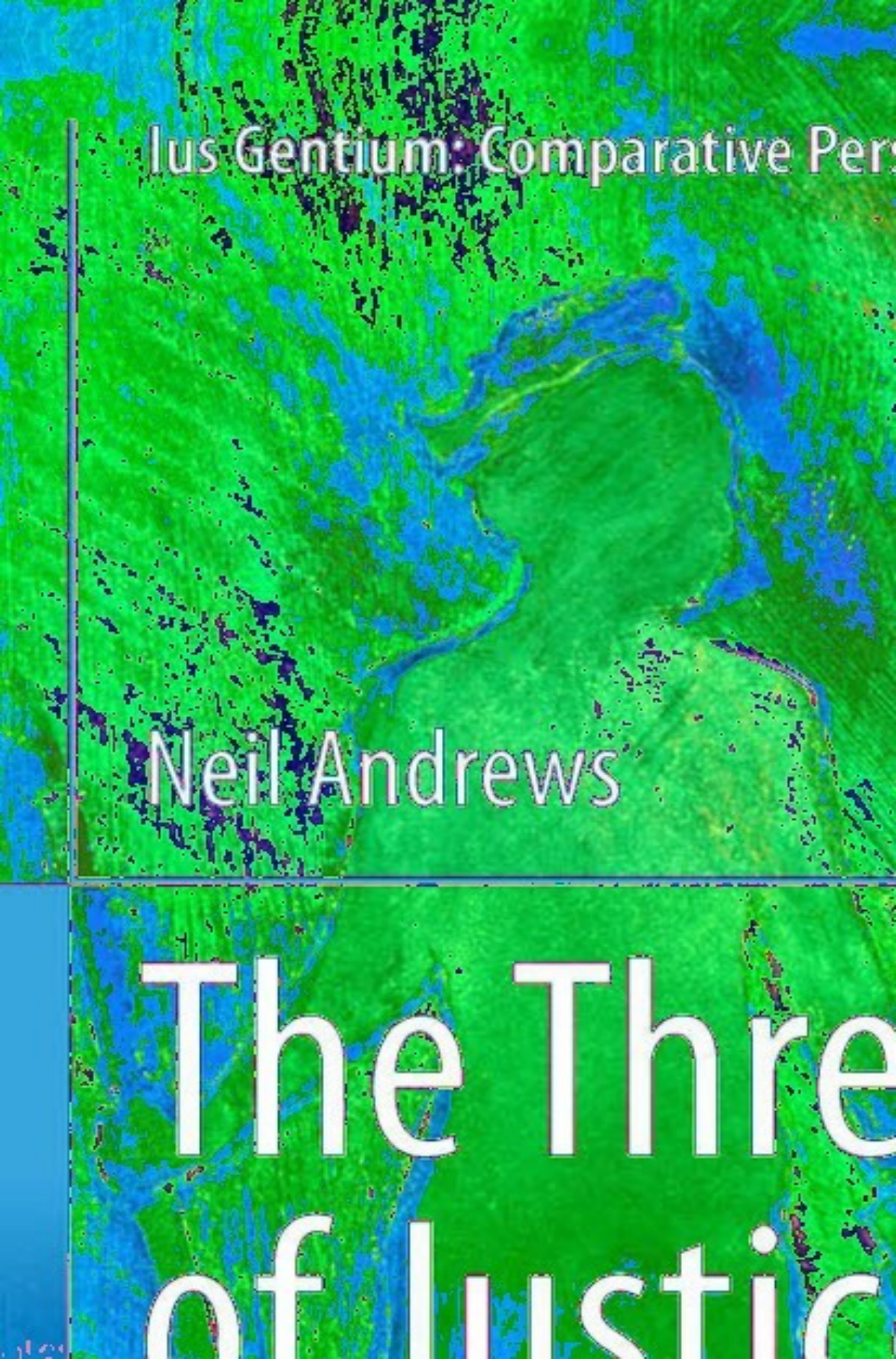
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THE THREE PATHS OF JUSTICE

IUS GENTIUM

Comparative Perspectives on Law and Justice

VOLUME 10

THE THREE PATHS OF JUSTICE

COURT PROCEEDINGS, ARBITRATION, AND MEDIATION IN ENGLAND

by

Neil Andrews

Springer

Neil Andrews
Clare College
Trinity Lane
CB2 1TL Cambridge
United Kingdom
nha1000@cam.ac.uk

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For Liz, Sam, Hannah, and Ruby
and in memory of
Kurt Lipstein
1909–2006
Professor of Comparative Law, University of Cambridge,
Fellow of Clare College,
Bencher of Middle Temple

Foreword

In this book Neil Andrews does non-English lawyers a great service: he gives us an authoritative, digestible and—and at the same time—critical guide to the new civil justice in England and Wales. For a dozen years we have watched—sometimes puzzled—as the queen of common law systems has transformed itself in ways that we have not seen heretofore and to an extent that England has not experienced for a long time. Led by the 'Woolf reforms' of 1999, the metamorphosis has included, in addition to substantial changes in civil procedure, the introduction of the Human Rights Act of 1998 (entered into force 2000), the establishment of a Ministry of Justice (2007) and the abolition of the House of Lords (Judicial) and creation of the Supreme Court of the United Kingdom (began business 2009).

Neil Andrews is one of England's best known proceduralists and author of one of its best known treatises on civil procedure. He, as well as anyone could, guides readers through the thickets and hedges of England's reforms to the essential elements of the reforms. He helps readers learn conveniently what is new and what is old: what is system-shaking and is therefore especially worthy of foreign attention.

Such a guide is particularly needed by American lawyers and law reformers: Americans are accustomed to looking to England for ideas for the American system. Even before the Woolf reforms came into effect, some American observers ascribed a 'Continental Character' to English law distinct from America's common law. We all wonder what the effects of the predominantly civil law European Union will be on its premier common law system.

American lawyers need not fear English abandonment of values their system holds dear. The 'overriding objective' of the Woolf reforms is the enabling of courts 'to deal with cases justly.' Areas they target for reform include putting parties on an equal footing, dealing with cases proportionately to the disputes involved, and handling cases expeditiously and fairly. Neil Andrews, in Chap. 2 of the book, 'Principles of Civil Justice,' lays out four headings under which to consider the fundamental and important principles of civil justice:

a. Regulating Access to Court and to Justice
b. Ensuring the Fairness of the Process: a Shared Responsibility of the Court and the Parties
c. Maintaining a Speedy and Efficient Process
d. Achieving Just Outcomes

These are not alien to American lawyers: they are at the heart of American civil justice. They are the promises that America's founding fathers made in their declarations of rights of 1776.[1] These are, indeed, values shared by civil law systems.

