Zuckerman on Civil Procedure

Principles of Practice

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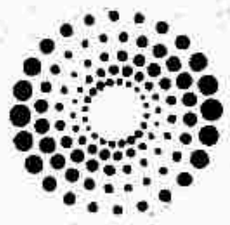

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CHAPTER 1

THE OVERRIDING OBJECTIVE

INTRODUCTION

1.1 The Civil Procedure Rules 1998 (SI 1998/3132) (CPR), which came into effect on April 26, 1999, were designed to transform English civil procedure. The CPR largely implemented the recommendations made by Lord Woolf M.R. in his reports on Access to Justice, which proposed measures for remedying the shortcomings of the old system.[1] Three provisions in particular were intended to mark the change: CPR 1.1(1), which set out an overriding objective, CPR 1.1(2) which elaborated meaning of the overriding objective, CPR 1.4(1) which imposed a duty on the court to "further the overriding objective by actively managing cases". These provisions give expression to the idea that only by adequate management of cases can the court deliver a satisfactory dispute resolution service. The present chapter examines the background and the theory behind the overriding objective and its far reaching implications for the court's approach to the conduct of litigation. The practical implications of the overriding objective for case management are dealt with in Chapter 10.

CPR
- OVERRIDING OBJECTIVE
- ACTIVE CASE MANAGEMENT

1.2 Originally, CPR 1.1(1) declared: "These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly." This wording has been amended and the CPR 1.1(1) now states that "These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost." The first version has come to be known as Mark I overriding objective and the new version as Mark II overriding objective.[2] Mark II overriding objective was introduced by the Rules Committee following the recommendations of the Sir Rupert Jackson Report on Civil Litigation Costs.[3]

OVERRIDING OBJECTIVE (OO
MARK I : DEAL WITH CASES JUSTLY
MARK II : + AT PROPORTIONATE COST

1.3 CPR 1.1(2) elaborates that 'dealing with cases justly and at a proportionate cost includes; so far as is practicable, the factors listed from CPR 1.1(2)(a) onwards. In the Jackson Final Report, Sir Rupert Jackson considered that

[1] Lord Woolf, Access to Justice: *Woolf Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1995) (hereinafter "Woolf Interim Report"); *Access to Justice: Woolf Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996) (hereinafter "Woolf Final Report"). Some of Lord Woolf's views before he undertook his inquiry appear in the 1994 Bentham Club Presidential Address, entitled *"Access to Justice"*, CLP 341.

[2] To use the language of Lord Dyson M.R., 'The Application of the Amendments to the Civil Procedure Rules: 18th Lecture in the Implementation Programme' (speech delivered at the District Judges' Annual Seminar, Judicial College, March 22, 2013).

[3] Sir Rupert Jackson, *Review of Civil Litigation Costs: Preliminary Report* (2009) (hereinafter "Jackson Preliminary Report"); Sir Rupert Jackson, *Review of Civil Litigation Costs: Final Report* (2010) (hereinafter "Jackson Final Report").

proportionality is an 'overriding principle' in civil litigation.[4] Other commentators describe proportionality as 'one of the most important principles underlying the new approach to civil procedure'.[5] There is also a new CPR 1.1(2)(f), which establishes that dealing with cases justly and at a proportionate cost includes 'enforcing compliance with rules, practice directions and orders.' Although the argument may be made that the amendments to CPR 1.1(1) are superfluous because the Mark I overriding objective already required the courts to deal with cases justly and at proportionate cost, the better view is that the addition of the above mentioned words now underline the court's duty to manage cases in ways that are proportionate to the circumstances of the particular case and to the resources of the judicial system as a whole. As Lord Dyson M.R. has said, the new "framework is intended to ensure that all litigants have fair access to the courts and a fair opportunity to proceed to judgment."[6] If one litigant uses a disproportionate amount of court resources it impacts on others who are waiting to use the court system to vindicate their rights. Proportionality then, in the context of the law of procedure, is a systemic concept as well as a decision-making parameter in specific cases.

1.4 The amended CPR 1.1 emphasises the centrality of dealing with cases at proportionate cost and that the courts will place greater weight than previously on enforcing compliance.[7] CPR 1.4(1) states that the "court must further the overriding objective by actively managing cases". Together these provisions give expression to the idea that only by adequate and proportionate management of cases can the court deliver a satisfactory dispute resolution service. Obvious though this idea is, it has far reaching consequences in practice.

THE CIVIL COURT PROVIDES A PUBLIC SERVICE OF ENFORCING CIVIL RIGHTS

The function of the civil court—delivering a public service for the enforcement of rights

1.5 The overriding objective can be properly understood only in the context of the particular function that the court fulfils in a system governed by the rule of law. The adjudication of civil disputes tends to be seen nowadays as merely a dispute resolution process. Since disputes predominantly concern private rights, it is thought that the process of resolving them is essentially a private matter of no major public interest. This explains why it is so fashionable to regard ADR as an

[4] Sir Rupert Jackson, *Review of Civil Litigation Costs: Preliminary Report* (2009) (hereinafter "Jackson Preliminary Report"); Sir Rupert Jackson, *Review of Civil Litigation Costs: Final Report* (2010) (hereinafter "Jackson Final Report") [2.4].

[5] 2013 WB 3.11.10.

[6] Lord Dyson M.R., 'The Application of the Amendments to the Civil Procedure Rules: 18th Lecture in the Implementation Programme' (speech delivered at the District Judges' Annual Seminar, Judicial College, March 22, 2013).

[7] Lord Dyson M.R., 'The Application of the Amendments to the Civil Procedure Rules: 18th Lecture in the Implementation Programme' (speech delivered at the District Judges' Annual Seminar, Judicial College, March 22, 2013).

adequate and cheaper substitute for court adjudication and why courts all over the world are so insistent that litigants avail themselves of ADR. Yet, to regard court adjudication as simply one of many forms of private dispute resolution is to debase its constitutional function in a system governed by the rule of law.[8] A pedestrian injured by a speeding car does not go to court asking the judge: "Please resolve my dispute with the speeding driver". Rather, the pedestrian demands his due under law. Expressions such as a court of justice, administering justice, or going to court to seek justice, refer to the court's role of protecting rights. Court adjudication is the process which provides citizens with remedies for wrongs that they have suffered. Without remedies there are no rights and without enforceable rights there is no rule of law.

PUBLIC SERVICE OF ENFORCEMENT OF RIGHTS - RULE OF LAW - JUSTICE

1.6 "A third subordinate right of every Englishman," Blackstone wrote, "is that of applying to the courts of justice for redress of injuries. Since the law is in England supreme arbiter of every man's life, liberty, and property, courts of justice must at all times be open to the subject, and the law be duly administered therein."[9] The right to court assistance for the protection of rights is therefore an essential component of any system ruled by law. It finds expression in the Supreme Court Rules 2009 (SCR 2009), rule 2(2) which states that the "over-riding objective of these Rules is to secure that the Court is accessible, fair and efficient". Accessibility is a pre-condition to court assistance; in the absence of access to court an aggrieved person cannot obtain redress for wrong. No one thinks of an appeal to the Supreme Court or of the criminal trial as merely a dispute resolution process. Nor should one regard any other court adjudication of civil claims as merely a dispute resolution mechanism. The civil process is just as much a law enforcement process as is its criminal counterpart.

NEED OF ACCESS TO COURT ASSISTANCE ↓ ENFORCEMENT OF THE LAW

1.7 Law enforcement, whether civil or criminal, transcends the interests of the immediate parties. In a society governed by the rule of law, we all have an interest in rights being respected and in wrongs being remedied. The surest way of undermining good social order is to allow infringements of rights to go without redress. Where there is no redress for wrongs there is no value to rights and no reason to behave according to the law. It is precisely because the upholding of rights is in the interest of the community as a whole that binding adjudication is a monopoly of the state and is not left to private enterprise. Law enforcement is essentially a public service, delivered by a public authority, with the objective of redressing wrongs. The civil courts underwrite the rights that

PUBLIC INTEREST IN LAW ENFORCEMENT ↓ BINDING ADJUDICATION IS A MONOPOLY OF THE STATE ↓ PUBLIC SERVICE

[8] Professor Dame Hazel Genn, The Hamlyn Lectures 2008, *Judging Civil Justice* (Cambridge University Press 2009) 20–24; 134.

[9] William Blackstone, *Commentaries on the Laws of England* (edited by W. Morrison, 2001), p.105 (Vol.1, p.141). The direct aim of the civil process, Bentham thought, was to obtain rectitude of decision, by which he meant the correct application of the law to the true facts. Collected works of Jeremy Bentham (Bowring edition 1838–1843), *Principles of Judicial Procedure*, Vol.II. See also W. Twining, *Theories of Evidence: Bentham & Wigmore* (1985). "[T]he primary duty of the courts", Lord Denning M.R. observed, "is to ascertain the truth by the best evidence available": *Harmony Shipping Co SA v Davies* [1979] 3 All ER 177 at 181. Another Master of the Rolls, Lord Donaldson, stressed that "litigation is not a war or even a game. It is designed to do real justice between opposing parties . . . ": *Davies v Eli Lilly & Co* [1981] 1 All ER 428 at 431.

persons possess under its jurisdiction by providing a service for the enforcement or rights.

A public service requires management

1.8 Judges tend to consider that their role is predominantly to deliver judgments that are well founded in fact and in law, and that all else is secondary. While it is undoubtedly true that the court's role as an underwriter of our rights is to deliver correct judgments, this does not fully describe the court's function as law enforcers. The rule of law idea demands the court to uphold our rights by providing practical and effective remedies for wrongs. Once we focus on the need to deliver effective remedies for wrongs the time factor comes into view. A remedy for a wrong has to be administered when it can still do some good. Compensation for personal injuries that comes after 15 years is hardly adequate, even if it reflects the correct application of the law to the true facts, because the claimant will have been denied adequate income support and possibly treatment for a substantial portion of his life. Even when the dispute is over property rights, the passage of time tends to erode their usefulness and value by the sheer uncertainty of litigation; the longer the enforcement process the greater the uncertainty and the less valuable rights become.

1.9 It follows that if the court is to provide effective remedies for wrongs it has to deliver judgments within a reasonable time, because timing is as crucial to righting wrongs as it is to the provision of medical care. Effective treatment does not only have to be appropriate but must also be delivered at a time when it can do some good. Timing is not an independent aspect of treatment but an integral part of it. Put differently, it makes no sense to speak of treatment as appropriate unless it was delivered at the appropriate time. We must similarly accept that time is an integral imperative of civil justice, as is indicated by the aphorism 'justice delayed is justice denied'.

Justice management calls for balancing competing needs

1.10 We may take as our base line that citizens are entitled to correct court adjudication within a reasonable time. This does not mean, however, that citizens are entitled to claim the best possible court adjudication system regardless of how much it costs. A legitimate claim that the state should protect our rights does not entail an entitlement to the best possible law enforcement system regardless of expense. One is no more entitled to the best possible system of justice than one is to the best possible health, education, or transport services. Since public resources are limited we can only demand such civil rights enforcement as can reasonably be afforded by the taxpayer. At the same time, it would be unjustified to extract from those who seek court assistance a disproportionate price as a condition to redress of wrong. It follows therefore that justice, like any other public good, has resource or cost limitations. A judgment for the recovery of debt that costs more than the amount recovered could not provide an adequate remedy to the creditor. And it would be likewise unsatisfactory if the financial risk of litigation were disproportionate to the hoped-for recovery. Justice, like any other public service, must be provided at a reasonable and proportionate cost to taxpayers and litigants alike.

We may conclude that an adequate system of adjudication of civil disputes must meet three basic requirements, all of which are as integral as each other to the enforcement of civil rights. It must deliver judgments that are well grounded in law and in fact. It must do so within a reasonable time. And it must deliver this with the use of proportionate public and litigant resources. This may sound a tall order but it represents no more than what we expect every other public service to deliver: a reasonable level of service at a reasonable cost. **1.11**

The need to deliver well founded judgments within a reasonable time and within available resources creates obvious tensions between different imperatives. Delivering speedy and high quality judgments would require more resources than are affordable. As a result compromises must be made by the legislature or by the court. It may be decided to adopt less resource-intensive processes or perhaps to take longer reaching a resolution. While there may be several options open one thing is clear: court adjudication involves inevitable compromises arising from the need to balance competing imperatives or desired goals. Striking such balance is the peculiar business of management. **1.12**

The need for managing competing demands is not peculiar to court adjudication but is a constant in any public service. For no organisation can provide satisfactory (or even unsatisfactory) service to the public without effective management. A public service can achieve satisfactory results only if it has a coherent and robust strategy for balancing desired outcomes against time and resource constraints. This is now common place in all public services. It is impossible to imagine, for instance, the National Health Service or the education service being operated without proper management. Although some may still believe that justice can be delivered by the judiciary without a well developed managerial input, in reality there is no such thing as a management free service; there are only well managed services and poorly managed services and many shades in between. **1.13**

Pre-CPR management deficit

Although it is common to say that the Woolf reforms and the ensuing CPR transferred the control of litigation from the parties to the court this is somewhat inaccurate. The court has always had control over its proceedings. The court had the jurisdiction to grant or withhold an extension of time, to grant or withhold permission of an amendment, to cure a procedural defect or refuse to do so, or to make any order it saw fit. The problem was not lack of control but lack of willingness to exercise it in an adequate manner. **1.14**

The main defect of the old system, Lord Woolf found, was that it allowed litigants to use as many of the court's resources as they desired. It tolerated litigant failure to comply with the rules, especially those concerning time limits. It encouraged procedural complexity that required practitioners to master an ever-growing volume of case law. It tolerated wasteful satellite litigation on matters of procedure rather than substance. Not least, it created considerable scope for running up high and unpredictable litigation costs without necessarily contributing to the quality of outcomes. Clearly, these defects could be attributed to poor management of the litigation service. **1.15**

THE OVERRIDING OBJECTIVE: INTEGRATING JUSTICE AND MANAGEMENT

Balancing three imperatives

1.16 The CPR seek to reverse these tendencies by a number of means. As already noted, the court must now actively manage cases at a proportionate cost and is given an objective and the powers to achieve it. The court, not the parties, dictates the pace and intensity of the litigation process. The overriding objective was defined and elaborated in order to guide the court in exercising both its new case management powers and its traditional discretion in matters of procedure. The thinking behind the CPR has been set out by Brooke L.J. in *Thomson v O'Connor*[10]:

> "The Civil Procedure Rules, with their tough rules in relation to requiring compliance with court orders, were introduced to extinguish the lax practices which existed before those rules were introduced whereby parties' solicitors often regarded directions given by the court as so much waste paper, extended time unilaterally without approaching the court, reached agreements allowing each other plenty of time without approaching the court, and made it virtually impossible for courts to organise their lists effectively."

1.17 The objective of the civil legal process remains of course the same: enabling the court to decide disputes on their merits and determine the litigants' rights and enforce them. It remains the case that the court must strive to establish the true facts and correctly apply the law to them, thereby giving effect to substantive rights. This is sometimes referred to as doing substantive justice, or justice on the merits. But the CPR now recognise that substantive justice is not the sole aim of the civil process. Substantive justice, it makes clear, must be delivered by means of proportionate use of resources (public and litigant alike) and within reasonable time. To fully appreciate the nature of the CPR system and its practical implications it is essential to realise that it is driven by three imperatives: that judgments follow from the correct application of the law to the true facts; that judgments are reached by means of proportionate resources; and that judgments are delivered in a reasonable time. The overriding objective makes plain that all three imperatives are central components of the civil litigation justice system. It seeks to ensure that considerations of resource and of time receive appropriate attention throughout the adjudication process. The pre-CPR approach to justice is no longer appropriate to the modern legal system. Lord Dyson M.R. has explained the Mark II reflects the change in conception of what it is to achieve justice[11]:

> "[I]t is easy to see why, not least given the long heritage we have of striving to secure justice on the merits in each case and the intuitive understanding that doing justice is to reach a decision on the merits, mistaken assumptions took hold. This was compounded by the failure to make explicit in the overriding objective that it includes a duty to manage cases so that no more than proportionate costs are incurred and so as to

[10] *Thomson v O'Connor* [2005] EWCA Civ 1533, [17].
[11] Lord Dyson M.R., 'The Application of the Amendments to the Civil Procedure Rules: 18th Lecture in the Implementation Programme' (speech delivered at the District Judges' Annual Seminar, Judicial College, March 22, 2013).

enforce compliance. By making these features explicit the Rule Committee has clarified the meaning of the overriding objective."

1.18 Given the pivotal role of the overriding objective in the interpretation of the CPR, in the exercise of judicial discretion, and in judicial use of case management powers, it is important to outline at the outset its principal components and their role in the general scheme of litigation. It should be stressed that since the court must seek to give effect to the overriding objective when it interprets the CPR or exercises any power given to it by the Rules (or indeed under the common law), it will be kept in view throughout the book.

ROLE OF THE OO IN GUIDING JUDICIAL DISCRETION AND CASE MANAGEMENT POWERS

1.19 One of the components of the overriding objective is procedural fairness.[12] The requirements of fair process are deeply rooted in English law. Entitlements such as the right to an impartial tribunal, the right to be informed of the opponent's case and to an opportunity to be heard or, indeed, the elementary right of access to court, have for centuries found expression in the case law and in the rules of procedure, including of course the CPR. The common law safeguards of procedural fairness are now overlaid with the right to a fair trial established by Art.6 of the European Convention on Human Rights (ECHR). Discussion of the right to a fair trial at common law, under the CPR and in accordance with the ECHR, is to be found in Chapter 2.

PROCEDURAL FAIRNESS:
- IMPARTIALITY
- INFORMATION OF THE OPPONENT CASE
- RIGHT TO BE HEARD
- ACCESS TO COURT.

ART. 6 ECHR

1.20 Novel though the CPR approach is it cannot be fully understood without some reference to the previous law, if only because the CPR regime represents an attempt to remedy the defects of the old system. As in other contexts of statutory interpretation, we need to have a conception of the mischief that the CPR are intended to cure before we can fully comprehend their implications. Accordingly, it is necessary to devote part of this chapter to the problems that gave rise to the need for the new arrangements.

"Enabling the court to deal with cases justly"—a three-dimensional concept of justice

1.21 The CPR articulate general principles that must guide the interpretation of the rules and their application and in this sense take precedence over individual rules. Individual rules, Lord Woolf explained, offer detailed directions for the steps to be taken in the course of litigation, but their success in achieving a sensible and just resolution "depends upon the spirit in which they are carried out" and on the "understanding of the fundamental purpose of the rules and of the underlying system of procedure".[13] The predecessors of the CPR, the Rules of the Supreme Court (RSC) and the County Court Rules (CCR), relied for their interpretation on general common law and equity principles, which were not specifically articulated for delivering an adjudication service. By contrast, the CPR bring with them their own interpretive machinery in the shape of the overriding objective. The overriding objective expresses the legislature's commitment to delivering a

GENERAL PRINCIPLES MUST GUIDE THE INTERPRETATION OF RULES AND THEIR APPLICATION
- PRECEDENCE OVER INDIVIDUAL RULES

[12] Dealing with cases justly includes "ensuring that the parties are on an equal footing" (CPR 1.1(2)(a)), and ensuring that a case is dealt with "fairly" (CPR 1.1(2)(d)).
[13] Woolf Final Report, 274.

litigation service which is just, timely and with proportionate use of resources.[14] The same is true of the Supreme Court Rules 2009, which states that the "Court must interpret and apply these Rules with a view to securing that the Court is accessible, fair and efficient and that unnecessary disputes over procedural matters are discouraged" (SCR 2009, 2(3)). Efficiency and the avoidance of waste of court resources are placed on the same level as fairness and accessibility.

