

# **Time to call it a day: some reflections on finality and the law**

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The original title of this lecture was simply “Time to call it a day”. But on reflection, it seemed to me that such a Delphic title might mislead people into thinking that I was going to use this occasion as a platform to make an hour-long announcement of my retirement from the Supreme Court (which would be of no interest whatsoever to anybody and would be a hoax in any event); or, perhaps more interestingly, to say why, in the light of recent statements by the First Minister of Scotland, I thought that the Supreme Court should cease to have jurisdiction to hear any Scottish appeals. But, rather pusillanimously, I thought it more prudent not to plunge into such treacherous political waters, particularly at this rather febrile time. I therefore thought that I should amplify the title to give something of a clue (but not too much) of the theme of this lecture. My remarks are directed at the position in England and Wales. Anyone who is hoping for some tit bits from me on Scottish law will be disappointed.

I should say at the outset that I propose to speak mainly about civil litigation. But I shall say a few words about crime before I move on. With one exception, there is no statutory limitation period for criminal proceedings. The exception is that a magistrates’ court may not try an accused for a summary offence unless the information was laid within six months of when the offence was allegedly committed. Subject to that minor exception, so far as I am aware, Parliament has never said that there should come a time when it is too late to prosecute. No statute has imposed a time limit after which a criminal can rest easy in the knowledge that he cannot be prosecuted for a crime that he is alleged to have committed. In this respect, Parliament has drawn a sharp distinction between crimes and civil wrongs. It has consistently taken the view that it is never time to call it day so far as the prosecution of serious crimes is concerned. This is presumably because, in balancing the interests of alleged criminals on the one hand and those of their victims, as well as the interest that society as a whole has in the prosecution of serious crimes, the scales come down resoundingly in favour of the latter. It would be unfair to the victims of crime and an affront to society to allow a defendant to escape from the criminal process merely because of the lapse of time. But

where Parliament has declined to intervene, the courts have stepped in. Under the common law, the court has the inherent power to stay the proceedings as an abuse of process if, by reason of the passage of time, a defendant would not be able to have a fair trial. A person's right to a fair trial is paramount. As a matter of policy, the State will not countenance the possibility of subjecting anyone to criminal proceedings, even an alleged serial murderer, unless he can be given a fair trial.

This is but one of many examples of the law saying that it is time to call it a day because that is what fairness and justice require. Unsurprisingly, fairness and justice are touchstones of our law. They are concepts which are clear enough in general terms, but they are often difficult to apply in particular situations. The power to stay criminal proceedings as an abuse of process by reason of the passage of time is a good example. There is no doubt as to what the relevant principles are. But opinions may reasonably differ in relation to any set of facts on the question whether a defendant will be able to have a fair trial by reason of the passage of time. I suspect that courts are less likely in practice to find that a fair trial will be impossible where the defendant is facing a serious charge than where he is facing a minor one, although it is difficult to see any logical or principled basis for drawing a distinction between the two cases. Understandably, courts are more reluctant to prevent the trial of a murderer than a thief.

So the question whether it is time to call it a day is engaged when the court is called on to decide whether it is too late to prosecute. But it is also engaged when the question of a retrial arises. If a person has been acquitted after a trial, the common law doctrine of *autrefois acquit* may be invoked to prevent a second attempt by the Crown to secure a conviction for the offence of which he has been acquitted, even if fresh and possibly overwhelming fresh evidence is discovered following the acquittal. The common law doctrine of *autrefois convict* protects a person from being tried for a crime in respect of which he has previously been convicted or in respect of which he could on some previous indictment have been convicted. These doctrines are founded on the idea that basic fairness demands that even those alleged to be guilty of crimes need to be protected from oppression at the hands of the State. There are two statutory exceptions to the doctrine of *autrefois acquit*. The first is where the acquittal is "tainted" within the meaning of section 54 of the Criminal Procedure and Investigation Act 1996. The second (introduced by sections 75 to 97 of the Criminal Justice Act 2003) permits a prosecutor to apply to the Court of Appeal for an order to quash a person's acquittal for a qualifying offence. Qualifying offences are serious offences (which

in the main carry a maximum sentence of life imprisonment). The Court of Appeal must order a retrial if there is new and compelling evidence in the case (section 78) and it would be in the interests of justice for an order to be made (section 79).

Where a defendant is convicted and his conviction is quashed on appeal, he may now face a retrial, but only if it appears to the Court of Appeal that the interests of justice so require: see section 7 of the Criminal Appeal Act 1968. Before the enactment of that provision, there could be no retrial.

In outline, this is how the balance between defendant and the State is currently struck in criminal proceedings. However serious the alleged crime, a defendant's right to a fair trial is sacrosanct and if he has been acquitted once, he cannot be prosecuted again for the same offence unless the narrowly circumscribed statutory criteria apply.

What is the position in civil proceedings? I shall suggest that fairness and justice lie at the heart of the law on finality in civil as in criminal proceedings. But two important differences should be noted at the outset. First and obviously, the stakes are different. Society's interest in the prosecution of crime is different from its interest in seeing that civil wrongs are remedied. Secondly, Parliament has not been content to leave it to the courts to develop the law in this area. As we shall see, it has intervened with increasing frequency to prescribe detailed rules. Some of the rules are certain and easy to apply; others call for an exercise of judgment the outcome of which may be difficult to predict. Tempted though I am to do so, I do not intend to explore why Parliament has intervened with careful attention to detail in the arena of civil litigation, but ceded so much territory to the courts in relation to the prosecution of crime.

