The rise and rise of arbitration

Guy Featherstonhaugh QC and Caroline Shea of Falcon Chambers take an in-depth look at the changing face of litigation

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WE MAY NOT BE SURPRISED BY REPORTS of litigation taking many years and costing between £60,000 and £70,000. However, were we told that the reports in question stem from 1852, and that such sums in real terms today would be many millions of pounds, we would perhaps agree with Dickens' statement regarding the Chancery Court in *Bleak House*:

> '... there is not an honourable man among its practitioners who would not give – who does not often give – the warning, "Suffer any wrong that can be done you rather than come here!"'

How has the litigant's experience of the courts improved over the last 162 years? Well, judges have largely foregone their wigs and robes in favour of Betty Jackson-designed Star Trek costumes, in a bid to make the court experience more à la mode. Among other changes, in order to streamline civil procedure, the White Book and the Green Book, containing the civil procedural rules for the Supreme Court and county courts, were replaced in 1999. By even denser White and Green Books.

The traditional approach of our civil courts on the whole, prior to the 1999 reforms, was to excuse non-compliance with procedural rules in litigation if any prejudice caused to the other party could be remedied (usually by an appropriate order for costs). The 1999 reforms attempted to encourage the courts to adopt a less indulgent approach. But reform did not stop in 1999. In a critical report in 2009 concerning litigation costs, Sir Rupert Jackson concluded that a still tougher and less forgiving approach was required. His recommendations were incorporated into the Civil Procedure Rules.

Largely as a result of this reform, the volume of proceedings issued declined substantially, which the rules committees and the courts, not to mention the Ministry of Justice with its cost-cutting mission, presumably view as a good thing. The views taken by would-be litigants, whose grievances must now remain unresolved as a result of the complexity and costs of litigation, are presumably somewhat different.

The parties must now take multiple significant steps, and thus incur considerable costs, both prior to issuing proceedings, to comply with the relevant pre-action protocols (failure to comply with which may itself lead to adverse costs consequences); and very soon after commencement of proceedings, to fulfil the onerous and complex procedural requirements now imposed at the very outset, the production of complex costs budgets being one such step. This front loading of costs typically, and understandably, prevents litigation being a reasonable option for most parties other than the super rich, the highly risk friendly, or the compulsive optimist.

The startling results of the reforms introduced in response to the Jackson report are now beginning to emerge. We set out below some of the more egregious examples, drawn from the law reports over the last few months, before going on to examine what alternatives are available for prospective litigants.

Readers will already be familiar with the case of the former government chief whip, Andrew Mitchell, and his attempt to cycle through the Downing Street gates on 19 September 2012 (an affair originally dubbed 'Plebgate', and now, for reasons familiar to devotees of this fascinating saga, 'Gategate'). Subsequently, Mr Mitchell started libel proceedings against *The Sun*, the paper that broke with an (allegedly) contentious version of the story. During the course of that litigation, Mr Mitchell's hapless solicitors omitted to file a costs budget with the Court seven days prior to the costs case management conference, contrary to the new pilot prescribed under the CPR PD51D Defamation Proceedings Costs Management Scheme. The budget (estimating the claimant's costs at £506,425) was instead filed with the Court (at the Court's prompting) the day before the hearing.

At the hearing, the defendant's solicitor said that there had not been sufficient time to consider the claimant's budget. In the good old days, when the courts used to administer justice, there was no need for a costs budget at all, still less a sanction for failing to file one. Even in this stricter climate, one might have thought that the overriding objective of

dealing with cases justly and at proportionate cost could have been served by adjourning the hearing for a sufficient time to allow the defendant to consider the claimant's budget, and making the claimant pay the costs associated with the aborted hearing, especially since the defendant was quite unable to show that it had suffered any prejudice as a result of the claimant's default (other than the wasted costs of the short hearing itself).

The Court would have none of this indulgent thinking. The sanction it imposed was to disentitle Mr Mitchell to recover any of his costs of the entire proceedings, other than the court fees, regardless of success in the case. That sanction was taken from the new rules, which were not even in force at the time that the decision was made, but which were applied by analogy. The Court subsequently refused Mr Mitchell relief from that sanction. Both these decisions were approved, with enthusiasm, by the Court of Appeal in November 2013: *Mitchell v News Group Newspapers Ltd* [2013]. The Court said, in tones that will be of concern to every litigation solicitor:

> 'We understand that solicitors may be under pressure and have too much work. It may be that this is what occurred in the present case. But that will rarely be a good reason. Solicitors cannot take on too much work and expect to be able to persuade a court that this is a good reason for their failure to meet deadlines. They should either delegate the work to others in their firm or, if they are unable to do this, they should not take on the work at all. This may seem harsh especially at a time when some solicitors are facing serious financial pressures. But the need to comply with rules, practice directions and court orders is essential if litigation is to be conducted in an efficient manner. If departures are tolerated, then the relaxed approach to civil litigation which the Jackson reforms were intended to change will continue.'