I commend Neil Andrews for his openness. His work is valuable because he is critical. He is not timid. He is not content to recite the hopes of English reformers; he does not finesse hard problems by calling them out of place in a short work. He does not retreat to a student's outline. Instead he sets out the realities of the reforms' implementation. He calls failures when he sees them: through colorful language he imprints them in readers' memories. I give but one example:

> Bill Gates himself, and other modern-day descendant of Croesus, would hesitate to run the risk of engaging in protracted and complicated claims hear by the High Court. The 'Woolf reforms' of 1999 were expected to alleviate the problem of the high costs of litigation. But the situation has not improved. [9.16]

Americans hoping to find in England a panacea for the failures of American civil justice will be disappointed. The ailments of English civil justice—above all lawyer control of proceedings—are largely our own. If we are to overcome them, we must be open to changes that differ from traditional common law approaches.

Baltimore, Maryland James R. Maxeiner

[1] They were included in what are called 'open courts' clauses. That in Maryland's Declaration of Rights of November 3, 1776 reads:

> 17. That every freeman, for any injury done to him in his person, or property, ought to have remedy by the course of the law of the land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the law of the land.

Maryland Declaration of Rights of Nov. 3, 1776*, in The Decisive Blow is Struck, A facsimile edition of The Proceedings of the Constitution Convention of 1776 and the First Maryland Constitution* (1977). Similar declarations were made throughout colonial America. J. Maxeiner, G. Lee, and A. Weber, *Failures of American Civil Justice in International Perspective* 3–5 (2011).

Preface

This work is intended to enable lawyers, especially non-English lawyers, to gain an overview of the three main processes now operating in England for the resolution of civil disputes: civil proceedings in the courts, arbitration, and mediation. These three forms of civil justice, and their developing connections, continue to (1) bewilder, frustrate, and impoverish disputants, (2) enrich lawyers, (3) confuse most advisors, and (4) stimulate scholars. It seems to lie beyond the power of Government to respond successfully to (1). As for (2), proposals for changes in the costs rules for court litigation will increase the opportunity for some lawyers to become very rich quickly (contingent fees: 5.20 ff). It is hoped that (3) (confusion) might be reduced and (4) (stimulation) promoted by this short work. It is also hoped that the reader will find pointers for further research not just in the footnotes and bibliography, but in the section entitled 'Leading Contributors to English Civil Justice', which introduces foreign readers to the main players in the subject's modern development and analysis.

The text reflects fast-moving changes within this subject. The sources of this change are internal—constant development of the subject by the English courts and legislature—and external, notably the influence of the European legal authorities. For example, this book contains discussion of: curbing appeals (1.40; 4.01 ff); creation of the United Kingdom Supreme Court (2.06 ff; 4.03 ff); expansion of electronic justice (1.42); attempted reform of costs in England (5.20 ff); judicial abolition of the immunity protecting party-appointed experts against civil liability (3.73); awards of secret injunctions to protect privacy (currently a red-hot issue within England) (3.09); EU law and the limits of legal professional privilege (2.11 ff, and 3.30 ff); European human rights law and the scope of the privilege against self-incrimination (2.15 ff; 7.25); protective relief, namely 'freezing injunctions', in support of foreign proceedings (7.17 ff); the European mediation directive (2008) (9.49); mediation and sanctions (9.32); proposals for automatic referral of court proceedings to mediation (9.19); mediation sceptics (9.21); the long-running debate whether England should expand opportunity for opt-out system of class action

litigation in money actions (8.09; 8.23 ff); the controversy concerning arbitration and the 'anti-suit injunction' within the European Union (10.16 ff; 11.03 ff); problems concerning attempted enforcement of foreign arbitral awards under transnational convention (10.29 ff; 11.17 ff); the transnational trend towards combining the functions of mediators and arbitrators (11.36 ff); links between the courts and the processes of mediation and arbitration (Chapter 11); and perennial and fundamental issues, such as identification of fundamental principles of civil justice, under the American Law Institute/UNIDROIT principles (2.22), or Article 6(1) (2.02 ff) of the European Convention on Human Rights, and generally (Chapter 2, notably the author's four-fold categorisation at 2.35 ff—(i) Regulating Access to Court and to Justice (ii) Ensuring the Fairness of the Process (iii) Maintaining a Speedy and Efficient Process (iv) Achieving Just and Effective Outcomes); and the capacity of courts to engage actively in aspects of the case (1.08, 1.22 ff; 1.28).

I am grateful to my wife, Elizabeth Deyong, and our children, Samuel, Hannah, and Ruby. Their good humour has enabled me to keep the Law fully at arm's length outside normal business hours.

Cambridge, UK Neil Andrews

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Chapter 1
Introduction

Contents

1.1 The New Procedural Code ('CPR 1998') and the Woolf Reforms

1.01 Under the 1998 procedural code, the Civil Procedure Rules ('CPR (1998)'), also known as the 'Woolf Reforms',[1] English judges have been granted wide-ranging powers to manage the development of civil cases, especially in large actions. This was a fundamental change because before 1998 English procedure had generally avoided pre-trial judicial management (although, as explained below, even before the Woolf reforms, case management had emerged as a convenient and necessary technique in, notably, the Commercial Court, part of the High Court).[2] The 1998 code was intended to change the culture of English court-based litigation. English civil procedure has moved from an antagonistic style to a more co-operative

[1] Lord Woolf's two reports are: *Access to Justice: Interim Report* (1995) and *Access to Justice: Final Report* (London, 1996) both available on-line at: http://www.dca.gov.uk/civil/reportfr.htm.

[2] On the CPR system from the perspective of the traditional principle of party control, Neil Andrews, 'A New Civil Procedural Code for England: Party-Control "Going, Going, Gone",' *Civil Justice Quarterly* 19 (2000): 19–38; Neil Andrews, *English Civil Procedure* (Oxford: Oxford University Press, 2003), 13.12 to 13.41; 14.04 to 14.45; 15.65 to 15.72.

N. Andrews, *The Three Paths of Justice*, Ius Gentium: Comparative Perspectives on Law and Justice 10, DOI 10.1007/978-94-007-2294-1_1,

ethos. Although lawyers have adapted to the judicial expectation that they should no longer pursue their clients' interests in a relentless and aggressive manner, practitioners report[3] that the adversarial nature of the underlying contest remains a daily reality. It is true that correspondence between rival parties, which might be seen by the court in due course, is no longer couched in the aggressive terms which characterised pre-CPR dealings between adversaries. But the softer and sometimes more conciliatory tone of written exchanges under the CPR regime often masks an intensely fought battle.

1.02 English civil procedure appears to occupy a mid-position between the distinctively robust American system and the court-orientated systems of the civilian tradition. Thus the English system of disclosure imposes quite strict restrictions upon the scope of documentary disclosure.[4] Each party must now disclose and allow inspection of: documents on which he wishes to rely; or which adversely affect his case or his opponent's case, or which support the latter's case.[5] Furthermore, pre-action disclosure in commercial cases is controlled to prevent arrant forms of 'fishing'.[6] England has yet to countenance USA-style contingency fee agreements in ordinary court litigation (under the American system the attorney's fee is measured as a percentage of the size of the damages award or settlement).[7] As for party-autonomy, and the respective powers of the court and of the parties, English judges must respect the parties' procedural rights to (I) define the issues in dispute; (II) to make private decisions concerning how the claim and defence are to be factually supported, by gathering, refining and presenting witness evidence, and other forms of evidence; (III) if the court gives permission for expert evidence to be used in the case, the parties are free to select the relevant party-appointed experts and so procure their own opinion for use in evidence at trial[8]; (IV) finally, the parties retain the freedom to formulate legal submissions concerning the claim or defence, and to present statutory or case law authority to support those submissions.

