arbuthnot Latham v Trafalgar Holdings and others *[1998] 2 All ER 181;* Choraria v Sethia *(1998)* The Times, *29 January.*

the most appropriate protection for a defendant who should not receive the windfall of a complete dismissal but who may have been inhibited by the expense of proving prejudice under the now defunct striking-out provisions.

In the words of Lord Justice Brooke: "the progress of the case cried out for firm external control by the court which it did not receive". Under the new regime, such control is much more likely. The days of wanting to close a file, but of being reluctant to do so for fear of disturbing sleeping dogs, are thankfully over. The court, of course, made it clear that it will support judges who exercise their discretion fairly and justly in all the circumstances and recognise that they should not allow the same defaults to occur in the future as have occurred in the past.

Thorn: relief for defendants

Biguzzi was followed up on September 1, 1999 by a decision of a Court of Appeal once again including Lord Justice Brooke and Lord Justice Robert Walker in *Thorn Plc v McDonald (The Times*, October 15 1999). This gave defaulting defendants an opportunity to get their case back on track following a default judgment entered against them. The judge at first instance had relied on pre-action delay in responding substantively to a letter before action to penalise the defendants. This was an irrelevant factor to take into account. Following the lead of *Biguzzi*, Lord Justice Brooke said:

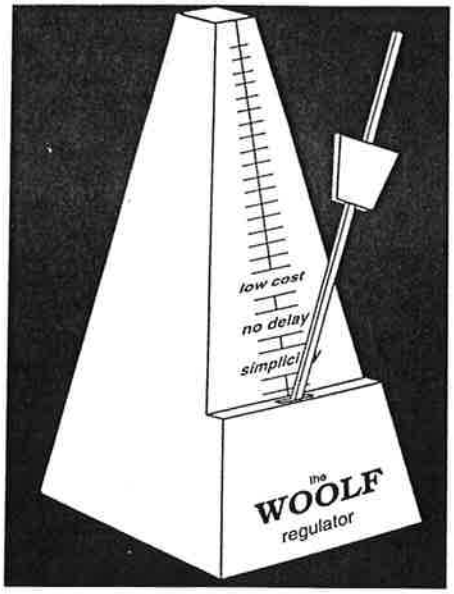
"This court, in my judgment, would be doing nobody any service in seeking to reintroduce into the interpretation of these rules judgments of courts which were given under the old regime, in so far as the new regime has taken over from the old regime. I can see nothing in rule 13.3 or in the overriding objective in part 1 to suggest that, if a defendant does not give a reason for the delay, that is somehow or other a knock-out blow, on which a claimant is entitled to rely in support of an irresistible submission that there is no material on which the court can exercise its discretion in the defendant's favour".

The common thread in these two cases is that the Court of Appeal does not appear to be encouraging a culture under the CPR that litigation should be a game of instant death in which one error in complying with the rules will lead to instant disaster and give your opponent an unmerited victory. Of course, quite rightly, you ignore timetables at your peril: the courts are not going to be a soft touch.

No room for complacency

On the day following *Biguzzi*, the same three-man court decided *Stevens v. Gullis* (*The Times*, October 6, 1999) and *Baron v Lovell (The Times*, September 14, 1999), which emphasised that little leeway will be given to defaulters.

Stevens confirmed a case management decision to debar a proposed expert from



"The claimant in *Baron* will not, on the facts of the case, have received an unmerited windfall. However, the defendants' insurers might be aggrieved that they lost the opportunity to achieve some reduction in liability through an admissible expert's report and might therefore seek to recover the loss from the Solicitors' Indemnity Fund or its successors."

giving evidence on the basis of his conduct and demonstrable unfitness to assist the court. *Baron* is a salutary lesson for old style defendant personal injury lawyers whose dominant strategy was to adopt an obstructive and aggressive approach with the intention of exploiting delay. The defendant's solicitors refused to take automatic directions seriously and failed to attend a pre-listing hearing with responsible personnel. As a result, they were barred from calling their expert whose report they had failed to serve early enough. Lord Justice Brooke made the point:

"The whole thrust of the CPR is to require the parties to behave reasonably towards each other in the conduct of litigation. The old antagonistic point scoring, which used to drag personal injury cases out and run up the costs, should now be at an end."

The court made it very clear that the sanctions for flouting directions of the court might involve awarding indemnity costs or enhanced rates of interest.

Some thoughts

We know where we stand so far as the Court of Appeal is concerned and the approach of Lord Woolf and his colleagues in these cases is welcome. Case management does not mean simply imposing harsh sanctions secure in the knowledge that the Court of Appeal will not interfere with your discretion. It is not always consistent with the overriding objective simply to throw cases out or make them impossible to try; this will simply lead to the problem being transferred elsewhere within the system.

If the *Biguzzi* claim had remained struck-out, the claimant would have had a right of action against his solicitors which would have been dealt with by professional indemnity insurers. Such cases are complex and time consuming and the recovery is bound to be less than 100%, however competently the claim is handled on both sides. A meritorious claimant would have been forced to start a fresh action and suffer the stress and delay involved in arguing over matters such as "notional date of trial" and "loss of a chance".

Penalising the defaulting defendants in *Thorn* would have given the claimant a windfall and translated the defendant's potential saving through fighting the action into a claim against their insurers or potentially, their solicitors. The claimant in *Baron* will not, on the facts of the case, have received an unmerited windfall. However, the defendants' insurers might be aggrieved that they lost the opportunity to achieve some reduction in liability through an admissible expert's report and might therefore seek to recover the loss from the Solicitors' Indemnity Fund or its successors.

Many robust and apparently reasonable case management decisions simply shift loss to third parties, whether lawyers or insurance companies, and this generates disputes at other points in the litigation life-cycle with which the civil justice system still has to cope at some stage. Dealing with a case justly must include: "allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases" (CPR 1.1 (2)(e)) but reliance on this can be misplaced. A struck-out case will still generate litigation elsewhere in the system. A financial sanction may still create disputes. One benefit of the *Biguzzi* approach is that it enables these facts to be recognised. Whilst, in a working system, punishment of defaults cannot be wholly avoided, the *Biguzzi* approach may help to reduce the problems of satellite litigation. o

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