

“Yes, I meant it then, but not now”

The Rules of the High Court 2009 in the Isle of Man (“the Rules”), give the court wide case management powers. The Rules and Orders made under them often impose strict time limits on parties to litigation.

Other Orders are made by consent of the parties. What happens when, for any reason, compliance cannot be achieved, and a party looks to revise the terms of an Order, that they previously consented to?

The Rules

- Rule 2.14 provides as follows:-

“2.14 Time limits may be varied by the parties (2.1.1).

Unless these Rules provide otherwise or the Court orders otherwise, the times specified by a Rule or by the Court (our emphasis added) for a person to do any act that may be varied by the written agreement of the parties.”

- Rule 7.2 (a) provides as follows:-

“7.2 Courts general powers of management (3.1)

(1) The powers in this Rule are in addition to any powers given to the Court by any other Rule or by any other statutory provision or rule of law.

(2) Except where these Rules provide otherwise, the Court may –

(a) extend (our emphasis added) or shorten the time for compliance with any Rule, practice direction or Court Order (even if an application for an extension is made after the time for compliance has expired) (our emphasis added);

Further at 7.2 (2) (n):-

“(n) take any step or make any other Order for the purpose of managing the case and furthering the overriding objective in Rule

1.2 and further (7) a power of the Court under these Rules to make an Order includes a power to vary or revoke the Order.

- Rule 2.58 provides as follows:-

“2.58 Sanctions have effect unless defaulting party obtains relief (3.8)

(1) Where a party has failed to comply with a rule, practice direction or court order any sanction for failure to comply imposed by the rule, practice direction or court order has effect unless the party in default applies for and obtains relief from the sanction.

(2) Where a rule, practice direction or court order-

(a) requires a party to do something within a specified time, and

(b) specifies the consequence of failure to comply,

the time for doing the act in question may not be extended by agreement between the parties”.

- Rule 2.59 provides as follows:-

“2.59 Relief from sanctions (3.9)

(1) On Application for relief from any sanction imposed for a failure to comply with any Rule, practice direction or Court Order the Court shall consider all the circumstances including:-

(a) the interests of the administration of justice;

(b) whether the application for relief has been made promptly;

(c) whether the failure to comply was intentional;

(d) whether there is a good explanation for the failure

(e) the extent to which the party in default has complied with other Rules, practice directions and Court Orders;

(f) whether the failure to comply was caused by the party or its Advocates;

(g) whether the trial date or the likely trial date can still be met if relief is granted;

(h) the effect which the failure to comply had on each party; and

(i) the effect which the granting of relief would have on each party

(2) An application for relief should be supported by evidence.

English Case Law

The issue of a variation of a Consent Order has arisen on a number of occasions, before the Courts in England, which assist in understanding how a Manx Court would approach matters.

- Ropac Limited v Innpreneur Pub Company (CPC) Limited – High Court of Justice Chancery Division – June 7 2000
- Community Care North East (a Partnership) v Durham County Council – High Court of Justice Queens Bench Division – April 29 2010
- Pannone LLP v Aardvark Digital Limited – Court of Appeal (Civil Division) – July 12 2011; and
- Alexis Maitland Hudson v New Media Holding Company LLC – High Court of Justice Queens Bench Division – November 23 2011.

“Yes, but No”

In Ropac Limited v Innpreneur Pub Company (CPC) Limited 2000 WL 742048, Mr Justice Neuberger, was faced with an application for the extension of time to a consent order.

Here, the tenant had made an application against his landlord for a breach of Article 81 of the Treaty of Rome. The landlord served a defence and counterclaim for possession and arrears of rent. The tenant’s only defence, to the counterclaim, was to set off the claim for rent against any damages awarded in respect of the claim for breach under Article 81. When the claim for breach of Article 81 was decided, the parties reached an agreement, that the tenant pay the balance of the outstanding rent by December 9. The agreement was put into a consent order. Subsequently, the tenant made one payment on December 8, with a second payment on December 18. The landlord then obtained an order for possession. The tenant had initially applied for a stay of the possession order and for relief from forfeiture, which was refused and the tenant appealed. The tenant then made a second application for an extension of time in which to comply with the consent order.

The Court was referred to Siebe German v Pneupac 1982 1 WLR 185, in which Lord Denning considered the ambiguity of an order that is said to be made “by consent”. At page 189 of the Siebe judgment, Lord Denning commented:-

“There are two meanings to the words “by consent”... One meaning is this: the words “by consent” may evidence a real contract between the parties. In such a case the court will only interfere with such an order on the same grounds as it would with any other contract. The other meaning is this: the words “by consent” may mean “the parties hereto not objecting”. In such a case there is no real contract between the parties. The order can be altered or varied by the court in the same circumstances as any other order that is made by the court without the consent of the parties. In every case it is necessary to discover which meaning is used. Does the order evidence a real contract between the parties? Or does it only evidence an order made without objection?”

