MASTER OF THE ROLLS

Sir Anthony Clarke, Master of the Rolls

The *Supercase* – Problems and Solutions: Reflections on BCCI and Equitable Life

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Introduction

It gives me great pleasure to be here this evening to deliver the annual KPMG Law Lecture. It is, however, extremely daunting, partly because it is not about law at all and partly because all those solicitors present know much more about the practicalities of substantial commercial litigation than I do. I have well in mind Sir Winston Churchill's dictum that there are only two things more difficult than making a speech (or giving a lecture): (1) climbing a wall which is leaning towards you and (2) kissing a girl who is leaning away from you.

It is of great importance to the well-being of London as the leading financial and commercial centre in the world that it should also be the centre of efficient dispute resolution. The Commercial Court has for many years had a justified reputation for excellence in this regard. The same is true of the Chancery Division. That is in large measure thanks to the qualities of the City solicitors, the Bar and (we like to think) the judges themselves. It is now over thirty years since Lord Denning said this, in answer to allegations of undesirable forum shopping:

> "*No one who comes to these courts asking for justice should come in vain. ... This right to come here is not confined to Englishmen. It extends to any friendly foreigner. He can seek the aid of our courts if he desires to do so. You may call this 'forum shopping' if you please, but if the forum is England, it is a good place to shop in, both for the quality of the goods and the speed of service.*"[1]

[1] *The Atlantic Star* [1973] QB 364 at 381 – 382

Much has changed since then, including the advent of the Brussels Regulation. However, it is I think of critical importance to UK plc and to the reputation and standing of the courts that England should remain a good forum to shop in, both (as Lord Denning put it) for the quality of the goods and for the speed of service. Some say that the English courts' reputation in this regard had suffered a setback as a result of what have been called the *Supercases*.

Supercases

There has been considerable discussion in the legal world concerning the significance of these '*supercases*'. They gave rise to such concerns that Mr Justice David Steel, the judge in charge of the Commercial Court, convened a symposium on 30 October 2006 to discuss issues arising from such cases. The symposium was attended by a large number of commercial court users, lawyers, legal academics and members of the judiciary. It may well be that many of those here this evening were present at that symposium. As a result of it, a working party was set up under Mr Justice Aikens to consider the issues further. I want to touch on some of those issues tonight. The first thing that I want to look at – to save, if nothing else, much metaphorical scratching of heads - is what exactly is a '*supercase*'.

What is a *supercase*? The starting point to answering this question ought really to be the two long running commercial cases which gave rise to the term: *Three Rivers District Council v The Bank of England*, which is popularly known as the *BCCI case*, and *Equitable Life v Ernst & Young*, the *Equitable Life case*.

The *BCCI* case arose out of the spectacular collapse of the *Bank of Credit and Commerce International* in 1991. Its collapse, as is well-known, resulted in it owing massive sums to its creditors, including its depositors. On 24 May 1993 6019 depositors began proceedings arising out of the collapse against the Bank of England. Damages were initially sought for approximately half a billion pounds, plus interest. The basis of the action was the allegation that the depositors' losses arose out of the Bank of England's failure properly to supervise and regulate *BCCI* by first granting it a licence in 1979 and by then not later revoking it. The case was that the Bank ought to have closed it down every day from 1979 until 1991 when it took action which effectively closed it down. The claim was not, as might have been expected, based on negligence, but on an old and rarely used action, that for misfeasance in public office. That was because the courts had previously held that a banking supervisor did not owe a duty of care to depositors or creditors and because the relevant Banking Act provided that the Bank of England would not be liable other than in a case of bad faith.

I have some knowledge of the *BCCI* case because I was minding my own business one day in about 1995 sitting as a judge in the commercial court, when I was asked to order a preliminary issue in a case about misfeasance in public office. I am ashamed to say that until then I had never even heard of the tort of misfeasance in public office. I ordered the trial of a

