Editor's Note

A Colossal Wreck—the BCCI-Three Rivers Litigation

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> '' 'Look upon my works, ye Mighty, and despair!'
> Nothing beside remains. Round the decay
> Of that colossal wreck, boundless and bare
> The lone and level sands stretch far away.''
>
> Shelley

The Bank of Credit and Commerce International AS (''BCCI'') collapsed in 1991 leaving behind massive debts, especially to its depositors. Depositors commenced legal proceedings in *Three Rivers-BCCI v Bank of England* on May 24, 1993, when 6,019 claimants sued the Bank of England. The claimants' complaint was, in essence, that their losses were caused by the Bank's failure to discharge its duty properly by granting a licence to BCCI and, later, by failing to revoke it. The claimants founded their claim not on the tort of negligence, which was not available in the circumstances, but on misfeasance in public office. They alleged that between 1980 and 1991 the Bank of England acted in a knowingly unlawful manner in its supervisory regulation of the activities of BCCI in the United Kingdom. Initially, damages were estimated to be in the region of £550 million, plus interest.

Proceedings came to an end on November 2, 2005, when the claimants abandoned their action on day 256 of the trial. In the intervening 12 years a great deal of litigation took place requiring numerous court hearings occupying an extraordinary amount of judicial time in High Court, Court of Appeal and House of Lords (involving at least 63 days of hearings) and costing the defendants some £80 million. Since the action was from the start doomed to failure due to the lack evidential support the question that needs to be answered is: How was such a colossal wreck allowed to take place?

Determining the parties to the proceedings

The early skirmishes were purely technical. The depositors commenced proceedings in their own names but they really wanted the BCCI liquidators to fund the litigation. To this end they assigned their claims to BCCI, the very company which made off with their money. However, an unconditional assignment would have had the consequence that if the BCCI liquidators succeeded, the moneys recovered would have to be shared with all the creditors of BCCI. The claimants sought to overcome this problem by certain means, which are immaterial to the present purpose. The dispute as to whether and how BCCI could be joined was first dealt with by Gatehouse J., and subsequently resolved by the Court of Appeal in *Three Rivers DC v Bank of England (No.1)* [1995] 4 All E.R. 312, CA on November 24, 1994. The Court of Appeal held that the defects of the original writ could be cured by an amendment that made it clear that BCCI was acting on behalf of the individually named plaintiffs who were the legal owners of the claims equitably assigned to it.

Simple though this solution was, the matter of costs was beginning to exercise minds. Staughton L.J. was driven to remark that as a result of these proceedings: ''we shall no doubt face a great dispute about the costs, both of this appeal and in the court below; and the amount is likely to be huge'' (*ibid.*, at p.317). At the conclusion of his concurring judgment Waite L.J. said (at p.323):

> ''Each side has accused the other of preoccupation with tactical advantage. For my own part, I would not wish to comment on that, beyond observing that from now on this case ought to be seen publicly as one in which all parties accept that procedural skirmishing should have no place in it.''

As things turned out, Staughton L.J. words now seem prophetic while Waite L.J.'s counsel seems to have fallen on deaf ears, given that overall costs have been indeed huge and that the ensuing proceedings were mostly in the nature of antagonistic procedural skirmishing.

The substantive law issue—the nature of misfeasance in public office

The next significant application came before Clarke J. on November 27, 1995: *Three Rivers DC v Bank of England (No.2)* [1996] 2 All E.R. 363, QBD (Comm). In it the claimants applied for leave to refer to two speeches made by ministers in Parliament. They sought to do so in order to rebut the Bank of England's argument that the Banking Acts of 1979 and 1987 were not intended by Parliament to impose on the defendant an obligation to protect depositors and potential depositors from negligence, impropriety, dishonesty, etc. on the part of credit institutions. The Bank resisted the application. The dispute between the parties concerned the interpretation of *Pepper (Inspector of*

Taxes) v Hart [1993] A.C. 593; [1993] 1 All E.R. 42 and *Melluish (Inspector of Taxes) v BMI (No.3) Ltd* [1995] 3 W.L.R. 630; [1995] 4 All E.R. 453.