In order to determine this, Neuberger J, needed to consider the prior negotiations of the parties. He concluded that the consent order was a binding contract, and then proceeded

to consider whether, under the English Civil Procedure Rules 1998 (“the CPR”), he should interfere with what the parties have agreed, he said:-

“To my mind, the CPR therefore give the Court rather more wide ranging more flexible powers... In my judgment, those powers are to be exercised not merely to do justice between the parties, but in the wider public interest. Further, the objection to deal with a case “justly” must, as I see it, sometimes (albeit rarely) require the Court to override an agreement made between the parties in the course of, and in connection with, the litigation. I consider that that means that the Court has greater power to interfere than before. Having said that, I should add this. Where the parties have agreed in clear terms on a certain course, then, while that does not, take away its power to extend time, the Court should, when considering an application to extend time, place very great weight on what the parties have agreed and should be slow, save in unusual circumstances, to depart from what the parties have agreed”.

In Ropac, Neuberger J decided that although he had the jurisdiction under the CPR to extend the time for compliance of the order, he would not do so, as the tenant had an avenue of relief open to them. The tenant was entitled to relief from forfeiture provided they paid all the rent due, within a reasonable time.

The courts power to extend time for compliance with a consent order, was more recently considered in Pannone LLP v Aardvark Digital Limited [2011] EWCA Civ 803.

In Pannone, the Claimant solicitors had asked for the time in which to file their Reply and Defence to Counterclaim, to be extended to the 1pm on October 26. The Defendants granted the extension and provided the form of consent order, the terms of which were draconian. The Claimants served their Reply and Defence to Counterclaim by email at 12:58 on the Defendants. The Claimant then faxed a 25 page document to the court at 12.59. A second document was faxed to the court at 13.06, which the court took to be the complete document as it included a cover sheet. Both the first and second fax, took over two and a half minutes to transmit through to the court.

The District Judge, in a Case Management Conference, granted relief from sanction and extended the time for compliance with the order. On appeal, the extension of the consent order was upheld as, although the interests of justice required the courts to give effect to the terms of the consent order, justice was to be seasoned with mercy. Where a party has attempted to comply with an order but failed to do so, the interests of justice would be best served by allowing the matter to go to trial, to be decided on its merits, provided that the other party hadn’t suffered any prejudice. The Defendants appealed on the grounds that the court should only grant relief where there have been unusual circumstances.

In the Court of Appeal, Lord Justice Tomlinson, considered all the leading authorities, including Siebe and Ropac, and at paragraph 28 stated:-

“I particularly note that Rule 3.8(3) again contains no derogation so far as concerns an order made by consent. It would no doubt be rare for the court to decline to give effect to the parties' subsequent agreement to extend the time within which some step was required to be taken by the terms of their earlier consent order, and thus to relieve from the sanction specified, but that the court reserves to itself the power so to do is entirely consistent with the court's general powers of management. It is also consistent with that aspect of the overriding objective which requires the court to allot to a case an appropriate share of the court's resources, while taking into account the need to allot resources to other cases. Thus an agreed extension of time by parties who have already agreed to an order imposing sanctions for failure to comply with the existing timetable which will lead, for example, to the vacation of an already oft deferred trial date might not be endorsed by the court in circumstances where the parties have already had allotted to them more than a fair share of the court's resources. It must however I think equally follow that it is inherent in Rule 3.8(1) that the power to relieve from sanctions is available in respect of all orders of the court, including those expressed to be made by consent. No exception is made and an implied exception would be inconsistent with the court's general powers of management as embodied in CPR Part 3, part of a “new procedural code” which CPR 1.1(1) tells us has the overriding objective of enabling the court to deal with cases justly”.

At paragraph 33, Lord Justice Tomlinson concluded:-

“In my view the weight to be given to the consideration that an order is agreed will vary according to the nature of the order and thus the agreement. Where the agreement is the compromise of a substantive dispute or the settlement of proceedings, that factor will have very great and perhaps ordinarily decisive weight... Where however the agreement is no more than a procedural accommodation in relation to case management, the weight to be accorded to the fact of the parties' agreement as to the consequences of non-compliance whilst still real and substantial will nonetheless ordinarily be correspondingly less, and rarely decisive. Everything must depend on the circumstances, and CPR 3.9(1) prescribes that on an application for relief from a sanction for a failure to comply with a court order the court will consider all the circumstances, including those enumerated in the following sub-paragraphs. Beyond noting that where an order is made by consent, that is one of the circumstances which the court will take into account, it is not I think necessary to impose any further gloss on the Rules, which are already adequately drafted so as to ensure that all proper considerations must be taken into account”.