preliminary issue and at that trial I had a stab at identifying the ingredients of the tort. I was then asked to strike the claim out as being doomed to failure. After prolonged argument I was persuaded to strike it out as doomed to failure and I was upheld 2:1 by the Court of Appeal (Hirst and Robert Walker LJJ, with Auld LJ dissenting).[2] Things were different in the House of Lords – in my experience they often are. The majority, consisting of Lord Steyn, Lord Hope and Lord Hutton, held that I should not have struck the case out and they struck it back in again. I had Lord Hobhouse and Lord Millett on my side. I thought they put the case particularly well but I was no doubt biased. In any event the majority held that the case should continue to trial.[2] Finally, on 02 November 2005, fourteen years after BCCI collapsed, over twelve years after litigation commenced, and after about 18 months of trial, the claimants abandoned their claim. I understand that by that time at least 63 days had been spent on interim hearings and 256 days had been spent at the trial; of which 205 days were taken up by the claimants' opening speech. The defendant's costs were estimated as at approximately £80 million. I can't say that I did not have a wry smile on my face when I learned what had happened.

The Equitable Life Assurance Society (Equitable Life) was a mutual life assurance company founded as long ago as 1762. Between 1957 and 1988 it issued a significant number of with-profits pension policies. These polices contained an entitlement to a bonus, and an entitlement to an annuity. The annuity carried with it a guaranteed annual return. Unfortunately there was a drop in returns on its investments. This resulted in the policies becoming '*ruinously expensive to maintain.*'[3] Equitable Life attempted to contain this problem by paying smaller bonuses to holders of the relevant pension policies after it exercised a power to apportion bonuses among different classes of policy holder. This action resulted in protracted litigation, which ultimately ended up before the House of Lords in 2002. Their Lordships held that Equitable Life's action was unlawful.[4] This decision was disastrous for Equitable Life because its effect was that the Society did not have enough assets to cover its potential liabilities. The decision resulted in it becoming exposed to an extra one and a half billion pounds worth of liabilities. The directors put the Society up for sale. They were unable to find any willing buyer. On 08 December 2000 it stopped writing new business. Subsequently some of its assets were sold off.

Proceedings were issued by Equitable Life against its former auditors, Ernst & Young and fifteen of its, former, directors. It alleged that its directors had negligently failed in their duties towards its policy holders. It further alleged that Ernst & Young had been negligent in two respects: first, that in the period 1997 to 1998 it had failed to make sufficient provision for the potential liabilities arising under the policies. Secondly, for failing to draw attention to the liabilities that were contingent on an adverse decision in the *Equitable Life v Hyman* litigation. Equitable Life

[2] *Three Rivers DC v Bank of England (No 3)* [2003] 2 AC 1

[3] *Equitable Life Assurance Society v Ernst & Young (A Firm)* [2003] PNLR 23 at (H2)
[4] *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408

claimed somewhere in the region of four billion pounds. In February 2003 an application for summary judgment on the claim, issued by Ernst & Young, came before Mr Justice Langley in the Commercial Court.[5] He struck out part of the claim but it was struck back in again by the Court of Appeal, which reached its decision not long after the House of Lords decision in *BCCI*.[6] I sometimes wonder whether the Court of Appeal would have taken the same view, if the House of Lords had dismissed the appeal in *BCCI*. We will never know. The claim ultimately collapsed during the trial. *Equitable Life* first abandoned its claim against Ernst & Young in July 2005. It then abandoned its claim against nine directors and then, finally in December 2005 against the remaining six directors. The proceedings had lasted, from letter of claim to collapse, some four years and had run up legal fees of approximately £40 million.

In many ways *Equitable Life* was a different case from that of *BCCI*. The *Equitable Life* litigation lasted a relatively shorter period of time than the *BCCI* case: four years rather than twelve. It took up far less court time: there were less interim hearings; a much shorter length of time during which formal litigation was conducted; the trial was shorter and it advanced much further than the *BCCI* trial.

There were however some significant similarities between the two cases. In the first instance, both cases gave rise to claims for significant amounts of money – as I mentioned earlier approximately four billion in *Equitable Life* and approximately half a billion in the *BCCI* case. Secondly, both cases gave rise to complex legal issues, as for example in the *BCCI* case the nature of the tort of misfeasance, as well issues of fact.

