

Jackson ‘bites’: Brian McCluggage strikes out £230,000 special damages claim on the basis of the revised Overriding Objective and CPR 3.9.

In *Ozbay & Ozbay v. Jack Richards Haulage Limited*, Brian McCluggage acting for the Defendant obtained an order in the Bow County Court that the Claimants’ entire special damage claim totalling £230,000 be struck out for breach of court directions. Mr. McCluggage was instructed by Liane Atcheson of Berrymans Lace Mawer LLP, Birmingham.

The case is of interest because this decision was based on a scenario *where a strike-out would have been most unlikely pre-April 2013, but where the facts lay right on the margin where the Jackson reforms might make a difference*. Readers are invited to consider whether this was application of a draconian “Singapore shock” philosophy or whether it was merely a robust and sensible application of the rules under the new civil procedure regime.

The background lay in a motor accident, notable for involving a modest personal injury claim but some £220,000 of hire charges from Direct Accident Management. The claimants’ case is conducted by Armstrongs Solicitors. Though there is a vigorous liability dispute, the claimants are said to remain in a Mercedes hire car over two years since the accident on 24.8.11.

Notably, the strike out arose out of breach of disclosure obligations but *before any “unless order” had been made*. The judge expressly made his decision on the change of litigation culture envisaged by the Jackson reforms, in particular to the Overriding Objective and CPR 3.9 (relief from sanction). The chronology involved:

- 14.8.13: disclosure by list to be made
- August and September 2013: Numerous items of correspondence unanswered by claimants’ solicitors
- 27.8.13: defendant’s application for unless order
- 11.9.13: claimants not ready to exchange witness statements by date due
- 16.9.13: defendant’s application for strike out
- 29.10.13: claimants serve disclosure statements
- 6.11.13: claimants’ application for relief from sanction
- 8.11.13: hearing

It will be noted that:

- (i) The court had not yet listed the application for an ‘unless order’. Thus both application for an unless order and strike out were being heard at the same time.

- (ii) The default was largely that of the claimants themselves. Various explanations such as problems with their telephones and the postal service were asserted.
- (iii) The claimants had (broadly) complied with disclosure obligations prior to the hearing, albeit copy documents were being sent even on the morning of the hearing itself.
- (iv) An application for relief from sanction had been made, albeit very late in the day, and the explanations were not considered entirely satisfactory by the judge.

In striking out the special damages claim, the judge held that it was unnecessary for the defendant to establish any specific prejudice. He held that the interests of other litigants who were having their hearings delayed by this case, the claimants' apparent disregard of the timetable and the increased emphasis on observation of court orders and directions in the revised Overriding Objective and CPR Part 3.9 were critical factors in the exercise of his discretion. He decided that it was inappropriate for the court to tolerate this standard of litigation, especially when the actual disclosure required was commonplace in terms of financial documentation and the like. He held that the case would therefore progress as a personal injury action only.

Permission to appeal has been granted as the judge felt that guidance on sanctions for non-compliance was required. The 9SJS website will update the situation when known.