Lord Justice Tomlinson dismissed the appeal as the court was not required to look to unusual circumstances, before granting relief. The appeal judge had carefully considered all the circumstances of the case, as set out in CPR 3.9, and both he and the District Judge had come to the correct decision.

“But maybe”

In Community Care North East v Durham County Council, the court was faced with an application to vary the terms of a Tomlin Order. A Tomlin Order is a type of consent order, which is in two parts. The terms which the parties have agreed, is set out in a schedule, to the consent order. However, only the consent order is approved by the court. Durham County Council sought to vary a term in the schedule. This raised three issues for the court:-

- Whether the court had the power and jurisdiction to vary the Tomlin order;
- If so, whether, in the circumstances of the case, the court should vary the order;
- If the terms weren't varied, whether the Council would be prevented from exercising any of its other powers, to terminate the current tender process and start afresh.

Ramsay J decided that although the CPR and the overriding objective, gave the court the power to vary a consent order, this did not apply to the schedule to the Tomlin order, as it constituted a binding contract.

However, Ramsay J, at paragraph 29 commented:-

“... if the terms of the consent order part of the Tomlin order included an express liberty to apply to vary the terms of the schedule either generally or in particular circumstances, the court would have the power to do so. However the scope of the liberty to apply would have to be clearly defined...”

The Council argued that they had “liberty to apply” to the court for the variation of the terms of the consent order, given the wording of the order itself which began as follows:-

“These proceedings be stayed save for the purpose of giving effect to the terms, for which there be liberty to apply.”

Ramsay J was referred to two matrimonial cases, Cristel v Cristel [1951] 2 KB 725 and S v S (Ancillary Relief: Consent Order) [2003] Fam 1. In the former case, liberty to apply was said to be implied where it had not been expressly reserved, although this in itself did not entitle one to have the consent order varied. In S v S, the court held that there were only two grounds for setting aside a consent order, either there had been an erroneous basis of fact or there had been a material or unforeseen change in circumstances.

At paragraph 34, Ramsay J stated:

“...The decisions in Cristel v Cristel and S v S, in my judgment, are directed at the circumstances in which the terms of a consent order can be varied. Whilst those cases

relate to matrimonial proceedings where there may be other applicable principles, I accept that the principle may be extended to the power of the court to vary consent orders generally. However, when it comes to a Tomlin Order, I can see no justification for a general power for the court to vary the terms of the agreement set out in the schedule on the basis that there has been a material or unforeseen change in circumstances after the order was made which might undermine or invalidate the basis of the agreement, unless that would give rise to a power to do so as a matter of the law of contract. Such a procedural power would provide an additional remedy in cases where the agreement is incorporated into a Tomlin Order, which is not available in a case where the parties merely enter into a separate settlement agreement and leave any question of enforcement to a further set of proceedings. I do not see that this is the effect of a Tomlin Order where the agreement in the schedule does not form part of the terms ordered by the court.”

In the context of the current case, Ramsay J stated that the term “liberty to apply” meant nothing more than either party being able to apply to the court to enforce the terms in the schedule. He decided that the terms in the schedule did not prevent the Council from starting a new procurement process, and as such, he refused the application.

Despite an Order, expressed to be consent, and requiring a particular step, by a given date being made, the jurisdiction exists for the Court to consider varying that Order.

Conclusion

When deciding whether to not to extend time for compliance with a consent order, or to vary its terms, the court will first look at what the parties have agreed. The (Manx and English) Rules do provide the court with wide case management powers within which to grant the relief a party seeks. Whether or not the court will exercise its powers will depend on the circumstances of the case, in particular those set out in Rule 2.59.

It is repeatedly suggested that the Manx Courts will be guided by the approach of the English Courts, under the CPR, when considering their current approach under the 2009 Rules of the High Court.

It is clear from Pannone, that the court will place greater weight on an agreement which is determinative of the proceedings between the parties. If the parties are merely agreeing to extend time for compliance with a case management direction, then the court will attribute lesser weight and are more likely to grant the relief sought. The courts will not only exercise its powers to ensure that justice is done between the parties, but in the wider public interest. It is clear from Ropac, that if there is another avenue of relief open to the applicant, it is unlikely that the court will grant the relief under the terms of the consent order.

The type of consent order is also important. If the matter is to be disposed of in a Tomlin Order, then parties should consider whether or not to include express liberty to apply to

vary the terms of the schedule. If the parties do not, the court will not interfere with the parties have agreed, Community Care North East v Durham County Council.

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