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Lord Dyson and the Implied Sanctions Doctrine
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Effective case management by the courts is seen to be essential in combating the dual problems of delay and expense in the conduct of litigation. Setting realistic timetables for the progress of cases through to trial, and expending no more than a proportionate amount of time and energy on the interlocutory stages of civil procedure, are part of the equation. A culture of compliance, combined with meaningful sanctions in the event of default, are key components of the system. Addressing deficiencies in these two last areas formed central parts of the civil justice reforms of 1998[1] and 2013[2]. The success of these reforms in tackling delay has resulted in the framework of the Civil Procedure Rules being adopted in other jurisdictions[3]. A continuing problem both here and abroad is how best to deal with instances of non-compliance.

Express sanctions may be laid down in the rules, practice directions, or in court orders tailored to the circumstances of individual cases. Examples are striking out for non-payment of certain court fees[4] and being debarred from calling witnesses whose witness statements are not exchanged in accordance with the court's directions[5]. Where the court imposes a prospective sanction in the event of non-compliance it will do so in the form of an 'unless' order which must state the precise time when the deadline will elapse[6]. As the deadlines and consequences of breach are spelt out expressly, there is little excuse for parties not realising what they have to do, and what will happen if they fail to do so.

An implied sanction is said to arise where a party needs to seek the court's permission in order to take a step in the proceedings out of time in circumstances where, if permission is refused, some adverse consequence will follow from that refusal. The archetypical examples are seeking permission to appeal out of time and setting aside default judgments. In these situations, failing to extend time or to set aside means the pre-existing judgment stands, which is said to be the implied sanction for failing to adhere to the relevant time limit. This is significant, because it is said to follow that the restrictive principles relating to seeking relief from sanctions[7] must be applied, at least by analogy, to these applications.

Implied sanctions should have no place in the civil justice system. The rule of law dictates that the law must be accessible, and so far as possible intelligible, clear and predictable[8]. Nevertheless, an implied sanctions doctrine has taken root, almost unnoticed by the commentators on civil procedure[9], but it is said that at least in certain situations it is now too well established to be overturned[10].

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[1] Implemented by the Civil Procedure Rules 1998 (SI 1998/3132) following the publication of Lord Woolf's *Access to Justice: Final Report* (July 1996); *Blackstone's Guide to the Civil Procedure Rules*, ed Charles Plant, 1999 Blackstone Press, chapter 11.

[2] Implemented primarily by the Civil Procedure (Amendment) Rules 2013 (SI 2013/ 262) following the publication of Sir Rupert Jackson's *Final Report on Civil Litigation Costs* (December 2009); *Blackstone's Guide to the Civil Justice Reforms*, Sime and French, 2013 Oxford, chapter 5.

[3] Of particular relevance to this article is the adoption of the Civil Procedure Rules, with local adjustments, in Trinidad and Tobago.

[4] CPR, r 3.7.

[5] CPR, r 32.10. This sanction applies unless the court gives permission.

[6] PD 40B, paras 8.1, 8.2.

[7] In CPR, r 3.9, together with the guidelines now to be found in *Denton v TH White Ltd* [2014 EWCA Cic 906, [2014] 1 WLR 3926.

[8] *The Rule of Law*, Bingham (Penguin) 2010, p 37.

[9] There is no express reference to the doctrine in *Civil Practice* (2014) Sweet & Maxwell (the 'White Book') or in the Fourth Cumulative Supplement. The only express reference to the doctrine in the literature is in

Following the Civil Justice Reforms of 2013 the appellate courts in England and Wales have been struggling to enunciate a coherent system to deal with instances of procedural default. The main authorities have concentrated on how to deal with instances of breach of express sanctions imposed by rules, practice directions and court orders. This has proved difficult enough. The implied sanctions doctrine threatens to undermine the principles that have been laid down by the leading authorities by converting a wide range of applications into applications for relief from sanctions, at least by analogy. It calls into question the accepted understanding of what is meant by a 'sanction', and threatens to unleash an undesirable wave of satellite litigation. This article will consider the origins of the doctrine, the attempt by Lord Dyson to kill it off, and its subsequent re-emergence. It will conclude by considering how the doctrine should be codified within the general scheme of civil procedure.

Origins of the Implied Sanctions Doctrine

Authorities on the implied sanctions doctrine trace its origins to *Sayers v Clarke Walker*[11]. Delivering the main judgment, Brooke LJ said[12]:

'In my judgment, it is equally appropriate to have regard to the check-list in CPR r 3.9 when a court is considering an application for an extension of time for appealing in a case of any complexity. The reason for this is that the applicant has not complied with CPR r 52.4(2)[13], and if the court is unwilling to grant him relief from his failure to comply through the extension of time he is seeking, the consequence will be that the order of the lower court will stand and he cannot appeal it. Even though this may not be a sanction expressly "imposed" by the rule, the consequence will be exactly the same as if it had been, and it would be far better for courts to follow the check-list contained in CPR r 3.9 on this occasion, too, than for judges to make their own check-lists for cases where sanctions are implied and not expressly imposed.'

In its original form, CPR, r 3.9 provided a check-list of nine factors that the court had to consider as part of all the circumstances of the case when deciding whether to give relief from sanctions. As Brooke LJ said in the quotation above, strictly r 3.9 did not apply to an application for an extension of time for filing an appellant's notice because r 52.4(2) does not expressly state a sanction for non-compliance with the time limit, and r 3.9 stated that it applied "[o]n an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order ..."[14]. Particularly when read in conjunction with r 3.8(1), it is clear that r 3.9 only applies in its express form when a party is seeking relief from a sanction imposed by a rule, practice direction or court order which itself imposed the time limit that has been breached. Nevertheless, Brooke LJ said that the courts should apply the check-list laid down in r 3.9 where a sanction is implied, particularly on applications to extend time for appealing. The language used in the quotation can be taken to have a wider application than in relation to appeals brought out of time, and may extend to other cases where sanctions are implied rather than being expressly imposed.

Blackstone's Civil Practice 2015 (2015) Oxford at para 48.13. The main appellate decisions are of course discussed in the texts on civil procedure, but usually without crystallising the doctrine in express terms.

[10] *R (Hysaj) v Secretary of State for the Home Department* [2014] EWCA Civ 1633, per Moore-Bick LJ at [36].

[11] *Sayers v Clarke Walker* [2002] EWCA Civ 645, [2002] 1 WLR 3095.

[12] *Sayers* [2002] EWCA Civ 645 at [21].

[13] CPR, r 52.4(2) provides (in its current form) that an appellant must file an appellant's notice at the appeal court within 21 days after the date of the decision of the lower court, or such other period as may be directed by the lower court.

[14] CPR, r 3.9(1) in its original form, current in 2002.