These two cases are archetypal. They gave rise to the term '*supercase*' and they gave rise to the concerns which prompted David Steel J's symposium. They are suggestive of a number of features, which could be used to formulate a general definition. A *supercase* could be understood to be one which: first, involves large amounts of money; secondly, gives rise to complex legal and/or factual issues; thirdly, gives rise to a large amount of active judicial case management over a long period of time; fourthly, gives rise to a large amount of, generally contested, interim hearings. A fifth possible criterion might be that the case is allocated to the Commercial Court, although there are no doubt *supercases* in the Chancery Division.

The difficulty with defining a *supercase* in this way is that the elements are equally applicable to large numbers of other actions. Cases allocated to the Commercial Court often have large amounts of money at stake. Perhaps this suggests that this criterion needs to be qualified, such that only claims running into the hundreds of millions fall under it. If this qualification were made I wonder just how many claims would satisfy the test. Equally, large amounts of money can be at stake in non-commercial cases, which would seem to put into question whether allocation to the commercial court could be a legitimate criterion. It is true also that many different

[5] *Equitable Life Assurance Society v Ernst & Young (A Firm)* [2003] PNLR 23
[6] *Equitable Life Assurance Society v Ernst & Young (A Firm)* [2004] PNLR 16

types of cases give rise to complex legal and factual issues. Even the lowest value claims, such as those allocated to the small claims track can, involve complex issues. And again, very many cases give rise to the need for a good degree of active judicial case management and, for that matter, hard fought interim applications. It might be thought in light of this that these criteria amount to necessary conditions for falling under the definition. They do not at first blush appear to be both necessary and sufficient conditions.

This leaves a problem. Are we to say that a *supercase* is one which is similar to *BCCI* or *Equitable Life*, which might well denude the definition of any real work? How many claims are genuinely similar to either of these two cases? There have only been two such cases after all. And how similar would similar need to be? Or, are we to adopt the '*I can't say what a supercase is, but I'll know one when I see one*' approach. Neither option seems to me to be particularly helpful or useful. The first problem therefore which arises from *supercase*s is how to define them properly. I return to this definitional problem later.

Assuming that we can arrive at a workable and useful definition what are we to do with *supercase*s? It appears to me that the answer to this question, paradoxically, helps to answer the definitional problem. In order to answer that question it seems to me that we need to look at the changes that have occurred in the recent past to the way in which the English civil justice operates.

As is of course well-known, by the 1990s the English civil justice system was understood to be in crisis. It was not alone in this. The crisis was worldwide and affected common law systems, such as our own, America's, Canada's and Australia's, and civilian systems, such as those in Germany, France and Italy, equally.[7] As the eminent civil proceduralist, Neil Andrews has been known to say, the crisis arose as a result of the eternal, and unholy, trinity of cost, delay and complexity. Civil litigation was too costly, both for litigants and the courts. It took too long to arrive at a judgment, or other form of resolution. And the process was too complex and cumbersome. These complaints are of course not new. I am sure that we all remember the great case of *Jarndyce v Jarndyce*, if not from our reading of *Bleak House*, then from the recent adaptation on television. Dickens' satire of the Chancery Court was based in his ever acute understanding of the problems of cost, delay and complexity that bedevilled English civil justice then. Those same ills bedevilled civil justice in the 1990s. They did so despite numerous attempts at reform during the course of the late 20th Century.

By the 1990s however it was well-accepted that the problems were so acute that fundamental change had to come. Lord Woolf, then Master of the Rolls, was commissioned to examine the problems and recommend solutions. He did so in his two *Access to Justice Reports*, which were

[7] Zuckerman, *Civil Justice in Crisis*, (OUP) (1999)

published in 1995 and 1996.[8] His recommendations were, of course, introduced in the form of the new *Civil Procedure Rules 1998* (the *CPR*)[9], which now govern procedure in the civil justice system. Lord Woolf's reforms and the *CPR* were intended to overcome the crisis in civil justice by ensuring that litigation was cost-effective and conducted expeditiously. The new procedural rules were also intended to make civil procedure as simple and straightforward as possible. The *CPR* were drafted accordingly.

The *CPR* introduced a wide range of reforms. I wish to focus on two of those reforms: the overriding objective and judicial case management. I wish to do so because these aspects of the reformed procedure seem to me to have an important bearing on how we should view *supercases*.