I doubt whether it is controversial that, although the fundamental aim of any system of justice in a modern democracy is that parties should have their disputes determined fairly and so far as possible correctly, there must be finality at some point. Of course, it hardly needs any longer to be stated that access to justice is a fundamental right both at common law and under the European Convention on Human Rights. But the question arises: when is enough enough? How much time should be allowed to a claimant from the date when his cause of action arises before it becomes too late for him to start proceedings? How many bites of the litigation cherry should he be allowed to have? How many times should a defendant be required to face the same claim in proceedings? How many times should an unsuccessful litigant be permitted to appeal? How long should he be allowed to take the various

procedural steps that are prescribed by statutory rules and what sanctions should he face if he fails to observe the time limits imposed by the rules or by court orders?

Any answer to these questions should attempt to strike a fair balance between the interests of claimant and defendant. It is now realised that the State also has an interest in ensuring that litigation is conducted in a responsible and proportionate manner. It is in the public interest that courts are used efficiently, so that litigants do not have to wait any longer than is necessary to have their cases heard. If the courts are clogged up with stale claims which are conducted at a snail's pace, the interests of other litigants will be prejudiced.

A number of different techniques have been developed in England and Wales to strike a fair balance between the twin objectives of (i) allowing parties to have their disputes determined fairly and, so far as possible, correctly and (ii) keeping dispute resolution within reasonable bounds. Some of these are statutory; others are by judge-made law. The most obvious area in which Parliament has intervened is in prescribing limitation periods in which proceedings may be brought. The first "limitation periods" were introduced in the 13<sup>th</sup> century, but these were restricted to land-related actions: Pollock and Maitland, *The History of English Law before the time of Edward I* (2<sup>nd</sup> ed 1968), vol 2 p 85. The Limitation Act 1623 introduced for the first time limitation periods in relation to non land-related actions: 2 years for actions on the case for words; 4 years for actions of assault and false imprisonment; and 6 years for most other actions. Thereafter, apart from some modification to the limitation periods for land-related claims (the Real Property Limitation Act 1833 and the Real Property Limitation Act 1874), Parliament did not turn its attention to the issue of limitation until it enacted the Limitation Act 1939 which provided for a limitation period of 6 years for all causes of action except actions on a specialty. Since then, there have been further Parliamentary interventions further refining the law, including reducing the period to 3 years for personal injury claims (Limitation Act 1963); making special provisions for the date of knowledge (Law Reform (Miscellaneous Provisions) Act 1971 and Limitation Act 1975)); introducing a judicial discretion to disapply the limitation period in personal injury cases where it is equitable to do so ( ); and so on.

The underlying rationale for these rules is the need to strike a fair balance between the interests of claimants and defendants. Claimants are expected to start proceedings within a reasonable time of the accrual of their causes of action. But where it is not reasonable to expect them to be able to do this, whether because they suffer from a disability or they are not

aware that they have a cause of action (whether because the defendant has been guilty of concealment or for some other reason) and they could not reasonably be expected to be so, then the start of the limitation period is postponed. What is remarkable is the extent to which Parliament has regulated this part of the law.

Another area where Parliament has stepped in to secure finality in the interests of fairness and justice is civil procedure. Thus, in England and Wales the Civil Procedure Rules provide that a party who wishes to appeal must in most cases seek permission to appeal and show that an appeal would have real prospects of success or that permission to appeal should be granted for some other reason. Judges in other jurisdictions are surprised that the right of appeal (which they consider to be a fundamental requirement of access to justice) can be restricted in this way. Others view our rather draconian approach with envy. For second appeals, the criteria for permission to appeal prescribed by the Rules are tougher still. It must be shown that the point at issue is one of general importance or that there is some other compelling reason to appeal. Few cases raise a point of general importance. The test of “some other compelling reason” gives the courts a little more flexibility, but it has been said on a number of occasions that this too is a fairly steep mountain for a would-be appellant to climb. It has been suggested that it might be satisfied where it is strongly arguable that the individual has suffered from a wholly exceptional collapse of fair procedure or that there has been an error of law which has caused truly drastic consequences: *R (Cart) v Upper Tribunal* [2011] 3 WLR 107 at para 131. Importantly, in a second appeal the mere fact that it is arguable that the decision of the court below is wrong is not enough. The same thinking informs the rules which govern the grant of permission to appeal to the Supreme Court. Para 3.3.3 of the Supreme Court Practice Directions states: “permission to appeal is granted for applications that, in the opinion of the Appeal Panel, raise an arguable point of law of general public importance which ought to be considered by the Supreme Court at that time, bearing in mind that the matter will already have been the subject of judicial decision and may have been reviewed on appeal”.

These restrictions on the right of appeal are the statutory response to the fact that some unsuccessful litigants, if free to do so, would appeal against a decision which they think is wrong and go on appealing, as they would say, “for as long as it takes”. It seems that litigation can seriously disturb the balance of the mind. Most judges can testify to the truth of this lamentable fact. Many of us have had the experience of dealing with those who have been declared “vexatious litigants”. But any legal system also has to deal with those who

have arguable cases and who, perhaps not unreasonably, believe that they should have won and wish to go on and on until they win. Some cases are intrinsically difficult and could reasonably be decided either way. The propensity of the Supreme Court to reach split decisions (a source of despair in some quarters) provides eloquent testimony of this fact of litigation life. Justice Robert Jackson of the Supreme Court of the USA once famously wrote: “We are not final because we are infallible, but we are infallible because we are final”: *Brown v Allen* 344 US 443, 540 (1953).