Establishing a general implied sanctions doctrine was however, on reading the whole of the judgment, far from what the Court of Appeal intended to do in *Sayers v Clarke Walker*. The primary concern to the court in *Sayers v Clarke Walker* was to establish a consistent approach to applications to extend time for lodging an appeal. There were at least five different sets of principles or guidelines that could be applied on an application to appeal out of time, all of which had their adherents, namely:

(a) applying the principles developed under the old Rules of the Supreme Court for applications for leave to appeal out of time. These could be summarised as needing to balance four factors: (i) the length of the delay; (ii) the reasons for the delay; (iii) the prospects of success on the appeal; and (iv) any prejudice to the respondent[15];
(b) imposing a requirement that all rules and procedures are complied with strictly[16];
(c) applying the two criteria set out in what was then PD 52, para 5.6[17]. This provision says that on an application for an extension of time for filing an appellant's notice the evidence in support must state: (i) the reason for the delay; and (ii) the steps taken prior to the application being made. This was regarded in *Sayers v Clarke Walker* as suitable for 'very many cases', but not for the 'more complex cases'[18];
(d) applying the overriding objective[19]. This is relevant, but not sufficient in itself;
(e) applying one of the check-lists devised by judges dealing with post-CPR applications for extensions of time for appealing[20]. For example, Lightman J had drawn up such a list in an appeal in the period between the introduction of the main provisions of the CPR and that of the new appellate structure in May 2000[21].

The Court of Appeal in *Sayers v Clarke Walker* was anxious to avoid a proliferation of judge-made check-lists dealing with different aspects of civil procedure. In addition to Lightman J's list, Neuberger J had constructed a list of nine factors to be considered on applications to dismiss on account of delay in the unreported decision of *Annodeus Entertainment Ltd v Gibson*[22], which brought together ideas from the pre-CPR case law, the overriding objective, post-CPR case law and the need to have a fair trial from the European Convention on Human Rights, art 6(1). While accepting that Neuberger J had been fully justified in constructing that check-list in the particular context of the case in hand, in a later case Jonathan Parker LJ[23] commented:

'I do respectfully doubt the value of adopting a judicially-created checklist which does not appear in the rule itself. Inherent in such an approach, as it seems to me, is the danger that a body of satellite authority may be built up, rather as it was under the old rules in relation to the dismissal of an action for want of prosecution, leading in effect to the rewriting of the relevant rule through the medium of

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[15] *Sayers* [2002] EWCA Civ 645 at [10], referring to the White Book 1999 at para 59/4/17. The four factors are derived from *C.M. Van Stillevoldt BV v EL Carriers Inc* [1983] 1 WLR 207, and are taken from Sime, *A Practical Approach to Civil Procedure*, 1st ed (Blackstone Press Ltd 1994, p 493). This approach was rejected because it failed to reflect the new, more rigorous, approach required by the CPR.
[16] *Sayers* [2002] EWCA Civ 645 at [13]. This had been recommended by the authors of the *Report on the Review of the Court of Appeal (Civil Division)* (September 1997) (usually known as the Bowman Report), at p 91. This was not adopted when CPR Part 52 on appeals was promulgated.
[17] *Sayers* [2002] EWCA Civ 645 at [17], [18]. The equivalent position at the time of writing is PD 52C, para 4(2).
[18] *Sayers* [2002] EWCA Civ 645 at [19].
[19] *Sayers* [2002] EWCA Civ 645 at [18].
[20] *Sayers* [2002] EWCA Civ 645 at [18], [23].
[21] In *Customs and Excise Commissioners v Eastwood Care Homes (Ilkeston) Ltd*, *The Times*, 7 March 2000.
[22] *Annodeus Entertainment Ltd v Gibson*, unreported, 2 February 2000, quoted in *Audergon v La Baguette Ltd* [2002] EWCA Civ 10, [2003] CPLR 192 at [51].
[23] In *Audergon v La Baguette Ltd* [2002] EWCA Civ 10, [2003] CPLR 192 at [107]. Pill and Tuckey LJJ agreed.

judicial decision. That would seem to me to be just the kind of undesirable consequence which the CPR were designed to avoid.'

This was quoted with approval by Brooke LJ, commenting that '... judge-made check-lists of this kind are to be avoided wherever possible.' It was because the original CPR, r 3.9 laid down a prescribed check-list in the Rules themselves that '... it would be far better for courts to follow the check-list contained in CPR r 3.9 ...'.[24] A proper reading of *Sayers v Clarke Walker* is therefore not that it lays down a general implied sanctions doctrine, but that it seeks to promote consistency by making use of the r 3.9 check-list where appropriate in preference to judges devising their own check-lists. This is exactly the way commentators interpreted the decision at the time. For example, the 2003 edition of Blackstone's Civil Practice in dealing with applications to extend the time for appealing said[25]:

'The principles laid down in pre-CPR cases on extending time for appealing are no longer good law (*Sayers v Clarke Walker* [2002] EWCA Civ 645, [2002] 1 WLR 3095). In simple cases, it will be enough for the court to consider the matters set out in PD 52, para. 5.2, namely the reason for the delay and the steps taken prior to the application to extend time being made. In more complex cases, the court should apply the factors laid down in CPR, r. 3.9, and should avoid judge-made checklists of matters to consider (*Sayers v Clarke-Walker*). Each application must be viewed by reference to the criterion of justice, and it is important to bear in mind that time limits are there to be observed, and that justice may be seriously defeated if there is any laxity in this regard.'

Even in the 2014 edition of the White Book, in considering the general power to extend time in CPR, r 3.1(2)(a), the notes refer to *Sayers v Clarke Walker* and maintain the distinction between most cases, where applications are governed by the overriding objective, and more complex cases where '... the court should have regard to the language of r. 3.9 ...'[26], with a reference to the fact that the long check-list in the original r 3.9 has been replaced following the Jackson reforms by a shorter rule with only two specific factors to be taken into account. Elsewhere in the White Book the view is stated that r 3.9 only comes into play where a sanction is imposed as a result of a failure to comply with a rule etc[27], apparently denying the existence of the implied sanctions doctrine.

Professor Zuckerman[28] takes a different approach. Para [21] of *Sayers v Clarke Walker* is quoted almost in full in support of the proposition that r 3.9 has been considered in a range of situations even where the result was not a sanction[29]. Zuckerman takes the view that the requirements imposed by the CPR and court directions are not duties or obligations in the sense these terms are used in other branches of the law, because litigants remain free to choose whether or not to comply[30]. On this theory, it follows that the consequences of default are not punitive in nature, but are merely regulatory[31], and so the consequences of non-compliance are not properly termed 'sanctions' at all[32]. The argument continues that r 3.9 should be applied to all forms of procedural default, with the advantage that an integrated approach to non-compliance may be developed by

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[24] *Sayers* [2002] EWCA Civ 645 at [18], [23] and [21].
[25] *Blackstone's Civil Practice 2003* (2003) Oxford at para 71.15.
[26] White Book 2014, para 3.1.2.
[27] White Book 2014, para 3.9.1 of the main volume, and supported by comments in the Fourth Cumulative Supplement at paras 3.9.5.1 and 3.9.5.14. This latter para continues in its fourth and fifth sub-paras to acknowledge the existence of various of the authorities referred to below, apparently without accepting their validity.
[28] *Zuckerman on Civil Procedure*, 3rd edn (London: Sweet & Maxwell, 2013)
[29] *Zuckerman on Civil Procedure* at paras 11.133 and 11.134.
[30] *Zuckerman on Civil Procedure* at para 11.13.
[31] *Zuckerman on Civil Procedure* at paras 11.14; 11.15 and 11.136.
[32] *Zuckerman on Civil Procedure* at para 11.15.

the courts[33]. The underlying premise of this argument has not been adopted by the Civil Procedure Rule Committee, and the idea that there are 'sanctions' which may be prescribed by the Rules themselves or by the court is deeply embedded in the Civil Procedure Rules[34]. What is of interest for present purposes is that Professor Zuckerman's treatment of *Sayers v Clarke Walker* is not as the foundation for an implied sanctions doctrine, but as part of an argument that the consequences of procedural default are not sanctions at all[35].