During the course of its judgment, the Court of Appeal castigated the decision of Walker J in *Ian Wyche v Careforce Group Plc* [2013], in which he had acceded to an application for relief from sanctions in respect of two non-trivial failures, saying:

> 'The culture which the court seeks to foster is a culture in which both sides take a common sense and practical approach, minimising interlocutory disputes and working in an orderly and mutually efficient manner towards the date fixed for trial. It would be the antithesis of that culture if substantial amounts of time and money are wasted on preparation for and conduct of satellite litigation about the consequences of truly minor failings when diligently seeking to comply with an "unless" order.'

Not so, said the Court of Appeal: the desire to discourage satellite litigation is not a good reason for adopting a more relaxed approach to the enforcement of compliance with rules, practice directions and orders.

The Court of Appeal then transferred its disapproving gaze to the decision of Andrew Smith J in *Raayan Al Iraq Co Ltd v Trans Victory Marine Inc* [2013]. In granting relief from sanction in that case, the judge had held that the overriding objective demanded that relief be granted, on the footing that the change in the rules or in the attitude or approach of the courts to applications did not mean that relief from sanctions would be refused even where injustice would result. Again, not so, said the Court of Appeal. According to them, the judge was focusing exclusively on doing justice between the parties in the individual case and not applying the new approach which seeks to have regard to a wide range of interests.

The *Mitchell* approach appears to be being followed strictly in other cases. In *Durrant v Avon & Somerset Constabulary* [2013], the Court of Appeal held that, while it should be wary of interfering with case management decisions, it was vital that decisions which failed to follow the *Mitchell* approach should not be allowed to stand. Indeed the Court of Appeal went further and elevated the *Mitchell* approach to a principle. Once an unless order has been made, late service of witness statements is no longer to be tolerated save in the types of exceptional and rare circumstances alluded to in *Mitchell*.

Another rigid application of *Mitchell* occurred in the case of *Karbhari & anor v Ahmed* [2013], in which the defendant sought to change his defence and introduce new witness evidence on the second day of trial. This was not allowed, regardless of whether or not the other side could be compensated in costs for the adjournment that would be necessary. Again in *SC DG Petrol SRL v Vitol Broking Ltd* [2013], an application on the last day for compliance for an extension of time to the period provided in an unless order for provision of security for costs was refused, expressly applying the approach in *Mitchell*, and holding that the non-compliance was not trivial and the applicant had not discharged the burden of establishing a good reason for the default. The defence was struck out.

And so it goes on. In *Harrison v Black Horse Ltd* [2013], it was held that failure to serve notice of a conditional fee arrangement was not trivial and no good reason had been given for it: relief from sanctions was refused. In *Malcolm-Green v And So To Bed Ltd* [2013], an order granting an extension of time for service of a claim form was set aside where the claimant had not provided any good reasons under CPR7.6 for his failure to comply with the four-month time limit for service, and where there were no exceptional circumstances justifying an extension of time. And most recently it has been held in *Webb Resolutions Ltd v E-Services Ltd* [2014] that the *Mitchell* principle applies equally to applications for permission to appeal out of time. Result: permission was refused.

A rare exception to the stringency of the *Mitchell* principle appears, but offers the average litigant little hope, in *Robert Adlington & 133 ors v ELS International Lawyers LLP (In Administration)* [2013], where at first instance the Court held that failure by seven out of 133 claimants to sign Particulars of Claim because they were out of the country in the lead up to the relevant date was properly characterised as trivial since it was a failure of form not of substance and the defendant well knew the case against it, having received the signed statements of case of the other 126 claimants and the unsigned versions in similar if not identical terms from the offending seven holidaymakers. The number of litigants involved in this group litigation means that the decision turns on its unusual facts and is therefore unlikely to be of assistance to the average individual litigant.

The message then is clear:

1) The overriding objective of securing that cases are dealt with justly and at proportionate expense is not the same thing as, nor is it subject to an overarching consideration of, securing justice in the individual case. Conversely, therefore, litigants may expect that the courts will

dispense injustice in individual cases *pour encourager les autres*.

2) Trivial breaches may be relieved from sanction.

3) Non-trivial breaches will not be excused, save in return for a very good explanation typically involving circumstances outside the control of the party seeking relief or its lawyers.

4) The chances of securing relief from sanction will be improved if the application for relief is made within good time, before the time for compliance has expired.