So any system of justice that is fair to all parties requires that a time should come when it is time to call it a day. Thus the time should come when the losing party must accept an adverse decision for better or worse. The successful party is entitled to nothing less. The more generous the scope for challenging decisions by appeal or review, the greater the chance of eliminating error. But successive proceedings involve delay and additional expense. And the pall of uncertainty continues to hang over the parties until their disputes have finally run their course and an unchallengeable decision emerges. Certainty, even if less than perfect, has great value. At least the parties can get on with their lives knowing exactly where they stand.

The common law continues to pay a part in promoting finality in civil litigation too. The doctrines of acquiescence and laches protect a defendant against the claimant who seeks to make a claim for equitable relief after an unconscionable delay. Further protection to defendants from the attention of unsuccessful claimants who do not call it a day is provided by the doctrines of issue estoppel and res judicata. These are analogous to the doctrines of *autrefois acquit* and *autrefois convict* in the criminal law. Parties are not allowed to reopen issues that have already been decided between them. The case of *R (Coke Wallis) v Institute of Chartered Accountants in England and Wales* [2011] 2 WLR 103, is an interesting recent example of the application of the principle of res judicata. The institute preferred a complaint against a chartered accountant alleging a breach of a particular bye-law. The complaint was dismissed. A second complaint was preferred. The substance of the underlying conduct was the same in the case of both complaints, although as a matter of form they were differently expressed. The Supreme Court held that, since the proceedings were not criminal, the doctrines of *autrefois acquit* and *autrefois convict* did not apply. But the principle of res judicata applied because the two complaints were concerned with the same substantive allegations. There was force in the suggestion that, in the context of professional disciplinary proceedings (unlike conventional civil litigation), an exception should be recognised to the

strict application of cause of action estoppels. But the Supreme Court held that whether, and in what circumstances, such an exception should be permitted was a matter for Parliament and not the courts.

The court's inherent power to prevent an abuse of process has been invoked to prevent a person from bringing a subsequent claim because he could and should have raised it during previous litigation. This rule is one of public policy based on the desirability in the public interest as well as that of the parties themselves, that litigation should not drag on for ever, and that a defendant should not be oppressed by successive suits when one would do. As Lord Bingham explained in *Johnson v Gore Wood & Co* [2002] 2 AC 1, there will rarely be a finding of abuse unless the later proceeding involves what the court regards as "unjust harassment" of a party. It is wrong to hold that, because a matter could have been raised in earlier proceedings, it should have been, so as to render the raising of it in later proceedings necessarily abusive. What is required is a broad merits-based judgment, which takes account of the public and private interests involved and focuses attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise the issue which could have been raised before. In other words, a balance has to be struck and a judgment made as to what is required in the interests of fairness and justice.

A recent important example of judicial striking of the balance between the interests of claimants and defendants is in relation to the scope of judicial review of a refusal by an upper tribunal of permission to appeal to itself from a decision of a lower tribunal on a point of law. Judicial review is a judge-made doctrine and it is for the courts to determine its scope. A number of possibilities were canvassed in the recent appeals in *Cart* and *Eba v Advocate General for Scotland* [2011] 3 WLR 149 in the Supreme Court. The first possibility was that there should be untrammelled access to judicial review on all the conventional public law grounds where no other remedy is available. This had been the Scottish approach. The second, which found favour with the Court of Appeal in *Cart*, was that judicial review should only lie on grounds of excess of jurisdiction in the sense understood prior to the decision in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 or some serious procedural flaw. The third was that Civil Procedure Rules criteria for second appeals should be adopted by analogy.

The choice could only be taken on policy grounds. The court was given no clue or steer by statute. It was surely uncontroversial that it had to arrive at a reasonable, proportionate and just solution. But there was considerable scope for disagreement as to what that solution should be. This is amply demonstrated by the fact that the Supreme Court adopted a different solution from that adopted by the lower courts. The Supreme Court rejected the Scottish approach essentially on floodgates grounds. A substantial number of the cases would be immigration and asylum cases. Previous experience had shown that, if judicial review on all the conventional public law grounds was the criterion, the courts would be likely to face large numbers of applications for judicial review on the basis of alleged errors of law which in truth were complaints about findings of fact. The cost and delay of such (often) hopeless applications were a powerful reason for not adopting that approach. The courts would be clogged up. This would cause delay to public authorities in implementing, for example, decisions to remove failed asylum-seekers. It would also prejudice deserving litigants whose would have to wait longer for their day in court.

The court also rejected the approach of the Court of Appeal for two reasons. First, it was not a good idea to revert to the unsatisfactory Byzantine world of pre-*Anisminic* jurisprudence in order to determine what did and what did not constitute an excess of jurisdiction. Secondly, the Court of Appeal solution to the problem meant that an arguable error of law which did not satisfy the pre-*Anisminic* jurisdictional test could not qualify for judicial review, even if the point at issue was one of considerable importance. To resurrect the test of jurisdictional error in the narrow pre-*Anisminic* sense would be as retrograde step for all the reasons stated by Lord Reid in *Anisminic* itself.

So the Supreme Court decided on the third way and adopted the second appeals criteria approach. It considered that this best struck the balance between the interests of justice and the need for finality.