If things had stopped here there would no controversy. Obviously applications for extending time to appeal have to be governed by settled principles. Given that the respondent has already secured an adjudication by the court, the interests in the finality of litigation[36] dictate that those principles have to be restrictive in this context. Avoiding a proliferation of different tests is a key objective of civil process[37], so adopting the ready-made check-list by analogy from the original r 3.9 was a very sensible approach.

In-time Applications

Lord Dyson, at that time sitting as a Lord Justice of Appeal in the Court of Appeal, dealt with an early implied sanctions case[38] raising the question whether an application for an extension of time which is made before the relevant deadline has expired amounts to an application for relief from sanctions. A claim form in a personal injuries claim was issued on 1 March 2001. The particulars of claim were not prepared because the claimant's solicitor was awaiting a medical report, which had to be served with the particulars[39]. Particulars of claim, if not served with the claim form, must be served within 14 days of service of the claim form, and in any event before the expiry of the period of validity of the claim form[40]. An application to extend the period for serving the particulars of claim was issued on 13 June 2001; the claim form was served on about 1 July 2001, the final day of its validity, which was also the final date for serving the particulars of claim. The fact the application to extend time was not heard until 3 October 2001 was irrelevant: the application had been made before expiry of the deadline[41].

Dyson LJ was faced with the issue whether the claimant's application for an extension of time to serve the particulars claim, which was made under the general power to extend time set out in CPR, r 3.1(2)(a), is governed by the criteria in r 3.9. Dyson LJ quoted at length from the judgment of Brooke LJ in *Sayers v Clarke Walker*, then commented[42]:

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[33] *Zuckerman on Civil Procedure* at para 11.137.

[34] Most obviously in CPR rr 3.7 to 3.9, but also in numerous other places, see the table of sanctions set out in Sime, *Sanctions after Mitchell* [2014] CJQ 133 at 151 to 152.

[35] Professor Zuckerman also referred to *Sayers v Clarke Walker* in his article *The revised CPR 3.9: a coded message demanding articulation* [2013] CJQ 123 at 132-133, in the context of satellite litigation giving rise to a whole jurisprudence about the different factors in the original r 3.9, a process not helped by making use of the r 3.9 checklist in many other situations, including the *Sayers v Clarke Walker* situation of extending the time for appealing. Again, there is no reference to the implied sanctions doctrine.

[36] This has long been recognised as an important consideration on applications to extend the time for appealing, see *Norwich and Peterborough Building Society v Steed* [1991] 1 WLR 449, per Lord Donaldson of Lymington MR.

[37] The Civil Procedure Rule Committee is under a duty to try to make rules that are simple and simply expressed: Civil Procedure Act 1997, s 2(7), something that has apparently been forgotten.

[38] *Robert v Momentum Services Ltd* [2003] EWCA Civ 299, [2003] 1 WLR 1577.

[39] As required by PD 16, para 4.3.

[40] CPR, r 7.4.

[41] CPR r 23.5.

[42] *Robert* [2003] EWCA Civ 299 at [33].

'It is clear that Brooke LJ treated *Sayer's* case as a relief from sanctions case, or at least closely analogous to such a case. That is because the time for appealing had already expired when the application for an extension of time was made. I see no reason to import the rule 3.9(1) checklists by implication into rule 3.1(2)(a) where an application for an extension of time is made before the expiry of the relevant time limit. There is a difference in principle between on the one hand seeking relief from a sanction imposed for failure to comply with a rule, practice direction or court order, where such failure has already occurred, and on the other hand seeking an extension of time for doing something required by a rule, practice direction or court order before the time for doing so has arrived. The latter cannot sensibly be regarded as, or even closely analogous to, a relief from sanctions case. If the draftsman of the rule had intended that the checklist set out in rule 3.9(1) should be applied when the court is exercising its discretion under CPR 3.1(2)(a) in such a case, then he could and, in my judgment, would have said so.'

Accordingly, on an in-time application the judge should simply have regard to the overriding objective of dealing with cases justly and at proportionate cost, including any relevant considerations from CPR, r 1.1(2).

Robert v Momentum Services Ltd was severely criticised by Professor Zuckerman[43] because it did not fit into his argument that the consequences of failing to comply with process requirements is regulatory rather than punitive. However, as mentioned above, the underlying theory is inconsistent with the scheme of the CPR, and *Robert v Momentum Services Ltd* shows the Court of Appeal drawing a sharp distinction between cases where applications are made before as opposed to those made after the expiry of the relevant deadline. This is because after the deadline the sanction takes effect[44], and, as the word itself indicates, sanctions are punitive. That there is a distinction between in-time and after the event applications for extensions of time was flagged up by Lord Dyson MR in *Mitchell v News Group Newspapers Ltd*[45]. When the point arose directly in *Hallam Estates Ltd v Baker*[46] the Court of Appeal affirmed the distinction. Giving the main judgment, Jackson LJ said that an in-time application for an extension of time simply is not an application for relief from sanctions[47].

There is a marked contrast between two schools of thought among the academic writers on the question of sanctions, which can be explained as the contrast between those who regard sanctions as having a punitive effect[48] and those who regard them as regulatory[49]. Those in the latter group tend to want to extend the reach of r 3.9 to all applications where the applicant is seeking a discretionary order. Whatever the difference between the academics, the Court of Appeal has drawn a clear distinction between a litigant who fails to comply with a deadline, who can expect adverse (punitive) consequences to follow, and a litigant who respects the relevant deadline and seeks to co-operate with the court by seeking an extension before falling into default.

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[43] *Zuckerman on Civil Procedure* at paras 11.135 to 11.137.
[44] CPR, r 3.8(1).
[45] *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537, [2014] 1 WLR 795 at [41].
[46] *Hallam Estates Ltd v Baker* [2014] EWCA Civ 661, CP Rep 38.
[47] *Hallam Estates Ltd* [2014] EWCA Civ 661 at [26]. This position was affirmed in the leading implied sanctions doctrine case, *R (Hysaj) v Secretary of State for the Home Department* [2014] EWCA Civ 1633, at [29].
[48] Including the author, and also probably Professor Zander (*A Step too Far* (2014) NLJ 16 May 2014) and Steven Akerman (*There can be only (CPR) 1: the reasonableness of Mitchell (and litigation generally) is confirmed* [2014] JPIL 191).
[49] In addition to Professor Zuckerman, probably Andrew Higgins (*CPR 3.9: the Mitchell guidance, the Denton revision, and why coded messages don't make for good case management* [2014] CLQ 379) and Jack Williams *('Well, that's a relief (from sanctions)!" - Time to pause and take stock of CPR r. 3.9 developments within a general theory of case management* [2014] CJQ 394).