Overall, therefore, this tougher, more robust approach to rule compliance and relief from sanctions is intended to ensure that justice in individual cases is not to be dispensed if it would or might theoretically threaten the delivery of justice in other cases, because of wasted court time in aborted hearings, for example. As the Court of Appeal said in *Mitchell*, this requires an acknowledgement that the achievement of 'justice' under the overriding objective in Civil Procedure Rules means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations. For the foreseeable future, therefore, we think that we can expect to see a vast increase in the amount of satellite litigation, as litigants seek to derive advantage, often in the form of disposing of the litigation in its entirety, from any procedural err or, irrespective of the merits of their tactics. An example of the law of unintended consequences, if ever there was one.

Lawyers may gasp as what was once perceived as justice metamorphoses into its opposite at the flick of a *1984*-style recasting of language; parties may scratch their heads in disbelief as they are denied a judicial determination of their dispute for the sake of the greater good (now seemingly defined as the smooth administration of justice within budgetary constraints); and insurers will undoubtedly raise their premiums as parties seek recompense from their lawyers for the draconian consequences of what was once regarded as understandable and therefore forgivable human error or delay. The *Mitchell* principle now defines the basis on which justice is to be delivered or (depending on your point of view) withheld.

So much for litigation, an area where even – perhaps especially – experienced litigation solicitors may now fear to tread. Let us now be positive, and investigate other routes available to resolve parties' disputes, absent litigation.

Mediation is the buzz word that has occupied many column inches over the last few years. It seeks to present parties with a flexible form of dispute resolution in which the options for settlement that may be brought into account go far and wide, beyond the particular issues dividing the parties. Often, the claimant will want something that the combative slog of litigation will be unable to deliver: an apology; an acknowledgement that pain has been caused; a gift to a third party; in other words a remedy beyond the jurisdiction of the court. Mediation can work well in such circumstances.

Often, however, the parties will simply want the point at issue between them decided one way or another, so that they have a proper basis on which to conduct their affairs in a continuing relationship. Mediation here is less appropriate. Another downside to mediation is the fact that it may not, and often does not, lead to finality, since the mediator has no power to impose a solution and the parties are free to walk away and continue their litigation, with all the disadvantages identified above. Moreover, it is becoming received wisdom, justified in our experience, that mediation favours the weaker party in the dispute; as any conscientious lawyer must advise, the stronger party must be prepared to concede, some, often a great deal, of its legitimate claim in order to dispose of the dispute by mediation.

Further, it is increasingly the case in our experience that parties will use mediation tactically during litigation, with no intention of resolving the dispute at any point short of full trial. The mediation process is deployed cynically, for one or more of a number of ulterior purposes: to delay the final outcome; to gain valuable information in a without prejudice setting; to force a party to reveal its case earlier and/or more fully than would be the case under the litigation timetable; to gain an outcome beyond what the court would be capable of ordering; to satisfy the court that alternative dispute resolution has been tried and thereby avoid adverse costs consequences (in other words, going through the motions). Mediation often therefore becomes an additional step in the litigation rather than truly an alternative means of dispute resolution.

So mediation can work in certain circumstances, particularly where the real dispute involves individuals and emotions, rather than commercial entities and balance sheets. In other more commercial cases, in an ideal world, litigation would afford the remedy – but as we have shown, litigation is now far from ideal, if indeed it ever was. At this point, we turn to arbitration for consideration as an alternative both to litigation and to mediation.

Arbitration is a form of dispute resolution that is widely used both in international forums, and in this country, for certain forms of dispute where arbitration has long been built into the parties' relationships. Agricultural disputes are routinely decided by arbitration (contractual and statutory), as are rent review disputes, to take two examples. It is striking that very few other forms of domestic law dispute have conventionally been arbitrated, although this is changing, at some considerable speed. The historical reason for ignoring the obvious benefits of arbitration has generally lain with parties' lawyers, who tend to treat litigation, with all its faults, as the default option. While mediation is routinely considered, not least because of the court's ability (and increasing willingness) to impose sanctions against a party that does not consider it, parties rarely spare a backward glance at arbitration.

This is curious, for the benefits of arbitration are evident, and sound in flexibility, autonomy, expertise, and costs. The parties are in charge of their own procedure, and may agree such fundamental matters as whether there should be a hearing, and what evidence should be given. They can pick the (expert) tribunal of their choice, rather than having an uncongenial or (increasingly common) inexperienced judge foisted upon them. They can control the date and pace of their proceedings. They will not be slapped down if they fail to file their costs budget seven days before a costs budget case management conference. Indeed, it is entirely unlikely that they would decide to indulge in such wasteful procedural hurdles in the first place; even more unlikely that an arbitrator would impose them.