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[3] For example, London litigation partner, seminar, Cambridge March 2010.

[4] Especially, CPR 31.3(2), 31.7(2), 31.9(1); generally, Neil Andrews, *The Modern Civil Process* (Tübingen, Germany: Mohr & Siebeck, 2008), Chap. 6.

[5] CPR 31.6; the court can vary the width of disclosure in special situations: CPR 31.5(1),(2).

[6] CPR 31.16 (3) contains a general power to order pre-action disclosure of documents against a 'respondent who is likely to be a party to subsequent proceedings'.

[7] A convenient source of details concerning the USA system is Moorhead and Hurst's study: *Improving Access to Justice: Contingency Fees: A Study of their operation in the United States of America: A Research Paper informing the Review of Costs* (November 2008), edited by Robert Musgrove: www.civiljusticecouncil.gov.uk/files/cjc-contingency-fees-report-11-11-08.pdf.

[8] Under the CPR system the main rule is that no expert evidence can be presented in a case unless the court has granted permission: CPR 35.4(1) to (3).

1.2 Enduring Features of the English Civil Justice System

1.03 In 1997[9] I explained that the pre-CPR system had the following five main characteristics, and these in fact remain cardinal features of the present system, and hence aspects of continuity. First, nearly all first instance English civil trials are adjudicated by professional judges sitting alone, lacking support both from fellow judges and from a civil jury (jury trial in civil matters being now confined to specific tort claims, for defamation, malicious prosecution, or false imprisonment).[10] Secondly, large actions involve a segmented passage through various interim and pre-trial stages and remedies.[11] Thirdly, litigation is conducted under the shadow of the principle that each litigant is at risk of an order to pay the legal costs reasonably incurred by the opponent, if the latter emerges victorious from the fray.[12] This cost-shifting rule operates intensively because English legal costs are high (Sir Rupert Jackson's 'Civil Litigation Costs Review'[13] places the whole topic of costs and funding under scrutiny). Fourthly, the professional division between different types of litigation lawyers has been maintained: overall control of the case resting with solicitors, who delegate specific tasks, such as advocacy or 'advice on law or evidence', to specialists, namely barristers. Fifthly, trial is a rare event because most cases settle, the parties nearly always accommodating themselves to the wisdom of compromise.

1.3 Changes and Challenges Association with the Civil Procedure Rules (1998)

1.04 On 28 March 1994, Lord Mackay LC of Clashfern (Lord Chancellor 1987–1997) appointed Lord Woolf to make recommendations concerning civil procedure, with the following aims[14]: (i) *improving access to justice*

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[9] Neil Andrews, 'Development in English Civil Procedure: How Far Can the English Courts Reform Their Own Procedure?' *Zeitschrift für Zivilprozess International* 2 (1997): 3–29.

[10] Andrews, *English Civil Procedure*, 34-06 ff.

[11] For example, Sir Leonard Hoffmann, 'Changing Perspectives on Civil Litigation,' *Modern Law Review* 56 (1993): 297.

[12] Generally on costs, Andrews, *The Modern Civil Process*, Chap. 9; Andrews, *English Civil Procedure*, Chap's. 35 to 37; M.J. Cook, *Cook on Costs* (annual editions); P. Hurst, *Civil Costs* (4th edn, 2007); A. Zuckerman, *Civil Procedure* (2nd edn, 2006), Chap. 26.

[13] Sir Rupert Jackson, *Review of Civil Litigation Costs* (December, 2009: London, 2010); on which A.A.S. Zuckerman, 'The Jackson Final Report on Costs—Plastering the Cracks to Shore up a Dysfunctional System,' *Civil Justice Quarterly* 29 (2010): 263.

[14] Terms of appointment cited in Lord Woolf, *Access to Justice: Interim Report* (London, 1995), introduction.

and reducing the cost of litigation (ii) *reducing the complexity of the rules* (iii) *modernising terminology* (iv) *removing unnecessary distinctions of practice and procedure*. Woolf's interim and final reports appeared in 1995[15] and 1996,[16] and they stimulated a substantial literature.[17] The CPR was enacted in 1998 and took effect on 26 April 1999.

1.05 In the preface to *Andrews on English Civil Procedure* (2003),[18] published 4 years after the Woolf reforms were implemented, I suggested that the CPR and associated recent developments involved twelve changes. Three changes had in fact preceded Lord Woolf's 1999 procedural reforms. First, the interests of fiscal economy had led to introduction of the conditional fee system.[19] The Courts and Legal Services Act 1990 permitted lawyers to agree with litigants 'conditional fee agreements' ('CFAs'), and this paved the way for implementation in 1995 (personal injury litigation) and 1998 (expansion to most civil litigation).[20] Secondly, the Human Rights Act 1998 incorporated the European Convention on Human Rights into English law (with effect from 2 October 2000). Thirdly, as I explained in 1997,[21] rule changes and judicial initiative had created the framework for case management, that is, active involvement of judges before trial in the preparation of a case for adjudication, with emphasis on the need for proportion (and hence overall economy) and expedition.

1.06 From the perspective of overarching principle, the main features of this exciting fresh start can be summarised as follows. The new CPR system recognised and sought to promote these principles, values, or aims:

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[15] Ibid.; this and its successor are available on-line at: http://www.dca.gov.uk/civil/reportfr.htm.

[16] *Access to Justice: Final Report* (London, 1996).

[17] A.A.S. Zuckerman and R. Cranston, eds., *The Reform of Civil Procedure: Essays on 'Access to Justice'* (Oxford: Oxford University Press, 1995); R. Cranston, *How Law Works: The Machinery and Impact of Civil Justice* (Oxford: Oxford University Press, 2006), Chap. 5; Andrews, *English Civil Procedure*, Chap. 2; Andrews, 'A New Civil Procedural Code for England: Party-Control "Going, Going, Gone",' 19–38; S. Flanders, 'Case Management: Failure in America? Success in England and Wales?' *Civil Justice Quarterly* 17 (1998): 308; J.A. Jolowicz, 'The Woolf Report and the Adversary System,' *Civil Justice Quarterly* 15 (1996): 198; M. Zander, 'The Government's Plans on Civil Justice,' *Modern Law Review* 61 (1998): 383 and 'The Woolf Report: Forwards or Backwards for the New Lord Chancellor?,' *Civil Justice Quarterly* 16 (1997): 208; A.A.S. Zuckerman, 'The Woolf Report on Access to Justice,' *Zeitschrift für Zivilprozess International* 2 (1997): 31 ff.

[18] Andrews, *English Civil Procedure*, preface.

[19] A clear statement of this background is M. Zander, *The State of Justice* (London: Hamlyn Lecture Series, 2000), Chap. 1.