Subsequent Development

On a piecemeal basis, no doubt depending on the relative success of researches of counsel in different cases, *Sayers v Clarke Walker* started to be applied in a range of applications. By far the most important was in setting aside default judgments. In *Hussain v Birmingham City Council*[50] an application to set aside judgment in default was granted on appeal apparently with the respondents conceding this result[51]. Despite this unpromising provenance, this case has been treated as Court of Appeal authority for the implied sanctions doctrine[52]. This was a personal injuries claim in which a 6-year old child fell through a window in a school. There was a dispute over who was responsible for the school premises. One of the defendants issued a third party claim against 'the Governors' of the school, and the default judgment was entered in this third party claim. There was some delay in applying to set aside the default judgment, but the contemporaneous documentation showed that the third party claim had probably been made against the wrong party, and in any event the facts of the accident showed that the right party was likely to have a good defence[53].

Applications to set aside regularly entered default judgments are governed by CPR, r 13.3. Criteria to be applied on these applications are laid down in the rule itself: whether the defendant has a real prospect of success, or whether there is some other good reason to set aside the judgment; and among the factors to be considered is whether the application has been made promptly. The wording of r 13.3(2), which says: 'In considering whether to set aside ... the matters to which the court must have regard include ...', makes it clear that the specific requirements in r 13.3 are not the only things to be considered. The traditional way of interpreting r 13.3(2) is to regard it as requiring the court to consider all the circumstances of the case in accordance with the overriding objective.

Hussain v Birmingham City Council went further than this, with Chadwick LJ saying: 'Second there is, by analogy, the guidance given in CPR 3.9(1) (relief from sanctions) and in CPR 39.3(5) (setting aside judgment where a party has failed to attend at trial).'[54] The idea that r 39.3(5) might assist was not developed, but the checklist in r 3.9(1) and how it applied to the facts of the case was considered in some detail[55]. Weighing up those factors, Chadwick LJ concluded: 'Nothing in any of those factors would lead the Court to relieve the Governors of the sanction which the entry of judgment in default imposes.'[56] From this the implied sanctions doctrine was born.

In the event the implied sanctions doctrine played no part in the actual decision in *Hussain v Birmingham City Council*. Rule 3.9 pointed firmly against setting aside. Indeed, there was nothing in the r 3.9 factors pointing in the other direction. Instead, the default judgment was set aside primarily because it could not stand on the merits, which is the traditional approach to setting aside under r 13.3. The decision is unreasoned on the implied sanction point; fails to refer to any of the authorities; was decided on the basis of concessions by the other parties; and did not apply r 3.9 in the sense of making any difference to the decision (and in fact the decision is contrary to how r 3.9 was analysed by the court). There is very little discussion on how the r 3.9 factors inter-relate with those laid down by r 13.3, except that r 13.3 seems to have taken precedence over the r 3.9 factors[57]. This is about as unsatisfactory an authority for a new doctrine as can be imagined.

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[50] *Hussain v Birmingham City Council* [2005] EWCA Civ 1570, LTL25/11/2005.
[51] *Hussain* [2005] EWCA Civ 1570 at [38].
[52] *Samara v MBI & Partners UK Ltd* [2014] EWHC 563 (QB) and *Mid-East Sales Ltd v United Engineering & Trading Co (Pvt) Ltd* [2014] EWHC 1457 (Comm).
[53] *Hussain* [2005] EWCA Civ 1570 at [37].
[54] *Hussain* [2005] EWCA Civ 1570 at [30].
[55] *Hussain* [2005] EWCA Civ 1570 at [32] to [35].
[56] *Hussain* [2005] EWCA Civ 1570 at [35].
[57] *Hussain* [2005] EWCA Civ 1570 at [35] to [40].

The doctrine was then firmed up in a number of cases involving applications to appeal out of time. In *YD (Turkey) v Secretary of State for the Home Department*[58] Brooke LJ said that as it was a case where the application for permission to appeal was made out of time it was necessary to consider the factors set out in r 3.9. The same approach was adopted in *Jackson v Marina Homes Ltd*[59], *Bank of Scotland v Periera*[60] and *Yeates v Aviva Insurance UK Ltd* [61]. The way it was put by Longmore LJ in *Yeates v Aviva Insurance UK Ltd* [62] was that *Sayers v Clarke Walker* decided that on an application for an extension of the time for appealing '... the court must not only take into account the overriding objective in CPR 1.1 of enabling the court to deal with cases justly but also the checklist of considerations listed in CPR 3.9(1) as circumstances to be considered on an application for relief from sanctions.' Like *Sayers v Clarke Walker*[63], the Court of Appeal in *Yeates v Aviva Insurance UK Ltd*[64] was heavily influenced by the policy behind the Bowman Report and the importance of finality in the appeal context where the time for appealing has expired without an application for permission to appeal. As mentioned above, this is a powerful reason for taking a restrictive approach, and justifies applying r 3.9 by analogy on applications extending time for appeals.

Trinidad and Tobago Cases

Two cases on the implied sanctions doctrine from the Court of Appeal of the Republic of Trinidad and Tobago reached the Privy Council in 2011. Lord Dyson delivered the judgment of the Board in both cases. Under the Trinidad and Tobago version of the CPR[65], r 13.3[66] on setting aside regular judgments is in broadly similar terms to the English r 13.3; and r 26.6(2)[67] is broadly similar to the English r 3.8(1). Trinidad and Tobago CPR, r 26.7 deals with relief from sanctions, adopting some of the English concepts in the original r 3.9. It provides:

'Relief from sanctions
(1) An application for relief from any sanction imposed for a failure to comply with any rule, court order or direction must be made promptly.
(2) An application for relief must be supported by evidence.
(3) The court may grant relief only if it is satisfied that—
(a) the failure to comply was not intentional;
(b) there is a good explanation for the breach; and
(c) the party in default has generally complied with all other relevant rules, practice directions, orders and directions.
(4) In considering whether to grant relief, the court must have regard to—

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[58] *YD (Turkey) v Secretary of State for the Home Department* [2006] EWCA Civ 52, [2006] 1 WLR 1646 at [35].
[59] *Jackson v Marina Homes Ltd* [2007] EWCA Civ 1404 at [20].
[60] *Bank of Scotland v Periera* [2011] EWCA Civ 241, [2011] 1 WLR 2391.
[61] *Yeates v Aviva Insurance UK Ltd* [2012] EWCA Civ 634 at [25].
[62] *Yeates* [2012] EWCA Civ 634 at [4].
[63] *Sayers* [2002] EWCA Civ 645 at [12].
[64] *Yeates* [2012] EWCA Civ 634 at [25].
[65] The Trinidad and Tobago Civil Proceedings Rules 1998 came into force on 16 September 2005 after an intense period of review and debate, see *Attorney General of Trinidad and Tobago v Regis* (Civ App No 79 of 2011) at [27].
[66] The Civil Proceedings Rules 1998 (Trinidad and Tobago) r 13.3(1) provides: 'The court may set aside a judgment entered under Part 12 if - (a) the defendant has a realistic prospect of success in the claim; and (b) the defendant acted as soon as reasonably practicable when he found out that the judgment had been entered against him.'
[67] The Civil Proceedings Rules 1998 (Trinidad and Tobago) r 26.6(2) provides: 'Where a party has failed to comply with any of these Rules, a direction or any court order, any sanction for non-compliance imposed by the rule or the court order has effect unless the party in default applies for and obtains relief from the sanction, and rule 26.8 shall not apply.'