1.22 CPR 1.1 states that the overriding objective is to enable the court "to deal with cases justly". Doing justice is the goal of all adjudication systems, even of those that do not live up to it. The notion of doing justice in this context is capable of a variety of interpretations, but the drafter of the CPR took good care to be more specific. CPR 1 makes it clear that the court must not only determine disputes in accordance with the true facts and the law but must also do so by the use of proportionate court and litigant resources and within a reasonable time. In the present context, dealing with cases justly is therefore a multi dimensional concept. Lord Dyson M.R. spelt this out in a lecture[15]:

> "The revisions to the overriding objective and to rule 3.9, and particularly the fact that rule 3.9 now expressly refers back to the revised overriding objective, are intended to make clear that the relationship between justice and procedure has changed. It has changed not by transforming rules and rule compliance into trip wires. Nor has it changed it by turning the rules and rule compliance into the mistress rather than the handmaid of justice. If that were the case then we would have, quite impermissibly, rendered compliance an end in itself and one superior to doing justice in any case. It has changed because doing justice is not something distinct from, and superior to, the overriding objective. Doing justice in each set of proceedings is to ensure that proceedings are dealt with justly and at proportionate cost. Justice in the individual case is now only achievable through the proper application of the CPR consistently with the overriding objective."

1.23 It is a matter of regret that some judges think that dealing with cases justly means no more than reaching a correct decision on the merits. They seem to believe that the overriding objective gives precedence to doing substantive justice, in the sense of returning a judgment which is founded on the correct application of the law to the true facts. This narrow understanding of the judicial duty flies in the face of the express legislative intention, because the clause immediately following CPR 1.1(1) expressly states that "[d]ealing with a case justly includes, so far as practicable" a number of specific aims, such as proportionate use of resources and timely resolution. The instrumental nature of the overriding objective is made clear by the wording of CPR 1.1(1): "*enabling* the court to deal with cases justly". The enabling aspect is central. The function of the overriding objective is to guide the court in managing litigation. This is spelt out by CPR 1.4(1), which states that the "court must further the overriding objective by actively managing cases".

[14] In *Ali v Kayne* [2011] EWCA Civ 1582 the Court of Appeal prefer one interpretation, a particular interpretation concerning jurisdiction on the ground that it is more consistent with the overriding objective.

[15] Lord Dyson M.R., 'The Application of the Amendments to the Civil Procedure Rules: 18th Lecture in the Implementation Programme' (speech delivered at the District Judges' Annual Seminar, Judicial College, March 22, 2013), [26].

1.24 It is the court's responsibility to control and guide the course of litigation with a view to deciding the case on its merits by means of proportionate use of court and party resources and in a timely manner. What is involved in carrying out this task is spelt out in CPR 1.1(2):

IS THE RESPONSIBILITY OF THE COURT TO CONTROL AND GUIDE THE COURSE OF LITIGATION CPR 1.1(2) SPECIFIC AIMS (GOALS) ↓ SO FAR AS IT IS PRACTICABLE

"(2) Dealing with a case justly includes, so far as is practicable—

(a) ensuring that the parties are on an equal footing;
(b) saving expense;
(c) dealing with the case in ways which are proportionate—
  (i) to the amount of money involved;
  (ii) to the importance of the case;
  (iii) to the complexity of the issues; and
  (iv) to the financial position of each party;
(d) ensuring that it is dealt with expeditiously and fairly; and
(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."

The court is required to achieve the case management goals set out in CPR 1.1(2), it should be noted, only in so far as it is practicable, making it clear that the overriding objective is a tool designed to obtain practical results.

1.25 Although there is some overlap between the practical aims of the overriding objective, such as ensuring that cases are dealt with expeditiously and that litigants are treated on an equal footing, and basic requirements of a fair trial, one should not lose sight of important differences. First, the right to a fair trial, whether at common law or under Art.6 of the European Convention on Human Rights, is much wider, and includes such rights as the right to be heard, the right to an impartial tribunal and the right to open trial. Second, the entitlements bundled under the concept of fair trial are not instrumental but are ends in themselves, not means to achieving some other ends.[16] The goals of efficient and expeditious resolution do not impose precise duties on the court or confer well-defined rights on litigants. The aim of using proportionate resources cannot be translated into a rule that assigns a pre-determined amount of judicial time to the resolution of every dispute. Such imperatives call for practical measures to be adapted to the specific circumstances of the case, having regard to the resources available to the administration of civil justice. What might be reasonable expedition and reasonable allocation of resources in a complex case might be regarded as unacceptable delay and excessive use of resources in a simpler straightforward dispute. Likewise, the ascertainment of truth necessitates the adoption of practical fact-dependent means. Truth is an end that can only be obtained by means which are adapted to the particular circumstances of the dispute.

SOME OVERLAP WITH FAIR TRIAL BUT FAIR TRIAL INCLUDES OTHER RIGHTS AND IS NOT INSTRUMENTAL

1.26 CPR 1.1(2)(b) to (e) list considerations of efficiency: saving expense, proportionality in the use of resources, expedition and proper distribution of court resources. However, the meaning of item (a) is less obvious. It might be argued that the aim of ensuring that the parties are on an equal footing looks beyond

CPR 1.1(2) CONSIDERATION OF EFFICIENCY

[16] Summers "Evaluating and Improving Legal Processes—A Plea for 'Process Values'" (1974) 60 Cornell L. Rev. 1; Mashaw "Administrative Due Process: The Quest for a Dignitary Theory" (1981) 61 Boston L.R. 885.

matters of practical efficiency and invokes general principles of procedural fairness. However, such an interpretation would make the clause redundant because fundamental standards of fairness have always been part of English procedure and are now reinforced by Art.6 of the European Convention on Human Rights. It would, therefore, be more in keeping with the ideas behind the overriding objective to interpret CPR 1.1(2)(a) to require fairness in the exercise of judicial case management powers.

1.27 On this view, ensuring that the parties are treated on an equal footing would mean, for instance, that the court must not give directions that impose on one party an unwarranted procedural disadvantage compared with another party. This does not mean that the court must mechanically ensure that each party is treated equally. If one party is allowed to call only one expert witness, CPR 1.1(2)(a) does not necessarily dictate that the other party must not be allowed more than one expert.[17] Equality in this context is case sensitive and depends on the circumstances of the particular case.

1.28 This may be illustrated by reference to CPR 1.1(2)(c)(iv), which requires the court to deal with cases in ways that are proportionate "to the financial position of each party". Under the interpretation advocated here it would be wrong to give case management directions that disadvantage litigants of limited means. Where one party is much better financed than his opponent the court may make orders designed to rectify this imbalance, such as allowing the party represented by a sole practitioner more time to carry out necessary work, or requiring the larger firm to prepare bundles of documents needed for court hearings.[18] Similarly, the court may order that a large corporation, which has an interest in obtaining a ruling of general importance to its business, to bear its own costs even if it succeeds on appeal.[19] Although the court may make costs orders to redress resource imbalance, it may not prevent a party from employing a QC simply because the opponent cannot do the same.[20] A party is entitled to be represented by lawyers of his choice, though he may not necessarily recover the cost.

1.29 The overriding objective establishes a framework for decision-making which aims to deliver decisions in accordance with the true facts and the applicable law by the use of proportionate court and litigant resources and with reasonable expedition. It turns the temporal and resource dimensions of justice into working principles of case management. It cannot be overemphasised that dealing with cases justly does not only mean, as it did in the past, reaching a result which is correct as a matter of fact and of law. Dealing with cases justly integrates the imperatives of merits, of resource limitations and of time, each of which forms part of the whole.

1.30 Laws L.J. brought out this point when he wrote, extra judicially, that the CPR "involve a conceptual shift in the idea of justice, so that economy and proportionality are not merely desirable aims but are defining features of justice itself. And

[17] *Kirkman v Euro Exide Corp (CMP Batteries Ltd)* [2007] EWCA Civ 66; [2007] C.P. Rep. 19.
[18] *Maltez v Lewis* (2000) 16 Const LJ 65 (Ch).
[19] *Lloyd Jones v T-Mobile (UK) Ltd* [2003] EWCA Civ 1162, [25]–[28].
[20] *Maltez v Lewis* (2000) 16 Const LJ 65 (Ch).

it is not merely aspiration; it is law."[21] Buxton L.J. gave expression to this idea when he said that CPR "1.1(1) says that the overriding objective is to enable the court to deal with cases justly; but then in 1.1(2) it explains that just dealing with a case includes not only matters such as the parties being on an equal footing but also, much more directly, management questions such as saving expense, dealing with the case in a proportionate way and ensuring that it is dealt with expeditiously. In making a decision under the overriding objective the court has to balance all those considerations that are set out under that heading without giving one of them undue weight."[22] The connection between justice and efficiency was brought out by Rix L.J., albeit in a different context, when he said that in the eyes of the fair-minded and informed observer "there is not only convenience but also justice to be found in the efficient conduct of complex civil claims".[23]

CONNECTION BETWEEN JUSTICE AND EFFICIENCY

1.31 Since the court is required to actively manage cases, it is only natural that the overriding objective should be primarily addressed to the court. However, it is also addressed to the parties, who have a duty to assist the court to further the overriding objective by co-operating with each other and with the court (CPR 1.3, CPR 1.4(2)). The duty to co-operate has improved the relationship between adversaries and the conduct of litigation, as emerges from surveys concerning the implementation and success of the CPR and associated reforms.[24]

1.31 THE OVERRIDING OBJECTIVE IS ADDRESSED TO THE COURT AND THE PARTIES. (DUTY TO ASSIST THE COURT AND TO COOPERATE WITH EACH OTHER)

THE THREE CENTRAL COMPONENTS OF THE OVERRIDING OBJECTIVE: TRUTH, PROPORTIONALITY AND EXPEDITION

The imperative of ascertaining the truth

1.32 The overriding objective of CPR 1.1 does not expressly mention the determination of truth. This is not surprising because, as a footnote to the third draft of CPR 1.1 stated, "seeking the truth is so obviously part of the court's role that it does not need to be stated expressly in the Rules". As we saw earlier, providing remedies for wrongs is the peculiar constitutional function of court adjudication in a system governed by the rule of law. Therefore, the right to court assistance, to adjudication upon disputed rights, is not something derivable from the CPR, a mere subordinate legislation. The function of the CPR is quite different: to provide the practical framework for court adjudication.

1.32 DETERMINATION OF TRUTH IS OBVIOUSLY PART OF THE COURT'S ROLE (ADJUDICATION)

1.33 Interestingly, while the overriding objective of the CPR implicitly assumes the constitutional position, the overriding objective of the Criminal Procedure Rules 2005 (SI 2005/384) expressly states it in CPR 1.1(2): "dealing with a criminal case justly includes—(a) acquitting the innocent and convicting the guilty". Another implicit assumption of CPR 1.1 that is brought into the open by the

1.33 CRIMINAL PROCEDURE RULES OVERRIDING OBJECTIVE EXPRESSLY INCLUDES
- ACQUITING THE INNOCENT AND CONVICTING THE GUILT.
- RECOGNIZING THE RIGHTS OF THE DEFENDANT

[21] Preface to the *Civil Court Service* 1st edn (Jordans, 1999). See also *Adoko v Jemal*, *The Times*, July 8, 1999 (CA), where Laws L.J said that the "proper and proportionate use of court resources is now to be considered part of substantive justice itself".

[22] *Holmes v SGB Services Plc* [2001] EWCA Civ 354, [38].

[23] *JSC BTA Bank v Ablyazov* [2012] EWCA Civ 1551, [65].

[24] This research is now available by request to the Civil Procedure Rules Secretariat at the Ministry of Justice: *http://general.queries@justice.gsi.gov.uk*. See "Emerging Findings: An Early Evaluation of the Civil Justice Reforms" (March 2001) and "Further Findings—A Continuing Evaluation of the Civil Justice Reforms" (August 2002) (requested December 12, 2011).

Criminal Procedure Rules, r.1.1(2)(c), is that the criminal overriding objective includes "recognising the rights of a defendant, particularly those under Article 6 of the European Convention on Human Rights". It would take a foolhardy advocate to argue that the absence of similar references in CPR 1.1 supports a negative inference about the applicability of these matters in civil proceedings.

1.34 The court is under a constitutional duty to decide cases according to the law and the facts. But the court is not infallible and no system can guarantee the factual correctness of each and every judgment. Furthermore, we do not have a meta-test for judging the conformity of individual judgments to the truth; if we had independent means of ascertaining the truth, we would be using them rather than the present procedures. All that is available for the determination of right and wrong is the existing procedural system. Public confidence in court decisions depends on whether the court follows procedures capable of delivering well founded judgments at proportionate costs and with reasonable expedition. The law's commitment to correct outcomes is demonstrable in most areas of procedure. It shapes the right to fair trial and underpins English law's processes of giving parties access to all relevant evidence. Further, the preference for deciding cases on their merits constitutes an important consideration in the exercise of judicial discretion in virtually all matters of procedure. However, public confidence in the civil process can be undermined by excessive complexity of process, disproportionate cost and undue delay in obtaining judgment. This is why the overriding objective brings to the fore the resource and time dimensions of justice.

The imperative of proportionality

1.35 The notion of 'proportionality' in the CPR is not easy to define, not least because of its recent appearance in the English system. Proportionality is a civilian principle. It is developed as an independent concept in German law. Its origin is in administrative law where it is used as a criterion for assessing the use of authority by state organs, such as the police, so as to determine whether their use of power was excessive or unnecessary in relation to the particular intended objective.[25] In England, the doctrine of proportionality in administrative law, derived from the German conception, applies in all cases where the Human Rights Act 1998 is triggered. In *Campbell v M.G.N. Ltd (No.2)*[26] Lord Hoffmann considered that there were two conceptions of proportionality: one is in the CPR and the other features in the law concerning ECHR rights. The use made of the concept of proportionality necessarily varies according to the context.

1.36 When it considers proportionality, the court must first identify the determinants, or factors, or objectives, which need to be taken into considerations and then assign a value, weight, or a priority order to each of them.[27] The initial task of identification was carried out by the rule maker itself. CPR 1.1(2) list the relevant determinants:

[25] J. Schwarze, *European Administrative Law* (revised edn, 2006) 685–686.
[26] *Campbell v M.G.N. Ltd (No.2)* [2005] UKHL 61.
[27] P. Craig, *EU Administrative Law* 2nd edn (Oxford University Press, 2012) 591.

"(2) Dealing with a case justly and at proportionate cost includes, so far as is practicable—

(a) ensuring that the parties are on an equal footing;
(b) saving expense;
(c) dealing with the case in ways which are proportionate—
  (i) to the amount of money involved;
  (ii) to the importance of the case;
  (iii) to the complexity of the issues; and
  (iv) to the financial position of each party;
(d) ensuring that it is dealt with expeditiously and fairly;
(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and
(f) enforcing compliance with rules, practice directions and orders."

When assessing, for instance, whether to order electronic disclosure and, if so, how extensive it should be, the court must consider proportionally by reference to the above factors, and in doing so it must consider which of the factors carries greater weight in the circumstances.

1.37 A central consideration in case management is whether the likely benefits of taking a particular procedural step justify the cost of taking it: CPR 1.4(2)(h).[28] A particular case management course that may otherwise seem suitable and necessary may on reflection be considered disproportionate if the benefits to be gained from it are outweighed by excessive cost, and complexity, and by the amount of court resources that it would consume. Besides case management decisions, proportionality figures also in decisions concerning the application of ECHR rights. Although the context is different, the intellectual exercise involved in assessing proportionality is essentially the same: judging desired objective by reference to externalities. In case management decisions, the externalities will include cost, time and use of resources. In relation to human rights, the externalities may include the extent to which protecting a particular right may have harmful side effects with respect to other rights or the public interest.

BALANCE BETWEEN BENEFITS AND COSTS OF PROCEDURAL STEPS

1.38 The primary objective of the civil process is the enforcement of rights, which in turn requires the court to determine the true facts and correctly apply the law to them. The exercise is best known as doing justice on the merits. Case management decisions must therefore strive to reach correct decisions on the merits within the constraints of resources and time; it must do so, in other words, by the use of proportionate process. Practical constraints of time and resources are bound to impinge on the litigation process and could influence the outcome. The question therefore arises whether litigants are entitled to insist that the taxpayer should provide the best possible adjudicative process, regardless of how much it costs. There clearly is no such entitlement. Important though adjudication of civil disputes is, Parliament is no more bound to give the court an open-ended budget than it is to provide unlimited funds for hospitals, or any other public service. All that litigants are entitled to expect is a reasonable allocation of resources needed to achieve reasonable protection and enforcement of their

[28] 2013 WB 1.4.10. The editors of the White Book consider that this may be regarded as an 'aspect' of proportionality in the CPR context.

rights.[29] Determining what is a reasonable allocation of resources for the administration of justice involves many and varied public policy decisions, which only the legislature can make.[30]

1.39 The overriding objective brings into the open the need for articulating resource allocation decisions. It brings to the fore the importance of adapting the litigation process to the needs of the individual case. The court has extensive powers to ensure that the process employed is proportionate to a case's needs.[31] CPR 1.1(2)(e) instructs the court to allot to any given case an appropriate share of its resources, bearing in mind the need to reserve resources for other cases. A just distribution of court resources between all those who require court assistance, it must be stressed, is dictated by considerations of fairness. For it would be unjust for the court to allow one litigant to take so much of its time that it is unable to help others waiting for court attention. The idea is by no means new.[32]

1.40 When making case management decisions, the court must have regard to the need to provide assistance to all and therefore consider the consequences that individual decisions on matters of procedure may have on its ability to satisfy the public need. This may be referred to as the systemic conception of procedural proportionality. Extra-judicially, Lord Dyson M.R. has explained that the reference to proportionality in the Mark II overriding objective takes account of this public need[33]:

> "This may mean that in some cases parties will have to be denied the opportunity to adduce certain evidence if they have failed to exchange in accordance with case management directions. Doing so may be justified in order to ensure that they do not expend more than proportionate costs on their own litigation. Equally, this might be justified in order to ensure that all other court-users have fair access."

The notion of the systemic conception of procedural proportionality is not new. Lord Woolf stated in the pre-CPR case of *Beechley Property Ltd v Edgar*, looking forward to the CPR system[34]:

[29] R.M. Dworkin, *A Matter of Principle* (1985) p.92. For a purely economic approach to the problem see: R.A. Posner, "An Economic Approach to Legal Procedure and Judicial Administration" (1973) 2 *Journal of Legal Studies 399*, and R.A. Posner, *Economic Analysis of the Law* (8th edn, 2011).