The general principle that is applied in civil litigation is, therefore, clear enough. A fair balance has to be struck between the interests of claimants and defendants in the interests of justice, but also bearing in mind that the State has an interest in ensuring that its increasingly limited resources are not dissipated in the determining of repeat appeals or hearing of claims which should have been litigated on an earlier occasion. I now wish to look in a little detail at the question of finality in two particular commercial contexts, where special policy reasons have led to a different approach to the balance between the need for a correct decision and the



need for finality from that which has been adopted in conventional civil litigation. The first is arbitrations; the second is adjudications under the Housing Grants, Construction and Regeneration Act 1986.

A series of Arbitration Acts (of which the Arbitration Act 1996 is the latest) contain provisions which strike a balance between the interest that the parties have in arbitrators producing correct decisions fairly and justly and their interest in achieving finality and having the arbitral process protected from undue challenges by the losing party. There is also a public interest in having an arbitral system in which parties have confidence. This is achieved by a proportionate degree of regulation and control by the courts, even though individual arbitrations are private and confidential affairs and arbitrators derive their jurisdiction from the consent of the parties. The idea that erroneous decisions and procedural impropriety should be beyond challenge in all circumstances, however egregious the error or impropriety, and however disastrous the consequences for the victim, would strike many as unjust and unacceptable. There is the further point that knowledge by an arbitrator that his or her decision may be challenged in certain circumstances tends to concentrate the mind and to lead to careful and conscientious decision-making. The ability to challenge decisions in tightly circumscribed circumstances should therefore enhance the arbitral process and increase the confidence of businessmen in it. That is obviously in the public interest.

The public interest in limiting the ability to challenge an arbitrator's award by appeal is well demonstrated by a little legislative history. The background to the significant changes that were introduced by the Arbitration Act 1979 is well known. I shall, therefore, deal with it briefly. One of the complaints about the position that existed under the Arbitration Act 1950 was that a nit-picking approach by clever and zealous advocates to awards generated large numbers of appeals. Although there could be no appeal on questions of fact, courts would order arbitrators to state a case on any question of law that was real, substantial and fairly arguable. No distinction was drawn between "one off" points of law that were of no interest other than to the parties to the arbitration and those that were of general public importance. One of the concerns that inspired the reform of the appeal provisions was a concern that parties (especially foreign parties) were ceasing to arbitrate in London. They did not like the idea of the courts being so ready to hear appeals with all the delay, cost and uncertainty that this entailed. There was a danger that, despite the excellence of the commercial lawyers and arbitrators in London, it would cease to be a pre-eminent centre for international arbitration. There was a real public interest in intervening to stop this trend.

The Arbitration Act 1979 provided that an appeal would lie to the High Court on any question of law arising out of an award (a) with the consent of all the other parties to the reference and (b) with the leave of the court. The statute said that leave was not to be given unless the court considered that, having regard to all the circumstances, the determination of the question of law could substantially affect the rights of one or more of the parties to the arbitration agreement. At first sight, there seemed to be nothing in the Act to indicate that the court would be required to apply different criteria from those previously applied when exercising its jurisdiction in relation to the granting of leave to appeal. All that seemed to be required for an appeal was a question of law. But this myopic view of the Act overlooked two things. First, the requirement that, unless both parties consented, the leave of the court was obtained. Secondly, Lord Diplock who was perhaps the most powerful and influential judge of his day. He had very strong views about the 1979 Act and he was determined to see that they prevailed.

In *The Nema* [1982] AC 724, he gave a breathtakingly purposive interpretation of section 1(3) of the 1979 Act. He drew a distinction between (a) a question of law involving the construction of a “one off” clause and its application to the particular facts of the case and (b) a question as to the construction of contracts in standard terms. The test to be applied in the former case was whether it was apparent to the judge on a mere perusal of the reasoned award and without the benefit of adversarial argument, that the meaning ascribed to the clause by the arbitrator was “obviously wrong”. In the latter case, it was sufficient for the aggrieved party to show that there was a strong prima facie case that the construction favoured by the arbitrator was wrong. He said that, in weighing the rival merits of finality and “legal meticulous accuracy”, there were several indications in the Act that Parliament intended to give effect “to the turn of the tide in favour of finality in arbitral awards”. He perceived in other provisions of the Act an intention to accord the primacy of the principle of finality less weight where the award dealt with standard forms of contract, than where the subject-matter was a “one off” clause. On any view, this was a piece of creative purposive statutory interpretation plugging gaps which Lord Diplock clearly felt had to be plugged in the public interest.

He clearly thought that the legal profession had not understood his message, because he returned to the fray in *The Antaios* [1985] 1 AC 191 where he repeated and reinforced the so-called *Nema* guidelines in rousing terms. His rallying cry was that, unless judges were vigilant in the exercise of their powers under sections 1 and 2 of the 1979 Act, they would

frustrate the intention of Parliament “to promote speedy finality in arbitral awards rather than insistence upon meticulous semantic and syntactical analysis of the words in which business men happen to have chosen to express their bargain made between them, the meaning of which is technically, though hardly commonsensically, classified in English jurisprudence as a pure question of law”. No room for misunderstanding here.

An inevitable (indeed intended) consequence of this approach was that far fewer appeals from arbitrators’ decisions would come to the courts. When I started at the Bar, the law reports contained a significant number of reports of commercial cases from the Court of Appeal and House of Lords. Many of these were appeals by way of case stated arising from arbitration awards. A perusal of the law reports over the past 30 years shows that this flow of jurisprudence has largely dried up, no doubt to the relief of the commercial community. Lord Diplock would certainly have been pleased.