The claimants emerged victorious out of this little side-show since Clarke J. held that where the court is seeking to construe a statute purposively and consistently with any relevant European legislation, or the object of the legislation under consideration is to introduce into English law the provisions of an international convention or European Directive, it is of particular importance to ascertain the true purpose of the statute, and in those circumstances the court may adopt a more flexible approach to the admissibility of parliamentary materials than that established for the construction of a particular provision of purely domestic legislation.

Within a few months of this decision Clarke J. was called upon to decide, as a preliminary ruling, two issues of law that went to the very foundation of the claimants' action: (1) whether the Bank could be liable to the depositors for the tort of misfeasance in a public office, and (2) whether the depositors' losses were capable of being caused in law by the Bank's omissions. A decision against the claimants on any one of these issues would in effect have cut the ground from under their feet.

After a 13-day hearing Clarke L.J. delivered his decision on April 1, 1996; *Three Rivers DC v Bank of England (No.3)* [1996] 3 All E.R. 558, QBD. He held that the tort of misfeasance in public office required the deliberate and dishonest wrongful abuse of the powers given to a public officer. The tort, he explained, could be established where (a) a public officer performed or omitted to perform an act with the object of injuring the plaintiff, and (b) where he performed an act which he both knew to be beyond his power and one that would injure the plaintiff. This definition of the tort of misfeasance in public office was subsequently endorsed, with some modifications, by the Court of Appeal and the House of Lords.

Clarke J.'s summary judgment decision against the claimants

The definition of misfeasance in public office set a very high, if not impossible, hurdle for the claimants to surmount. There therefore followed further hearings before Clarke J. to determine the practical consequences of his substantive decision for the continuation of the action. The issue at this stage was whether the action should be struck out as showing no reasonable cause of action. Clarke J. explained:

> ''In my judgment the question in the instant case is whether the Bank has persuaded the court that the plaintiffs' case is bound to fail on the material at present available and that there is no reasonable possibility of evidence becoming available to the plaintiff, whether by further investigation, discovery, cross-examination or otherwise sufficiently to support their case and to give it some prospect of success. If the Bank discharges that burden, it will follow that the plaintiffs' claim is bound to fail. In that

> event to allow the action to proceed would serve no useful purpose. It would only involve the expenditure of time and money—in this case a very great deal of both. Neither party would have any legitimate interest in such expenditure because it could not benefit either. As the necessity for Lord Woolf's reforms shows, the time of the courts is not unlimited and should not be used in the consideration of what can be seen to be obviously hopeless cases. To allow such an action to proceed would be to permit an abuse of process. It follows that the question is whether the Bank has shown that the plaintiffs' claim is doomed to failure. As already stated, it will only be able to do so if it shows that the court has available to it all the evidence which is at present available to the plaintiffs, that the plaintiffs' case is bound to fail on the basis of that evidence and that there is no realistic possibility of the plaintiffs obtaining further evidence to support their case in the future, whether by further investigation, discovery, cross-examination or otherwise.''

On July 30, 1997 Clarke J. declared that on the facts pleaded by the claimants the Bank of England was not capable of being liable for the tort of misfeasance in public office and that the claimants' losses were not capable in law of being caused by the defendant's acts or omissions. He therefore struck out the statement of claim as disclosing no reasonable cause of action and refused leave to amend the statement of claim on the grounds that the draft was frivolous and vexatious. As a result he dismissed the plaintiffs' action with costs.

The summary judgment appeal to the Court of Appeal

Clarke J.'s decision was appealed to the Court of Appeal, which heard 13 days of argument and delivered its decision on December 4, 1998: *Three Rivers DC v Bank of England (No.3)* [2000] 2 W.L.R. 15, CA. In a judgment occupying some 165 pages a majority of the Court of Appeal (consisting of Hirst and Robert Walker L.JJ.) was in broad agreement with Clarke J.'s conclusions on the tort of misfeasance in public office and on the implications of these conclusions for the action. However the majority was less sure whether the claimants' case could be as easily disposed of on the issue of causation. The majority judges were supportive of the course taken by Clarke J. to the application to strike out the action. They accepted that in a complex case it would normally be inappropriate to strike out at an interlocutory stage, but they considered that this was a case where a departure from the normal rule was necessary.