[30] A number of questions of policy are connected with the resource dimension of justice. The first is whether the cost should be borne by the state (namely, the taxpayer) or the litigants who use the system. This policy question is influenced by considerations that are beyond the scope of this work, such as whether public services are more effectively or justly provided by charging the user or by paying for them through taxes. Low litigation costs would tend to encourage litigation. The more litigation there is, the more the taxpayer will have to maintain the system. But if resources are not increased in line with the volume of litigation, the more litigation there is, the longer delays will be. High litigation costs also may have a bearing on equality of arms between litigants. Court fees must not be imposed so as to restrict access to justice: *R v Lord Chancellor Ex p. Witham* [1998] QB 575, [1997] 2 All ER 779.

[31] The need for proportionality is stressed in a number of rules. See for example: CPR 30.3 (criteria for transfer), CPR 31.3 (right of inspection of a disclosed document), CPR 31.7 (duty of search). See also discussion on case management in Ch.10.

[32] Lord Devlin Lecture broadcast in 1970 and quoted by Lord Woolf in Woolf Interim Report, Section 2, [5] and [6], see para.1.61 below.

[33] Lord Dyson M.R., 'The Application of the Amendments to the Civil Procedure Rules: 18th Lecture in the Implementation Programme' (speech delivered at the District Judges' Annual Seminar, Judicial College, March 22, 2013).

[34] *Beechley Property Ltd v Edgar, The Times*, July 18, 1996.

"It is no use the party coming forward and saying, "The evidence will help our case". You have to consider the position not only from the plaintiff's point of view, but also from the point of view of the defendant, and with a view to doing justice between other litigants as well."

1.41 Even before the Mark II overriding objective, the resource dimension was meant to play a significant role in the courts' approach to litigant-induced delay, as Lord Woolf M.R. explained in *Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd*[35]:

"In *Birkett v James* the consequence to other litigants and to the courts of inordinate delay was not a consideration which was in issue. From now on it is going to be a consideration of increasing significance. Litigants and their legal advisers must recognise that any delay which occurs from now on will be assessed not only from the point of view of the prejudice caused to the particular litigants whose case it is, but also in relation to the effect it can have on other litigants who are wishing to have their cases heard and the prejudice which is caused to the due administration of justice. The existing rules do contain the limits which are designed to achieve the disposal of litigation within a reasonable time scale. Those rules should be observed."

Lord Woolf C.J. returned to this matter in *Jones v University of Warwick*[36]:

"A judge's responsibility today in the course of properly managing litigation requires him, when exercising his discretion in accordance with the overriding objective contained in CPR Part 1, to consider the effect of his decision upon litigation generally. An example of the wider approach is that the judges are required to ensure that a case only uses its appropriate share of the resources of the court (CPR Part 1.1(2)(e)). Proactive management of civil proceedings, which is at the heart of the CPR, is not only concerned with an individual piece of litigation which is before the Court, it is also concerned with litigation as a whole."

1.42 Unfortunately, the time and resource dimensions of the overriding objective were often neglected in practice. The impression was sometimes given that considerations of economy of time and resource were incompatible with doing justice in the sense of reaching decisions based on the substantive merits of the case. The Mark II CPR 1.1 came into existence in order to remove the misconception that where justice on the merits conflicted with proportionality the former prevails. The Master of the Rolls emphasised how the addition of the words 'and at proportionate cost' to the Mark II CPR 1.1(1) were intended to resolve any apparent conflict[37]:

TIME AND RESOURCES DIMENSIONS WERE NEGLECTED IN FAVOUR OF JUSTICE ON THE MERITS.

"Dealing with cases justly does not simply mean ensuring that a decision is reached on the merits. It is a mistake to assume that it does. Equally, it is a mistaken assumption, which some have made, that the overriding objective of dealing with cases justly does not require the court to manage cases so that no more than proportionate costs are expended. It requires the court to do precisely that; and so far as practicable to achieve

[35] *Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd* [1998] 2 All ER 181 at 191, [1998] 1 WLR 1426 at 1436. See also *Spooner v Webb*, *The Times*, April 25, 1997, CA. For discussion of the *Birkett* case see paras 1.63 ff and 10.28 ff.

[36] *Jones v University of Warwick* [2003] EWCA Civ 151, [2003] 1 WLR 954 [25].

[37] Lord Dyson M.R., 'The Application of the Amendments to the Civil Procedure Rules: 18th Lecture in the Implementation Programme' (speech delivered at the District Judges' Annual Seminar, Judicial College, March 22, 2013).

> the effective and consistent enforcement of compliance with rules, PDs and court orders."

1.43 One of the reasons for the failure to appreciate the implications of the overriding objective as originally expressed was that considerations of resources and time were not viewed as part of doing justice, but as external to it. This view rests on the fallacy that the court can reach a correct conclusion on the merits (i.e. the correct application of the law to the true facts) free of the practical constraints of time and resources. This is a myth. Resources are by their nature limited, however ample they may otherwise be. Similarly, the court cannot take an infinite time to reach a conclusion. A court that invests disproportionate time and effort in the case before it will simply run out of resources for dealing with other cases waiting for their turn and therefore leave some litigants without adequate remedy. A court that allocates judicial time according to the difficulty of the case is likely to reach correct and timely outcomes in a larger proportion of disputes than a court that allows litigants to take a disproportionate amount of its time.

1.44 Unfortunately, we still come across expressions that suggest a dichotomy between procedure and justice, as if justice can be process free, or even process neutral. In one case Lord Phillips SCP said that "procedural rules should be the servant not the master of the rule of law".[38] It is of course true that the function of the court is to maintain the law. However, as has already been explained, for the rule of law to command public confidence and compliance, court adjudication must be delivered in a timely manner and at proportionate cost. Procedure is not just a servant of the rule of law, it is as much a part of the rule of law as are the principles that contracts should be enforced, and that wrongs should be remedied. For contracts to be enforced and wrongs remedied, there needs to be a procedure capable of delivering enforcement and remedy when they are required and at proportionate cost. In short, the overriding objective must be implemented.

1.45 Lord Woolf M.R. explained in one of the early CPR cases that[39]:

> "In considering whether a result is just, the courts are not confined to considering the relative positions of the parties. They have to take into account the effect of what has happened on the administration of justice generally. That involves taking into account the effect o[n] the court's ability to hear other cases if such defaults are allowed to occur."

1.46 The point was somewhat differently articulated by Lord Phillips M.R.:

> "An abuse of process is of concern not merely to the parties but to the court. It is no longer the role of the court simply to provide a level playing field and to referee whatever game the parties choose to play upon it. The court is concerned to ensure that judicial and court resources are appropriately and proportionately used in accordance with the requirements of justice."[40]

Lord Phillips M.R. went on to explain that it "would be an abuse of process to continue to commit the resources of the English court, including substantial

[38] *NML Capital Ltd v Argentina* [2011] UKSC 31, [74].
[39] *Biguzzi v Rank Leisure* [1999] 4 All ER 934 at 940, [1999] 1 WLR 1926 at 1933, CA.
[40] *Jameel v Dow Jones & Co Inc* [2005] EWCA Civ 75, [2005] QB 946, [54].

judge and possibly jury time, to an action where so little is now seen to be at stake".[41] "The mere fact that a claim is small", Lewison L.J. explained, "should not automatically result in the court refusing to hear it at all. If I am entitled to recover a debt of £50 I should, in principle, have access to justice to enable me to recover it if my debtor does not pay. It would be an affront to justice if my claim were simply struck out. The real question, to my mind, is whether in any particular case there is a proportionate procedure by which the merits of a claim can be investigated. In my judgment it is only if there is no proportionate procedure by which a claim can be adjudicated that it would be right to strike it out as an abuse of process".[42] Central to the concept of justice underlying the CPR, the overriding objective, is the provision of processes which are proportionate to the likely value of the outcome. How far the court may take proportionality is illustrated by the Court of Appeal decision in *R (M) v Croydon London Borough Council*[43] where Lord Neuberger M.R. indicated that the court may refuse to make a determination of costs in costs only proceedings on the ground that such an exercise would be disproportionate.[44]

PROPORTIONALITY IS ALSO CONCERNED WITH THE APPROPRIATE PROCESS TO THE LIKELY VALUE OF THE OUTCOME

1.47 A further aspect of proportionality is concerned with cost to the parties. Legal services are expensive. The more complex and protracted the litigation process is, the greater the demand on the parties' resources. Party control over costs is limited because of the need to respond to the opponent's strategy. A claimant may, for instance, consider that his case can be decided on a summary judgment application, but the defendant may insist on taking the dispute to trial. A defendant may be satisfied with limited disclosure, but the claimant may insist on more extensive disclosure. If the intensity of the process is left unchecked, a rich party would be able to exhaust his poorer adversary by continually intensifying the process, such as by liberal use of interim applications or of expert testimony. Accordingly, one of the functions of proportionality is to ensure that the civil process is not used as a means of oppressing poorer or otherwise vulnerable opponents. Thus, courts must have regard to the availability of both court and party resources and ensure that the case is managed in a way that is proportionate to both. As Lord Bingham stressed, "the judge must always bear in mind that justice requires not only that the right answer be given but also that it be achieved by a trial process which is fair to all parties".[45]

THE COURTS MUST ENSURE PROPORTIONATE COSTS TO PARTIES AND THE JUDICIAL SYSTEM.

The imperative of timely resolution

1.48 Delay may have two types of adverse effects on court adjudication: it may induce error and it may create prejudice. The first is concerned with the effect that the passage of time may have on the court's ability to determine the truth. Over time memories fade, witnesses become unavailable, documents may be lost. Deterioration of evidence may undermine the court's ability to determine

DELAY MAY:
- INDUCE ERROR
- CREATE PREJUDICE

[41] *Jameel v Dow Jones & Co Inc* [2005] EWCA Civ 75, [2005] QB 946, [70].
[42] *Sullivan v Bristol Film Studios Ltd* [2012] EWCA Civ 570, [29].
[43] *R (M) v Croydon London Borough Council* [2012] EWCA Civ 595.
[44] Costs only proceedings are taken where parties have compromised their dispute and agreed the incidence of costs, but cannot agree their amount: CPR 44.12A. See Ch.27, Costs.
[45] *O'Brien v Chief Constable of South Wales Police* [2005] UKHL 26, [2005] 2 All ER 931, [6].

DETERIORATION OF EVIDENCE UNDERMINE ABILITY TO ASCERTAIN THE TRUTH

the facts.[46] Claimants and defendants alike can be adversely affected by error-inducing delay.[47] Prejudice-inducing delay has different, though equally harmful, consequences. Delay may undermine the effectiveness of the judicial remedy by eroding the ability of the court to redress wrongs. A judgment may come too late to be of practical use to the successful litigant, or may have taken so long to obtain that its benefit has been diminished. A judgment holding that the claimant was wrongly excluded from the electoral roll would be of little use if it were given after the elections had taken place. A person who has suffered serious injuries could hardly be said to have received just redress if he had to endure many years of privation before obtaining compensation.[48] The uncertainty produced by lengthy proceedings may itself undermine rights, because a point may be reached when the length of the period of uncertainty will have effectively destroyed the value of the right in question.[49] The longer the period during which rights are uncertain, the more their practical value is diminished.

DELAY MAY UNDERMINE THE EFFECTIVENESS OF THE REMEDY AND DESTROY THE VALUE OF THE RIGHT

1.49 Where prejudice-inducing delay has occurred, a judgment may be unjust because it comes too late to put things right even though it may have correctly found the facts and applied the law. It is this idea that is conveyed by the aphorism "justice delayed is justice denied", which draws attention to the temporal dimension of justice. Whether delay results in error or in reducing the effectiveness of the remedy the result is a denial of justice because the court is unable to redress the wrong or enforce the right in question. Timing is as important in dispensing justice as it is in the provision of medical treatment, where timely delivery may be just as crucial as the appropriate medical procedure. The imperative of timely judgments is therefore as integral a component of justice as is the imperative of delivering judgments that are correct in law and in fact.

JUSTICE DELAYED IS JUSTICE DENIED (EVEN IF IT CORRECTLY FOUND THE FACTS AND APPLIED THE LAW)

1.50 The adverse consequences of prejudice-inducing delay are varied. Where a long period of procedural inactivity on the part of one party to a dispute has induced the other party to act on the assumption that the proceedings would go no further, it could be unfair to restart the proceedings. Protracted litigation may adversely affect the well-being of litigants by causing stress and anxiety. Long delays tend to increase the cost of litigation. If a substantial period of time is allowed to elapse between procedural stages, lawyers must spend time to refresh their knowledge of the case, doubtless at a cost to their clients, and the same goes for the judges who manage the case. In addition, delay has a tendency to generate process disagreements and costly procedural hearings. Failure to comply with the litigation timetable often calls for repeated court hearings and therefore causes

VARIOUS PREJUDICES FROM DELAY:
- STRESS AND ANXIETY
- INCREASE THE COST OF LITIGATION
  - REFRESH OF MEMORY
  - REPEATED HEARINGS
- ACTING ON THE ASSUMPTION THAT THE PROCEEDINGS WOULD GO NO FURTHER

[46] See *Birkett v James* [1978] AC 297, [1977] 2 All ER 801, discussed at para.1.63 ff.
[47] Defendants are particularly vulnerable in this respect because they may not know of the potential claim against them and may be unaware of the need to keep evidence or build up a case.
[48] The *Report of the Committee on Personal Injury Litigation* (1968), Cmnd 3691, drew attention to the plight of victims of personal injuries who have to wait a long time for compensation. It resulted in the introduction of the interim payment procedure under RSC Ord.29, rr.11–12. The ECtHR has held that the following periods of delay amounted to violations of ECHR, Art.6: four years delay in a personal injury case: *Guincho v Portugal* (1984) 7 E.H.R.R. 223, ECtHR; four years for the determination of a costs dispute: *Robins v UK* (1997) 26 E.H.R.R. 527, ECtHR; and almost nine years for a claim for unfair dismissal: *Darnell v UK* (1993) 18 E.H.R.R. 205, ECtHR.
[49] If the defendant is at risk from a claim denying his right to build on land for which there is no other use, the longer he is exposed to the risk the more likely it is that the land would lose its value.

unnecessary waste of court resources, thereby making it more difficult for the court to provide others with timely dispute resolution services.

1.51 Although the deleterious effects of delay were not unknown before the CPR, the courts were unable to translate the imperative of expedition into practical measures for speeding up the resolution of disputes. The overriding objective, backed by a variety of case management powers, seeks to do just that. It requires the court to ensure that cases are dealt with expeditiously (CPR 1.1(2)(d)). The court is entrusted with the task of actively managing cases in order to further the overriding objective by, amongst other measures controlling the progress of the case (CPR 1.4(2)(g)). By including the need for expedition amongst the goals of the overriding objective, the CPR has made the need for timely resolution a major consideration in case management and in the exercise of judicial discretion generally.

CASE MANAGEMENT POWERS SEEK TO INCREASE EXPEDITION

The right to adjudication within a reasonable time under ECHR, Art.6

1.52 The imperative of expeditious resolution dictated by the overriding objective converges with the right to adjudication within a reasonable time, arising from ECHR, Art.6. It is therefore convenient to deal with this aspect of Art.6 here, rather than in Chapter 3, where the right to fair trial is discussed. ECHR, Art.6 provides that "[i]n the determination of their rights and obligations . . . everyone is entitled to a . . . hearing within a reasonable time . . . ". The right to adjudication within a reasonable time is independent of prejudice, so that a violation of the right may be found even if a party has suffered no material hardship as a result of the delay and even though it has not undermined the possibility of holding a fair trial.[50]

RIGHT TO ADJUDICATION WITHIN A REASONABLE TIME (INDEPENDENT OF THE EXISTENCE OF PREJUDICE

1.53 The concept of "reasonable time" is flexible and context-dependent. "Expedition" is a relative term incapable of exact definition or measurement.[51] Furthermore, the need for expedition is only one of several factors to be considered under Art.6, as well as under the overriding objective. For example, the court is also duty bound to ensure that litigants have adequate time for preparation, which may dictate considerable waiting times before trial. Similarly, respect for equality of arms may require the court to wait until a litigant is in a position to obtain the evidence he needs in order to respond to the case against him. The European Court of Human Rights (ECtHR) has recognised that the reasonableness of delay must be assessed by reference to circumstances of the particular case.[52] Factors

THE CONCEPT OF REASONABLE TIME IS FLEXIBLE AND CONTEXT-DEPENDENT
↓
CIRCUMSTANCES OF THE PARTICULAR CASE:
- COMPLEXITY OF THE CASE
- CONDUCT OF PARTIES
- COURT'S RESOURCES

[50] *Eckle v Germany* (1982) 5 E.H.R.R. 1 at [66], ECtHR; *Dyer (Procurator Fiscal, Linlithgow) v Watson* [2002] UKPC D1, [2002] 4 All ER 1, [2002] 3 WLR 1488, [50] (PC).

[51] See Council of Europe, "The length of civil and criminal proceedings in the case-law of the European Court of Human Rights" (2007), *http://www.echr.coe.int/NR/rdonlyres/B8229174-D0F4-4C65-A78C-FF9A510096AF/0/DG2ENHRFILES162007.pdf*

[52] For example, see: *Grishin v Russia App. No.14807/08*, (2012) (ECtHR), [170]; *Caplik v Turkey No.57019/00*, (2005), [37]; *Rajcevic v Croatia App. No.56773/00*, (ECtHR), [36]; *Yagci and Sargin v Turkey* (1995) 20 E.H.R.R. 505 at 59–70 (ECtHR); *Pélissier and Sassi v France [GC], No.25444/94*, ECHR 1999 II, [67]. Also: G. van Hoof, *Theory and Practice of the European Convention on Human Rights* 4th edn (2006) pp.606–609; O. Harris, M. O'Boyle and C. Warbrick, *Law of the European Convention on Human Rights* (1995), pp.222ff.

such as the complexity of the case,[53] the conduct of the parties,[54] especially of the applicant,[55] and the court's resources[56] must be taken into account when determining the reasonableness of delay.

1.54 The general approach of the ECtHR is reflected in a Privy Council decision, which was concerned with delay in trying criminal cases. Lord Bingham said[57]:

> "In any case in which it is said that the reasonable time requirement . . . has been . . . violated, the first step is to consider the period of time which has elapsed. Unless that period is one which, on its face and without more, gives grounds for real concern it is almost certainly unnecessary to go further, since the convention is directed not to departures from the ideal but to infringements of basic human rights. The threshold of proving a breach of the reasonable time requirement is a high one, not easily crossed. But if the period which has elapsed is one which, on its face and without more, gives ground for real concern, two consequences follow. First, it is necessary for the court to look into the detailed facts and circumstances of the particular case . . . . Secondly, it is necessary for the contracting state to explain and justify any lapse of time which appears to be excessive."

He went on to explain that three areas call for particular inquiry: the complexity of the case; the conduct of the accused; and the manner in which the case has been dealt with by the administrative and judicial authorities. Although these matters are equally important in civil cases, there are further considerations that must be taken into account in relation to litigation in the civil courts, which will be discussed in due course.