First, the overriding objective. This is found in rule 1 of the *CPR*. It is a purposive provision. Courts are required to give effect to it whenever they exercise any power given in the *CPR* or interpret any procedural rule. It requires courts to deal with cases justly and in doing so it requires, amongst other things, expense and expedition to be taken into account. Secondly, active case management. The traditional approach to civil litigation in England and Wales was that its conduct lay in the hands of the parties. As Sir Jack Jacob put it in *The Fabric of English Civil Justice*:

> "*. . . under the adversary system, the passive role of the court becomes the active role of the parties and their lawyers . . . the responsibility for the initiation, conduct, preparation and presentation of civil proceedings is shifted from the court to the parties, mainly of course the legal practitioners. . . Under the principle of what is called 'party control', but subject to compliance with the rules, practices and orders of the court, and so far as the lawyers are concerned subject to their duties and responsibilities as officers of the court and their obligations under the disciplinary code of their respective professional bodies, the parties retain the initiative at all stages of civil proceedings.*"[10]

This was all very well but it gave rise to serious difficulties. I always though that the day that the Court of Appeal decided *Allen v Sir Alfred McAlpine &Sons Ltd* [11] was a black day for justice. It said that defendants could let sleeping dogs lie. Defendants (or more accurately their insurers) did precisely that. They did nothing. Many plaintiffs' lawyers in personal injury claims were very sleepy dogs. They could lie asleep for many years. When they woke up the defendants immediately applied to strike the action out for want of prosecution. Many actions were struck out, which involved the court concluding that a fair trial between the plaintiff and the defendant was no longer possible. The plaintiff then consulted new

[8] Lord Woolf MR, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO) (1995); Lord Woolf MR, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO) (1996)
[9] SI 1998/3132
[10] Jacob, *The Fabric of English Civil Justice*, (Stevens & Sons) (1987) at 12 – 13
[11] [1968] 2 QB 229

solicitors and sued his old solicitors for failing to proceed with reasonable speed. At the trial of that action the question was what were the chances of success against his former solicitors, which involved an assessment of those chances in circumstances in which a fair trial of the original dispute had (ex hypothesi) been held to be no longer possible. All this was far from satisfactory. One of the great advantages of the CPR has been to ensure that this cannot occur.

The CPR require co-operation between the parties and the court ensures that there is always a date for a next hearing so that there is no scope for letting sleeping dogs lie. That is all to the good. The *CPR* thus fundamentally alter the old adversarial position. While it is true to say that the parties retain responsibility for such things as the initiation of proceedings, the court now has a much more active role in their conduct, preparation and presentation. A long list of specific case management powers are set out within *CPR* 3.1. In order to emphasis that the court is not limited to those express powers it is enabled by *CPR 3.1 (m)* to '*take any other step or make any further order for the purpose of managing the case and furthering the overriding objective.*' In order to enable it to do so, the court can now make orders of its own initiative (*CPR 3.3*). It need not therefore simply sit and wait passively for the parties to act. The court is now an active rather than a reactive creature.

Taken together, the overriding objective and active case management seek to ensure that each case is afforded no more than a proportionate amount of judicial and party resources, that the real issues in dispute are identified early and concentrated on by the court and the parties, and that the claim is dealt with expeditiously. Taken together they enable a simple and straightforward procedural system to be tailored effectively to the needs of the court, the parties and to litigants in general so that justice in the individual case can be achieved at a reasonable cost and within a reasonable timeframe.

That is the theory at least, and to my mind it is a theory that we should all, judges, litigants and legal practitioners, strive to ensure becomes reality. It involves co-operation between parties and their lawyers. I hope that it involves courteous and not aggressive behaviour. Fortunately, these days I very rarely see the *inter partes* correspondence but when (on the odd occasion) I do, I am sometimes surprised, not to say astonished by its aggressive tone. Arbitrators of my acquaintance say the same. It is presumably for the benefit of the client. Such correspondence is rarely read out in court because aggressive posturing sounds so absurd.

I recall a letter in one of the last cases I did at the Bar. It was from my Instructing Solicitors to the solicitors on the other side and was written a few days before the trial – no names no pack drill. It read: "30 April 1992. Tenth letter. Dear Sirs, We are astonished not to have received a reply to our eighth letter of today". I asked the person instructing me why this was necessary and he said that he had all these assistants, each of whom felt he should be doing something. I very much hope it is not like that now.

