Simon Lewis The 'Plebgate' affair may not have been very edifying but it did give the courts the opportunity to issue guidelines on Civil Procedure Rule 3.9 – on granting relief from court sanctions

PLAYING BY THE RULES

A WHOLE RAFT OF CASES WAS GENERATED EXPLORING THE BOUNDARIES OF THE GUIDELINES. IN PARTICULAR, THEIR STRICT REQUIREMENTS WERE EMPLOYED TACTICALLY TO TAKE ADVANTAGE OF ANY FAILURE TO OBSERVE THE RULES, HOWEVER SLIGHT

Remember Plebgate? The story of what Andrew Mitchell MP may or may not have said to the police will run for some time yet. For lawyers, however, it has a different connotation: Mr Mitchell subsequently sued News Group Newspapers Ltd in connection with the reporting of the incident. Mr Mitchell's solicitors served his cost budget six days late. This breach of the rules caused substantial extra work and extra costs to be incurred by the defendant and disrupted the work of the court on other matters. Mr Mitchell applied for relief from the sanction which would otherwise be imposed by the court as a result of this breach; namely that he could not recover any of his costs other than those of issuing the proceedings, irrespective of the result.

The court refused to grant relief from the sanction. Mr Mitchell appealed against this decision and in refusing his appeal the Court of Appeal, led by the Master of the Rolls, took the opportunity to lay down a number of guidelines which focused around the application of Civil Procedure Rule 3.9. This rule states that if a party applies for relief from any sanction imposed by the court for a failure to comply with any rule the court is to consider "all the circumstances of the case" 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 Court of Appeal emphasised that the need to comply with rules, practice directions and orders is essential if litigation is to be conducted in an efficient manner.

Consequently, a whole raft of cases was generated exploring the boundaries of the guidelines. In particular, their strict requirements were employed tactically to take advantage of any failure to observe the rules, however slight. All of this culminated in the need for the court to revisit the guidelines. The court chose three separate actions, all of which were appeals against the use of the guidelines, to do so. The lead case was Denton vs White and Another and the three appeals were all heard on 4 July [2014] EWCA Civ 906.

The court was again led by the Master of the Rolls. Plainly the intention is to set a marker down for future reference and to discourage lawyers from trawling through earlier decisions. The court observed that Mitchell had been "misunderstood and misapplied" and the three decisions on appeal illustrated that point well. One was an example of an overly lax attitude towards breach of a court order and the other two were overly draconian.

The court noted that the guidance in Mitchell was substantially sound but needed to be "clarified and amplified". The court then set out a three-stage approach to the operation of rule 3.9:

- Assess the seriousness and significance of the default
- Consider why the default occurred
- Evaluate all the circumstances of the case so that the court can deal justly with the application, giving particular weight to the need to enforce compliance with rules and orders.

IN FUTURE THE COURT IS GOING TO BE MORE READY TO PENALISE OPPORTUNISM ARISING FROM A TRIVIAL FAILURE TO MEET A RULE OR DEADLINE

Whether something is serious or significant or not will often depend on whether it disrupts any other aspect of court business or the case timetable itself. Why a default has occurred and whether there is a good reason for it will require some examination but the court was not going to be drawn into giving a list of good and bad reasons for a failure to comply.

The third stage is a formulation that allows the court some room for manoeuvre. The court noted that there had been a misunderstanding by some judges in the past that if there had been a serious or significant breach and no good reason for that breach, the application for relief from sanctions would automatically fail. That is not the case. In such circumstances the courts still needed to use this third stage to evaluate the matter in the round.

The court noted the spirit of non-cooperation that had occurred following Mitchell and stated that this should be discouraged. In future the court is going to be more ready to penalise opportunism arising from a trivial failure to meet a rule or deadline. This is likely to result in heavy costs sanctions on parties that behave unreasonably.

So the pendulum swings the other way: arguably the over-strict approach in Mitchell has now received some welcome clarification which will allow for a more nuanced and less confrontational attitude than we have seen recently. Or have we in fact just gone full circle?