But debate continued about the extent of the courts’ role. The abolitionists wished to exclude the involvement of the courts altogether and to respect the arbitrator’s decision as inviolable. The interventionists considered that there should continue to be a limited right of appeal to correct an arbitrator’s error of law. The interventionists considered that failure to apply the law properly would not achieve the result contemplated by the arbitration agreement and that party autonomy does not require the sacrifice of the rule of law on the altar of finality. Lord Saville chaired a Departmental Advisory Committee to investigate the working of the 1979 Act. Its report, which recommended a compromise between the two extremes, was the progenitor of the Arbitration Act 1996. This Act reflects Parliament’s latest thoughts on the question of finality and the arbitral process. So far as I am aware, it is working well and there is no pressure for further change.

Section 69 of the 1996 Act introduced a modified right of appeal on a point of law arising out of an award. An appeal may not be brought except with the agreement of all the other parties to the proceedings or with the leave of the court. Section 69(3) provides that leave to appeal shall only be given if the court is satisfied (a) that the determination of the question will substantially affect the rights of one or more of the parties, (b) that the question is one which the tribunal was asked to determine, (c) that, on the basis of the findings of fact in the award the decision of the tribunal on the question is obviously wrong, or the question is one of general public importance and the decision of the tribunal is at least open to serious doubt,

and (d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.

It will be seen that the *Nema* guidelines have been articulated in section 69(3)(c), although with some modifications. In one respect, the test has been relaxed by the introduction of the requirement that the arbitrator's decision is at least open to doubt (rather than that it is obviously wrong). But in other respects, the requirements have been tightened. It is now necessary to show that the determination of the question *will* substantially affect the rights of one or more of the parties. By section 1 of the 1979 Act, it was sufficient that the determination *could* have that effect. Under the 1996 Act, therefore, a peripheral point of law can no longer be the subject of leave to appeal, even if the arbitrator's decision on it is obviously wrong and even if it is on an issue of general public importance. In effect, leave will be refused unless the point goes to the heart of the dispute.

Finally, there is the interesting requirement in section 69(3)(d) that the court must be satisfied that, despite the agreement to arbitrate, it is just and proper in all the circumstances for the court to determine the question. I am not aware of evidence that applications for leave to appeal are refused on the grounds that they fail to satisfy this additional requirement. It appears to give the court the discretion to refuse leave to appeal, even where the other conditions are satisfied, on the grounds that it is just and proper that the aggrieved party should have to live with the award, simply because he agreed to have the dispute resolved by arbitration. In considering what justice requires, the fact that the parties have chosen to arbitrate rather than litigate is an important factor.

What are the circumstances to which the court should have regard in deciding whether it is just and proper to grant leave to appeal despite the agreement to arbitrate? Section 69 does not provide an answer. They do not include the extent to which the determination of the question will affect the rights of the parties, since that is a distinct factor separately mentioned. Nor do they include the prospect of succeeding in an appeal, since that too is already covered. What is postulated is a question whose determination will substantially affect the rights of the parties, where the decision is either obviously wrong, or (in the case of a question of general public importance) at least seriously open to doubt, and yet which it is just and proper that it be considered by the court. It would seem that section 69(3)(d) is a statutory reminder to the judge who is considering whether to grant leave to appeal that some weight must be given to the fact that the parties have agreed to resolve their disputes by

arbitration. In theory at least, this goes some way to meeting the concerns of the abolitionists. But the Act gives no guidance as to what factors may be taken into account (other than the agreement to arbitrate itself) in deciding whether it is just and proper to grant leave to appeal. After all, every case is one in which the parties have agreed to resolve the dispute by arbitration.

One example of a situation in which I suggest that the court might invoke section 69(3)(d) to refuse to give leave to appeal is where a party suspends the performance of a contract pending resolution of a dispute, and the parties agree to hold a quick arbitration so that their rights can be determined and performance of the contract resumed with minimum delay. In the *Nema* (which was a case of this type), Lord Diplock described the giving of leave in such circumstances as “an unjudicial exercise of discretion”. Another example may be where, although the issue does substantially affect the rights of the parties under the contract in question, the amount at stake is small and of no significance for the paying party. The arbitrator may have made an obvious error, but the court may decide that the victim of the error should not be allowed to challenge it: justice in the particular circumstances of the case requires the court to respect the public interest in the finality of arbitral awards. The beneficiary of the mistake may have small means and the court may fix on section 69(3)(d) to say “enough is enough”. At all events, experience thus far suggests that, if the other conditions of section 69(3) are met, it will only be in comparatively few cases that leave to appeal will be withheld on the basis of section 69(3)(d).

To summarise, Parliament has decided that arbitral decisions may only be challenged in the limited circumstances prescribed by the 1996 Act, principally in order to encourage the use of London as a centre for arbitration, and in particular international arbitration for the resolution of commercial disputes. This policy reason has no application in conventional litigation where, as we have seen, the balance between the desirability of having decisions made correctly and fairly on the one hand and of finality on the other hand has been struck quite differently.