(a) the interests of the administration of justice;
(b) whether the failure to comply was due to the party or his attorney;
(c) whether the failure to comply has been or can be remedied within a reasonable time; and
(d) whether the trial date or any likely trial date can still be met if relief is granted.
(5) The court may not order the respondent to pay the applicant's costs in relation to any application for relief unless exceptional circumstances are shown.'

It will be seen that this adopts similar wording to the original English r 3.9, and all the concepts in the English r 3.9(1)(a) to (g) and r 3.9(2), but includes at Trinidad and Tobago r 26.7(4)(c) a consideration of whether the default has been or can be remedied within a reasonable time, which was not in the English rule, and that the Trinidad and Tobago rule does not include the English r 3.9(1)(h) and (i) (the effect which failure to comply had on each party, and the effect of granting relief on each party). It also prioritises the factors, differentiating between those that are treated as essential in r 26.7(3), and those which are to be taken into account in para (4).

In *Attorney-General of Trinidad & Tobago v Universal Projects Ltd* [68] the claimant sought payment of $31 million for work done on state highways. The claim form was served, but was placed by inexperienced staff acting for the relevant Ministry in a vacant office, where it was not discovered until after the claimant had applied for permission to enter judgment in default. By a series of fortunate chances the legal representative for the government was in court on the day the default judgment application was to be heard, and on that occasion an unless order was made giving the government a further 21 days to serve a defence, expiring on 13 March 2009, and in default leave was granted to the claimant to enter judgment against the defendant. A defence was not served within the time allowed by the unless order, and judgment was entered 3 days later.

On the government's application to set aside that judgment it was argued that the application was to set aside a default judgment under Trinidad and Tobago r 13.3. This was rejected by the Board. As Lord Dyson said, the unless order imposed a term that in default the claimant had permission to enter judgment. That term was a 'sanction' within the meaning of Trinidad and Tobago r 26.7. As Lord Dyson explained:

'The word "sanction" is an ordinary word. It has no special or technical meaning in rule 26.7. Dictionary definitions of "sanction" include "the specific penalty enacted in order to enforce obedience to a law". That is precisely what the term attached to the grant of an extension of time was. It was a penalty[69] that would be imposed if the defence was not served by 13 March. In the language of rule 26.6(1)[70], it was the consequence of the failure to comply with the court order. ... The sanction was the judgment entered pursuant to the permission.'

Relief from sanctions had been refused by the Court of Appeal of the Republic of Trinidad and Tobago, and the Privy Council found no grounds for interfering with that decision.

Attorney-General of Trinidad & Tobago v Matthews[71] was a claim for damages for assault and battery against the State arising out of an alleged assault by a prison officer. The last day for filing the defence was 11 November 2009. Problems were encountered in interviewing the relevant staff for the purpose of drafting the defence. On 11 December the claimant applied for permission to enter judgment in default, and on 14 January 2010 the defendant applied for an extension of time for filing the defence. Both applications were heard together.

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[68] *Attorney-General of Trinidad & Tobago v Universal Projects Ltd* [2011] UKPC 37.
[69] As opposed to a regulatory consequence, see FN 47 and FN 48.
[70] This is broadly equivalent to the English PD 40B, para 8.2.
[71] *Attorney-General of Trinidad & Tobago v Matthews* [2011] UKPC 38.

The Court of Appeal of the Republic of Trinidad and Tobago allowed an appeal by the claimant and gave permission to enter judgment in default of defence, applying the reasoning in two of its previous decisions. *Trinican Oil Ltd v Schnake*[72] was an application to extend time for filing an appeal. P Jamadar JA said that once the deadline passed with no prior application for an extension of time there was an implied sanction that no appeal could be pursued. The other previous decision was *Khanhai v Cyrus*[73], where it was held that where a defendant failed to file a defence by the stipulated deadline there was a sanction to the effect that, without the permission of the court, no defence could be served. It followed that a defendant seeking to file a defence after the deadline had to make an application for relief from sanctions under the Trinidad and Tobago r 26.7.

There was a third decision of the Court of Appeal of the Republic of Trinidad and Tobago on the same subject, *Attorney General of Trinidad and Tobago v Regis*[74], which affirmed the implied sanctions doctrine, where the court[75] said:

'The consequences of these decisions and the approach mandated by the Court of Appeal has resulted in an observable shift away from a cancerous *laissez-faire* approach to civil litigation to a more responsible and diligent one. However, the discipline that is now demanded has also resulted in some disquiet among some members of the legal profession and even among a few judges. ... The aforesaid decisions of the Court of Appeal on Part 26.7 reflect the exercise of the indigenous court's interpretative function as it develops a local jurisprudence relevant to existing needs and circumstances. While it is acknowledged that other jurisdictions and other cultures may adopt different approaches to similar problems, it is hoped that regard will be paid to the experiences and insights of local judges to know what best suits the needs of local society as they seek, in the exercise of their independent sovereignty and constitutional mandate, to interpret and apply the laws of Trinidad and Tobago in ways that are purposeful for their people.'

Chief Justice Sharma noted in the foreword to the Trinidad and Tobago CPR 1998 that:

'It marks an important milestone in the development of our jurisprudential history. It seeks to instil discipline and promote responsible behaviour on the part of all participants in the litigation process. Discipline in any system is the hallmark of efficiency and productivity.'