[20] On this development Andrews, *The Modern Civil Process*, 9.19 ff; and Andrews, *English Civil Procedure*, Chap. 35.

[21] Andrews, 'Development in English Civil Procedure: How Far Can the English Courts Reform Their Own Procedure?' *Zeitschrift für Zivilprozess International*, 3, at 14 ff.

(1) proportionality, (2) procedural equality, (3) active judicial involvement in a case's progress, (4) accelerated access to justice by improved summary procedures, (5) curbing excessive documentary disclosure, (6) greater resort to the disciplinary use of costs orders, (7) curbing appeals, (8) stimulating settlement by use of costs incentives to induce acceptance of reasonable settlement offers, and (9) judicial encouragement of resort to ADR, notably mediation. These bare points are fleshed out in the following paragraphs.

1.07 'The Overriding Objective' in CPR Part 1 gives prominence to the notion of 'proportionality' both in the organisation of levels of procedure—small claims, fast-track, or multi-track proceedings[22]—and in the exercise of the court's extensive case management powers.[23] Part 1 also emphasises the requirement of procedural equality.

1.08 The principle of party-control was modified.[24] The CPR created a general framework for active involvement of judges in the pre-trial development of moderately or extremely complex litigation. Judges are required to ensure that litigation proceeds with reasonable speed and that the issues are identified and prioritised. At trial (and during its preparation), judges should control the volume of evidence. But there are limits to judicial initiative:

(i) parties still select factual witnesses and draw up witness statements[25];
(ii) parties still select party-appointed experts (they can also agree upon selection of a single, joint expert, this 'shared' expert being an innovation of the CPR system); judicial permission to use experts is required, but judicial selection of individual experts is avoided, unless the parties reach stalemate in agreeing a single, joint expert[26];

[22] Respectively, CPR Parts 27, 28, 29.

[23] CPR 1.4(2); CPR 3.1(2); CPR Parts 26, 28, 29; Andrews, *The Modern Civil Process*, 3.13 ff; Neil Andrews, *English Civil Justice and Remedies: Progress and Challenges: Nagoya Lectures* (Tokyo: Shinzan Sha Publishers, 2007), Chap. 3; see now *The Admiralty and Commercial Courts Guide* (9th edn, 2011), Section D; and note the anxious discussions engendered by 'rogue' 'super-cases': the Long Trials Working Party Report December 2007; and a pilot scheme since 2008; for the background, Sir Anthony Clarke MR, 'The Supercase-Problems and Solutions', 2007 Annual KPMG Forensic Lecture: available at http://www.judiciary.gov.uk/docs/speeches/kpmg_speech.pdf.

[24] On the CPR system from the perspective of the traditional principle of party control, Andrews, 'A New Civil Procedural Code for England: Party-Control "Going, Going, Gone,"' 19–38; Andrews, *English Civil Procedure*, 13.12 to 13.41; 14.04 to 14.45; 15.65 to 15.72.

[25] Andrews, *The Modern Civil Process*, 8.04 ff.

[26] On these aspects of CPR Part 35, Neil Andrews, Ibid., Chap. 7; D. Dwyer, *The Judicial Assessment of Expert Evidence* (Cambridge: Cambridge University Press, 2008).

(iii) the Court of Appeal has said that excessive intervention by trial judges during the course of evidence is prohibited because it would be wrong for a judge to 'arrogate to himself a quasi-inquisitorial role', this being something which is 'entirely at odds with the adversarial system.'[27]

1.09 Summary disposal of cases is promoted by introduction of a more searching test of 'real prospect of success', in CPR Part 24.[28]

1.10 'Standard disclosure' was intended to subject documentary discovery to a more focused notion of relevance. 'Standard disclosure'[29] covers documents on which a party will rely; or which adversely affect his case; or adversely affect the opponent's case; or support the opponent's case.

1.11 Procedural discipline would be reinforced by a more discretionary approach to costs decisions.[30] The courts could adjust costs awards and so reflect the fact that a victorious party had raised unnecessary issues. Lord Woolf MR in *AEI Rediffusion Music Ltd v. Phonographic Performance Ltd* (1999), attempting to temper the perceived rigidity of the 'winner takes all' approach, said: too robust an application of the 'follow the event principle' encourages litigants to increase the costs of litigation; and he suggested 'if you recover all your costs as long as you win, you are encouraged to leave no stone unturned in your effort to do so.'[31]

1.12 Finality of judgment would be fortified by the requirement that an appellant must obtain permission to appeal.[32] Nearly all appeals require the court to give its permission (formerly known as 'leave'),[33] in response to the appellant's speedy request to the first instance court (normally within 14 days[34]; a period which cannot be extended by party agreement).[35] If the lower court refuses permission, a fresh application for permission can be made to the appeal court.

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[27] *Southwark London Borough Council v. Maamefowaa Kofiadu* [2006] EWCA Civ 281, at [148].

[28] CPR 24.2: *Swain v. Hillman* [2001] 1 All ER 91, 92, C.A.; Andrews, *The Modern Civil Process*, 5.18 ff.

[29] CPR 31.6; Andrews, op. cit., Chap. 6, notably 6.04, 6.22; on the pre-CPR excessive documentary disclosure system, Woolf, *Access to Justice: Interim Report*, Chap. 21, at paras 1–9 (commenting on the *Peruvian Guano* test: *Compagnie Financière v. Peruvian Guano Co* (1882) 11 QBD 55, 63, CA); Sir Johan Steyn (later Lord Steyn), preface. to Hodge and Malek, *Discovery* (London, 1992); R. Cranston, 'Complex Litigation: The Commercial Court,' *Civil Justice Quarterly* 26 (2007): 190, 203.

[30] Andrews, *The Modern Civil Process*, 9.09 ff.

[31] [1999] 1 W.LR 1507, 1522-3, C.A.

[32] Andrews, *The Modern Civil Process*, 8.12 ff.

[33] CPR 52.3(1): except decisions affecting a person's liberty.

[34] CPR 52.4(2); appeals out of time will only exceptionally be permitted: *Smith v. Brough* [2005] EWCA 261; [2006] CP Rep 17.

[35] CPR 52.6(1) (2).

1.13 Settlement would be promoted by the capacity of both defendants *and claimants* to make settlement offers backed by costs sanctions.[36] In essence: under the English CPR system, Part 36, the claimant's costs risk arises if he does not accept the defendant's settlement offer.[37] In that situation, if the claimant at trial 'fails to obtain a judgment more advantageous than a defendant's Part 36 offer', then, 'unless [the court] considers it unjust to do so', the claimant must pay the defendant's costs incurred after the date when the claimant should have accepted the settlement offer. The defendant will only be liable for the claimant's costs incurred before that date. The defendant's costs risk arises if he does not accept the claimant's settlement offer. If 'judgment against the defendant is at least as advantageous to the claimant as the proposals contained in a claimant's Part 36 offer', then, 'unless [the court] considers it unjust to do so', the defendant will be liable to pay the claimant not just the ordinary measure of costs ('standard' costs) but an aggravated measure (so-called 'indemnity costs'), with the further possibility of a high level of interest on those costs.