1.55 It should be observed that the obligation to provide adjudication within a reasonable time, like all ECHR obligations, is imposed on the state. It requires contracting states to organise their legal systems in such a way that the court has the facilities necessary to enable it to satisfy the right to an adjudication within a reasonable time.[58] The ECtHR has held that in civil litigation it is the responsibility of the courts to ensure that a litigant's entitlement to expeditious adjudication is not undermined by the delay that other parties are willing to cause. In *Unión Alimentaria Sanders SA v Spain*,[59] the ECtHR dealt with a complaint by a Spanish litigant of an infringement of his right to adjudication within a reasonable time. The Government of Spain argued that since it was a principle of Spanish civil procedure that the responsibility for progressing proceedings rested on the parties, the Spanish courts could not be held responsible for party-induced delays. The ECtHR rejected this argument, observing[60]:

[53] *Andreucci v Italy* (1992) A/228G, ECtHR; *Manieri v Italy* (1992) A/229D, ECtHR; *Wemhoff v Germany* (1968) 1 E.H.R.R. 55, ECtHR. However, complexity alone cannot justify excessive delay: *Sizov v Russia (No.2) App. No.58104/08* (2012) (ECtHR), [60].

[54] *Eckle v Germany* (1982) 5 E.H.R.R. 1, ECtHR; *Scopelliti v Italy* (1993) 17 E.H.R.R. 493, ECtHR; *Union Alimentaria Sanders SA v Spain* (1989) 12 E.H.R.R. 24, ECtHR.

[55] *Janssen v Germany* (*App. No. 23959/94*) (1998) 27 E.H.R.R. CD 91, ECtHR.

[56] *Foti v Italy* (1982) 5 E.H.R.R. 313, ECtHR.

[57] *Dyer (Procurator Fiscal, Linlithgow) v Watson* [2002] UKPC D1 at [52], [2002] 4 All ER 1 at [52], [2002] 3 WLR 1488 at [52].

[58] *Zimmerman and Steiner v Switzerland* (1983) 6 E.H.R.R. 17, ECtHR; *Muti v Italy* (1994) A/281C, ECtHR; *Lelik v Russia App. No.20441/02*, ECtHR at [50]. And see discussion in H. Genn, *Judging Civil Justice*, Hamlyn Lectures 2008.

[59] *Unión Alimentaria Sanders SA v Spain* (1989) 12 E.H.R.R. 24, ECtHR.

[60] *Unión Alimentaria Sanders SA v Spain* (1989) 12 E.H.R.R. 24, ECtHR at [35].

"The Court reiterates that such a principle does not absolve the courts from ensuring compliance with the requirements of Article 6 concerning reasonable time . . . the Court considers that the person concerned is required only to show diligence in carrying out the procedural steps relating to him, to refrain from using delaying tactics and to avail himself of the scope afforded by domestic law for shortening the proceedings. He is under no duty to take action which is not apt for that purpose . . . "

In a later case the ECtHR observed[61]: **1.56**

THE PRINCIPIO DISPOSITIVO DOES NOT DISPENSE THE COURTS FROM ENSURING COMPLIANCE WITH ADJUDICATION IN A REASONABLE TIME

"The Court reiterates that in Italy civil proceedings are subject to the '*principio dispositivo*', according to which it is for the parties to take the initiative with regard to the progress of the proceedings. However, that principle does not dispense the courts from ensuring compliance with the requirements of Article 6 as regards reasonable time. In any event, Article 175 of the Code of Civil Procedure provides that the judge responsible for preparing the case for trial 'shall take all possible steps to ensure that the proceedings are conducted with the utmost speed and fairness'."

The CPR give full effect to the need to reach a resolution within a reasonable time by requiring the court to ensure that cases are dealt with expeditiously (CPR 1.1(2)(d)). To this end the CPR give the court the necessary powers to ensure that the parties comply with time limits and numerous rules are designed to encourage expeditious resolution of disputes. As May L.J. observed, it is "one of the main aims of the Civil Procedure Rules and their overriding objective . . . that civil litigation should be undertaken and pursued with proper expedition."[62] **1.57**

CPR 1.1(2)(D) THE COURT MUST ENSURE THAT CASES ARE DEALT WITH EXPEDITION

The court's responsibility for the duration of proceedings starts only once proceedings have been initiated and are pending before the court. Since the initiation of legal proceedings is entirely in the hands of the parties, the period before commencement cannot count for the purpose of determining whether there has been a breach of Art.6. This is true not only of substantive actions but also of costs assessment proceedings, for example, because the court does not become involved in a costs assessment until the receiving party has initiated the assessment process.[63] **1.58**

RESPONSIBILITY STARTS ONLY ONCE PROCEEDINGS HAVE BEEN INITIATED

The court's responsibility to respect litigants' rights to adjudication within a reasonable time has a far-reaching consequence with regard to the court's power to excuse litigant induced delay. Since parties are autonomous, the court cannot force a litigant to perform his process obligations.[64] However, the court can, and must, ensure that procedural defaults do not defeat the right of other litigants to a timely resolution.[65] That said, the fact that there has been a delay in the conclusion of the proceedings, amounting to a breach of the right to adjudication within a reasonable time, does not of itself render a subsequent hearing a further breach of Art.6.[66] **1.59**

DEFAULT SHOULD NOT DEFEAT THE RIGHT TO A TIMELY RESOLUTION.

Since reasonable expedition is context-relative, the court will set a pre-trial and trial timetable calibrated to the needs of the particular dispute; i.e. to the **1.60**

[61] *Scopelliti v Italy* (1993) 17 E.H.R.R. 493, ECtHR at [25].
[62] *Vinos v Marks & Spencer* [2001] 3 All ER 784, [20].
[63] *Less v Benedict* [2005] EWHC 1643, Ch. Under CPR 47 both the paying party and the receiving party have it in their own hands to move the assessment forward unilaterally.
[64] For discussion see Ch.11, Court management and party compliance.
[65] For discussion see Ch.11, Court management and party compliance.
[66] *Attorney General's Reference (No.2 of 2001)* [2003] UKHL 68, [2004] 1 All ER 1049, [29]; *Less v Benedict* [2005] EWHC 1643, Ch.

PRE-TRIAL AND TRIAL TIMETABLES

STARTING POINT FOR MEASURING REASONABLENESS

complexity of the issues, the difficulty of the law, the amount of documentary evidence, the extent of expert evidence and the like. Once this has been done, the parties are entitled to assume that the case would be brought to a resolution within the timetable set by the court, barring unforeseen difficulties. Such a timetable, it is suggested, should be regarded as the starting point for measuring reasonableness. Put differently, case management directions create a legitimate expectation of a final resolution within the rough contours of this timetable. Where a party has had reasonable time to perform his process obligations but has failed to do so, it may be the court's duty not to allow that party further time to comply, for to do so may rob the non-defaulting party of his legitimate expectation of timely resolution. This does not mean that the court should always deny defaulting parties more time. It does, however, mean when it considers an application for an extension of time for compliance the court should take into account the legitimate expectations of the non-defaulting party to timely adjudication.[67] A litigant who has striven to fulfil his process requirements punctually is entitled to have his interest in an expeditious resolution given appropriate weight when another party seeks to delay the resolution for no good reason.

The overriding objective—a matter of compromise

THE OVERRIDING OBJECTIVE GOALS POINT IN DIFFERENT DIRECTIONS

1.61 The overriding objective sets out specific goals that the court must further in carrying out its case management powers. However, one can hardly fail to notice that these goals are capable of pointing in different directions.[68] Sparing litigant and court resources may be incompatible with expeditious resolution, or it may be at odds with the need to arrive at a correct outcome. Similarly, expedition may be achieved only by investing more resources, or by restricting disclosure and thus running a higher risk of error. As in every other context, it is simply impossible to achieve perfection in every respect. The need to balance truth and resources had been pointed out by Lord Devlin a quarter of a century before the Woolf report when he said[69]:

> "[I]s it right to cling to a system that offers perfection for the few and nothing at all for the many? Perhaps: if we could really be sure that our existing system was perfect. But of course it is not. We delude ourselves if we think that it always produces the right judgment. Every system contains a percentage of error; and if by slightly increasing the percentage of error, we can substantially reduce the percentage of cost, it is only the idealist who will revolt."

1.62 The strength of the CPR lie precisely in confronting the inevitable tension between the three imperatives: the need for correct outcomes, the need for

[67] See *Annodeus Ltd v Gibson, The Times*, March 3, 2000; *Woolwich Plc v Daisystar Ltd* (March 16, 2000, unreported), CA. See also *Davies v UK* (Application 42007/98) (2002) 35 E.H.R.R. 720, ECtHR; *Less v Benedict* [2005] EWHC 1643, Ch; *Smith v Kvaerner Cementation Foundations Ltd* [2006] EWCA Civ 242, [51]; *Powell v Pallisers of Hereford Ltd* [2002] EWCA Civ 959, [28].

[68] For a general discussion see: Walker, Lind and Tyler, "The Relationship between Procedural and Distributive Justice" (1979) 65 Vir. L.R. 1401; W. Twining, "Alternative to What? Theories of Litigation, Procedure and Dispute Settlement in Anglo-American Jurisprudence: Some Neglected Classics" (1993) 56 M.L.R. 380; A.A.S. Zuckerman, "Quality and Economy in Civil Procedure—the Case for Commuting Correct Judgments for Timely Judgments" (1994) 14 O.J.L.S. 353.

[69] Quoted in Woolf Interim Report, Section 2, [5] and [6]. The quotation is from a 1970 broadcast.

expeditious resolution, and the practical constraints of court and party resources. The court must actively manage litigation with a view to furthering the overriding objective, which brings to the fore considerations of resources and of expedition. The need to take into account these factors inevitably presents the court with a range of possibilities among which the court will have considerable scope for choice. It is inevitable that there will be situations where different judges may come to different case-specific conclusions.

ACTIVE CASE MANAGEMENT TO SOLVE THE TENSION ↓ SCOPE OF CHOICES ↓ POSSIBILITY OF DIFFERENT CONCLUSIONS

1.63

However, the court does not have unlimited discretion, because it must give effect to the overriding objective when it exercises any power given to it by the CPR. The court cannot overlook considerations of proportionality and expedition and focus only on reaching a determination on the merits. How the court goes about its task is examined in Chapter 11, which deals with case management. However, it needs stressing at the outset that while dicta may be found which could lead the unwary to conclude that the need for deciding the case on its merits trumps all other considerations, this is not so. "In making a decision under the overriding objective", Buxton L.J. explained, "the court has to balance all those considerations that are set out under that heading [i.e. in CPR 1.2] without giving one of them undue weight."[70] And Lord Bingham stressed that "the judge must always bear in mind that justice requires not only that the right answer be given but also that it be achieved by a trial process which is fair to all parties".[71]

THE COURT HAS TO BALANCE THE THREE IMPORTANT VES. WITHOUT GIVING ONE OF THEM UNDUE WEIGHT.

The overriding objective as a tool of interpretation

1.64

The court must seek to further the overriding objective not only when it exercises any power under the new rules but also when it interprets any particular rule (CPR 1.2). This means that the court is required to adopt a purposive approach to interpretation in preference to the more traditional literal approach.[72] For instance, where a particular interpretation would result in an infringement of constitutional rights, the court must give precedence to common law principles.

PURPOSIVE INTERPRETATION ↓ FURTHER THE OVERRIDING OBJECTIVE

DEFECTS OF THE PRE-CPR SYSTEM

Introduction

1.65

It is impossible to appreciate the full implications of the overriding objective without understanding the mischief which it aims to remedy. Although CPR 1.1 represents the first express articulation of the resource and temporal dimensions of justice in rules of procedure, these factors were not unknown to English law before. The right to timely adjudication was mentioned in the Magna Carta: "To no one will we sell, to no one deny *or delay* right or justice".[73] Jeremy Bentham saw rectitude of decision as the "direct end" of justice, but stressed that justice

PRECEDENTS OF THE RESOURCE AND TEMPORAL DIMENSIONS OF JUSTICE

[70] *Holmes v SGB Services Plc* [2001] EWCA Civ 354, [38].
[71] *O'Brien v Chief Constable of South Wales Police* [2005] UKHL 26, [2005] 2 All ER 931, [6].
[72] The court now tends to follow a similar approach when it exercises any discretionary power in matters of procedure, and not just those specifically derived from the CPR: 2013 WB 11.5; *Clarkson v Gilbert* [2000] 3 F.C.R. 10, [2000] 2 F.L.R. 839, CA.
[73] Magna Carta, Ch.40.

also entailed the "collateral ends" of "the avoidance of unnecessary delay, vexation, and expense".[74] Similarly, the courts were not completely oblivious of the connection between justice and resources. In *Pearse v Pearse*[75] Knight Bruce V.C. observed:

> "The discovery and vindication and establishment of truth are main purposes certainly of the existence of Courts of Justice; still, for the obtaining of these objects, which, however valuable and important, cannot be usefully pursued without moderation, cannot be either usefully or creditably pursued unfairly or gained by unfair means, not every channel is open to them . . . Truth, like all other good things, may be loved unwisely—may be pursued too keenly—may cost too much."

CONSIDERATIONS OF TIME AND RESOURCES HAD A LIMITED ROLE

1.66 In practice, however, considerations of time and resources played a very limited role in the way that the courts handled litigation before the CPR. The need for timely adjudication found expression only in certain corners of procedure. For instance the grant of interim injunctions was guided (as it still is) by the need to protect rights from being irrevocably harmed pending final adjudication. Courts were willing to strike out claims where delay undermined their ability to dispose fairly of the action. Apart from that, parties were free to complicate and procrastinate and protract litigation. Resource considerations were likewise limited to marginal areas. For example, it was recognised that unaffordable court fees could lead to a denial of access to justice. Thus, the court struck down subordinate legislation which imposed court fees without making provision for litigants who were unable to pay the fees.[76] At the same time, however, little attention was given to the fact that the high and unpredictable cost of litigation constituted a far greater obstacle to access to justice.

OPTIONS TO RESPOND TO PARTY FAILURE TO COMPLY WITH RULES AND COURT ORDERS

- TOLERANCE
- INTOLERANCE (FATAL DEFAULT)
- ONLY WITH A REASONABLE EXCUSE

1.67 A perennial problem faced by any system of procedure is how to respond to party failure to comply with the rules or with court orders, especially with regard to time limits. Several options present themselves in this respect. At one extreme, defaults would always be tolerated and the defaulting party be allowed to proceed when he is ready to comply so that the court may decide the dispute on its substantive merits. At the other extreme, time limits (and other process requirements) would be strictly enforced so that failure to meet a deadline would result in the loss of the opportunity to proceed with the process in question. Under this approach, a party who has failed to file an expert report or a witness statement in time, would not be allowed an extension and would have to proceed without the expert or the witness, even if it meant certain defeat of his cause. Between these two poles there is room for a variety of compromises. The defaulting party may, for instance, be allowed to proceed only if there has been a reasonable excuse for the delay. Alternatively, the court may allow the defaulting party to

[74] J.Bentham, *Rationale of Judicial Evidence*, [1827] Vol.1 pp.33–34.
[75] *Pearse v Pearse* (1846) 63 ER 950 at 957. Cited with approval in *Minet v Morgan* (1873) 8 Ch App. 361 at 368. Civil procedure was described by Collins M.R. as the "handmaiden of justice": *Re Coles and Ravenshear* [1907] 1 KB 1 at 4. In *Ashmore v Corp of Lloyd's* [1992] 2 All ER 486 at 488, [1992] 1 WLR 446 at 448, HL, Lord Roskill said: "Litigants are only entitled to so much of the trial judge's time as is necessary for the proper determination of the relevant issues."
[76] *R v Lord Chancellor Ex p. Witham* [1998] QB 575, [1997] 2 All ER 779.

proceed on condition that he pays costs or that he suffers some other disadvantage. It is clear that whichever approach is chosen, it is bound to influence the cost of litigation, its duration, the litigation culture and more generally the effectiveness of the administration of justice.

RSC system a reaction against the earlier formalistic procedure

1.68 The system contained in the Rules of the Supreme Court (RSC, replaced by the CPR), was itself a reaction against its predecessor. For a long period preceding the Judicature Acts of 1873 and 1875, a formalistic approach dominated procedure under which the courts regarded their main task as being to secure strict adherence with process requirements. A party to litigation would not be able to obtain a judgment on the merits unless all procedural forms were completely and precisely followed. In 1901 W.B. Odgers described the judicial climate before the Judicature Acts[77]:

> "In the first place, our judges in those days were pedantically strict as to the form of action in which the plaintiff sued and as to the technical language in which claims and defences appeared on the records of the Court. There were only so many 'forms of action' recognised by the Court; and every plaintiff had to pin himself down to one of these. If he selected the wrong one, he would at the trial be non-suited and have to pay the defendant's costs, although an action would have lain if the declaration had been differently drawn."

The courts of common law, Odgers wrote, "were sadly hampered in the year 1800 by cumbrous procedure and pedantic technicalities which caused suitors expense, delay, vexation and disgust. It took years for a merchant to recover a debt due to him. And half the actions were decided not on their real merits, but on questions of form and pleading".[78] The situation in the Court of Chancery was no better. Although this court was supposed to administer a code of morals rather than strict law and was meant to remedy the evils that flowed from the technicalities of the common law, its processes by the year 1800 "had become", according to Odgers " . . . more technical, if that were possible, than the courts of common law themselves; its procedure had become more rigid; it would only grant relief in certain specified cases. However strong the moral claim of a plaintiff might be, he was constantly told he had no equity; often too he was sent to a court of common law, though the matter could more fitly be decided in equity . . . ".[79]

1.69 Delay was exacerbated by a combination of two factors: litigation was liable to involve a multiplicity of proceedings and court appearances, and the judiciary

[77] W.B. Odgers, "Changes in Procedure and in the Law of Evidence" in *A Century of Law Reform* (1901) 203 at 212. For a comprehensive survey see W.S. Holdsworth, *History of English Law* (1924), Vols I and XV.
[78] W.B. Odgers, "Changes in Procedure and in the Law of Evidence" in *A Century of Law Reform* (1901), p.203.
[79] W.B. Odgers, "Changes in Procedure and in the Law of Evidence" in *A Century of Law Reform* (1901), p.203 at pp.207–208; see also pp.221 ff. In Chancery the process of discovery was subverted in order to maximise legal fees: J. Getzler, "Patterns of Fusion" in P. Birks (ed.) *The Classification of Obligations* (1997), p.157.

was very small.[80] Since an action could be defeated on procedural grounds alone, a great deal of effort would go into taking up procedural points.[81] And their resolution would not necessarily put an end to the litigation, for a claimant who had been defeated on one form of action could frame his cause in another form and launch new proceedings, which could in turn be liable to intense procedural scrutiny by the opponent. Jurisdictional problems were also a cause of much delay. The repeated journeys to court that a case had to take delayed not only the case in hand but also contributed to delaying other cases by increasing congestion in the courts. Needless to say, the amount of procedural activity which involved in litigation greatly inflated the costs to the litigants.