One of the unusual features of the case was the fact that an official inquiry had already been carried out into the circumstances of the collapse of BCCI. Lord Justice Bingham was appointed to examine the role played by the Bank in the lead up to the collapse. The inquiry was instituted by the Bank of England and the Treasury to review the adequacy of the Bank's supervision of BCCI. Bingham L.J. had no power to compel the attendance of witnesses or the production of documents and there was no counsel to the inquiry. The

Bank and the UK firm of Price Waterhouse did show a very high level of co-operation with the inquiry. The liquidators of BCCI did not feel able to take the opportunity to comment on factual passages and opinions in the report. Bingham L.J. produced a lengthy report (the *Bingham Report*) after hearing submissions from the Bank (Inquiry into the Supervision of the Bank of Credit and Commerce International (HC Paper (1992-93) No.19). The report ran to some 200 pages. It had eight appendices consisting of a large volume of Bank of England contemporary documents relating to the supervision of BCCI.

Hirst and Robert Walker L.JJ. agreed with Clarke J. that it was unlikely that a fundamentally different picture from that depicted in the *Bingham Report* might emerge at trial and that there was no realistic possibility that what could emerge would be fundamentally different from the position set out in the report. They shared the judge's view that the claimants' case against the Bank up to the point at which it foresaw BCCI's collapse in April 1990 was not arguable on the basis of the available material and that there was no realistic prospect of its becoming arguable if amended. They believed that the totality of the documentary evidence showed that once the Bank realised that BCCI would collapse the Bank had hoped and expected on reasonable grounds that BCCI could be rescued and that in the circumstances it was practically inconceivable that new material would emerge to alter that conclusion. Accordingly Hirst and Robert Walker L.JJ. stated ([2000] 2 W.L.R. at 87):

> ''The pleadings involve imputations against a considerable number of Bank officials who held various posts of responsibility at different times during a period of over 10 years. The trial, if it took place, would be extremely long and expensive. An estimated duration of a year was mentioned, and that does not seem to us likely to be an overestimate. Justice may of course require a full trial, however great the trouble and expense involved; but the burden on the parties and their witnesses is one of the factors to be taken into account in discerning what course, in exceptional circumstances, best meets the requirements of justice.''

Dismissing the claimants' appeal they concluded as follows (*ibid.*, at 100–101):

> ''Throughout the preceding four sections we have adopted the same approach as that taken by the judge, and asked ourselves whether the plaintiffs have an arguable case that the Bank actually foresaw B.C.C.I.'s imminent collapse at each relevant stage. We have agreed with the judge's conclusion that all the evidence indicates that up to April 1990 it did not, and that thereafter it did, but properly relied on the prospect of a rescue. That is sufficient to dispose of the case in the Bank's favour. That formulation, however, may have been too favourable to the plaintiffs. In view of the stringent requirements of the tort of misfeasance in public office, the more appropriate question may be: 'Is it reasonably arguable that the Bank at any stage made an unlawful and dishonest decision knowing at the time that it would cause loss to the plaintiffs?' To that

question, in the light of our analysis of the evidence, the answer is plainly 'No'."

Auld L.J., dissenting, thought that the judge should not have struck out the plaintiffs' claim on the basis that, on the evidence which he considered would be available at trial if there were one, the claim would be bound to fail. He was of the view that a legally and factually complex case such as the present one was unsuitable for summary disposal.