1.14 The courts were charged with the duty to promote resort to ADR,[38] especially mediation, though use of costs orders,[39] and the staying of proceedings.[40]

1.15 *Litigation Less Popular*: There has been a decrease in the amount of litigation in England under the CPR (1998) system. It is now no longer possible to refer to listing crises and chronic congestion, except in the Administrative Court.[41] It is widely known that the public, and even large companies and government departments, no longer wish to spend large sums on litigation. The CPR (1998), although excellent in many respects, did not alter the system of remuneration for lawyers. The financial background is well known. Law firms require revenue. Litigation is a source of fees. Individual lawyers have 'billing targets'. Billing clients by the hour naturally leads to the search for more 'billable' hours in preparation for trial.

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[36] Andrews, *The Modern Civil Process*, 10.15 ff.

[37] *C v. D* [2010] EWHC 2940 (Ch); [2011] 1 WLR 31, Warren J, establishes that a Part 36 offer cannot be time-limited, but must be open for acceptance unless withdrawn by the offeror; *Gibbon v. Manchester City Council* [2010] EWCA Civ 726; [2010] 1 WLR 2081, CA, establishes that a counter-offer made by the offeree does not terminate a Part 36 offer.

[38] CPR 1.4(2)(e).

[39] Notably, *Dunnett v. Railtrack plc* [2002] 1 WLR 2434, C.A.; *Halsey v. Milton Keynes General NHA Trust* [2004] 1 WLR 3002, CA; *Nigel Witham Ltd v. Smith* [2008] EWHC 12 (Technology and Construction Court), at [36] (J. Sorabji, *Civil Justice Quarterly* 27 (2008): 427); on this line of cases, Andrews, *The Modern Civil Process*, 11.40 ff.

[40] CPR 3.1(2)(f); Neil Andrews, op. cit., at 11.31.

[41] *The Times* 9 April 2009 reported that the 'hugely overburdened Administrative Court in London. . .struggles with the caseload that requires extra judges for its 8,000 asylum and immigration cases a year.'

Besides expense, there are other factors which render litigation less attractive. Litigation is normally conducted by lawyers. As a result, the client can lose control, sometimes all control. Furthermore, the system of all-or-nothing victory at judgment, with costs liability for the defeated litigant, introduces a high risk. In short, the process is expensive, alien and alienating, and fraught with risk. To reverse the exodus from the court system, the formal system must become much more attractive: cheaper and more focused; and judges must be more robust in exercise of their powers to maintain clarity and time-discipline.

1.4 Six Phases of English Civil Proceedings

1.16 The phases to be discussed here are: (i) the pre-action phase; (ii) commencement and pleadings; (iii) party preparation of factual evidence, expert evidence, and exchange of documents between the parties ('disclosure', formerly known as 'discovery'); (iv) trial; (v) appeal; (vi) enforcement. 'Pre-trial applications', including 'case management' hearings, can take place at stages (ii) and (iii). Protective relief is often sought at stage (i).

1.17 *Pre-Action Phase*[42]*:* The 'pre-action phase' covers the period from when the relevant ground of complaint or contested issue arose until that matter produces formal civil proceedings. When the period of prescription (or 'limitation of actions') is generous, pre-litigation phase will not be short (for example, 6 years for ordinary contractual claims, or even 12 years if the contract is contained in a formal 'deed'.[43] Perhaps no other subject so vividly reflects the scope for national difference than the fixing of periods of prescription.[44]

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[42] See the author's 'general report' (examining nearly 20 jurisdictions) on this topic for the world congress on procedural law in Brazil (2007): Andrews, 'Pre-action Stage of Civil Proceedings,' in *Direito Processual Comparado: Proceedings of the XIII World Congress on Procedural Law*, eds. A. Pellegrini Grinover and Petronio Calmon (Editora Forense: Rio de Janeiro, 2007), 201–41.

[43] For the formalities of a deed, s 1(2)(3), Law of Property (Miscellaneous Provisions) Act 1989; 158–60; *Bolton MBC v. Torkington* [2004] Ch 66, CA.

[44] For comparative discussion, R. Zimmermann, *Comparative Foundations of a European Law of Set-off and Prescription* (Cambridge: Cambridge University Press, 2002); in England the subject of limitation of actions, based largely on case law interpretation of the Limitation Act 1980, is so fast-moving and abstruse that Parliament seems to have despaired of reforming it; the nature of possible legislative reform remains controversial: Andrews, *English Civil Procedure*, Chap. 12; *Zuckerman on Civil Procedure* (London, 2006), 24.4 ff; A. McGee, *Limitation Periods* (6th edn, 2010); Law Commission's discussion, 'Limitation of Actions' (Law Commission Report No 270, HC 23, 2001); and 'Limitation of Actions' (Law Commission Consultation Paper No 151, 1998); on which, Neil Andrews [1998] *Cambridge Law Journal* 588; R. James, *Civil Justice Quarterly* 22 (2003): 41.

1.18 The CPR (1998) system introduced an important set of 'pre-action protocols'. As explained in Andrews (2007)[45] and (2008),[46] a leading aim of the English scheme of pre-action protocols is to promote early and informed settlement, avoiding the expense and inconvenience of formal litigation. This is rooted in the philosophy that formal litigation, notably trial, is a form of dispute resolution which should be treated as a matter of 'last resort'. The rules contained in the protocols are largely self-executing and require the disputants to co-operate. The courts become involved in the pre-action phase of litigation only retrospectively, once proceedings have begun. The judges are then prepared to criticise parties who have failed to comply with the pre-action protocol. The courts have a wide discretion to adjust costs orders to reflect this criticism. Pre-action protocols prescribe 'obligations' which the prospective parties and their legal representatives must satisfy before commencing formal proceedings. One of the aims of this system is that each side should know the strengths of his opponent's case. It is also hoped that settlement will be promoted by efficient exchange of information.[47] For example, a person who alleges that he was the victim of medical negligence can gain access to hospital or medical records under this system of pre-action protocols. If the dispute does proceed to a formal action, the court has power to sanction a person's failure to comply by making an appropriate costs order. Various rules or judicial powers regulate preservation of, or access to, potential evidence and information before formal commencement of proceedings.

1.19 *Tracks:* The allocation of cases to different types of first instance court (county court or High Court) and to different systems of procedure (known as 'tracks') under the CPR (1998) is founded on the principle of jurisdictional proportionality: that litigation must be tailored to the size and nature of the dispute. The idea of allocating cases to different types of court according to their value or importance was not an innovation of the CPR system. The dualism of county court and High Court first instance jurisdiction can be traced to the nineteenth century. Within the county court system, small claims procedure was introduced in the 1960s and 1970s. These matters, therefore, ante-date the Woolf Inquiry of 1994–1996. However, the CPR (1998) system does refine the notion of proportionate allocation (stopping short of amalgamating the county court and High Court system into a unified first instance court). There are now three tracks (that is, types of first instance procedure to which a case can be allocated): the small claims jurisdiction; the fast-track; and the multi-track. High Court

[45] See Neil Andrews, 'General report' (examining nearly 20 jurisdictions) on this topic for the world congress on procedural law in Brazil,' in *Direito Processual Comparado: XIII World Congress of Procedural Law*, eds. A. Pellegrini Grinover and R. Calmon (Editora Forense: Rio de Janeiro, 2007), 201–42.