The emergence of the justice on the merits approach following the Judicature Acts

1.70 Although the profession initially resisted change,[82] once the reform culminating in the Judicature Act 1875 was accomplished, the judiciary embraced the new approach to procedure with enthusiasm. Judges were no longer willing to allow technicalities to get in the way of the real merits of the case.[83] Instead, they embraced the principle that doing justice on the merits of the case was more important than enforcing compliance with the rules or court orders. In an oft-quoted dictum, Brett M.R. said:

> "However negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated in costs."[84]

Bowen L.J. gave an even more fulsome endorsement to the new creed:

> "... the object of the Courts is to decide the rights of parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights ... I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, ... It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real

[80] In the early 1800s the King's Bench consisted of the Lord Chief Justice and three other judges; the Exchequer included the Chief Baron and three Barons of the Exchequer; the Court of Chancery included the Lord Chancellor, who had many responsibilities in addition to his judicial duties, and the Master of the Rolls. It was only in 1815 that another Chancery judge was added, in the form of the Vice-Chancellor. W.B. Odgers, "Changes in Procedure and in the Law of Evidence" in *A Century of Law Reform* (1901), p.203 at p.224.

[81] Odgers tells of a case heard in 1830 in which there had been seven trials—three in the King's Bench and four in Chancery—at the close of which the suit went up to the House of Lords: W.B. Odgers, "Changes in Procedure and in the Law of Evidence" in *A Century of Law Reform* (1901), p.203 at p.225. Lord Eldon himself could take over 30 years to give judgment: J.H. Baker, *An Introduction to English Legal History* (3rd edn, 1990), pp.126–131; M. Lobban "Contractual Fraud in Common Law and Equity" (1997) 17 O.J.L.S. 441.

[82] Sunderland, "The English Struggle for Procedural Reform" (1926) 39 Harv. L.R. 725 at 728. See also Shelton, "The Drama of English Procedure" (1931) 17 Va. L.R. 215; Ipp, "Reforms to the Adversarial Process in Civil Litigation—Part I" (1995) 69 A.L.J. 705.

[83] Judges brushed "aside senseless technicalities in the same spirit (they) would a house fly": Shelton, "The Drama of English Procedure" (1931) 17 Va L.R. 215 at 252.

[84] *Clarapede & Co v Commercial Union Association* (1883) 32 WR 262 at 263, CA.

matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice . . . ".[85]

1.71 This philosophy was embedded in the rules of court.[86] RSC, 1883, Ord.70, r.1 stated[87]:

"1. Non-compliance with any of these rules, or with any rule of practice for the time being in force, shall not render any proceedings void unless the court or judge shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the court or judge shall think fit.

2. No application to set aside any proceeding for irregularity shall be allowed unless made within reasonable time, nor if the party applying has taken any fresh step after knowledge of the irregularity."

DISCRETION TO CORRECT DEFECTS, FAILURES AND NON-COMPLIANCE OR TO SET ASIDE PROCEEDINGS (CURE IRREGULARITIES)

These provisions ensured that procedural irregularities no longer rendered proceedings void. Instead, the court had discretion either to allow the defect to be put right on terms that the court thought fit or, alternatively, to set aside the proceedings. In addition to its general discretion to cure irregularities under the RSC the court had a specific power to extend time limits under RSC Ord.3, r.5[88]:

"(1) The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by these rules, or by any judgment, order or direction, to do any act in any proceedings.

(2) The Court may extend any such period as is referred to in paragraph (1) although the application for extension is not made until after the expiration of that period."

DISCRETION TO EXTEND TIME LIMITS EVEN TO ALLOW LATE COMPLIANCE IN RETROSPECTION

If a party was late in performing a procedural step, the defaulter could apply to court for an order validating late compliance, or the opponent could apply for an order setting it aside. A party who missed a deadline imposed by a rule or court order could apply for a retrospective extension of time.

1.72 For a while the supremacy of the justice on the merits approach was checked by a distinction between non-compliance with the rules of court that rendered the proceedings a nullity or void, and non-compliance that merely rendered the proceedings irregular.[89] But this distinction was removed by RSC Ord.2, r.1 in the wake of *Re Pritchard*, 1963,[90] with the result that almost no procedural

ALMOST NO PROCEDURAL DEFAULT COULD LEAD TO NULLITY

↓

ELIMINATION OF THE DISTINCTION BETWEEN NULLITIES AND IRREGULARITIES (ALL IRREGULARITIES)

[85] *Cropper v Smith* (1884) 26 Ch D. 700 at 710–711, CA. Bowen L.J.'s views too are oft quoted: *Pontin v Wood* [1962] 1 QB 594 at 609, [1962] 1 All ER 294 at 297, CA.

[86] RSC Ord.59, r.1 of 1875.

[87] Replacing the original rule Ord.59 r.1 of 1875.

[88] CCR 13, r.5 was to the same effect.

[89] If they were a nullity or void, the court had no choice but to set them aside. If they were merely irregular, they remained valid and the court had a discretion to set them aside or to make some other order on terms it thought just. Attempts to devise a test for distinguishing between the two classes of irregularities were made: *Marsh v Marsh* [1945] AC 271 at 284.

[90] *Re Pritchard* [1963] Ch 502, [1963] 1 All ER 873, CA. A widow applied under the Inheritance (Family Provision) Act 1938 for provision to be made for her maintenance out of the husband's estate. She issued a summons in the Pontypridd District Registry of the High Court, overlooking the fact that RSC Ord.54, r.4B provided at the time that an originating summons "shall be sealed in the Central office" of the High Court, and not the District Registry. In the face of a powerful dissent by Lord Denning M.R. the Court of Appeal held that the mistake rendered the proceedings void. "The originating summons in this case, therefore", Danckwerts L.J. added, "is a nullity and has no operation. It has no more application to the matter to be decided than a dog licence", at 885.

default could lead to nullity.[91] This rule change was declared by Lord Denning M.R. to be the final parting with the former formalistic approach:

> "This new rule does away with the old distinction between nullities and irregularities. Every omission or mistake in practice or procedure is henceforward to be regarded as an irregularity which the court can and should rectify so long as it can do so without injustice. It can be asserted that 'it is not possible . . . for an honest litigant in Her Majesty's Supreme Court to be defeated by any mere technicality, any slip, any mistaken step in his litigation'".[92]

1.73 Some procedural defaults could still justify dismissal of a case for non-compliance with the rules. For instance, it was held that an irregularity in the renewal of a writ was exclusively the province of RSC Ord.6, r.8 and could not be cured in the exercise of discretion under Ord.2, r.2.[93] Further, there were situations where the default was so fundamental that, as a rule, the court would not use its discretion to cure it.[94] But such instances were few.

Exercise of court discretion under RSC undermined authority of rules and court orders

1.74 The ambivalent provisions of the RSC concerning procedural irregularities combined with the single minded attachment to achieving justice on the merits to produce satellite litigation. An irregular procedural step manifested symptoms of both validity and invalidity.[95] It was invalid in the sense that it did not have the automatic effect that a regular procedural step would have. For instance, an

[91] RSC Ord.2, r.1 stated: "(1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of any thing done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein." CCR 37, r.5 was to the same effect. The distinction has not, however, disappeared altogether. First, failure to comply with statutory procedural requirements may lead to nullity. Second, a failure to comply with some rules of court may still be so fundamental that the court should never cure as a matter of discretion: Supreme Court Practice, 1999, Vol.1, 2/1/2.

[92] *Harkness v Bell's Asbestos and Engineering Ltd* [1967] 2 QB 729 at 735–736, [1966] 3 All ER 843 at 845–846, CA. The reference in the dictum is to Bowen L.J. as quoted in A. Vanderbilt, *Improving the Administration of Justice—Two Decades of Development* (1957). See also *Hillingdon LBC v Vijayatunga* [2007] EWCA Civ 730.

[93] *Bernstein v Jackson* [1982] 2 All ER 806, [1982] 1 WLR 1082, CA.

[94] For instance, it was held that failure to obtain leave before serving out of the jurisdiction was such a fundamental defect that it must not be rectified in the exercise of the discretion under RSC Ord.2 r.1: *Leal v Dunlop Bio-Processes International Ltd* [1984] 2 All ER 207 at 215, [1984] 1 WLR 874 at 885, CA. This decision was later modified: *Golden Ocean Assurance Ltd and World Mariner Shipping SA v Martin, The "Golden Mariner"* [1990] 2 Lloyd's Rep. 215, CA, but the court's power to limit its discretion remained intact. See also *Camera Care Ltd v Victor Hasselblad AB* [1986] 1 F.T.L.R. 348.

[95] *Metroinvest Anstalt v Commercial Union Assurance Co Plc* [1985] 2 All ER 318, [1985] 1 WLR 513, CA. Slade L.J. said: "Where . . . the court finds that a failure of the nature referred to in [RSC Ord.2] r.1(1) has occurred, which has not been waived by the other party either expressly or by implication, the court is given by r.1(2) a choice of courses to pursue at its own discretion, whether or not an application under Ord.2, r.2 is before it. In such a situation, in the exercise of its discretion under r.1(2), it may either adopt the more draconian course of setting aside wholly or in part the proceedings in which the failure occurred, or the relevant step taken in those proceedings or the relevant document or order. Alternatively, it may 'make such order . . . dealing with the proceedings generally as it thinks fit'. The last mentioned words are . . . manifestly wide enough to empower it to make a dispensing order waiving the relevant irregularity . . . ".

irregular claimant's notice of acceptance of money paid into court would not confer a right on the claimant to take out the money. But the irregular acceptance also had manifestations of validity, for unless the defendant promptly applied to retrieve the money paid in, the notice would entitle the claimant to take out the money, notwithstanding that the notice had been defective.[96]

1.75 Of itself discretion need not necessarily undermine the binding force of rules and court orders, but it can and it certainly did prior to the CPR. *Birkett v James*[97] laid down the approach to be followed with regard to non-compliance with time limits. There Lord Diplock articulated the principles to be followed in applications to dismiss an action for want of prosecution:

> "The power should be exercised only where the court is satisfied either (1) that the default has been intentional and contumelious, e g disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or (2)(a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party."[98]

As long as the passage of time did not impair the quality of the evidence and as long as the delay caused the defendant no real prejudice, a claimant was free to delay performance of his process obligations for as long as he wanted with little risk.

1.76 This approach had unfortunate consequences. First, it undermined the normative force of the time limits and was conducive to delays. Second, it encouraged satellite litigation, which in turn resulted in a massive build up of binding case law.[99] The willingness of the court to tolerate defaults encouraged parties and their lawyers to be less than scrupulous about compliance with time limits and other obligations. Widespread non-compliance created a fertile ground for procedural wrangling that resulted in applications and counter applications to court. The court could not follow a principle of forgiving all delays, let alone declare universal absolution, because it would have robbed the time limits laid down in rules and court orders of any binding force.[100] Nor did the justice-on-the-merits philosophy permit the court to follow a principle of disqualifying all late compliance with process requirements. Since neither one nor the other of these

[96] This is because RSC Ord.2, r.2(1) provided: "An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein shall not be allowed unless it is made within reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity." The notion of waiver is introduced here; the failure to make a prompt objection can validate the defective notice. Waiver took place under r.2(1), if a fresh step had been taken with knowledge of the irregularity.

[97] *Birkett v James* [1978] AC 297, [1977] 2 All ER 801, HL.

[98] *Birkett v James* [1978] AC 297 at 318, [1977] 2 All ER 801 at 805, HL.

[99] For instance, the commonplace issue of dismissal for want of prosecution could necessitate recourse to a voluminous body of precedents and require protracted hearings in which the nuance of earlier rulings are debated: *Trill v Sacher* [1993] 1 All ER 961, [1993] 1 WLR 1379, CA; *Shtun v Zalejska* [1996] 3 All ER 411, [1996] 1 WLR 1270, CA.

[100] Lord Denning M.R. observed that if the courts never dismissed an action for want of prosecution without first making an "unless" order, "there would be no sanction whatever against delay"; *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229 at 245, [1968] 1 All ER 543 at 547, CA.

courses was open, the courts had to apply discretion on a case-by-case basis. This created uncertainty and encouraged interlocutory litigation about non-compliance.[101] It was therefore not uncommon for litigation on points of procedure to absorb more time and resources than the adjudication of the substantive issues. The court appeared indifferent to the effect that this permissive approach had on litigant behaviour, on court and litigant resources, or on the time it took to reach a final resolution.[102]

1.77 Quite apart from the court's laid back approach to enforcing compliance with rules and court orders, the court had very limited powers of control over the pre-trial process and no facility for monitoring its progress. As Lord Woolf observed, there was "no clear judicial responsibility for managing individual cases or for the overall administration of the civil courts".[103] The court's role was essentially reactive, directed to dealing with any applications that parties chose to make, at a time of their choice and on matters of their choosing. Many such applications (known at the time as interlocutory applications) concerned problems of compliance rather than with the determination of the underlying dispute.

1.78 Lord Woolf pointed out that discovery was sometimes pursued without any regard to efficiency and economy, consuming vast resources for little benefit. Expert evidence, instead of assisting the court, could cause unreasonable delay and confusion at great expense to the parties. Even procedural reforms that were designed to promote efficiency could be undermined. The process of exchange of witness statements, Lord Woolf noted, presented an opportunity for the employment of "the draftsman's skill often used to obscure the original words of the witness, not infrequently at enormous expense".[104] As a result, the cost of litigation could get out of all proportion to the value of the subject matter in dispute. The reason for the excess of cost and the long delays, Lord Woolf concluded, lay not so much in rules themselves as in the proliferation of "adversarial tactics" which had resulted in the procedural tools "being subverted from their proper purpose".[105] Litigants were left free to complicate and protract the litigation process and the courts had become powerless to intervene.

1.79 Parties were not obliged to complain about irregularities or to object to their opponents' applications for amendments or extensions. A defendant in receipt of a writ was not obliged to complain that it had been incorrectly served, and a claimant was not obliged to complain about late service of a defence. However, a confrontational culture prevailed and litigants were unlikely to forgive the opponent's lapse, especially if they stood to gain some advantage from objecting

[101] By 1993 the second limb of Lord Diplock's test in *Birkett v James* had acquired fifteen sub-rules: *Trill v Sacher* [1993] 1 All ER 961, [1993] 1 WLR 1379, CA. In turn, this called for lengthy hearings and lengthy judgments: *Shtun v Zalejska* [1996] 3 All ER 411, [1996] 1 WLR 1270, CA. Sir Thomas Bingham M.R. observed in *Sparrow v Sovereign Chicken Ltd* [1994] CA Transcript 750, that *Birkett v James* encouraged parties "to take points and indulge in refinements which would do credit to a medieval schoolman".

[102] Concerns about disproportionate procedural activity and costs were voiced in *Report of the Civil Justice Review Body* (1988), Cm 394, 14.

[103] Woolf Interim Report, 7.

[104] Woolf Interim Report, 8.

[105] Woolf Interim Report, 7–8.

or if they could inflict some disadvantage on the other side. The general discretion to cure irregularities encouraged litigation over matters of procedure, because it created uncertainty that could only be resolved by an application to court to resolve the matter. An application necessarily involved a hearing by a judge or a master, with the possibility of one or more appeals. The very existence of judicial discretion to cure irregularities offered considerable advantages to those who could sustain intense interlocutory activity. If the opponent could be tripped up on some procedural matter, the interlocutory litigation might exhaust his finances and force him to give up or settle on disadvantageous terms.

THE DISCRETION TO CURE IRREGULARITIES ENCOURAGED LITIGATION AS STRATEGIES TO EXHAUST THE OTHER PARTY FINANCIALLY

1.80 Not all cases involved extensive satellite litigation, but a fair proportion did. Since it was not possible to know in advance the amount of procedural warfare that the litigation could involve, parties considering litigation would therefore have to be prepared to spend large and unpredictable amounts of money. Increasingly, access to the courts became limited to litigants with deep pockets or to those who could rely on the taxpayer's support.

LITIGANTS HAD TO BE PREPARED TO SPEND LARGE AND UNPREDICTABLE AMOUNTS OF MONEY ↓ LIMITED ACCESS TO JUSTICE

1.81 The justice on the merits approach sprang from the laudable desire to ensure that disputes were resolved in accordance with the substantive merits of the case. Paradoxically it had the opposite result. For desire not to allow matters of procedure to stand in the way of doing justice on the merits created extensive scope for litigation that had nothing to do with the merits and which could well prevent a merits based resolution of the dispute. Lord Woolf criticised "the tendency of parties . . . to make numerous interlocutory applications. These are generally of a tactical nature which may be of dubious benefit even to the party making the application and which may not be warranted by the costs involved."[106]

THE PARADOX OF JUSTICE ON THE MERITS

OVERVIEW OF CASE MANAGEMENT OBJECTIVES AND POWERS

Court control—discretionary powers guided by the overriding objective

1.82 Before the CPR, the court was essentially reactive, in that it merely responded to parties' applications in the course of litigation. Now the court is proactive. It must take the initiative and direct the intensity and pace of the litigation process since CPR 1.4(1) requires it to "further the overriding objective by actively managing cases". CPR 1.4(2) lists good case management practices:

COURTS MUST BE PROACTIVE, TAKE THE INITIATIVE AND DIRECT THE INTENSITY AND PACE OF THE LITIGATION PROCESS TO FURTHER THE OVERRIDING OBJECTIVE.

CPR 1.4(2) GOOD CASE MANAGEMENT PRACTICES

"(2) Active case management includes—

(a) encouraging the parties to co-operate with each other in the conduct of the proceedings;
(b) identifying the issues at an early stage;
(c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;
(d) deciding the order in which issues are to be resolved;
(e) encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure;
(f) helping the parties to settle the whole or part of the case;
(g) fixing timetables or otherwise controlling the progress of the case;

[106] Woolf Final Report, Ch.7, [23].

(h) considering whether the likely benefits of taking a particular step justify the cost of taking it;
(i) dealing with as many aspects of the case as it can on the same occasion;
(j) dealing with the case without the parties needing to attend at court;
(k) making use of technology; and
(l) giving directions to ensure that the trial of a case proceeds quickly and efficiently."

1.83 A court managing a case must adopt the most appropriate measures for ensuring that a correct outcome is reached in a proportionate and reasonably expeditious manner. CPR 3.1 sets out the management powers that the court has at its disposal. However, the court continues to possess its traditional discretionary powers in matters of procedure. It continues to have a general discretion to cure procedural defects, as CPR 3.10 makes clear:

MANAGEMENT POWERS AND DISCRETIONARY POWERS TO CURE PROCEDURAL DEFECTS

> "Where there has been an error of procedure such as a failure to comply with a rule or practice direction—
>
> (a) the error does not invalidate any step taken in the proceedings unless the court so orders; and
> (b) the court may make an order to remedy the error."

CPR 3.10

DISCRETION TO EXTEND TIME LIMITS

As before, the court has discretion to extend time limits. CPR 3.1(2) states that the court may:

CPR 3.1(2)

> "(a) extend or shorten the time for compliance with any rule, practice direction or court order (even if the application for extension is made after the time for compliance has expired)."

POWER TO GRANT RELIEF FROM SANCTIONS FOR NON COMPLIANCE

CPR 3.8(1)

As before, the court has a general power to grant relief from the sanctions for non-compliance with rules or court orders. CPR 3.8(1) provides:

> "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."[107]

1.84 The powers to excuse procedural defects, to extend the time for compliance with process obligations, and to grant relief from sanctions are subservient to the overriding objective. This means ensuring expeditious resolution with proportionate use of resources. The court must therefore have regard not only to the interests of the litigants before it, but also to the interests of the administration of justice and to the effect that the conduct of a particular case may have on the court's ability to devote its attention to other litigants waiting in the queue.