I now turn to the Housing Grants, Construction and Regeneration Act 1996. The essentials of the statutory adjudication scheme are as follows. A party to a construction contract is entitled to refer a dispute arising under the contract for decision by an adjudicator. The adjudication procedure must either comply with the statutory scheme imposed by regulations made under the Act or with an equivalent voluntary scheme. An adjudicator must be appointed within 7

days of a notice of intention to refer a dispute to adjudication, and the adjudicator's decision must be made within 28 days of appointment. This period may be extended with the consent of the referring party for one further period of up to 14 days. For present purposes, the important feature of the scheme is that section 108(3) of the Act provides that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration or by agreement. The label "temporary finality" has been used to describe this element of the scheme. Although something of an oxymoron, it captures its essence.

The policy that underpins the scheme is clear enough. It is that a party to a construction contract who wishes to assert a claim should be able to have his claim adjudicated quickly by an independent third person, whose decision will be enforceable and binding until the dispute is finally resolved by litigation, arbitration or agreement. As I said in *Macob v Morrison* [1999] BLR 93, the plain intention of Parliament in enacting this part of the 1986 Act was "to introduce a speedy mechanism for settling disputes in construction contracts on a provisional interim basis, and requiring the decisions of adjudicators to be enforced pending the final determination of disputes by arbitration, litigation or agreement." The statutory background was that hard-pressed contractors were being kept out of their money, sometimes for long periods of time, before their claims reached court or a hearing before an arbitrator. Small sub-contractors, in particular, complained of oppressive and cynical behaviour by their more muscular main contractor customers. Parliament recognised that there was force in these complaints. There was a public interest in claimants obtaining a swift decision from an adjudicator that was binding until the dispute could be finally resolved. It must have been appreciated that the speed of the adjudication process would inevitably lead to mistakes. Some of the disputes are extremely complex. The process is bound to be rough and ready and mistakes are bound to occur.

One of the striking features of the Act is that it contains no provisions for challenging decisions of adjudicators. There is no right of appeal and no power to set aside decisions for procedural irregularity or for any other reason. In this respect, the Act is to be contrasted with the carefully structured and finely balanced provisions for challenging arbitrators' awards that are found in the Arbitration Acts, to some of which I have already referred. So whether, and if so to what extent, decisions of adjudicators could be challenged had to be worked out by the courts themselves. The problem was analogous to that which the court was later to face in *Cart*. The courts had to solve the problem.

It was not long before claimants' attempts to enforce the decisions of adjudicators by summary proceedings were being resisted by their opponents raising all manner of defences. A striking example was the case of *Bouyges (UK) Ltd v Dahl-Jensen (UK) Ltd* [2000] BLR 48. The adjudicator had awarded the claimant approximately £200,000. It was common ground that, in arriving at this figure, he had made a simple arithmetical error and that he should have awarded £140,000. But the adjudicator was not willing to correct the error. I held (and the Court of Appeal agreed) that it was inherent in the scheme that injustices would occur, but these would be subsequently corrected by litigation, arbitration or agreement. If a defendant could resist a claim for summary judgment to enforce an adjudicator's decision by alleging that the decision was arguably erroneous in fact or law, the scheme would fail and the intention of Parliament would be frustrated. It was held, therefore, that the courts would not refuse to enforce an adjudicator's decision on the grounds of error, even an obvious error that was admitted to be such by the defendant. It would only refuse to enforce a decision if it was arguable that there had been a fundamental jurisdictional error or serious procedural unfairness. This approach has been robustly and consistently applied in subsequent case law. As Chadwick LJ said in *Carillion Construction Ltd v Devonport Royal Dockyard Ltd* [2006] BLR 15 at para 86, it is all too easy in a complex case for a party who is dissatisfied with the decision of an adjudicator to comb through the adjudicator's reasons and find points on which to present a challenge under the labels of "excess of jurisdiction" or "breach of natural justice". But the task of the adjudicator is to find an interim solution which meets the needs of the case. The need to have the correct answer has been subordinated to the need to have an answer quickly. It may be said with some force that to require a defendant to comply with an adjudicator's decision that is manifestly incorrect is unfair and produces injustice. It produces injustice which is avoided even by the stringent provisions of the Arbitration Acts of 1979 and 1996. It may be said that this does not sit easily with the broad philosophy of striking a fair balance between the interests of claimants and defendants which I have suggested underpins the statutory and common law rules that deal with the problem of finality in conventional civil litigation. To the extent that this is true, it is because, for policy reasons, the 1986 Act was introduced in order to achieve justice for contractors who were being starved of cash-flow by being forced to sue for their money in expensive, drawn-out arbitration and litigation. The statutory solution to this problem was to devise a scheme which provided for decisions by adjudicators which had temporary final effect. But it did not produce true finality. That is why it is not significantly out of harmony with the broad philosophy to which I have referred.

As I have said, the courts had to work out an answer to the question whether and on what grounds an adjudicator's decision could be challenged. Not only are no statutory grounds of challenge identified, but we find an express provision in the statute that a decision is binding until the dispute is finally determined by legal proceedings, arbitration or agreement. This promotes the statutory purpose of protecting contractors from being starved of cash-flow while disputes grind their slow and expensive way through arbitrations or the courts. The courts have decided to limit the ability to challenge decisions severely in order not to frustrate that purpose. They have done all that they reasonably can to discourage challenges to decision of adjudicators. The cases show that the scope for alleging that the adjudicator did not have jurisdiction to make the decision is limited. But where an issue is raised that there has been a breach of natural justice, a defendant may be on more fertile ground. There are many reported cases where a defendant has argued that a decision should not be enforced on the grounds that the adjudicator did not consider all the issues that had been raised; he took into account new material or a new point raised by the referring party which was not raised at the outset and on which the responding party did not have an opportunity to comment or; he failed to consult the parties either about a communication he had received from one party, or about a view that he had formed independently of the parties' submissions. These are points of the kind that are familiar to public law practitioners. The cases show that where points of this kind are raised in answer to a claim to enforce an adjudicator's decision, they are scrutinised most critically. After all, allegations of this kind are easy to make.