In general I believe that significant progress has been made to try (as I said a minute ago) to achieve justice in the individual case at a reasonable cost and within a reasonable timeframe. The *supercases* have however prompted some to call into question whether the *CPR* is succeeding in this aim. The *BCCI* and *Equitable Life* cases, in gaining the notoriety that they have, have been seen in some quarters as highlighting problems in the operation of the *CPR*. Some, like Professor Zuckerman, have argued, at least in respect of *BCCI*, that it highlights significant failings in the way in which case management in particular and the CPR in general are operating in practice.[12]

We should be careful though before generalising. As the famous Austrian philosopher Ludwig Wittgenstein ought to have taught us, it is always dangerous, to generalise from one, or in this case two, examples. Put another way – and one perhaps more familiar to lawyers – hard cases make bad law. These two cases might well be so exceptional that to generalise from them may well be both unjustifiable and, at the very least, counter-productive. On the other hand however, we should equally remember that it is just as dangerous not to pay close attention to the implementation of reforms. If past experience teaches us anything it is that the successful implementation of reform is never easily achieved. I am sure that you will recall the words of Thomas Denman, later Lord Denman, in his evidence to the Common Law Commissioners in 1829. The Commissioners were the early 19th Century equivalent of Lord Woolf. They engaged in proposing reforms of the then civil justice system to ensure that it was reformed so as to become simpler, quicker and less costly. Thomas Denman rather pessimistically noted that:

> "*The fate of former attempts at a systematic reformation of the English Law, must be owned to be discouraging. They have been numerous, and all failures.*"[13]

Lord Denman's pessimistic appraisal of the prospects of successful reform in 1829 cannot be allowed to become, Cassandra-like, a foretelling of the future for us in 2007. In my opinion the two *supercases*, *BCCI* and *Equitable Life*, do not point to a general, systematic failure on the part of the judiciary and the legal profession to implement the *CPR*. They do not point to a general failure of the *Woolf reforms*. Indeed, but for the mischance that the House of Lords was constituted as it was, *BCCI* might (and I like to think would) have been struck out (and so perhaps would *Equitable Life*), and the cases would have been regarded as a triumph for case management in general and Lord Woolf's aims of speedy, efficient and cost-effective justice in particular. As it is, the cases do highlight areas which need scrutiny, improvement and renewed vigour on the part of all of us in order to ensure that the reformed civil justice system operates as Lord Woolf envisaged it would, which in my opinion is an aim devoutly to be wished.

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[12] Zuckerman, '*A Colossal Wreck – The BCCI – Three Rivers Litigation*', (2006) 25 CJQ 287

[13] 1st Report of the Royal Commission on Practice and Proceedings of the Courts of Common Law and Chancery (1829) at 639

In these circumstances, I would like to commend the initiative of Mr Justice David Steel, as judge in charge of the Commercial Court, to convene the symposium which took place on 30 October 2006 to discuss these two cases. Equally it seems to me that we cannot but benefit from the work being carried out by Mr Justice Aikens' working party to see how case management can be improved in the future. I tried to get hold of him to see if he had any tips I could pass on to you this evening but he seems to be keeping a low profile. If anyone here has any suggestions for improvements in the future, I would urge them to send them to Richard Aikens. The *supercases* have provided a spur to reflection and analysis, to a stock-taking of where we stand today, of what we are doing well and where we need to do better.

This is important not just for the Commercial Court, which has a justified world wide reputation for dispute resolution (as indeed has the Chancery Division). It is important for the civil justice system as a whole because the issues raised by the supercases in respect of the proper application of the overriding objective and effective and appropriate case management apply to the system as a whole.

I hope that symposia, like the one organised by David Steel J, will take place more often in the future so that judges may be kept abreast with the problems faced by the profession and so that there can be informed discussion between them, the profession and other interested parties. I like to think that we are open to all constructive suggestions, so that the system can operate for the benefit of those whom its serves – the litigants. One of my roles is as chairman of the Civil Justice Council, which has a widely representative membership and which tries to facilitate discussions between what (I am sorry to say) it calls stakeholders, whatever they are. They almost certainly include you who are here today. Given its role as both a consultative body and a representative body whose purpose is to monitor the CPR in practice future symposia may well find themselves organised by the Civil Justice Council either solely or jointly with individual judges who have responsibility for specialist courts.