[46] Andrews, *The Modern Civil Process*, 2.26 ff.

[47] In *Carlson v. Townsend* [2001] 3 All ER 663, CA, at [24], [28], [31], Brooke LJ.

litigation is concerned only with the multi-track. The county courts, which are the inferior first instance jurisdiction, are concerned with all three tracks. At the time of writing (April 2011), the small claims system concerns actions not exceeding £5,000 (or £1,000 in the case of personal injury claims and housing repair claims by resident tenants).[48] (However, a press release of 29 March 2011 by the Ministry of Justice, London,[49] states that the Government wishes to expand the small claims jurisdiction. It said: *Raising the maximum value for small claims from £5,000 to £15,-000: This would enable more cases to be heard through the simple small claims process rather than a more costly, complicated trial.*).[50] Above the small claims jurisdiction is the second tier of first instance adjudication, the 'fast-track', dealing with claims not exceeding £25,000.[51] At the top of the first instance system, the third tier, is the versatile 'multi-track', dealing with all other actions.[52] The High Court tends not to deal with matters less than £50,000.[53] Subject to this, the county courts and High Court now share the burden of the multi-track case load. The financial bands mentioned above create presumptions for the allocation of cases to the various tiers of first instance procedure. These presumptions can yield to other considerations. Accordingly, a case might be allocated to a lower or higher band, depending on the special features of the case. Thus, irrespective of the amount at stake, the multi-track might be the suitable venue for the following matters: a case which raises issues of public importance, or which is a test case[54]; cases where oral evidence might be extensive, or where there is a heavy amount of documentary material; or cases where trial might last more than 1 day. Allocation to a track will take place in the light of the parties' answers to the allocation questionnaire, which are normally served by the court on each party once a defence is filed.[55] The rules provide the following criteria to guide the court in making this allocation:

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[48] CPR 26.6(1)(2)(3); CPR 27.1.

[49] http://www.justice.gov.uk/news/press-release-290311a.htm.

[50] 'A consultation paper of 2011 supplies details: Solving disputes in the county courts: creating a simpler, quicker and more proportionate system' (CP 6/2011: Ministry of Justice: Cm 8045) (29 March 2011).

[51] CPR 26.6(4); generally, CPR 28.

[52] CPR 29; CPR 26.6(6) states: 'The multi-track is the normal track for any claim for which the small claims track or the fast track is not the normal track.'

[53] PD (29) para 2.2.

[54] Cf. the small amount litigated in *Bowerman v. ABTA* (1995) New LJ 1815, CA.

[55] CPR 26.3; CPR 26.8(2) states: 'It is for the court to assess the financial value of a claim and in doing so it will disregard (a) any amount not in dispute; (b) any claim for interest; (c) costs; and (d) contributory negligence.' PD (26) 7.3(2) states: 'Where the court believes that the amount the claimant is seeking exceeds what he may reasonably be expected to recover it may make an order under [CPR] 26.5(3) directing the claimant to justify the amount.'

– the financial value, if any, of the claim (see preceding note);
– the nature of the remedy sought;
– the likely complexity of the facts, law or evidence;
– the number of parties or likely parties;
– the value of any counterclaim or other Part 20 claim and the complexity of any matters relating thereto;
– the amount of oral evidence which may be required;
– the importance of the claim to persons who are not parties to the proceedings;
– the views expressed by the parties; and—the circumstances of the parties.[56]

Such allocation can be changed by the court.[57]

1.20 *Commencement and Pleadings*: Proceedings begin once the claimant issues a claim form. This requires a positive act by the claimant, who must notify the relevant court of his wish to instigate proceedings. Not surprisingly, despite the efforts of procedural draftsmen to achieve absolute precision, the moment when the procedural 'starter's gun' has been fired is often disputed.[58] The date when proceedings are 'commenced' or 'brought' or become 'definitively pending' varies between legal systems. This date is important for determining at least two important procedural issues: whether the plaintiff's attempt to bring proceedings is in fact 'out of time' for the purpose of the limitation or prescription rules; and whether the present proceedings are to be accorded priority under a regime of *lis alibi pendens* (for example, under the Brussels jurisdictional regime).[59] But it is unnecessary to investigate this matter further. What is significant for us is that the process of court proceedings has an officially-defined beginning.

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[56] CPR 26.8(1).

[57] CPR 26.10; see also *Maguire v. Molin* [2002] 4 All ER 325, CA.

[58] The time of commencement of civil proceedings is when the court enters the date on the claim form, CPR 7.2(2); however, for limitation purposes, the date can be earlier: when the claim form was received in the court office: PD (7) 5.1; thus in *St Helens MBC v. Barnes* [2006] EWCA Civ 1372; [2007] CP Rep 7 (noted J. Sorabji, *Civil Justice Quarterly* (2007): 166) the Court of Appeal held that a claim was 'brought' when a claimant's request for the issue of a claim form was delivered to the correct court office during its opening hours on the day before the expiry of the limitation period, even though the claim was not issued by the court office until four days later, by which date it was out of time.

[59] (EC) No 44/2001 of 22 December 2000 on 'jurisdiction and the recognition and enforcement of judgments in civil and commercial matters': [2001] OJ L 12/1; see, e.g., *Gasser GmbH v. MISAT Srl (Case C-116/02)* [2003] ECR I-14693 (a court of a Member State on which exclusive jurisdiction has been conferred pursuant to Article 23 of the 2001 Regulation, cannot issue an injunction to restrain a party from prosecuting proceedings before a court of another Member State if that court was first seised of the dispute).

Before that point, any dispute or disagreement is not subject to formal proceedings.

1.21 Each party to English civil proceedings must produce a sworn 'statement of case' (formerly known as 'pleadings'). This must set out the main aspects of the claim or defence. There is no need to include in a 'statement of case' any detailed evidence or details of legal argument. The claimant should also specify the relief he is seeking, such as the remedies of a debt claim, damages, injunction, or a declaration.