THESE POWERS ARE SUBSERVIENT TO THE OVERRIDING OBJECTIVE & INTEREST OF THE ADMINISTRATION OF JUSTICE

The CPR approach to adapting process to dispute

1.85 In any given volume of court cases there will be a divergence of relative complexity and importance of individual disputes. A majority of cases will be relatively simple or modest. As cases increase in complexity and importance their number diminishes until we end up with a handful of disputes that are of

DIFFERENCE IN THE COMPLEXITY AND IMPORTANCE OF CASES

[107] CPR 3.8(2) sets out the procedure for obtaining relief from sanctions and r.3.9 lists the considerations to be taken into account when considering an application for relief.

extraordinary complexity or of far-reaching economic or social consequence. It makes no sense to devote equal court attention to every dispute, because this would leave insufficient resources for cases of importance or complexity while unnecessarily wasting resources on disputes that could be satisfactorily resolved summarily. Differentiation in allocating procedural resources is therefore a demand of justice. Any adjudicative process carries with it a risk of error, but the magnitude of the harm that an error may cause varies according to the value at stake or the importance of the dispute. An erroneous judgment about an entitlement to £15,000 is less serious than a mistake about an entitlement to £15m.[108] An error concerning entitlement to damages for breach of contract to decorate a house may not be as serious as an error leading to a denial of a fundamental human right. The allocation of procedural resources must therefore take into account the harm that insufficient resources could cause. It may be noted again here that the need to direct resources to where they would do most good is not peculiar to the administration of civil justice but is present in every public service, be it health, education or any other service catering for individual or communal need.

ADAPTATION OF PROCESS TO THE DISPUTE

ALLOCATION OF PROCEDURAL RESOURCES WHERE THEY WOULD DO MOST GOOD AND AVOID GREATER HARM

1.86 There are several methods for matching process to disputes. The first consists of tiered courts whereby lower tier courts decide simple cases while important or complex disputes are reserved for the superior courts in the court hierarchy. This may be referred to as the jurisdictional technique, indicating that different courts have jurisdiction over different types of cases. A jurisdictional technique may differentiate between cases according to their value. Although common, the jurisdictional approach suffers from a serious weakness, because allocation criteria tend to be inflexible and end up making unsuitable matches between disputes and courts. If, for instance, the criterion for allocation turns on the value of the dispute, high value cases would be referred to the superior courts even when they are in reality straightforward, and low value cases would be sent to the inferior courts even when they are in reality complex. A different technique consists of matching not courts to disputes but of matching procedure to disputes. The same court may have a range of processes at its disposal, ranging from formal and demanding proceedings, through intermediary proceedings, to rough and ready informal processes.

METHODS FOR MATCHING PROCESS TO DISPUTES

- JURISDICTIONAL TECHNIQUE (COURTS ACCORDING TO VALUE OF CASES)
  - INFLEXIBLE
- PROCEDURAL TECHNIQUE

1.87 Both the jurisdictional system and the system of matching process to dispute have been prone to upward pressure, which constantly pushes more cases towards the superior courts or towards the more formal and demanding procedures. A number of factors tend to contribute to this. There is a common perception that the superior courts employing the most probing procedure provide the benchmark for justice, which entails that inferior courts dispense inferior justice because they are staffed by less senior judges or because they follow less

PRONE TO UPWARD PRESSURE

"SUPERIOR JUSTICE"

- HIGH COURT AND FORMAL PROCEDURES

[108] Suppose that a person is party to two separate disputes pending: one involving £15,000 and the other £1m. In both he strongly believes himself to be in the right. The person is allocated a given amount of judicial time for both his cases and he is left to choose how to use it. He could choose to devote half of his allocation to each case. But if he believes that the more judicial time a dispute receives the more likely it is that the court would reach the correct result, he would devote the great majority of his allocation to the £1m case for obvious reasons.

probing procedures. A further factor contributing to the upward pressure has to do with financial and tactical incentives. If lawyers earn more from litigation in the superior courts or from engaging in more demanding procedure, they may be tempted to direct as many of their clients to those directions. Clients too may have reasons of their own to turn to more expensive processes, particularly if they can thereby intimidate their poorer opponents by doing so.[109]

1.88 The pre-CPR approach to the problem was largely jurisdictional, consisting of a two-tier system of first instance courts. The County Court was originally conceived as a forum for the resolution of low value disputes by means of a simpler and more expeditious procedure than that employed in the High Court.[110] In recent decades, however, the procedural differences between County Court and High Court have been eroded, especially after 1991 when the monetary limit for County Court jurisdiction was abolished.[111] A simplified procedure continued to operate only with respect to small claims.

1.89 The CPR are based on a more thorough, flexible and adjustable method for obtaining a satisfactory correlation between the needs of individual cases and the process adopted for their resolution. There is only one set of rules applicable to both the High Court and the County Court. There are three procedural tracks: the small claims track, the fast track and the multi-track. Although some jurisdictional rules remain, the jurisdiction of the County Court overlaps substantially with that of the High Court. The intention is to reserve High Court adjudication for litigation that requires specialisation (such as heavy commercial cases or complex disputes arising from construction contracts), or which justifies High Court attention due its value, importance or complexity. Accordingly, whether litigation is to be disposed of in the High Court or the County Court and the appropriate track depend primarily on the importance, value and complexity of the claim.

1.90 Allocation to the appropriate track is determined by the court, not the parties. The tracks are considered in Chapter 11; for the present it suffices to say that the small claims track, which is intended, roughly speaking, for money claims up to £5,000, is meant to provide a simple and cheap method for resolving run of the mill disputes.[112] The fast track is designed for mid-range cases, of between £5,000 and £25,000.[113] It consists of a more probing procedure than the small claims track but is less intensive and extensive than the multi-track procedure which is reserved for the really serious or difficult cases. Moreover, within each

[109] Prior to the CPR, the High Court and the County Court had different procedures. Since it was difficult for lawyers to master the rules of both courts, there was a tendency to direct cases to the court with the procedure with which the lawyer was familiar, rather than to the appropriate court.
[110] The County Court (established by the County Courts Act 1846) had jurisdiction limited to the value of £20 in 1846, which was progressively raised reaching £5,000 in 1991. Within the County Courts, claims for less than £1,000 (1991) were dealt with by the small claims court. The County Court procedure was cheaper and litigants were encouraged to bring their claims there even where it was possible to seek High Court adjudication: County Courts Act 1959, ss.19, 20.
[111] Courts and Legal Services Act 1990 and the High Court and County Courts Jurisdiction Order 1991 (SI 1991/724). J. Baldwin, *Small Claims in County Courts in England and Wales* (1997).
[112] CPR 26.6(1); 26 PD 8.1.
[113] CPR 26.6(4).

track the court has extensive powers to ensure that the process employed is proportionate to the individual requirements of the case.[114]

1.91 It is worth bearing in mind though that just as process tends to get adjusted to disputes, disputes too can tend to adjust to process. As Professor Ian Scott has observed, "an alteration in the processes for handling a dispute can have the effect of altering the dispute itself."[115] The procedure adopted may have a bearing on what the parties decide to dispute and how they go about it. A further point to bear in mind is that parties and their lawyers respond to economic and other incentives and that these too may affect the nature of a given dispute, its complexity and its intensity.

THE PROCESS INFLUENCES HOW THE PARTIES DEAL WITH THE DISPUTE

The implications of proportionality for case management

1.92 CPR 1.1(2)(e) instructs the court to allot to any given case an appropriate share of court resources, bearing in mind the need to reserve resources for other cases. When dealing with an individual dispute, therefore, the court must consider the consequences that individual decisions may have for other litigants and the system as a whole. Lord Woolf C.J. has explained:

CASE MANAGEMENT

THE COURT MUST CONSIDER THE CONSEQUENCES OF INDIVIDUAL DECISIONS FOR OTHER LITIGANTS AND TO THE SYSTEM AS A WHOLE

> "A judge's responsibility today in the course of properly managing litigation requires him, when exercising his discretion in accordance with the overriding objective contained in CPR Part 1, to consider the effect of his decision upon litigation generally. An example of the wider approach is that the judges are required to ensure that a case only uses its appropriate share of the resources of the court (CPR Part 1.1(2)(e)). Proactive management of civil proceedings, which is at the heart of the CPR, is not only concerned with an individual piece of litigation which is before the Court, it is also concerned with litigation as a whole."[116]

Lord Dyson M.R., extra-judicially, has similarly stated:

> "We have a managed system. That system must be managed for the needs of all litigants. The new emphasis in the overriding objective on proportionate cost and compliance is intended to make sure the wider public interest remains at the forefront of all our minds."

ESPECIALLY IN ADJOURNMENTS

This is especially so in relation to adjournments, because the need to adjourn the trial in one case could have a knock on effect on other cases waiting for their turn. Therefore, the courts treat postponement of a date fixed for trial, or adjournment of the trial itself, with considerable disfavour.[117]

1.93 Considerations of proportionality come into most procedural decisions, and guide the court in determining the process to be followed both before and during the trial.[118] One of the first matters that the court must consider is whether the

CONSIDERATIONS OF PROPORTIONALITY

[114] The need for proportionality is stressed in a number of rules. See for example: CPR 30.3 (criteria for transfer), CPR 31.3 (right of inspection of a disclosed document), CPR 31.7 (duty of search).
[115] I.R. Scott, "Caseflow Management in the Trial Court" in Zuckerman and Cranston (eds), *Reform of Civil Procedure—Essays on Access to Justice* (1995).
[116] *Jones v University of Warwick* [2003] EWCA Civ 151 at [25], [2003] All ER (D) 34 (Feb) at [25], [2003] 1 WLR 954 at [25].
[117] See 29 PD 7.4(1); *Fox v Graham Group Ltd, The Times*, August 3, 2001, per Neuberger J; *Boyd & Hutchinson v Foenander* [2003] EWCA Civ 1516; *Fitzpatrick Contractors Ltd v Tyco Fire Integrated Solutions (UK) Ltd* [2008] EWHC 1927 (TCC).
[118] For examples see WB 2011, 11-10.

case raises issues that require adjudication. It has the power to strike out a statement of case if it discloses no reasonable grounds for bringing or defending the claim (CPR 3.4(2)), and it may do so at its own initiative. If the dispute does raise an issue worthy of court attention, the court must next consider whether it could be decided summarily without recourse to one of the normal trial tracks. The court may give summary judgment against a party if it considers that the party has no real prospect of succeeding in his claim or defence (CPR 24.2). The choice of summary disposal is governed by the need for "avoiding the court's resources being used up on cases where it would serve no purpose".[119]

1.94 Given the pivotal role occupied by proportionality in the overriding objective, it is only natural that a real prospect of success should become a widely used test for the investment of court resources. It is a general threshold test for allowing a case to continue or go to trial. It is used in deciding whether to give permission to appeal (CPR 52.3(6)),[120] whether to order a new trial,[121] whether to strike out a claim that is indistinguishable from a previous claim with which the claimant did not proceed,[122] and whether to set aside a default judgment (CPR 13.3(1)(a)).[123]

1.95 Proportionality informs the court's approach to virtually every aspect of the case. It is an important consideration in deciding to which track to allocate a case and is central to the choice of case management directions. Thus, it is relevant to deciding the scope of disclosure,[124] to permitting amendments to statements of case,[125] to allowing expert evidence,[126] to the making of costs orders,[127] and to whether to entertain an appeal.[128] Proportionality is similarly relevant to the imposition of sanctions for non-compliance with rules or orders and to making costs orders or assessing the amount of costs to be paid.[129]

1.96 There is a tendency to invoke the overriding objective even where the court is not exercising a CPR power or interpreting a CPR provision.[130] This is inevitable because a court that is conscious of its duty to manage cases is unlikely to remain unconcerned about excessive use of resources or about unacceptable delays

[119] *Swain v Hillman* [2001] 1 All ER 91, CA.
[120] *Adoko v Jemal, The Times*, July 8, 1999, CA; *SBJ Stephenson Ltd v Mandy, The Times*, July 21, 1999.
[121] *Coflexip SA v Stolt Comex Seaway MS Ltd* [2001] 1 All ER 952n, CA.
[122] *Securum Finance Ltd v Ashton* [2001] Ch 291, [2000] 3 WLR 1400, CA.
[123] *Akram v Adam* [2004] EWCA Civ 1601, [2005] 1 All ER 741.
[124] CPR 31.3; 31A PD 2.
[125] *McPhilemy v Times Newspapers Ltd* [1999] 3 All ER 775, CA.
[126] *Daniels v Walker* [2000] 1 WLR 1382, CA; *Mann v Chetty* [2000] All ER (D) 1531, CA.
[127] CPR 44.4-5, 44 PD 13.13. See also *Mars UK Ltd v Teknowledge Ltd (No.2), The Times*, July 8, 1999.
[128] It would not be a sensible use of court time to consider the merits of an appeal against an interlocutory injunction, when the trial was a few weeks away: *SBJ Stephenson Ltd v Mandy, The Times*, July 21, 1999, CA. cf. *Adoko v Jemal, The Times*, July 8, 1999, CA. See also: *Walker v Home Office* (April 16, 1999, unreported), CA; *Macdonald v Taree Holdings* [2000] All ER (D) 2204, *The Times*, December 28, 2000.
[129] *Adam Phones Ltd v Goldschmidt* [1999] 4 All ER 486, Ch.
[130] For example: *Igwemma v Chief Constable of Greater Manchester Police* [2001] EWCA Civ 953, [2001] 4 All ER 751, CA (permitting jury to alter verdict after discharge); *Bentley v Jones Harris & Co* [2001] EWCA Civ 1724 (acceding to submission of no case to answer without putting defendant to election); *Mobile Export 365 Ltd v Revenue and Customs Commissioners* [2007] EWHC 1737 (Ch). For more instances see 2013 WB, 11-5–11-7.

simply because CPR 1.2 does not strictly apply to the exercise of the management power in question.

Early identification of issues

1.97 In order to resolve a dispute expeditiously and with proportionate investment of procedural resources the court must control litigation from an early stage so as to be able to devise appropriate case management directions. The court must begin by identifying the issues in dispute, determine which of them require full investigation and which can be summarily determined, and decide the order in which this is to be done (CPR 1.4(2)(b)–(d)).[131] Even at this early stage the court may, of its own initiative, strike out a statement of case or exclude an issue from consideration.[132]

EARLY IDENTIFICATION OF ISSUES TO MANAGE THEM PROPERLY
- STRIKE OUT
- SUMMARY ADJUDICATION
- FULL ADJUDICATION
- ORDER OF DECISION

1.98 The court's management task is facilitated by the allocation questionnaires, which the parties must return to court after the defence has been served (CPR 26.3). In these the parties are required to furnish the court with information about the nature of the process that would be involved in resolving the dispute (such as the number of witnesses and experts to be called), about the likely duration of the trial and the costs of the proceedings. Moreover, the parties are encouraged to consult about the information supplied to agree proposed directions (26 PD 2).

FACILITATED BY ALLOCATION QUESTIONNAIRES
↓
INFORMATION ABOUT EVIDENCE AND TRIAL

Reducing cost and enhancing efficiency

1.99 Reducing the cost of litigation was a major aim of Lord Woolf's report.[133] This objective is reflected in CPR 1.4(2)(h) which directs the court to consider whether the likely benefit of taking a particular step justifies the costs of taking it. Most of the procedural innovations of the CPR, such as the procedural tracks, stronger incentives to respond to offers to settle, and greater judicial discretion to make costs orders that reflect the parties' conduct in the litigation, are designed to put a downward pressure on process costs.

MAJOR AIM
REDUCING COST OF LITIGATION.
TOOLS:
- TRACKS
- INCENTIVES TO SETTLE
- COST ORDERS

1.100 The very existence of the procedural tracks is founded on considerations of proportionality (CPR 26.8(1)). The small claims track offers a simple, expeditious and undemanding method for resolving disputes that will not benefit from greater procedural investment. Although the fast track procedure is fuller and more demanding, it is still sparing by comparison to the fullest procedural investment that the multi-track may demand. The concern about appropriate allocation of resources is reflected in the expectation that fast track trials should be completed within one day (CPR 26.6(5), 26 PD 9). To ensure that this target is met, the court is in a position to give appropriate directions for pre-trial preparations and for the conduct of the trial (CPR 28.6). Even on the multi-track the court is bound to have regard to cost-benefit considerations when it comes to determine, amongst other things, the range of disclosure, and the number of expert witnesses. Wherever possible, the court is encouraged to resolve matters

TRACKS ARE FOUNDED ON CONSIDERATIONS OF PROPORTIONALITY AND EFFICIENCY

[131] For the power to decide the order in which to determine issues see CPR 3.1(2). The court may decide that only certain issues in the proceedings should be adjudicated first. It may also consolidate different claims and try them together.
[132] According to 26 PD 5.2, the court's power to dispose of cases summarily includes the power to strike out a statement of case under CPR 3.4. For exclusion of issues see CPR 3.1(2).
[133] Woolf Final Report, 80.

of procedure without requiring the parties' attendance in order to save costs (CPR 1.4(2)(j)).

1.101 As part of the drive for improved efficiency Lord Woolf recommended greater use of technology in the management of litigation.[134] This is reflected now in CPR 1.4(2)(k). Technology may be used for a variety of purposes.[135] The court may use it to collect information about pending cases and track their progress, or as an instrument for planning judicial timetables and sittings. Judges are, for instance, making increasing use of telephone hearings and of electronic means for communicating with the parties, and lawyers employ email for communicating with each other and may manage the disclosure process electronically.[136] However, lack of adequate investment in the infrastructure and the support needed to enable the courts to make use of technology has hampered their ability to implement this policy fully and to improve their service to litigants.[137]

Promoting expeditious resolution

1.102 The court should not wait for the parties to make applications in order to give directions or, indeed, in order to enforce compliance with them.[138] CPR 1.4(2)(g) and (k) lay down specific measures for promoting expedition. Further, the court must set timetables for fast track and multi-track litigation (CPR 28.2 and 29.2). It has a duty to review the state of progress on every occasion that a case comes before it,[139] and consider whether any additional directions are necessary. It must deal with as many aspects of the litigation as it can at the same hearing (CPR 1.4(2)(i)). Whenever a case comes before the court, whether on an application for striking out or for summary judgment, or whether for case management directions, the court is now bound to consider all aspects of the case to date, including the extent to which parties have complied with court directions.

Functional convergence of pre-trial and trial processes

1.103 One of the prominent features of pre-CPR procedure was a sharp distinction between the pre-trial and trial stages of litigation. Traditionally the pre-trial process was exclusively occupied with preparation for the trial and was largely controlled by the parties, who were expected to carry out the pre-trial processes with minimal court interference. Most importantly, the pre-trial stage formed no part of the decision-making process. Adjudication took place only at the trial, where judges presided over the presentation of evidence and argument, and where the final outcome of the litigation was shaped.