Equally significantly, they will achieve a much greater degree of finality than they can expect in court. The opportunities to appeal an arbitrator's decision are much more constrained under the Arbitration Act 1996; and the need to appeal or review an arbitrator's decision arises far less frequently than it does

in disputes decided by a judge at first instance, since the arbitrator can be chosen precisely for their expertise in the subject matter of the dispute. This last advantage cannot be over emphasised. With the massive increase in jurisdiction of the county courts in property cases, it is alarming the number of times our clients have felt badly let down by having their technical property dispute decided by a judge whose own practice was at the criminal bar, and 95% of whose cases are criminal or family law. One of the writers sustained a market shaking victory in a 1954 Act renewal several years ago, the case being decided by a judge with almost exclusively criminal experience, albeit he exhibited considerable pride in knowing the retail unit in question well through personal shopping experience.

We believe the tide is turning, and at some speed. Recourse to arbitration, and its advantages, have recently received approval at the highest judicial level. Lord Neuberger, President of the Supreme Court, said in a speech to ARBRIX in November 2013 that:

> 'There appear to me to be a number of reasons why people prefer arbitration... and two of them are privacy and expert tribunal. Expertise may be a very important matter in property disputes, as many disputes involve technical issues, and some such disputes are assigned to judges with no experience whatever of property. I well recall trying to explain ITZA to a circuit judge who had failed his maths O level, and whose closest experience of retail property was paying his wife's Peter Jones bills.'

Moreover, Lord Neuberger endorsed the central role of arbitration in the administration of justice:

> 'When performing their function, arbitrators are participating in the rule of law: they are giving effect to the parties' contract in accordance with substantive and procedural legal principles. If they perform, and appear to perform, that role honestly, impartially, expeditiously, and openly, confidence in the rule of law will be maintained.'

From our own experiences, both as advocates appearing in arbitrations and as arbitrators, it seems clear that arbitration is going to play an increasingly important part in the administration of justice. We are pleased to find our confidence in the increasing use of arbitration as the method of choice for dispute resolution is shared by a leading light in the world of arbitration. Bruce Harris, a senior arbitrator of almost 40 years' experience, former chairman of the Chartered Institute of Arbitrators (CIArb), past president of the London Maritime Arbitrators Association (LMAA), and joint author of the leading practitioner's textbook *The Arbitration Act 1996 - A Commentary* (Blackwell Science) (new edition due later this year), believes that arbitration is growing as a viable alternative to litigation, more so than ever. This is partly for the reasons alluded to earlier in this article (spiralling costs of litigation, lack of relevant experience of first instance judges), but additionally he points to the growing numbers and variety of specialist backgrounds of those now qualifying as arbitrators with the CIArb.

Mr Harris emphasises the unique advantage arbitration offers in the form of privacy, which is of great value to clients who wish to keep commercial or personal information and data from the scrutiny of their neighbours, competitors or the market in general. He notes that a good arbitrator will be able to control costs by honing the procedure to meet the parties' specific needs, as opposed to the one-size-fits-all process imposed under the Civil Procedure Rules. He lauds the Arbitration Act 1996 as an excellent piece of legislation, providing wide and flexible powers for the conduct of the proceedings, including the ability for the arbitrator to act inquisitorially as the occasion requires. This can reduce the involvement of lawyers, leading again to a saving of costs to the end client.

Mr Harris points to the extension of arbitration into new pastures, such as family and medical negligence, and he sees every reason why this extension could permeate other areas, where expertise, privacy, flexibility and peer judgment matter to the parties, as they often do in commercial (and indeed residential) property disputes. He anticipates the growth of specialist barristers acting as arbitrators, and for such barrister arbitrators to act more inquisitorially, as the occasion demands. Further, he believes there is considerable scope for using specialised lawyer arbitrators to decide questions of construction of instruments such as wills, leases, conveyances and other property-related documents. We respectfully agree; our own experiences tell us that barrister arbitrators bring a discipline and rigour to the process, combining the best features of litigation with the flexibility, autonomy and privacy of arbitration.

Rent review clauses in leases routinely stipulate that valuation disputes should be arbitrated by a chartered surveyor appointed by the president of the Royal Institution of Chartered Surveyors. Leases and other property-related documents as a whole rarely provide, however, that legal disputes should be arbitrated by a lawyer. Happily, this does not prevent parties to a dispute under a lease, or a contract for sale, indeed any property-related document or transaction, from entering into a purpose-built agreement to refer the dispute to a lawyer arbitrator. Inspired by the advantages arbitration brings to the parties, and its effectiveness as a high-quality means of dispute resolution, Falcon Chambers has developed a set of simple forms designed to facilitate the appointment of a barrister arbitrator with expert knowledge of property law – see www.falcon-chambersarbitration.com. We encourage solicitors and parties to do the maths (literally and metaphorically), and actively to consider recourse to arbitration when strategising how best to resolve the property disputes facing them.

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