1.22 *Case Management*[60]: As examined in the next paragraph, the courts possess extensive 'case management' powers. In his reports of 1995–1996[61] Lord Woolf adopted this technique as the mainstay for actions on the 'multi-track', thus including all High Court litigation.[62] The court must now ensure that matters are properly focused, procedural indiscipline checked, expense reduced, progress accelerated, and that just outcomes are facilitated or awarded Case management has three main functions: to encourage the parties to pursue mediation, where this is practicable; secondly, to prevent the case from progressing too slowly and inefficiently; finally, to ensure that judicial resources are allocated proportionately, as required by 'the Overriding Objective' in CPR Part 1. This requires the court and parties to consider the competing demands of other litigants who wish to gain access to judges, the court's 'scarce resources'.[63]

1.23 The CPR lists various managerial responsibilities. These are not intended to be exhaustive statements of the court's new active role.[64] Judges, especially at first instance, have the following managerial responsibilities: *co-operation and settlement*: encouraging co-operation between the parties[65]; helping parties to settle all or part of the case[66]; encouraging alternative dispute resolution[67]; if necessary, staying the action to enable such extra-curial negotiations or discussions to be pursued[68];

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[60] On the new system from the perspective of the traditional adversarial principle, Andrews, 'A New Civil Procedural Code for England: Party-Control "Going, Going, Gone",' *Civil Justice Quarterly* 19 (2000): 19–38; Andrews, *English Civil Procedure*, 13.12 to 13.41; 14.04 to 14.45; 15.65 to 15.7.

[61] Lord Woolf's two reports are: *Access to Justice: Interim Report* (1995), and *Access to Justice: Final Report* (London, 1996): for comment, Zuckerman and Cranston, *The Reform of Civil Procedure: Essays on 'Access to Justice'*; Cranston, *How Law Works*, Chap. 5.

[62] For example, Andrews, *English Civil Procedure*, Chap.'s 13, 14, 15; *Zuckerman on Civil Procedure* (London, 2006), at 1.74 ff, Chap. 10, 11.53 ff.

[63] For example, Andrews, *English Civil Procedure*, Chap.'s 13, 14, 15; *Zuckerman on Civil Procedure* (London, 2006), at 1.74 ff, Chap. 10, 11.53 ff.

[64] CPR 1.4(2); CPR 3.1(2); CPR Parts 26, 28, 29.

[65] CPR 1.4(2)(a).

[66] CPR 1.4(2)(f).

[67] CPR 1.4(2)(e).

[68] CPR 3.1(2)(f).

determining relevance and priorities: helping to identify the issues in the case[69]; deciding the order in which the issues are to be resolved[70]; deciding which issues need a full trial and which can be dealt with summarily[71]; *making summary decisions*: deciding whether to initiate a summary hearing (under CPR Part 24) [72]; or whether the claim or defence can be struck out as having no prospect of success[73]; or whether to dispose of a case on a preliminary issue[74]; excluding issues from consideration[75]; *maintaining impetus:* fixing time-tables and controlling in other ways the progress of the case[76]; giving directions which will bring the case to trial as quickly and efficiently as possible[77]; *regulating expenditure*: deciding whether a proposed step in the action is cost-effective,[78] taking into account the size of the claim ('proportionality').[79] Lord Woolf commented on these powers: *. . .judges have to be trusted to exercise the wide discretions which they have fairly and justly. . .[Appeal courts] should not interfere unless judges can be shown to have exercised their powers in some way which contravenes the relevant principles*.[80] A party must obtain permission to appeal from a case management decision, but this will be difficult to obtain.[81] Appellate courts are prepared to show considerable deference to judges' case management decisions, unless they are incorrect in principle.[82]

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[69] CPR 1.4(2)(a).

[70] CPR 1.4(2)(d); 3.1(2)(j).

[71] CPR 1.4(2)(c).

[72] PD (26) 5.1, 5.2.

[73] CPR 3.4(2).

[74] CPR 3.1(2)(l).

[75] CPR 3.1(2)(k).

[76] CPR 1.4(2)(g).

[77] CPR 1.4(2)(l).

[78] For example, suggestion that video-conferencing should be used for short appeals: *Black v. Pastouna* [2005] EWCA Civ 1389; [2006] CP Rep 11, *per* Brooke LJ.

[79] CPR 1.4(2)(h) and 1.1(2)(c).

[80] *Biguzzi v. Rank Leisure plc* [1999] 1 WLR 1926, 1934 F, CA, *per* Lord Woolf MR.

[81] PD (52) 4.4, 4.5: 'Case management decisions include decisions made under rule 3.1(2) [containing a long list of procedural powers] and decisions about disclosure, filing of witness statements, or experts reports, directions about the timetable of the claim, adding a party to a claim, and security for costs.' In this context, a decision concerning permission to appeal requires consideration whether 'the issue is of sufficient significance to justify the costs of an appeal', 'the procedural consequences of an appeal (e.g. loss of trial date) outweigh the significance of the case management decision', and whether 'it would be more convenient to determine the issue at or after trial'.

[82] *Thomson v. O'Connor* [2005] EWCA Civ 1533 at [17] to [19], *per* Brooke LJ; *Three Rivers DC v. Bank of England* [2005] EWCA Civ 889; [2005] CP Rep 46, at [55]; the authorities cited in Andrews, *English Civil Procedure*, 13.61 to 13.68, 38.49; *Zuckerman on Civil Procedure* (London, 2006), 23.193 ff.

1.24 *Case Management in the Commercial Court*[83]: The Commercial Court is part of the Queen's Bench Division within the High Court.[84] It has its own detailed procedural code: *The Admiralty and Commercial Courts Guide*.[85] Its judges hear all pre-trial applications, including case management hearings.[86] This contrasts with the general pattern in the Queen's Bench Division where full High Court judges ('puisne judges') are generally involved in civil litigation only at trial and Masters hear many pre-trial matters.[87]

1.25 There are two important pre-trial hearings, the 'case management conference' ('CMCs') and the 'pre-hearing review'. Sir Richard Aikens, a former Commercial Court judge, (now a member of the Court of Appeal), has recently emphasised the need for procedural efficiency and focus in this important court.[88] His scholarly survey of the Commercial Court's impressive history is an important examination of the severe procedural challenges created by complex and protracted litigation. The 2011 Commercial Court Guide places emphasis on continuity of judicial involvement during the case's development, and on a 'docket' arrangement in cases of complexity.[89] The same Guide[90] identifies the following *Key features* of case management:

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[83] A. Colman, *Commercial Court* (5th edn, London: Lloyd's of London Press, 2000), Chap. 5 (although now rather dated).

[84] Senior Courts Act 1981, s 6(1)(2).

[85] *The Admiralty and Commercial Courts Guide* (9th edn, 2011); Colman, *Commercial Court*, 19–20; Cranston, Complex Litigation: The Commercial Court, 190.

[86] Colman, *Commercial Court*, 6–7.

[87] 'puisne' is the adjective used to describe High Court judges who are knighted or decorated as 'Dame'.

[88] R. Aikens, 'With A View to Despatch' (now a Lord Justice of Appeal), in *Tom Bingham and the Transformation of the Law: A Liber Amicorum*, eds. M. Andenas and D. Fairgrieve (Oxford: Oxford University Press, 2009), 563–88.