1.104 Court control of litigation, driven by the overriding objective, has greatly eroded the functional differences between the pre-trial and trial phases. The

[134] Woolf Interim Report, 82; Woolf Final Report, 284.
[135] 2011 WB 11-13.
[136] See CPR 3.1(2)(d) (telephone hearings); 23A PD 6 and 7 (telephone hearings and video conferencing).
[137] Lord Justice Brooke, Vice-President of the Court of Appeal (Civil Division), *Court Modernisation and the crisis facing our civil courts*, Society of Advanced Legal Studies, London, November 24, 2004. And see discussion in Ch.11, Court Management and party compliance.
[138] *Southern & District Finance Plc v Turner* [2003] EWCA Civ 1574, [34].
[139] See CPR 24.6(b) (directions after summary judgment hearing); CPR 26.4(5) (directions after stay for settlement); CPR 20.13 (directions after defence).

extent of the court's involvement in the litigation process from the start is such that the adjudicative task may be said to start as soon as the court undertakes management responsibility for the case. The pre-trial process is not exclusively devoted to exchange of pleadings and of evidence. Case management decisions, such as determining the extent of disclosure or deciding what kind of expert evidence to allow and how many experts to hear, are capable of influencing the outcome. These and other similar decisions are an integral part of the process of deciding the dispute. Of course, not every management decision is likely to affect the outcome, but the scope for influential decisions is sufficiently extensive to justify the conclusion that the adjudication of disputes is now one continuing process, in which the trial is merely the final stage. This represents a very considerable departure from the traditional common law model of civil adjudication and brings English procedure closer to civil law systems.

1.105 The evidentiary stage, which used to coincide with the trial, now begins earlier. While in theory evidence and argument are still presented at the trial, in reality they may be put before the court well in advance of the trial. In a complex case, the judge will have read the relevant documents, the witness statements and the parties' skeleton arguments before the trial. At the trial, the court may dispense with the reading out of documentary evidence, with evidence in chief and even with detailed legal argument. The trial judge may limit the time for cross-examination or direct that oral argument should be limited to certain issues only or should be limited in time. The trial of a complex case, where the judge has done preparatory reading and given detailed directions for the presentation of evidence and argument, is a fundamentally different process than the traditional trial. The modern trial can be a seamless continuation of the pre-trial process.

EVIDENCE AND ARGUMENTS ARE PRESENTED EARLIER

AT TRIAL THE COURT CAN DISPENSE WITH THE READING OUT AND LIMIT TIME THANKS TO PREPARATORY READING

THE PARTIES' DUTY TO CO-OPERATE

1.106 In addition to their specific procedural obligations, the parties have a general obligation of co-operation. CPR 1.3 stipulates that the "parties are required to help the court to further the overriding objective". Further, CPR 1.4(2)(a) states that the court must encourage "the parties to co-operate with each other in the conduct of the proceedings".

DUTY TO COOPERATE WITH THE COURT AND THE PARTIES

The duty to assist the court

1.107 A court cannot manage cases without party co-operation, especially in the English adversarial system in which the parties alone decide whether to litigate, what issues to dispute and what evidence to adduce. Without party co-operation the court can do little to decide cases on their merits. This has always been true, but court dependence on party co-operation is even greater now that the court has the duty to manage the litigation process. Accordingly, CPR 1.3 imposes on litigants a general duty to assist the court in its case management task. This applies equally to the parties' legal representatives.[140] However, the duty of

DUTY TO ASSIST THE COURT IN ITS CASE MANAGEMENT TASK

BUT NOT TO ACT CONTRARY TO THE CLIENT'S INTEREST

[140] *Geveran Trading Co Ltd v Skjevesland* [2002] EWCA Civ 1567, [2003] 1 All ER 1; *Albon (t/a NA Carriage Co) v Naza Motor Trading Sdn Bhd* [2007] EWHC 2613 (Ch), [2008] 1 All ER 995. Though CPR 1.3 cannot impose on a lawyer a duty wich is at odds with the duty owed to the client: *Khudados v Hayden* [2007] EWCA Civ 1316.

counsel to assist the court does not impose a duty on counsel to act in a manner which is contrary to the client's interests.[141]

1.108 For example, the parties have a duty to provide the court with full and timely information about their circumstances and constraints, such as the availability of expert witnesses.[142] They must assist the court to allot the case no more than an appropriate share of the court's resources by responding to requests from the court and the opponent for information relevant to the progress of the case.[143] Similarly, a party that notifies the opponent of a defect in the opponent's CPR 36 offer to settle but refuses to inform the opponent of the nature of the defect prior to a hearing is in dereliction of the duty to help the court manage the case.[144] A party must not delay an application if to do so would disrupt the timetable for trial.[145] Where, when trial is imminent, parties make an application to vacate a trial date, having been aware for several months that, because of the failure of either or both of them to meet deadlines imposed by the court's directions it was unlikely that that date could be met, they are in plain breach of their duty under CPR 1.3 (*Giggs v News Group Newspapers Ltd* [2012] EWHC 431 (QB), March 2, 2012, unreported. (Tugendhat J.)).

The duty of the parties to co-operate with each other

1.109 Although the rules do not expressly require it, parties are now expected to co-operate with each other because this is one of the objectives of active case management. They must respond positively to reasonable requests for information[146] and to invitations to settlement negotiations, and they are encouraged to agree to as many aspects of the litigation process as possible. Brooke L.J. drew attention to this aspect when he said that[147]:

> "The whole thrust of the CPR regime is to require the parties to behave reasonably towards each other in the conduct of the litigation. The old antagonistic point scoring, which used to drag personal injuries cases out and run up the costs, should now be at an end."

1.110 The duty to co-operate with each other is one of the most significant cultural changes brought about by the CPR. Before the CPR, parties had no comparable duty. They were of course obliged to perform their process duties, but beyond that they were free to refrain from responding to questions from their opponent, free to withhold information unless and until they came under a disclosure duty, free to resist settlement negotiations and free to treat any approach from an opponent with disdain. If they engaged in negotiations, they remained free to

[141] *Khudados v Hayden* [2007] EWCA Civ 1316.
[142] *Matthews v Tarmac Bricks and Tiles Ltd* [1999] All ER (D) 692, *The Times*, July 1, 1999, CA.
[143] *Mlauzi v Secretary of State for the Home Department* [2005] EWCA Civ 128, where Brooke L.J. was critical of the Treasury Solicitor's failure to respond to requests to clarify whether she was going to comply with her process duty.
[144] *Hertsmere Primary Care Trust v Rabindra-Anandh* [2005] EWHC 320, Ch; [2005] 3 All ER 274. cf. *Huntley v Simmonds* [2009] EWHC 406 (QB).
[145] *JSC BTA Bank v Ablyazov* [2012] EWCA Civ 1551, where a recusal application was dismissed because it was raised too close to the start of the trial.
[146] *Mlauzi v Secretary of State for the Home Department* [2005] EWCA Civ 128.
[147] *Baron v Lovell* 1999 W.L. 478164.

drag out the talks to no end other than to make their opponent's life difficult. By contrast, parties must now conduct the litigation in a co-operative manner.

1.111 Parties are encouraged to agree case management directions in the multi-track and present them for court approval without the need for a hearing (CPR 29.4). If a defendant requires an extension of time for serving a defence, the parties are expected to agree amongst themselves (CPR 15.5). If the parties are likely to become involved in settlement negotiations, they may agree to request a stay to allow time for negotiations (CPR 26.4). Instead of each party calling his own expert, they are encouraged to agree on a joint expert (CPR 35.7). If parties are in dispute over purely procedural matters, the duty stated in CPR 1.3 requires them to co-operate in making a real attempt to explore solutions so as avoid disproportionate expense and the taking up of excessive court time.[148]

PARTIES ARE ENCOURAGED TO AGREE IN SEVERAL PROCEDURAL MATTERS

Parties are expected to respond in a prompt and helpful manner to reasonable requests for information.[149] Crucially, parties are required to work together to make adequate preparations for trial. As Briggs J. explained, they are required to put to one side any hostility and co-operate in preparations for trial to ensure proportionality of costs and court resources.[150] Unfortunately, the court has not insisted on co-operation when it comes to service of proceedings, where it seems that parties in a continuing relationship (landlord-tenant, employer-employee) need not put in place arrangements to facilitate service of originating process.[151] Defendants' solicitors are under no obligation to reveal the defendant's address for service.[152]

PARTIES ARE EXPECTED TO COOPERATE IN PREPARATIONS FOR TRIAL AND IN REASONABLE REQUESTS FOR INFORMATION

PROBLEMS IN SERVICE OF PROCEEDINGS

1.112 Most importantly, parties are now expected to draw attention to any obvious procedural mistake that the opponent has made so it may be corrected in time. A defendant who waits until the limitation period has expired before arguing that the wrong party was sued would not be allowed to reap the benefit of the claimant's mistake. Sedley L.J. explained:

EXPECTATION TO DRAW ATTENTION TO OBVIOUS PROCEDURAL MISTAKES THAT THE OPPONENT HAS MADE. WITHIN A REASONABLE TIME

> "The Civil Procedure Rules are not, as at times the Rules of the Supreme Court seemed to be, a sort of Hague Convention regulating the worst excesses of warfare, which litigants were otherwise free to conduct as they saw fit. The overriding objective makes this plain. In support of its principal purpose of enabling the court to deal with cases justly, its first aim is to ensure that the parties are on an equal footing. The withholding by one party, until it is believed to be too late to do anything about it, of the fact that it is not the person whom the claimant manifestly intends to sue in my judgment runs counter to the overriding objective."[153]

[148] *Lexi Holdings v Pannone and Partners* [2010] EWCH 1416 (Ch).
[149] cf. *Kuenyehia v International Hospitals Group Ltd* [2005] EWHC 613, QB, [17]; *Lexi Holdings (In Administration) v Pannone & Partners* [2010] EWHC 1416 (Ch).
[150] *Lexi Holdings (In Administration) v Pannone & Partners* [2010] EWHC 1416 (Ch).
[151] *Estates Acquisitions and Development Ltd v Wiltshire* [2006] EWCA Civ 533; *Drury v Carnegie v Drury* [2007] EWCA Civ 497.
[152] *Hallam Estates Ltd v Baker* [2012] EWHC 1046 (QB).
[153] *Kesslar v Moore & Tibbits (a firm)* [2004] EWCA Civ 1551, [2005] P.N.L.R. 17, [27]. Although the approach to be taken to applications to add or substitute a party after the limitation period has been somewhat controversial (e.g. *Morgan Est (Scotland) Ltd v Hanson Concrete Products Ltd* [2005] EWCA Civ 134; *Adelson v Associated Newspapers Ltd* [2007] EWCA Civ 701) the sentiment experssed by Sedley L.J. is still valid. For a discussion see Ch.13, Joining claims and parties and collective redress procedures.

FAILURE TO POINT OUT A MISTAKE IS A FACTOR TO CONSIDER FOR GRANTING RELIEF FROM SANCTION

1.113 There is no general duty upon one party to point out the mistakes of anoth party or his legal advisers, but such failure may, as we have seen, attra disapproval.[154] For instance, in *Beever v Ryder Plc*,[155] the defendant alerted th court, but not the claimant, to the latter's failure to file a costs estimate with th allocation questionnaire, whereupon the court made an unless order with whic the claimant failed to comply with the result that the claim was struck out. Th Court of Appeal stated that the defendant's action was a breach of good practic and therefore a factor to be taken into account when determining whether th claimant should be granted relief from sanction.

Party co-operation—pre-action protocols

DUTY TO COOPERATE STARTS BEFORE THE COMMENCING OF PROCEEDINGS
↓
PRE-ACTION PROTOCOLS
↓
AIMS

1.114 Under the CPR the duty to co-operate starts before commencing proceeding as a result of the pre-action protocols. The aim of the pre-action protocols is t reverse the former culture of litigant warfare. In his *Access to Justice* report Lor Woolf explained that we need a system "which enables the parties to a dispu to embark on meaningful negotiations as soon as the possibility of litigation i identified, and ensures that as early as possible they have the relevant informatio to define their claims and to make realistic offers to settle".[156] Pre-actio protocols are designed to meet this objective by aiming:

> "(a) to focus the attention of litigants on the desirability of resolving disputes witho litigation;
> (b) to enable them to obtain the information they reasonably need in order to ente into an appropriate settlement; or
> '(c) to make an appropriate offer (of a kind which can have costs consequences i litigation ensues); and
>
> if a pre-action settlement is not achievable, to lay the ground for expeditious conduc of proceedings."[157]

Practice Direction—Pre-Action Conduct states:

PRACTICE DIRECTION PRE-ACTION CONDUCT

> 1.1 The aims of this Practice Direction are to—
>
> (1) enable parties to settle the issue between them without the need to start proceedings (that is, a court claim); and
> (2) support the efficient management by the court and the parties of proceedings that cannot be avoided.
>
> 1.2 These aims are to be achieved by encouraging the parties to—
>
> (1) exchange information about the issue, and
> (2) consider using a form of Alternative Dispute Resolution ("ADR").

ADVERSE CONSEQUENCES FOR FAILING TO COMPLY WITH PROTOCOLS

1.115 Failure to comply with the protocols would normally have serious adverse consequences for the party at fault, as the following provisions of the PD Pre-Action Conduct state:

[154] *Thames Trains Ltd v Adams* [2006] EWHC 3291 (QB); *Bethell Construction Ltd v Deloitte & Touche* [2011] EWCA Civ 1321.
[155] *Beever v Ryder Plc* [2012] EWCA Civ 1737.
[156] Woolf Final Report, 107.
[157] Woolf Final Report, 107.

4.6 If, in the opinion of the court, there has been non-compliance, the sanctions which the court may impose include—

(1) staying (that is suspending) the proceedings until steps which ought to have been taken have been taken; - STAY OF PROCEEDINGS

(2) an order that the party at fault pays the costs, or part of the costs, of the other party or parties (this may include an order under rule 27.14(2)(g) in cases allocated to the small claims track); - COST ORDER

(3) an order that the party at fault pays those costs on an indemnity basis (rule 44.4(3) sets out the definition of the assessment of costs on an indemnity basis); - INDEMNITY COSTS

(4) if the party at fault is the claimant in whose favour an order for the payment of a sum of money is subsequently made, an order that the claimant is deprived of interest on all or part of that sum, and/or that interest is awarded at a lower rate than would otherwise have been awarded; - LOSS OR REDUCTION OF INTEREST (PAYMENT CLAIM)

(5) if the party at fault is a defendant, and an order for the payment of a sum of money is subsequently made in favour of the claimant, an order that the defendant pay interest on all or part of that sum at a higher rate, not exceeding 10% above base rate, than would otherwise have been awarded." - INCREASE OF THE INTEREST RATE

1.116 The protocols set out codes of best practice, which the parties are expected to follow as soon as a dispute is likely to give rise to litigation. To remove the risk that the protocol process would become a source of procedural wrangling, it is expressly stated that the court will "be concerned about whether the parties have complied in substance with the relevant principles and requirements and is not likely to be concerned with minor or technical shortcomings" (PD Pre-Action Conduct 4.3(1)). The court will not insist on compliance where in the circumstances the protocol would achieve no useful purpose.[158] Complaints about minor or technical infringements would be seen as going against the spirit of the policy behind the protocols, and would certainly not attract adverse consequences.[159]

PROTOCOLS SET OUT CODES OF BEST PRACTICE

COMPLIANCE IN SUBSTANCE.

MINOR OR TECHNICAL SHORTCOMINGS ARE IRRELEVANT.

1.117 Although the court has no power to intervene before commencement of proceedings, it has ample powers to deal with failures to comply once proceedings are under way. Failure to comply with protocols may be taken into account when considering whether to grant relief from sanctions (CPR 3.9(1)(e)). The court may take into account compliance with protocols when it gives case management directions (CPR 3.1(4)). The court could, for example, refuse an extension of time to serve a statement of case or withhold permission to amend a statement of case, if the need for this would have been avoided had the party complied with the relevant protocol, or it may grant an extension subject to strict conditions.[160] A stay may be imposed where failure to comply resulted in the

COMPLIANCE WITH PROTOCOLS MAY BE TAKEN INTO ACCOUNT

- RELIEF FROM SANCTIONS
- MANAGEMENT DIRECTIONS
- COSTS ALLOCATION

[158] *Orange Personal Communications Services Ltd v Hoare Lea (A Firm)* [2008] EWHC 223 (TCC).
[159] *TJ Brent Ltd v Black & Veatch Consulting Ltd* [2008] EWHC 1497 (TCC).
[160] *Price v Price (t/a Poppyland Headware)* [2003] EWCA Civ 888, [2003] 3 All ER 911.

claim remaining obscure when proceedings were started.[161] The court may orde a party who has not complied with a protocol to pay a sum of money into cour (CPR 3.1(5)).[162] Most significantly, the court must take into account this facto when determining costs (CPR 44.3(4), (5)(a)).[163] The fact that unco-operative conduct may have serious costs consequences provides a potent incentive fo adopting reasonable attitudes. There can be little doubt that the pre-actio protocols and the culture of co-operation to which they give tangible expressio have changed the character of English litigation for the better.

1.118 Special pre-action protocols are in force in a number of litigation areas.[164] However, even in the absence of a subject specific protocol the parties are expected to maintain certain standards of conduct. These are to be found in PD Pre-Action Conduct, section III, which sets out the principles governing the conduct of the parties in cases not subject to a pre-action protocol. For example, although no protocols apply directly in small claims, failure to behave in the spirit of the protocols may lead to sanctions.[165] Reasonableness is assessed by the standards of the existing protocols. Failing to send a letter of claim, or respond to such letter, will almost inevitably attract adverse consequences.[166] A claimant who fails to send a letter before the claim, or a defendant who fails to respond, runs a serious risk of adverse costs and other procedural consequences.

1.119 The stated core aims of the Pre-Action Protocol for Personal Injury Claims[167] represent a general yardstick by reference to which parties' behaviour will be judged. The protocols advocate greater pre-action contact between the parties; early exchange of information; good pre-action investigation by the parties; and behaviour which is conducive to settlement or to enabling the parties to conduct litigation efficiently. It is not necessary for present purposes to discuss in detail the existing protocols. A general account of the personal injury protocol suffices to illustrate the general approach.[168]

1.120 As soon as the claimant has evidence to support a realistic claim he must write a letter of claim to the defendant and to the defendant's insurer, in which sufficient information must be given to enable the defendant and his insurer to assess their potential risk. The letter must include details of the accident, a description of the nature of the injuries and an outline of financial loss. The

[161] *Cundall Johnson & Partners LLP v Whipps Cross University Hospital NHS Trust* [2007] EWHC 2178 (TCC).

[162] Such order would be inappropriate where both sides failed to comply with pre-action protocols. See *Mealey Horgan Plc v Horgan*, *The Times*, July 6, 1999 (although the sentiments expressed in this case arose from the late service of witness statements rather than breaches of pre-action protocols).

[163] *Daejan Investments Ltd v Park West Club Ltd* [2003] EWHC 2872 (QB (TCC)), [2004] B.L.R. 223.

[164] PD Pre-Action Conduct 5.2: Personal Injury, Clinical Disputes, Construction and Engineering, Defamation, Professional Negligence, Judicial Review, Disease and Illness, Housing Disrepair, Possession Claims based on rent arrears, Possession Claims based on Mortgage Arrears.

[165] *Northfield v DSM (Southern) Ltd* [2000] C.L.Y. 461; *Linton v Williams Haulage Ltd* [2001] C.L.Y. 516.