Thus, although the courts have interpreted the scheme as providing for temporary finality, subtle and ingenious lawyers continue to attempt to circumvent it in ways that those who decided the early cases (including myself) would not have foreseen. The adjudication scheme was intended by Parliament to be simple and swift. An indication of how far it has fallen short of this aspiration is demonstrated by the fact that in 2007, Sir Peter Coulson published the first edition of his excellent book "*Construction Adjudication*". The second edition was published this year. It runs to some 500 pages.

Adjudications are not subject to the Arbitration Act 1996 and an adjudicator's decision is most certainly not the same as an arbitrator's award. An arbitrator's award may be challenged in the limited circumstances prescribed by the 1996 Act. An adjudicator's decision can be challenged only in the limited circumstances that have been explained by the courts. Parliament intended an arbitrator's award to be largely immune from challenge in the courts in order to promote the use of London as an arbitration centre for the resolution of



commercial disputes. That purpose would be frustrated if there could be wholesale challenges on the grounds of error of fact or law. Parliament also intended an adjudicator's decision to be largely immune from challenge in the courts in order to ensure that the adjudication scheme was effective and that cash flow was maintained for contractors pending lengthy litigation or arbitration between them and their customers. In these two important areas of commercial life, the balance has been struck between the need for decisions which are made correctly and fairly and the need for finality in a particular way for policy reasons. In this area as in so many others, context is everything.

The final subject that I wish to discuss can at best be described as a distant cousin of those that I have been discussing so far. It concerns the question: when does a claimant suffer damage for the purpose of completing his cause of action in negligence where his case is that the defendant's negligence has exposed him to a contingent liability to a third party? Is it at the date of the creation of the contingent liability or is it only when the contingency occurs? There have been a number of cases in this area in recent years. The most recent south of the border is the Court of Appeal decision in *Axa Insurance Limited v Akther & Darby* [2010] 1 WLR 1662. The court gave permission to appeal to the Supreme Court on the grounds that the law in this area is difficult. But the case was compromised. Apart from what I concede to be the rather remote consanguinity between this topic and my main theme of finality, I would seek to justify saying something about it on the grounds that it is interesting and continues to puzzle the courts.

In *Forster v Outred* [1982] 1 WLR 86, the facts were that, as a result of her solicitors' alleged negligence, Mrs Outred mortgaged her property as security for a loan made to her son. The Court of Appeal held that her cause of action in negligence arose when the mortgage was executed. Although her liability was contingent on her son defaulting on the loan, she had suffered actual damage as soon as she encumbered her property with a charge.

In *Wardley Australia Ltd v State of Western Australia* (1992) 175 CLR 514, as a result of allegedly misleading conduct by Wardley, the State had granted an indemnity in favour of a bank in respect of a facility granted by the bank to a third party. The High Court of Australia held that the State first suffered loss when a call was made on the indemnity and that before then "the likelihood, perhaps the virtual certainty, that there would be a loss....did not transform the liability into an actual or present liability at that time".

In *Law Society v Sephton & Co* [2006] 2 AC 543, an accountant was alleged to have negligently failed to identify fraud by a solicitor, thereby exposing the Society to liability for claims against its compensation fund. The House of Lords held that no loss was suffered by the Society until a claim was actually made on the fund. Even though it was true that, if the claimants had known the truth, they would have exercised their statutory powers of intervention in the practice and prevented misappropriation of funds, there had been no transaction changing their legal position or diminishing their assets. The reasoning in *Wardley* was applied. The solicitor's fraud gave rise to the possibility of a liability to pay a grant out of the fund, contingent on the misappropriation not being otherwise made good and a claim in proper form being made. A contingent liability is not damage until the contingency occurs. The existence of a contingent liability may depress the value of other property (as in *Forster*), or it may mean that a party to a bilateral transaction has received less than he should have done, or is worse off than if he had not entered into the transaction. Where any of these things occurs, loss is suffered when the claimant enters into the transaction. But standing alone, the contingency is not damage.

Thus it can be seen that damage is not suffered in respect of advice given on a personal guarantee until the lender makes a call on the guarantee; but where the guarantee is secured on the guarantor's property, it is suffered as soon as the security is given. The intelligent observer of these things might find it difficult to see why the unsecured guarantor should be less vulnerable to the risk of his negligence claim being time-barred than the guarantor who grants security over his property. But that seems to be the law.

In *Axa's* case, the facts were these. The claimant was the assignee of an insurer (NIG) who was in the business of providing after the event (ATE) legal expenses insurance in respect of claims by litigants. Claims would be insured if vetted by certain panel solicitors as being more likely than not to succeed and as being likely to meet a minimum value threshold of £1,000. The claimant brought proceedings against panel solicitors who it alleged had been negligent in their certification of the prospects of success in some cases. Many of the policies were made more than 6 years before the issue of the proceedings to which the insurance related. As regards the claims made in respect of these policies, the panel solicitors advanced a limitation defence. A preliminary issue was ordered to be tried on the question of when the claimant suffered loss. The majority (Arden and Longmore LJ) held that loss was suffered when the policies were issued. Lloyd LJ held that it was when NIG first came under an actual liability to make payment under the relevant policy.