The Chief Justice's comments are consistent with the policy behind the English Civil Justice Reforms of 2013. As Jackson LJ explained in *Fred Perry (Holdings) Ltd v Brands Plaza Trading Ltd* [76], the 2013 version of CPR, r 3.9 was implemented to address '... concern that relief against sanctions is being granted too readily at the present time. Such a culture of delay and non-compliance is injurious to the civil justice system and to litigants generally.' The need for discipline and effective management of the English civil justice system to control toleration of procedural default has been forcefully argued by Professor Zuckerman[77]. Speaking extra judicially, Lord Dyson MR said of the implementation of the Jackson Reforms that 'By emphasising the need to take account of the new explicit elements of the overriding objective, r 3.9 is intended to eliminate lax application and any culture of toleration. ... Parties can no longer expect indulgence if they fail to comply with their

[72] *Trinican Oil Ltd v Schnake* (Civ App No 91 of 2009).
[73] *Khanhai v Cyrus* (Civ App No 158 of 2009).
[74] *Attorney General of Trinidad and Tobago v Regis* (Civ App No 79 of 2011). This, like *Matthews*, was an application for permission to file a defence after the period for doing so had expired.
[75] I Archie CJ; P Jamadar JA and G Smith JA at [29] and [32].
[76] *Fred Perry (Holdings) Ltd v Brands Plaza Trading Ltd* [2012] EWCA Civ 224, [2012] FSR 28 at [49].
[77] For example in Zuckerman *The continuing management deficit in the administration of civil justice* [2015] CJQ 1.

procedural obligations. Those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure their own costs are kept within proportionate bounds. But more importantly they serve the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the court enables them to do so.'[78]

While everyone agrees that it is important that litigation is conducted efficiently, expeditiously and at no more than proportionate cost, there are different theories on how to achieve this. The way the implied sanctions doctrine developed in Trinidad and Tobago resulted in the conclusion being drawn that once a deadline passed, a litigant was no longer allowed to take the relevant step, unless relief from sanctions was granted[79]. As explained by Lord Dyson[80], the argument had 6 elements:

(a) in any case where a party needs or wishes to take procedural steps;
(b) and a mandatory time limit is prescribed by the rules for the taking of this step;
(c) if the time limit has expired without the party making an application for an extension of time for the taking of the step;
(d) then, unless a rule expressly otherwise states, the party is disabled from taking the relevant step;
(e) being placed under that disability is an adverse consequence for that party which flows from that failure to observe the rule which prescribes the time limit; and
(f) the adverse consequence is a sanction within the meaning of Trinidad and Tobago rule 26.7 (the equivalent of the English r 3.9).

In short, Trinidad and Tobago CPR rr 26.6 and 26.7 were said to be designed to ensure compliance with all the time limits provided by the rules of court, practice directions and court orders[81]. This is effectively the argument raised by Professor Zuckerman[82]. It was rejected by Lord Dyson for three reasons.

First, the way that entering default judgment works is that once the time limited for filing a defence has expired the claimant is entitled to enter (or apply for permission to enter, depending on the circumstances) judgment in default. But, until the claimant does so, the defendant remains entitled to file a defence without permission. As Lord Dyson said, 'If the claimant does nothing or waives late service, the defence stands and no question of sanction arises.'[83]

Secondly, Trinidad and Tobago CPR rr 26.6 and 26.7[84] have to be read together. Rule 26.7 provides for applications for relief from any sanction *imposed*[85] for a failure to comply inter alia with any rule. When read together with r 26.6(2), which says that where a party has failed inter alia to comply with any rule any sanction for non-compliance *imposed* by the rule has effect unless the party in default applies for and obtains relief from the sanction, the Board concluded that this is aiming at rules, practice directions and orders which themselves impose or specify the consequences of a failure to comply. Examples mentioned by Lord Dyson were failing to serve witness statements[86], failure to

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[78] Lord Dyson *The Application of the Amendments to the Civil Procedure Rules* [2014] CLQ 124 at 130, 131. This was originally delivered as the 18th Implementation Lecture relating to the Jackson Reforms (Judicial College, 22 March 2013).
[79] *Attorney-General of Trinidad & Tobago v Matthews* [2011] UKPC 38 at [13].
[80] *Attorney-General of Trinidad & Tobago v Matthews* [2011] UKPC 38 at [12].
[81] *Attorney-General of Trinidad & Tobago v Matthews* [2011] UKPC 38 at [13].
[82] See FN 33.
[83] *Attorney-General of Trinidad & Tobago v Matthews* [2011] UKPC 38 at [14].
[84] The equivalent provisions in England and Wales are CPR rr 3.8 and 3.9.
[85] Emphasis on this word is that of Lord Dyson, *Attorney-General of Trinidad & Tobago v Matthews* [2011] UKPC 38 at [15].
[86] Trinidad and Tobago CPR r 29.13(1); England and Wales CPR r 32.10.

disclose documents relied upon[87], and failing to comply with directions to disclose experts' reports[88]. In each of these cases both the Trinidad and Tobago and the England and Wales versions of the CPR have express sanctions.

Where a rule says nothing about the consequences of breach, such as the rules on serving a defence, Lord Dyson commented that[89]: 'It is straining language to say that a sanction is imposed by the rules in such circumstances. At most, it can be said that, if the defendant fails to file a defence within the prescribed period and does not apply for an extension of time, he is at risk of a request by the claimant that judgment in default should be entered in his favour. That is not a sanction imposed by the rules. Sanctions imposed by the rules are consequences which the rules themselves explicitly specify and impose.'

Thirdly, the implied sanctions doctrine would have consequences that could not have been intended by the draftsman of the CPR. It would mean that on an application to set aside a default judgment the defendant would have to satisfy two tests: the one set out in CPR r 13.3, and also the criteria for relief from sanctions[90]. As Lord Dyson pointed out[91], the criteria for these are quite different from each other, and '... [i]t cannot have been intended that a defendant who wishes to set aside a default judgment must satisfy the requirements of both rules.'

While commending the efforts of the Court of Appeal of the Republic of Trinidad and Tobago to end the culture of laissez faire, this was a case where the language of the rules admitted of only one interpretation, which had to be given effect. An application to set aside a default judgment or to extend the time for filing a defence is not an application for relief from sanctions. It follows that the Privy Council also ruled against the idea that CPR rr 3.8 and 3.9 govern all applications under the CPR.

Resurgence of the Implied Sanctions Doctrine

The obvious weakness in the Trinidad and Tobago cases is that decisions of the Privy Council are not binding in England and Wales. Confronted with the series of Court of Appeal decisions applying CPR r 3.9 by analogy on applications to extend time to appeal[92], the courts in England and Wales have on a number of occasions felt constrained to apply the implied sanctions doctrine despite the decision in *Attorney-General of Trinidad & Tobago v Matthews*.

In *Altomart Ltd v Salford Estates (No 2) Ltd*[93] the Court of Appeal extended the use of CPR r 3.9 by analogy to an application for an extension of time to file a respondent's notice. While this is an

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[87] Trinidad and Tobago CPR r 28.13(1); England and Wales CPR r 31.21.

[88] Trinidad and Tobago CPR r 33.12(1); England and Wales CPR r 35.13.

[89] *Attorney-General of Trinidad & Tobago v Matthews* [2011] UKPC 38 at [16].

[90] *Attorney-General of Trinidad & Tobago v Matthews* [2011] UKPC 38 at [17].