[166] *Phoenix Finance v Federation International L'Automobile* [2002] EWHC 1028, Ch: indemnity costs ordered for failure to send a letter before action.

[167] 2013 WB C2A-001.

[168] 2013 WB C2A-001.

defendant is required to acknowledge receipt within 21 days of the posting of the letter of claim and respond in full within three months of the acknowledgment, either admitting or denying liability with reasons. If the defendant denies liability, he must give reasons, including mention of any alleged contributory negligence, and accompany his response with material documents. The claimant is in turn required to submit supporting documents concerning special damages.

ACKNOWLEDGMENT OF RECEIPT (21 DAYS)
RESPONSE + MATERIAL DOCUMENTS (3 MONTHS)

1.121 The parties are required to co-operate on the selection of an expert, especially the medical expert. The protocol requires the claimant to give the defendant the name of more than one suitable expert. If the defendant does not object to at least one of those named within 14 days, the claimant will then instruct the expert to prepare a report. If the claimant is satisfied with the report it will be disclosed to the defendant; either party can ask the expert questions. However, if the defendant objects to all of the experts named by the claimant, or is not satisfied with the report disclosed after raising questions, he may decide to retain his own expert. At allocation stage the court will determine whether the cost of two experts is justified. The personal injury protocol also recommends that the claimant's solicitor should be responsible for organising access to the claimant's medical records and a specimen letter of instruction to a medical expert is to be annexed. The protocol includes, as an annex, specimen non-exhaustive detailed lists of documents which defendants should disclose with any denial of liability in particular types of case, e.g. highway accidents and employers' liability cases. The letter of claim and the defendant's response do not bind the parties later, provided that they were not intended to mislead and that they do not amount to a settlement.[169]

COOPERATION TO SELECT AN EXPERT
PROCESS
ACCESS TO DOCUMENTS
LETTER OF CLAIM AND RESPONSE DO NOT BIND THE PARTIES LATER

1.122 A letter before action or a response is no mere formality, which can be complied with by uninformative general phrases. In these documents parties must provide case specific information that will enable the other party to gain reasonable understanding of the nature of the case advanced and of the evidence or arguments supporting it. Once parties gain an understanding of each other's positions, their respective assessments of the soundness of their case will improve and may even converge. This initial exchange of positions will in many situations induce further exchanges to find out whether the gap between their respective positions can be closed sufficiently to make a settlement possible. Even if a settlement cannot be reached, the pre-action process will have in many cases helped the parties narrow the controversy and identify the matters which needed proof, so that the litigation process could be conducted with greater focus and efficiency.

LETTER OF CLAIM AND RESPONSE MUST PROVIDE SPECIFIC INFORMATION OF THE CASE AND EVIDENCE
↓
CLARIFICATION PROMOTES SETTLEMENT OR NARROWS THE CONTROVERSY
↓
MORE FOCUS AND EFFICIENCY

1.123 The parties' protocol exchange does not, it must be stressed, have the status of pleadings. As already noted, the parties are not bound by statements they make in the letter before claim and the response. Nor do admissions have the effect that formal admissions have under CPR 14.1. Thus, Brooke L.J. explained, an "admission of liability before an action was brought could not be equated with an admission of 'the truth of the whole or any part of another party's case'. That

PARTIES' PROTOCOL EXCHANGES ARE NOT PLEADINGS
- NOT BINDING
- NOT FORMAL ADMISSIONS

[169] Pre-action Protocol for Personal Injury, 2.12.

was because a party's 'case' was not formulated until the claim form or particulars of claim were prepared, and a person did not ordinarily become a party until legal proceedings had been commenced".[170]

PROMOTING SETTLEMENT

Settlement and dealing with cases justly

1.124 In his report on *Access to Justice* Lord Woolf said that court resolution should be seen as the last resort, to be employed only where the parties are unable to resolve their dispute otherwise.[171] CPR 1.4(2)(e) and (f) give expression to this idea by requiring the court to encourage the parties to use alternative dispute resolution procedures in order to settle their dispute without litigation. To this end the CPR adopt a twin strategy: facilitating inter-party communications, and providing economic incentives for settlement. The pre-action protocols, discussed above, represent the first limb of this strategy. Once the parties have exchanged the material information about their respective positions, they are expected to consider whether some form of alternative dispute resolution procedure would be more suitable than litigation (PD Pre-Action Conduct, 1.2, 8). Similarly, where the court gives case management directions of its own initiative it may direct the parties to consider ADR (29 PD 4.10 (9)).[172]

Benefits of ADR

1.125 Moderation, accommodation and foregoing some of one's entitlements for altruistic or selfish reasons are as much to be commended in legal disputes as in other social, economic, or personal relationships.[173] Out-of-court settlements offer considerable economies to litigants and the court. Parties who settle are spared the cost of litigation and obtain swift resolution, while the court saves scarce resources. By settling their dispute parties may avoid the tension, the uncertainty and the emotional burden that litigation often entails. Not least, an agreed outcome is more likely to be acceptable to both parties, and not just to the winner in court proceedings.[174]

1.126 The CPR Glossary defines the expression "alternative dispute resolution" (ADR) as denoting a "collective description of methods of resolving disputes otherwise than through the normal trial process". There are several alternative dispute resolution methods, ranging from informal mediation or conciliation

[170] CPR 14.1A. And see: *Sowerby v Charlton* [2005] EWCA Civ 1610, [18]; *Walley v Stoke on Trent City Council v Walley* [2006] EWCA Civ 1137, [2006] 4 All ER 1230, [2006] C.P. Rep. 48.
[171] Woolf Final Report, p.4.
[172] The direction would normally take the following form: "The parties shall by [date] consider whether the case is capable of resolution by ADR. If any party considers that the case is unsuitable for resolution by ADR, that party shall be prepared to justify that decision at the conclusion of the trial, should the judge consider that such means of resolution were appropriate, when he is considering the appropriate costs order to make . . . "
[173] M. Rosenberg "Devising Procedures That Are Civil to Promote Justice That Is Civilised" (1971) 69 Mich. L.R. 797.
[174] *Halsey v Milton Keynes General NHS Trust; Steel v Joy* [2004] EWCA Civ 576, [2004] 4 All ER 920.

systems to quasi-judicial methods such as arbitration.[175] Mediation processes are designed to bring opponents together with a view to reaching a mutually agreed solution to their dispute.[176] Conciliation aims not only at securing an agreement between the disputants but also at reconciling them to each other, so that they may resume a working or amicable relationship.[177] Arbitration may amount to a full blown legal process, conducted according to procedures that mirror those of the court, except that the process is voluntary and is carried out before adjudicators chosen by the parties.[178] Common to all these alternative forms of dispute resolution is the attraction of privacy.

- MEDIATION
- CONCILIATION
- ARBITRATION

Facilitating negotiations and ADR

1.127 One of the aims of pre-action protocols is to facilitate early negotiations between the adversaries. The parties' exchange of information and the exploration of their respective positions will often lead to discussions about the possibility of an agreed resolution. But the initiative is not left entirely to them. CPR 1.4(2)(f) makes it part of the court's case management duty to help "the parties to settle the whole or part of the case", and CPR 1.4(2)(e) requires the court to encourage "the parties to use alternative dispute resolution procedure" and to facilitate "the use of such procedure". Thus the court must itself try to see if the parties can be brought to resolve their dispute by agreement and, failing that, it must consider suggesting to them the use of an ADR process. The court would draw the parties' attention to ADR whenever it considers that the likely cost of litigation might exceed the amount in dispute.[179]

PRE-ACTION PROTOCOLS FACILITATE EARLY NEGOTIATIONS BY PROMOTING AN EXCHANGE OF INFORMATION

THE COURT MUST HELP PARTIES TO SETTLE OR TO USE AN ADR PROCESS

1.128 Pre-trial arrangements must ensure that sufficient room is always made for the possibility of settlement. After the defence has been served, the parties have to complete and return to court an allocation questionnaire (CPR 26.3). In it the parties are required to indicate whether they require a stay of proceedings in order to reach a settlement (CPR 26.4). Once the parties have requested such a stay, the court will stand aside from the process in order to enable them to attempt to resolve their dispute without court adjudication.

STAY OF PROCEEDINGS TO NEGOTIATE (REQUEST IN THE ALLOCATION QUESTIONNAIRE)

1.129 If the parties have not taken the initiative to attempt settlement, the court may use the first opportunity available to draw to the parties' attention the possibility of a stay for settlement and to the availability of facilities to help them in this regard. In the Commercial Court, the parties' attention is drawn to the possibility

COURT'S SUGGESTIONS OF ITS OWN INITIATIVE

[175] H.J. Brown and A.L. Marriott, *A.D.R. Principles and Practice* (3rd edn, 2011) ("ADR Principles"); D.S. Sutton, J. Gill and M. Gearing, *Russell on Arbitration* (23rd edn, 2007); D.M. Cato, *Arbitration Practice and Procedure* (3rd edn, 2002); J. Tackaberry and A. Marriott, *Bernstein's Handbook of Arbitration and Dispute Resolution Practice* (4th edn, 2003) ("Handbook"); M.J. Mustill and S.C. Boyd, *Commercial Arbitration* (3rd edn, 2009).

[176] Handbook, paras 11-08 et seq.; ADR Principles, Chs 6–13.

[177] Handbook, paras 11-08 et seq.; ADR Principles, Chs 6–13: the terms "conciliation" and "mediation" are often used interchangeably in the commercial context; but see Alan Shilston, *"Arb-Med? Arb-Con is preferable"*, 63 Arbitration (The Journal of the Chartered Institute of Arbitrators), (No.4, November 1997), p.241 for an attempt at distinguishing. Conciliation in a technical sense is more often found in the context of family disputes.

[178] Handbook, Pt 2.

[179] See: *Halsey v Milton Keynes General NHS Trust; Steel v Joy* [2004] EWCA Civ 576, [2004] 4 All ER 920; *Reed Executive Plc v Reed Business Information Ltd* [2004] EWCA Civ 887, [2004] 4 All ER 942; *Burchell v Bullard* [2005] EWCA Civ 358; 2013 WB 1.4.11.

EARLY NEUTRAL EVALUATION IN THE COMMERCIAL COURT

of an "early neutral evaluation" of the dispute. In appropriate cases and with th agreement of all parties the Commercial Court will provide a without-prejudice non-binding, early neutral evaluation ("ENE") of a dispute or of particula issues.[180]

Economic incentives for settlement

1.130

UNWILLINGNESS TO RESPOND TO AN OFFER OR TO CONSIDER ADR MAY RESULT IN AN ADVERSE COST ORDER

Although participation in ADR is voluntary, failure to accept an invitatio from the opponent or the court to participate in ADR may have serious advers consequences. The court may take into account the parties' conduct when i decides what costs order to make (CPR 44.3(4), CPR 44.5). It may therefore tak into account a party's unwillingness to respond to offers of negotiation comin from an opponent, or to the court's own suggestion of referring the dispute t ADR. A court may deny a successful litigant his costs if it considers that had th litigant accepted an ADR invitation the case might have settled b agreement.[181]

1.131

CPR 36 INCENTIVE: COST ORDER IF THE PARTY DOES NOT OBTAIN A MORE FAVOURABLE JUDGMENT THAN THE OFFER.

A powerful system of settlement incentives is established by CPR 36. A defendant may make a CPR 36 offer to settle for a certain amount of money. A claimant who declines such a settlement offer, but fails at trial to obtain a mor favourable judgment than the defendant's offer will normally be ordered to pa the costs that the defendant incurred from the time starting 21 days after the offe Similarly, a claimant may make an offer to settle for a certain amount. If defendant declines a claimant's offer to settle, and the claimant obtains a mor favourable judgment, the defendant will normally be ordered to pay enhance costs and enhanced interest. Given that litigation costs are very considerable, th risk created by being presented with an offer under CPR 36 provides a powerfu incentive to settle.

NO POWER TO COMPEL NEGOTIATIONS

Settlement and access to justice

1.132

ECONOMIC SANCTIONS TO WEAKEN RESISTANCE TO SETTLEMENT NEGOTIATIONS → COST ORDERS

The second part of the strategy of encouraging settlement consists in economi sticks and carrots. Although the court has no power to compel parties to attemp settlement,[182] the court uses economic sanctions to weaken resistance to settle ment negotiations. The sanctions usually take the form of adverse costs orders.[18] It might be said that imposing economic disadvantages on parties who refuse t attempt settlement is inconsistent with the court's duty to enforce rights b

[180] The Admiralty & Commercial Courts Guide (9th edn, 2011), G2.1. See also Chancery Guid (2009, amended to November 14, 2011), Ch.17, and Queen's Bench Guide (2007), 6.6.

[181] *Dunnett v Railtrack Plc* [2002] EWCA Civ 303, [2002] 2 All ER 850, [2002] 1 WLR 2434; *Hur v Leeming* [2001] EWHC 1051 (Ch), [2002] All ER (D) 135 (May), [2002] Rep. 59; *Halsey v Milto Keynes General NHS Trust; Steel v Joy* [2004] EWCA Civ 576, [2004] 4 All ER 920; *Reed Executi Plc v Reed Business Information Ltd* [2004] EWCA Civ 887, [2004] 4 All ER 942; *Burchell v Bullar & Others* [2005] EWCA Civ 358, *Rolf v DE Guerin* [2011] EWCA Civ 78. These matters a considered in detail in Ch.27, Costs.

[182] *Halsey v Milton Keynes General NHS Trust; Steel v Joy* [2004] EWCA Civ 576, [2004] 4 All E 920. However, the idea that the court may not compel parties to engage in ADR has been criticis extra judicially: Sir Gavin Lightman, December 5, 2007, *http://www.judiciary.gov.uk/Resources/JC Documents/Speeches/lightmanj_law_society_051207.pdf*; Sir Anthony Clarke M.R., May 8, 200 *http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/mr_mediation_conference_ may08.pdf*; and by Lord Phillips of Worth Matravers, March 28, 2008, *http://www.judiciary.gov.u Resources/JCO/Documents/Speeches/lcj_adr_india_290308.pdf*.

[183] For detailed discussion see Ch.27, Costs.

providing state-backed remedies for wrongs, which demands court adjudication. Professor Genn has pointed out that the message emerging from the Woolf Report on Access to Justice and from the ensuing stress on the importance of encouraging ADR is that litigation and adjudication are bad and disagreeable, while settlement and, in particular, mediation is attractive and in everyone's best interests.[184]

1.133 There is nothing inherently objectionable in encouraging opposing litigants to settle their differences by agreement rather than court adjudication. Giving up a proportion of one's entitlement for the sake of settlement would in many situations be a price well worth paying for avoiding the uncertainty and costs risks of litigation. However, for a settlement to be just it has to be truly voluntary. The issue of voluntariness was touched upon by the ECtHR in *Deweer v Belgium*.[185] The applicant, a Belgian butcher, was charged with an offence of selling meat at an illegal profit. The public prosecutor ordered the provisional closure of the applicant's shop either until judgment in the criminal prosecution or until he paid an agreed fine of B. Fr. 10,000 by way of settlement. The applicant argued that by being presented with that choice Belgium infringed his rights under Art.6 ECHR because the procedure employed put undue pressure on him to compromise. The ECtHR held that while the prospect of having to appear in court is liable to induce a tendency to compromise on the part of many persons charged with a criminal offence, such pressure is in no way incompatible with the Convention. But it did find that a threat of imminent closure unless the applicant settled did violate Art.6. True, the applicant could have challenged the order following the closure, but it would have taken months to resolve and in the meantime he would have been deprived of income while having to continue paying his staff and risking the loss of customers and therefore of his business even if he successfully challenged the order. Such pressure, the court found, was incompatible with Art.6.

1.134 The pressure exerted by the State in *Deweer* effectively robbed the right of access to court of much of its practical use because the disadvantage involved in obtaining court adjudication was greater than the value of the remedy that the applicant could obtain in court. However, not every pressure, whether financial or other, could be said to undermine voluntariness or access to justice. There is a fundamental difference between *Deweer* and the English position of imposing adverse consequences on a party who refuses mediation. The English rule does not require parties to settle but only to engage in settlement negotiations, in which the parties remain free to insist on their positions and refuse to compromise. Further, a refusal to negotiate would not necessarily result in financial loss, because the court may find that the refusal was reasonable and would therefore not impose an adverse costs order.

1.135 It might be said that punitive adverse costs consequences added to already high and unpredictable litigation costs could undermine voluntariness or access to justice. It has been held that insisting on charging court fees to indigent claimants

[184] Professor Dame Hazel Genn, The Hamlyn Lectures 2008, *Judging Civil Justice* (Cambridge University Press 2009) 52–56. See also S. Shipman, Court Approaches to ADR in the Civil Justice System, (2006) 25 C.J.Q. 181.
[185] *Deweer v Belgium* (1979-1980) 2 E.H.R.R. 439 (ECtHR).

amounts to a denial of access.[186] Exposing a litigant of modest means to unlimited and ruinous costs in the event that she fails to make out her case could similarly amount to a denial of effective access to court.[187] Pressure is further increased if on top of the normal costs risk one adds punitive adverse costs orders. However, the issue of whether adverse costs consequences undermine voluntariness is not straightforward because voluntariness is a matter of degree. We often choose options we would prefer to avoid but for the fact that the alternative is even less desirable. It cannot be seriously suggested that I involuntarily pay a parking fine which has been unlawfully imposed because I do not wish to devote time and energy to challenging it. The answer will be influenced not only by the degree to which a litigant experiences pressure but also by its source. As just noted, it is wrong for the state to impose unaffordable high fees on those who seek to bring actions. But it is not similarly wrong for lawyers to charge high fees, even if the effect on access to justice is the same. Whether the pressure to participate in mediation (or, indeed, to settle) undermines voluntariness or access to justice depends on the legitimacy of the pressure and its purpose.

1.136 If the incentives practiced by the court are merely directed to encouraging participation in reasonable settlement negotiations, as distinguished from punishing failure to settle, there can be no possible conflict. As long as settlements are concluded voluntarily (i.e., by parties able to decide what is in their best interests), no injustice is involved and no infringement of the right to fair trial under Art.6, ECHR occurs.[188] What is important is to ensure that encouragement to settle does not impinge on a litigant's right to insist on court determination of the dispute.[189] Nor should a party suffer from his refusal to engage in settlement, when his opponent was requesting ADR in order to delay the process.[190] Lastly, it should also be borne in mind that no matter how much we may value compromise there will always be a need for a legal process where rights, entitlements, and claims can be tested and determined by a court.[191]

[186] *R v Lord Chancellor, Ex p. Witham* [1997] 2 All ER 779.
[187] This matter will be addressed more closely in Ch.27, Costs.
[188] *Deweer v Belgium* (1980) 2 E.H.R.R. 439, ECtHR.
[189] *Nokia Corp v Interdigital Technology Corp* [2005] EWCA Civ 614. See K.E. Scott, "Two Models of the Civil Process" (1975) 27 Stan. L.R. 937.
[190] *Re Midland Linen Services Ltd (also known as: Chaudhry v Yap)* [2004] EWHC 3380, Ch.
[191] O. Fiss, "Against Settlement" (1984) 93 Yale L.R. 1073.