One of the questions which was raised at the symposium was whether a bespoke code was needed for heavy, complex, commercial cases. The question could, of course, be broadened out. It could be asked whether it might be desirable to have a bespoke code for discrete practice areas. My answer to both those questions is a resounding no. On the one hand we should remember that the *CPR* were expressly designed to provide a simple, straightforward code applicable to all cases and flexible enough to be tailored to all cases. It was designed, in part, in this way in order to overcome the complexity that was inherent in the previous system. We should always be careful to remember that the greater complexity any system has, the more opportunities there are for mistakes. Mistakes in the litigation process lead inexorably to satellite litigation, increased cost, increased delay and ever greater complexity - the most vicious of circles. In particular satellite litigation should in my opinion be avoided if at all possible.

More positively, it appears to me that the present system, with its court guides such as the Commercial Court Guide, with its pre-action protocols and with the *CPR* themselves, are enough. I do not for a minute suggest that there is no room for improvement. However, the *CPR* provide a wide range of case management powers, which can be moulded to the individual case. They can be exercised flexibly and they can be exercised robustly.

Most importantly, of course, as the overriding objective expressly states, they must be exercised justly. This principle must never be forgotten. In all the flurry and criticism which has arisen out of *BCCI* and *Equitable Life*, it is easy to think that case management necessary involves striking cases out. This is very far from the truth as Lord Woolf made clear in one of the earliest authorities, *Biguzzi v Rank Leisure plc*.[14] The purpose of a civil justice system is to ensure, as far as possible, that cases are resolved, hopefully by agreement, but if necessary by trial, on the underlying merits of the dispute. To be fair to the majority of the House of Lords in *BCCI*, which I naturally want to be, that is the reason they struck *BCCI* back in again.

In so far as there is a problem, as history shows us, it lies not simply with the provision of the right tools. It lies with the proper use of those tools. For case management to succeed in future, in all cases and not just latter day successors to *BCCI* and *Equitable Life*, those rules will have to be used with a greater eye towards the principles enunciated in the overriding objective. What might this mean in practical terms?

It might mean a much more robust approach by the courts to case management. This might include a more robust approach to summary judgment applications although, as Lord Hobhouse said in *BCCI*, [2001] UKHL 16 at [158], "*the criterion which the judge has to apply under CPR Part 24 is not one of probability; it is absence of reality*".

I favour a robust approach being taken by first instance judges, provided of course that an action is only struck out in an appropriate case. Cases which spring to mind are of course again *BCCI* and *Equitable* Life, but I would say that wouldn't I? It is, as it seems to me, just as important, if not more important, for appeal judges to take a robust view and, if at all possible to support case management decisions taken by judges. Case management decisions, in which I of course include strike out and summary judgment decisions, should be primarily the responsibility of the judge at first instance. Such decisions should generally be upheld, unless they are plainly wrong. Appeal judges should hesitate, perhaps more than at present, before interfering with a case management decision.

It seems to me that in future when making case management decisions both the judiciary and the legal profession should keep in mind the essence of paragraph 42 of Lord Hoffman's speech in *Sutradhar v Natural*

[14] [1999] 1 WLR 1926

Environment Research Council [2006] UKHL 33; [2006] 4 ALL ER 490. Lord Hoffman said this:

> "*(42) The overriding objectives of the Civil Procedure Rules include achieving justice for both claimants and defendants and saving time and expense. These objectives sometimes conflict and compromises are required. It is not the case that the administration of justice, alone among the services provided by the state, is exempt from any considerations of cost. It is obvious that a trial of this action, . . . , would be an enormous and expensive undertaking. Your Lordships were told that the costs incurred in these proceedings by the claimant and other residents of Bangladesh who wish to bring similar actions, at the expense of United Kingdom public funds, already exceed £380,000. That takes no account of the costs incurred, also at the public expense, by NERC. That is a factor which, however unpalatable it may be to those who think that justice is priceless, must be taken into account. And justice to the defendant requires one to have regard to the burden which a long and complicated trial would impose upon NERC. Speaking for myself, I think that even if the resources of the state and NERC were infinite, it would still be wrong for this case to proceed to trial. But when one considers the scale and cost of a trial, the case for stopping the proceedings now appears to me to be overwhelming*."