[91] *Attorney-General of Trinidad & Tobago v Matthews* [2011] UKPC 38 at [17] and [18]. The differences are even more marked following the decision in *Global Torch Ltd v Apex Global Management Ltd (No 2)* [2014] UKSC 64, [2014] 1 WLR 4495. In an application to set aside a default judgment the most important factor is the strength of the defence. An application can only be successful if the defendant has at least a real prospect of successfully defending the claim (CPR, r 13.3(1)(a)). *Global Torch Ltd v Apex Global Management Ltd (No 2)* decided that on an application under r 3.9 the merits one way or the other are generally irrelevant, but could be taken into account if the defaulting party has such a strong case that they would be entitled to summary judgment (per Lord Neuberger of Abbotsbury JSC at [29]). This is the opposite of the merits test under r 13.3. Under r 13.3 all the defendant has to show is a real prospect of success on the defence. A defendant seeking to make an argument on the merits under r 3.9 would have to show that the claimant had no real prospect of success on the claim (r 24.2(a)).

[92] See FN 57 to FN 60.

[93] *Altomart Ltd v Salford Estates (No 2) Ltd* [2014] EWCA Civ 1408.

extension on the previous authorities, it is wholly consistent with the policy behind the authorities on failing to comply with the time limit for filing an appellant's notice. Moore-Bick LJ agreed with the second reason given by Lord Dyson in *Attorney-General of Trinidad & Tobago v Matthews* that the language of the English CPR rr 3.8 and 3.9 is absolutely clear that r 3.9 only applies to cases where the sanction is imposed by the self-same rule, practice direction or court order that has been breached[94]. However, referring to a number of cases[95], Moore-Bick LJ concluded that it is now established that an application for permission to appeal out of time is analogous to an application under r 3.9, and therefore has to be decided in accordance with the same principles[96]. A respondent applying for an extension of time for filing a respondent's notice is subject to a similar implied sanction in being prevented from pursuing the merits of the case it wishes to pursue on the appeal if the extension is not granted, so the same principle applies to these applications[97]. This was followed by the Court of Appeal in *R (Hysaj) v Secretary of State for the Home Department*[98] where a direct challenge to the implied sanctions doctrine, relying on *Attorney-General of Trinidad & Tobago v Matthews*, was made without success.

On the face of it this seems uncontroversial. However, the check-list of 9 factors in the original r 3.9 was replaced with effect from 1 April 2013 with the current r 3.9 which stipulates that on an application for relief from sanctions the court must consider all the circumstances of the case so as to enable it to deal justly with the application, and includes only two factors which must be given particular consideration. As Professor Zuckerman has pointed out, the current r 3.9 says little that is not already in the overriding objective in r 1.1, or which any court has always done, namely to enforce its own orders[99]. Although the r 3.9 check-list has now gone, cases adopting the implied sanctions doctrine decided in the period 2013-14 have applied the guidelines in *Mitchell v News Group Newspapers Ltd*[100], and those decided after 4 July 2014 apply *Denton v TH White Ltd*[101].

What the post-Jackson Reforms implied sanctions doctrine cases do is to metamorphose the *Sayers v Clarke Walker* approach from its origins in making use of a check-list prescribed by the CPR into one where it is a set of judge-made guidelines that are applied by analogy. This may be thought to be exactly the mischief that Brooke LJ was attempting to avoid in *Sayers v Clarke Walker*[102]. A slightly more sophisticated interpretation of *Sayers v Clarke Walker* was given by Moore-Bick LJ in *R (Hysaj) v Secretary of State for the Home Department*[103]. Rather than merely applying the r 3.9 check-list by analogy, what *Sayers v Clarke Walker* did was to require judges on applications to extend the time for appealing to consider the check-list of factors in r 3.9 as it then stood in order to promote consistency of approach. As it is consistency of approach that is the goal, it is perfectly legitimate for that approach to change from time-to-time as and when r 3.9 is amended, and as and when the guidance on r 3.9 changes.

Mid-East Sales Ltd v United Engineering and Trading Company (PVT)[104] is a rather inconclusive authority. It discusses *Sayers v Clarke Walker* and *Attorney-General of Trinidad & Tobago v*

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[94] *Altomart Ltd* [2014] EWCA Civ 1408 at [10].
[95] In particular to another Court of Appeal decision in the series on extending time to appeal, *Baho v Meerza* [2014] EWCA Civ 669.
[96] *Altomart Ltd* [2014] EWCA Civ 1408 at [15].
[97] *Altomart Ltd* [2014] EWCA Civ 1408 at [16].
[98] *R (Hysaj) v Secretary of State for the Home Department* [2014] EWCA Civ 1633, see FN 10.
[99] Zuckerman *The revised CPR 3.9: a coded message demanding articulation* [2013] CJQ 123.
[100] *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537, [2014] 1 WLR 795.
[101] *Denton v TH White Ltd* [2014] EWCA Civ 906, [2014] 1 WLR 3926.
[102] See FN 24.
[103] *R (Hysaj)* at [27].
[104] *Mid-East Sales Ltd v United Engineering and Trading Company (PVT)* [2014] EWHC 1457 (Comm).

Matthews in the context of an application to set aside an order for service outside the jurisdiction, but ultimately the judge held that there was an express sanction in the form of a default judgment.

In two first instance cases[105] the implied sanctions doctrine has been applied in applications to extend time for filing particulars of claim. *Raayan Al Iraq Co Ltd v Trans Victory Marine Inc* was one of the cases discussed by Lord Dyson MR in *Mitchell v News Group Newspapers Ltd* [106]. Commenting on this in *R (Hysaj) v Secretary of State for the Home Department*[107], Moore-Bick LJ pointed out that there is no suggestion in *Mitchell v News Group Newspapers Ltd* that the judge had been wrong to regard the application as one for relief from a sanction, or at any rate sufficiently analogous to such an application to be determined applying the same principles. If this is correct, it opens up a wide range of problems. First, it re-opens the controversy over whether sanctions are punitive or regulatory. Secondly, it opens the door to the proposition that all process failures should be decided applying the r 3.9 guidance. Thirdly, if it is the case that some, but not all, process failures are sufficiently serious to merit the application of the r 3.9 guidance by analogy, it will be open season to satellite litigation covering the whole of civil procedure in considering whether different applications are sufficiently serious or are of the right kind to justify applying r 3.9 by analogy[108]. If the conclusion is that it depends on the seriousness of the breach in the circumstances of the individual case, it will add a layer of additional controversy to every application involving a discretionary indulgence from the court, which will add expense and delay to the whole civil justice system.

With the greatest respect to Lord Dyson MR, it is suggested that his Lordship's comments on *Raayan Al Iraq Co Ltd v Trans Victory Marine Inc* in *Mitchell v News Group Newspapers Ltd* are a rare instance when Homer nodded. Lord Dyson MR was concentrating in *Mitchell v News Group Newspapers Ltd* on the guidance desperately needed by the profession on the approach to applications for relief from sanctions. It is entirely understandable that his Lordship was not directing his mind to whether individual first instance cases raised the (at that time) nascent implied sanctions doctrine. That this is almost certainly the case is supported by Lord Dyson MR's closing remarks on the general principles governing applications for relief from sanctions in *Denton v TH White Ltd*[109]:

'Judges should also have in mind, when making directions, where the Rules provide for automatic sanctions in the case of default. Likewise, the parties should be aware of these consequences when they are agreeing directions. "Unless" orders should be reserved for situations in which they are truly required: there are usually so as to enable the litigation to proceed efficiently and at proportionate cost.'