[89] *The Admiralty and Commercial Courts Guide* (9th edn, 2011), at section D4.1, 4.3 and 4.4.: D.4.1: *An application for the assignment of a designated judge to a case may be made in circumstances where any or all of the following factors—(i) the size of or complexity of the case, (ii) the fact that it has the potential to give rise to numerous pre-trial applications, (iii) there is a likelihood that specific assignment will give rise to a substantial saving in costs, (iv) the same or similar issues arise in other cases (v) other case management considerations—indicate that assignment to a specific judge at the start of the case, or at some subsequent date, is appropriate. . . . D4.3: If an order is made for allocation to a designated judge, the designated judge will preside at all subsequent pre-trial case management conferences and other hearings. Normally all applications in the case, other than applications for an interim payment, will be determined by the designated judge and he will be the trial judge. D4.4: In all cases the Commercial Court listing office will endeavour to ensure a degree of judicial continuity. To assist in this, where a previous application in the case has been determined by a judge of the Commercial Court whether at a hearing or on paper, the parties should indicate clearly when lodging the papers, the identity of the judge who last considered the matter, so that so far as reasonably practicable, the papers can be placed before that judge.*

[90] *The Admiralty and Commercial Courts Guide* (9th edn, 2011), at section D2.

. . .case management will include. . .:

1. statements of case will be exchanged within fixed or monitored time periods;
2. a case memorandum, a list of issues and a case management bundle will be produced at an early point in the case;
3. the case memorandum, list of issues and case management bundle will be amended and updated or revised on a running basis throughout the life of the case and will be used by the court at every stage of the case. In particular the list of issues will be used as a tool to define what factual and expert evidence is necessary and the scope of disclosure;
4. the court itself will approve or settle the list of issues and may require the further assistance of the parties and their legal representatives in order to do so;
5. a mandatory case management conference will be held shortly after statements of case have been served, if not before (and preceded by the parties lodging case management information sheets identifying their views on the requirements of the case);
6. at the first case management conference the court will (as necessary) discuss the issues in the case and the requirements of the case with the advocates retained in the case. The court will set a pre-trial timetable and give any other directions as may be appropriate;
7. after statements of case have been served, the parties will serve a disclosure schedule or schedules. At the first case management conference, the court will discuss with the advocates retained in the case by reference to the list of issues the strategy for disclosure set out in the disclosure schedules with a view to ensuring that disclosure and searches for documents are proportionate to the importance of the issues in the case to which the disclosure relates and avoiding subsequent applications for specific disclosure;
8. before the progress monitoring date the parties will report to the court, using a progress monitoring information sheet, the extent of their compliance with the pre-trial timetable;
9. on or shortly after the progress monitoring date a judge will (without a hearing) consider progress and give such further directions as he thinks appropriate;
10. if at the progress monitoring date all parties have indicated that they will be ready for trial, all parties will complete a pre-trial checklist;
11. in many cases there will be a pre-trial review; in such cases the parties will be required to prepare a trial timetable for consideration by the court;
12. throughout the case there will be regular reviews of the estimated length of trial, including how much pre-trial reading should be undertaken by the judge.

1.26 *Sanctions and Procedural Discipline*: The main sanctions for breach of a procedural requirement are: costs orders[91]; stay of the proceedings[92]; striking out part or all of the claim or defence.[93] Breach of a judicial order or injunction can involve contempt of court, for example a freezing injunction.[94] But Adrian Zuckerman has contended that the courts have not been consistent and tough enough in exercising their powers of case

[91] CPR 3.8(2).

[92] CPR 3.1(2)(f).

[93] CPR 3.4(2)(c).

[94] For example, *Daltel Europe Ltd v. Makki* [2006] EWCA Civ 94; [2006] 1 WLR 2704.

management.[95] In particular, he contends that they have shown undue clemency towards procedural default. In his view, the courts are wrong to relieve parties and their lawyers from failure to comply efficiently with the procedural framework and specific orders administered during case management. Against this it might be suggested that it is important to apply the principle of 'procedural equity'.[96] 'Procedural non-compliance' cannot be treated as uniformly reprehensible. Examples of procedural default vary greatly in their intrinsic importance. They also cause, or have the potential to cause, different degrees of 'collateral' impact, that is, disturbing the 'case flow' of other litigation in the same 'list' of actions. For example, the courts have sensibly refrained from making draconian orders where parties have slightly delayed in making disclosure of expert reports or witness statements, provided this delay can be acceptably explained.[97] Furthermore, litigants in person require special consideration.[98]

1.27 *Party Preparation of Factual Evidence*: The decision to call particular factual witnesses and to use particular documents lies with the parties. The claimant bears the burden of proof. For example, he must show that the defendant breached his contract, or failed to exercise reasonable care, or committed some other legal wrong. The defendant bears the burden of proof on points of defence, for example that the claimant

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[95] A.A.S. Zuckerman, 'Litigation Management Under the CPR: A Poorly-Used Management Infrastructure…', in *The Civil Procedure Rules: Ten Years On,* ed. D. Dwyer (Oxford: Oxford University Press, 2010), 89–108; A.A.S. Zuckerman, 'Court Management,' in *The Future of Transnational Commercial Litigation: English Responses to the ALI/UNIDROIT Draft Principles and Rules of Transnational Civil Procedure,* eds. M. Andenas, Neil Andrews, and R. Nazzini, (London: British Institute of Comparative and International Law; re-printed 2006), Chap. 12; and in N. Trocker and V. Varano, eds., *The Reforms of Civil Procedure in Comparative Perspective* (Torino: Giappichelli, 2005), 143 ff, and *Zuckerman on Civil Procedure* (2nd edn, 2006), Chap. 10, especially at 10.139 and 10.164 ff; D. Piggott, 'Relief from Sanctions…,' *Civil Justice Quarterly* (2005): 103–29.

[96] Andrews, *English Civil Procedure*, 6.66 ff; recent examples, *Keen Phillips (A Firm) v. Field* [2006] EWCA Civ 1524; [2007] 1 WLR 686 at [18]; *Estate Acquisition and Development Ltd v. Wiltshire* [2006] EWCA Civ 533; [2006] CP Rep 32; *Horton v. Sadler* [2006] UKHL 27; [2007] 1 AC 307; *Baldock v. Webster* [2004] EWCA Civ 1869; [2006] QB 315; but there are limits, e.g., *Olafsson v. Gissurarson* [2006] EWHC 3162 (QB); [2007] 1 All ER 88 (invalid service in Iceland could not be cured under CPR 3.10).

[97] *Meredith v. Colleys Vacation Services* Ltd [2001] EWCA Civ 1456; [2002] CP 10; *RC Residuals Ltd v. Linton Fuel Oils Ltd* [2002] EWCA Civ 11; [2002] 1 WLR 2782; N. Madge, 'Court Management,' in *Experts in Civil Courts*, ed. L. Blom-Cooper (Oxford: Oxford University Press, 2006), 4.34 ff; cf., in a different context, *Calden v. Nunn* [2003] EWCA Civ 200 (where the trial window would be missed and the application for permission to adduce the report of a party-appointed expert was unacceptably late); and for refusal to make a disproportionate order in respect of late disclosure of a witness report, *Halabi v. Fieldmore Holdings Ltd* [2006] EWHC 1965 (Ch).

[98] *Hougie v. Hewitt* [2006] EWHC 2042 (Ch) (relief from striking out for breach of an 'unless order'; litigant in person's default mitigated by depression).