From these and other cases, it is clear that a pure contingent liability does not amount to actual damage. The risk of future loss is not enough. Something more is required. There must be a loss which is capable of being measured. The risk of future financial loss is not damage; but where the risk of future financial loss results in an immediate and measurable loss, there is damage. These statements at this level of generality are not controversial. But the problem arises in applying them. The line is difficult to draw. In *Knapp v Ecclesiastical Insurance Group Plc* [1998] PNLR 172, it was held that, where a policy of insurance was voidable for non-disclosure because of the broker's negligence, the cause of action arose when the policy was effected, not at the later stage when it was repudiated. On the other hand, in *Nykredit Mortgage Bank Plc v Edward Erdman Group Ltd* [1997] 1 WLR 1627, a valuer was responsible for the claimant having made a loan on the basis of an inadequate security. The issue was not one of limitation, but of when the cause of action accrued for the purpose of interest on damages. On the facts, the borrower defaulted immediately and the cause of action in respect of the inaccurate valuation was held to arise from the time of the transaction or very soon thereafter. However, the House of Lords was of the view that in general the question whether the lender had suffered a loss could not be determined without taking account of the value of the borrower's covenant to repay. It might be worthless or of some (uncertain) value or it might be adequate to protect the lender's interests: see per Lord Nicholls at p 1631-32.

The difficulties in this area provoked something of a *cri de coeur* from the Court of Appeal in *Axa*, who took the unusual course of themselves giving permission to appeal to the Supreme Court. The majority held that the facts in *Axa* did not reveal a case of mere contingent liability. Arden LJ expressed her conclusions in various ways. The claimants had suffered a loss from the outset because the liabilities under the ATE policies were greater than they should have been (para 60); if as a result of the vetting breaches a policy resulted in loss to the insurer, it carried that risk from inception and a valuation of the policy on inception would always have reflected that inherent risk (para 61); and NIG suffered loss which was to be measured as the difference between its financial position having issued the policies and its financial position if it had not issued them (para 62). Longmore LJ said that the claimants had entered into a flawed transaction which they ought not to have entered into and that there was a measurable relevant loss on the inception of the policies in that any valuation would have to take into account the fact that there had been no proper vetting. Lloyd LJ accepted that the negligence had an adverse effect on NIG's commercial and economic position from

the date of the issue of the policies. But he considered that the decision in *Sephton* compelled the conclusion that this was a case of pure contingent liability.

I agree with the majority. It is distinctly odd to say that by issuing the policies the claimant was put in a seriously worse commercial and economic position than it ought to have been, but that it did not suffer any loss until and unless it was called to meet a claim under a policy. I see no necessity for the law to travel down such a commercially unrealistic route. I suggest that any fair-minded person would say that NIG suffered a loss as soon as it issued the policies which, but for the defendants' assumed negligence, it would not have issued. It was in the business of writing insurance policies. It could have sold some or all of the policies which were vetted by the defendants. Any valuation of the policies on their inception would have to take into account the fact that there had been no proper vetting.

I also see force in the point that NIG suffered damage as soon as the ATE business was written because the liabilities were such as to affect the value of its business or goodwill on the open market. Both the judge and majority in the Court of Appeal did not and did not need to decide the issue on this basis. In taking this course, they were influenced by the statement by Lord Hoffmann in *Sephton* (para 29) that it was irrelevant that a prudent accountant, drawing up the accounts of the compensation fund to give a true and fair view of its assets and liabilities, would have included provision for contingent liabilities. That statement was made in the context of when loss was suffered by the Law Society which is not a commercial body and does not trade. The position of NIG was quite different. It was in the business of writing insurance. It did engage in trade. It had a business which it could sell. The value of that business was affected by the value of its assets, including its portfolio of insurance policies. I cannot see in principle why, if the value of its business is reduced by the issuing of unprofitable policies, it did not suffer a loss which was measurable at the date when the policies were issued.

Lloyd LJ said (para 165) that he found the case far from easy to decide, not least because the application of *Sephton* produced a result which was at odds with what one would anticipate in terms of the commercial and economic reality of NIG's position. *Sephton* is not an easy decision. It is tempting to say that what constitutes damage is essentially a question of fact and that it should not give rise to sophisticated arguments or engage the attention of the higher courts. But that is not how the law has developed. I am sure that we have not read the last word on this difficult subject.

To conclude, I shall return briefly to my main theme. The balance between access to justice and the need for finality is struck in different ways in different contexts. Parliament has intervened in some areas; the common law has set the parameters in others. Special situations call for special treatment. I have identified arbitration and adjudication as two types of dispute resolution procedure where for policy reasons the balance is struck differently from the way in which it is struck in conventional civil litigation. But generally speaking the golden thread that pervades throughout is the quest for fairness and justice. That is a constant. Views change over time as to how the demands of fairness and justice can best be met and how the balance should be struck. The law in this area as in others must always be responsive to developing social and moral values. There have been huge changes during my professional life. I have no reason to suppose that the pace of change will slacken. I would find it interesting to have the opportunity to rewrite this lecture in 25 years time and see how much, if any of it, would survive in recognisable form. I suspect very little indeed. But rewriting this lecture in 25 years time seems a rather unrealistic aspiration.