These comments are part of Lord Dyson MR's description of the compact between the courts and litigants. Courts will lay down reasonable directions, and parties will comply with those directions. In

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[105] *Raayan Al Iraq Co Ltd v Trans Victory Marine Inc* [2013] EWHC 2696 (Comm), [2013] Costs LR 911 and *Associated Electrical Industries Ltd v Alstom UK* [2014] 430 (Comm).

[106] *Mitchell* [2013] EWCA Civ 1537 at [49].

[107] *R (Hysaj)* at [31].

[108] For example, should the implied sanctions doctrine apply to applications for permission to amend? On the face of it, it may seem that there is no implied sanction, unlike the cases on extending time to appeal. But the situation could be analysed by saying that if permission to amend is refused, the applicant faces the implied sanction of being unable to advance the case set out in the amended statement of case at trial. This is almost identical reasoning to that employed by *Altomart Ltd v Salford Estates (No 2) Ltd* [2014] EWCA Civ 1408 to justify extending the implied sanctions doctrine to extensions of time for filing respondent's notices. Even more worrying would be whether the implied sanctions doctrine should be applied where there is no default, such as applications for permission to use expert evidence under CPR, r 35.1. It could be said there is an implied sanction in such a case in that if permission is refused the applicant cannot rely on expert evidence. The danger is that the implied sanctions doctrine could spread to the whole of civil litigation.

[109] *Denton* [2014] EWCA Civ 906 at [44].

doing so, Lord Dyson MR identifies the two categories where there are express sanctions as those where special care is needed when directions are made. If Lord Dyson MR thought the implied sanctions doctrine has a general application, this guidance would not have been necessary (and in fact would be entirely misleading).

Raayan Al Iraq Co Ltd v Trans Victory Marine Inc is in any event contrary to previous Court of Appeal authority. *Robert v Momentum Services Ltd*, which was a case on extending time for service of the particulars of claim, has already been discussed[110]. *Totty v Snowden* decided that applications to extend the time for service of particulars of claim are not governed by the principles in r 7.6, but are ordinary applications to extend time governed by r 3.1(2)(a) and the overriding objective[111]. The better view is that the decisions that the implied sanctions doctrine applies to applications to extend time for service of the particulars of claim are wrong.

Conclusion

Left unbridled, the implied sanctions doctrine has the potential to create havoc in the civil justice system. It has the potential to cause uncertainty over the status of court orders across the whole of civil litigation. If allowed to take root, it will add to the cost and complexity of applications to extend time, possibly in all such applications. Apart from the additional raft of principles generated by the doctrine itself, if it is applied, it also has the effect, as recognised by Lord Dyson MR in *Attorney-General of Trinidad & Tobago v Matthews*[112], on occasion to require consideration of two sets of principles, such as those relating to setting aside default judgments in r 13.3 and those relating to relief from sanctions in r 3.9, in what would otherwise be reasonably straightforward applications. None of this is at all attractive, and is completely contrary to the overriding objective of dealing with cases justly and at proportionate cost.

Despite the brave attempt by Lord Dyson to kill off the implied sanctions doctrine, it has refused to succumb. In the leading case on the implied sanctions doctrine[113], Moore-Bick LJ agreed with much of what was said by Lord Dyson in *Attorney-General of Trinidad & Tobago v Matthews*, and even said that if the area had been free from authority he would have been attracted by the submission that *Sayers v Clarke Walker* had been misunderstood and misapplied[114]. As recognised by Moore-Bick LJ in *R (Hysaj) v Secretary of State for the Home Department* the doctrine has become established in relation to extending time in appeals. While his Lordship refers to cases on extending time for serving particulars of claim and one or two other areas in his judgment in that case, what his Lordship actually said was:

'I think the approach to be taken to applications of the kind now under consideration is now too well-established to be overturned.'

These were applications to extend time in appeals. Therefore, the *ratio* of *R (Hysaj) v Secretary of State for the Home Department* is limited to extensions of time in appeals, and is to the effect that on such applications the court must apply, by analogy, the guidance given by the Court of Appeal for dealing with applications for relief from sanctions under r 3.9. This has been extended to applications to extend time for filing respondents' notices by *Altomart Ltd v Salford Estates (No 2)*

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[110] See FN 38.

[111] *Totty v Snowden* [2001] EWCA Civ 1384, [2002] 1 WLR 1384, especially at [46]; *Robert v Momentum Services Ltd* [2003] EWCA Civ 299, [2003] 1 WLR 1577.

[112] *Attorney-General of Trinidad & Tobago v Matthews* [2011] UKPC 38 at [18].

[113] *R (Hysaj) v Secretary of State for the Home Department* [2014] EWCA Civ 1633.

[114] *R (Hysaj)* [2014] EWCA Civ 1633 at [36]. A reference no doubt to Lord Dyson MR's comment in *Denton* [2014] EWCA Civ 906 at [3].

Ltd[115]. It is submitted that this should be the extent of the implied sanctions doctrine. The miscellaneous cases in support of the doctrine in other contexts are either wrongly decided or otherwise unsatisfactory and contrary to principle.

There may be legitimate reasons for demanding more onerous grounds in certain types of applications than currently provided by CPR rr 1.1 and 3.1(2)(a). If this is so, the right approach is for the Civil Procedure Rule Committee to make the necessary amendments to the relevant provisions of the CPR. There is nothing to prevent the Committee making specific reference to the criteria set out in r 3.9, or any other criteria, for different types of application. It has already done so, for example, in relation to extending the period of validity of a claim form in r 7.6, and for setting aside default judgments in r 13.3. It would be best if suitable amendments were now to be made to CPR rr 52.4 and 52.5 to codify the position on extending time in appeals by making express provision applying the guidance on r 3.9 to these applications. The CPR have to be accessible to all court users, and it is fundamentally wrong that special rules should only be accessible to those in the know. It would be sensible, at the same time, to include a suitable provision in PD 3A to the effect that the implied sanctions doctrine no longer has any effect.

It has been pointed out more than once that if the draftsman intended to impose more onerous requirements for some types of application, that could easily have been done, and where this is not so, it is not for the courts to impose such requirements[116]. As Lord Dyson said in *Attorney-General of Trinidad & Tobago v Matthews*[117], if the Rule Committee wishes to impose the r 3.9 conditions as additional requirements in any particular area, then this should be done expressly by an appropriate amendment to the rule.

[115] *Altomart Ltd v Salford Estates (No 2) Ltd* [2014] EWCA Civ 1408.
[116] For example, *Totty v Snowden* [2001] EWCA Civ 1415, [2002] 1 WLR 1384 per Chadwick LJ at [44]; *Robert v Momentum Services Ltd* [2003] EWCA Civ 299, [2003] 1 WLR 1577 per Dyson LJ at [33].
[117] *Attorney-General of Trinidad & Tobago v Matthews* [2011] UKPC 38 at [20].