Simon Lewis is a partner in the construction and engineering team at Bond Dickinson

Gary Sinden You can win an adjudication but still lose out if the client goes bust before you get payment of your award. But there are steps you can take to mitigate the risk

SHOW US THE MONEY

In the past year I have successfully represented main contractors in four adjudications only to find the clients fall into administration before making payment in accordance with the decision. These were not insignificant sums either with two awards being in excess of £500k.

The "big boys" can normally ride out such a hit, and in any event should know better than to let such a situation arise. However, for the regional contractors and SMEs such a knock is often fatal causing them to additionally find they cannot meet their own financial obligations and fall themselves into administration.

I know how it happens; I used to be in main contracting. The attraction of a project if it goes well could make you a 10% plus gross return; you have a site team sitting on their hands in the office, with a quick start you could fill the gap in your turnover and profit for the year.

Such enthusiasm to win the project, however, often causes the good business bible to fall into a muddy trench, leading to any financial governance being forgotten about. Well here is a brief reminder of the basics:

Assuming the client is a commercial enterprise, obtain the last three years published accounts. If you are not sure what they mean, get advice from an accountant. Ultimately you are interested in the net worth of the company, how successful it is, how the structure of the company is set up, and so on. If it makes grim reading, why would you want to do business with them? Perhaps use the information gained as leverage to try and seek some form of commercial protection.

If the company you are going to be contracting with has an ultimate or parent company, why not ask for a parent company guarantee. Then in the event of a breach by your client (say, non payment), the parent company is legally obligated to remedy the breach. If you're proposed client is reluctant to enter into such an agreement this should start the alarm bells ringing.

If you want a domestic mortgage nowadays and you are lucky enough to have a decent deposit, often the mortgage company before proceeding will ask to see evidence of the deposit and where the funds came from. As a contractor should you not do the same?

If a client is undertaking a reasonable sized project, is it not eminently sensible to know they have the funds or at least a commitment from a funder to provide such funds? While such evidence (say a letter from the funder) will not hold any contractual significance, it should still provide some comfort.

Funder guarantees if worded correctly can be a hidden gem. Obviously they exist for the benefit of the funder, but they can help you too. The key to this is in the event of the funder instigating its right to step into the shoes of the client, it will remedy any existing client breaches prior to the date of stepping in. Obviously the key issue is any unpaid sums due under the building contract. Such a condition is unlikely to exist in the draft of the guarantee they produce however; you will have to ask for it.

An escrow account provides visibility of employers funds in a "ring fenced" bank account set up specifically for the project. An agreed minimum sum is maintained (say the value of two projected monthly valuations), which can only be drawn down against by the monthly valuation certificates. This allows the contractor the benefit to see the funds are available before undertaking the works. It is advisable to seek specialist advice to ensure the escrow account is correctly set up.

Whilst project bank accounts are more for the benefit of the downstream tier 1 supply chain, benefits do exist for the contractor. Acceptance by an employer to adopt such a payment arrangement shows it is committed to making payments. Additionally even if things in the future do go wrong, with payments having been made to the supply chain, the liability of the contractor should be substantially reduced.

ENTHUSIASM TO WIN THE PROJECT OFTEN CAUSES THE GOOD BUSINESS BIBLE TO FALL INTO A MUDDY TRENCH

Shortened payment periods and reduced retention sums are simple steps that can significantly reduce a contractor's (or indeed subcontractor's) non-payment exposure.

Although the recently published Fair Payment Charter is no doubt a step in the right direction, it should be remembered it is voluntary. Unscrupulous clients with limited funds are most unlikely to sign up to such a commitment, and why would they? The phrase "turkeys voting for Christmas" springs to mind.

And finally, please don't accept any clause that in the event of an upstream insolvency the client does not have to pay you that part of the money the client did not receive. The new Construction Act gets it wrong in not outlawing such draconian practices.

Taking the steps outlined above will certainly not guarantee the purse that pays you is never going to be empty, but at least you will have mitigated such payment risk.

Gary Sinden is a director of G Sinden Consult