Lord Hoffmann's essential point is that time and expense may militate against taking certain steps in litigation, including steps that the parties might traditionally have taken. They might even militate against the claim being allowed to continue. Justice may require a claim to be brought to a premature end, even though a fair trial could, all other things being equal, be held. The compromises required by the overriding objective are not something which can be avoided. And equally, on some occasions they will have to in the future require case management decisions to be made, which resolve the conflict between them in favour of time and expense rather than a lengthy, expensive trial. A civil justice system which is fair for all cannot but do otherwise.

I have to confess that that was another case in which the House of Lords did not share my view. I had dissented in the Court of Appeal on the basis that it would be wrong to interfere with a case management decision of the judge of first instance. It is, however, fair to say that the case seems to have been put more broadly in the House of Lords. However that may be, Lord Hoffmann's speech demonstrates the many factors which may be relevant in a decision whether or not to allow a case to proceed. The underlying principle however remains – namely to deal with each case justly, which of course means justly to both sides.

To my mind the rules and principles of case management can be adapted to each stage of a dispute. Quite apart from cases of strike out or summary judgment, I would highlight these key features of case management:

- The identification of the real issues between the parties. Once this had been done, discovery of documents can be restricted to documents relevant to those issues, the factual evidence can equally be limited, as can the expert evidence. Equally, it may often be possible for one or more key issues to be decided first, with a view to settlement, mediation or, if absolutely necessary, trial, of the remaining issues.

- Experts should meet to identify the areas of common ground and areas of dispute between them. I know there have been some problems with expert meetings but they seem to me to be of the greatest importance.

- The trial process should be as focused as possible. Opening speeches scarcely exist in the Commercial Court. A short written opening with references to the issues and the documents is surely enough. There seems to me to be scope for limiting the oral evidence, including cross-examination. For example, not many cross-examiners do better if they have three days rather than, say, one. Co-operation between the advocates to the parties is crucial. In the *Marchioness* inquiry counsel for the parties agreed how long they would examine or cross-examine each witness for and that worked very well.

In making these suggestions, I do not wish to suggest that we should not continue our oral tradition. I met a judge of one of the Federal Courts of Appeals in the United States and he told me that he went into court about once every six weeks. I asked him what he did the rest of the time and he said that he read the briefs. That did not seem to me to be a very enticing way of life. As a judge, who shall remain nameless, put it to me, the only thing that is fun about being a judge is mobbing up counsel. I could not possibly say whether that it my own view. I find that the trouble is that they tend to answer back.

The *Woolf reforms* have in my opinion been a considerable success in very many ways. They have provided the tools for sensible case management and they have considerably reduced delays and have, I think, reduced civil litigation itself. As I said earlier, they have swept away applications to strike out for want of prosecution, which is all to the good. I do not, however, pretend that they have been an unalloyed success. The principal area where they have not perhaps had the success which was hoped relates to costs and the overall expense of litigation, but that (together with the problems of funding of civil litigation) is a subject for another day, although, if anyone had the (or even a) solution to any of those problems, please send them to me.

This leaves me with the question I deferred earlier: providing a proper definition of the *supercase*. In my view we don't need to answer this thorny question. The two *supercases* were a clarion call to us all to assess the workings of the *Woolf reforms*. They were not, in my view, two instances of a wider category of case which requires specific treatment in the sense of an individual tailored code of practice. The *supercases* are a timely reminder that the *CPR* need to be applied to each individual case

appropriately, fairly and robustly. If we keep this in mind we will hopefully ensure that the civil justice system can effectively deliver justice for all.

Finally, we could of course apply common sense. I should warn you that it is not a panacea for all the ills of the system. I once had a case in the Court of Appeal. We had won at the trial. In the court of Appeal I listened to my opponent for what seemed like weeks. When it came to my turn I said: My lords, justice and common sense suggest that the judge was right. Lord Justice Oliver said: Mr Clarke, common sense suggested that the world was flat. I was flummoxed. I had no answer. I was only afterwards that I realised that he was quite wrong, because of the horizon. One always thought of one's best points in Middle Temple Lane after the case was over.

Ends