The summary judgment appeal to the House of Lords—the seed of trouble

Had the Court of Appeal's decision been allowed to stand, the depositors' claim against the Bank of England would have been at an end. But they were not ready to give up. They took the matter to the House of Lords, which heard argument from January 24 to 27 2000, and from January 15 to 18 2001. These hearings resulted in two separate judgments: *Three Rivers DC v Bank of England (No.3)* [2000] 3 All E.R. 1, HL and *Three Rivers DC v Bank of England (No.3) (Summary Judgment)* [2001] UKHL 16; [2001] 2 All E.R. 513.

The first judgment was concerned with the substantive question of the nature of misfeasance in public office and with a further issue, which had also occupied the Court of Appeal, of whether the depositors had a claim under European law. The argument based on European law was rejected at all levels and nothing further need to be said about it.

On the principal substantive tort point the House of Lords held that the tort of misfeasance in public office had two forms: (i) cases where a public power was exercised for an improper purpose with the specific intention of injuring another person, and (ii) cases where a public officer acted in the knowledge that he had no power to do the act complained of and that it would probably injure the claimant. Clearly, the claimants were unlikely to pursue the first form. If they pursued the second form of the tort, the House of Lords made plain, they would have to prove that the public officer acted with a state of mind of reckless indifference to the illegality of his act. Moreover, to recover damages for consequential economic losses, a claimant would be required to establish that the public officer acted in the knowledge that his act would probably injure the claimant or a person of a class of which he was a member, i.e. that the public officer himself foresaw the probability of damage or was reckless as to the harm that was likely to ensue. Essentially the bar to proving misfeasance in public office remained as high as (if not higher than) that which was pronounced by the courts below.

Having decided the substantive issue, the House of Lords held a second hearing to determine whether it was justified to dispose of the claim summarily. It announced its judgment on March 22, 2001. However, while the House had been unanimous in its substantive decision, it decided the procedural issue in favour of the claimants by a bare majority of three to two (Lords Steyn, Hope and Hutton against Lords Hobhouse and Millett).

The majority held that the courts below were not entitled to treat the Bingham L.J. as conclusive on the questions that the court had to answer in the litigation or to conclude that all the available material evidence on those questions had been gathered. The majority then turned to consider the particulars of claim. Their Lordships proceeded on the assumption that the claimants would have to establish bad faith on the part of officers of the Bank and that they would have to prove that the Bank's officers acted intentionally in the knowledge that their act was beyond their powers and that it would probably cause the claimants injury, or, alternatively, that the Bank's officers acted recklessly in the sense that they were aware that there was a serious risk that the claimants would suffer loss due to their unlawful act and wilfully chose to disregard that risk.

At the same time, the majority was of the view that the facts pleaded by the depositors in their fresh pleadings were capable of meeting the requirements of the tort. There was an unequivocal plea that the Bank was acting throughout in bad faith. They thought that any question whether the evidence pointed to negligence rather than to misfeasance in public office, which would be insufficient, was a matter which had to be judged not on the pleadings but on the evidence, which was a matter for decision by the trial judge. They took the view that the question of whether the Bank knew that loss to the depositors was probable or was reckless could not be answered satisfactorily without hearing oral evidence and it could not therefore be said that the claim had no real prospect of success. In the view of the majority, justice required that the depositors should be given an opportunity to present their case at trial so that its merits might be assessed in the light of all the evidence. Accordingly, the Bank's application for summary judgment was rejected and the depositors' appeal was allowed.

The claimants' action was thus spared summary dismissal, but they were left with a tall mountain to surmount, for they now needed to prove, in effect, a conspiracy on the part of Bank of England officers to act unlawfully in order to harm them, or with the full knowledge that their unlawful actions would harm depositors. Although their case was now better pleaded, the claimants still had no evidence to support their allegations. The *Bingham Report*, which was based on an examination of the contemporary evidence, gave no indication that such evidence existed or might be found. Normally, claimants in this position would withdraw from the unequal struggle of trying to prove the improbable. But the depositors and their legal team must have been spurred on by the majority's approach to the absence of evidence.

A majority of their Lordships seemed to believe that the depositors had some sort of moral right to be allowed every opportunity to prise out of the Bank of England evidence in support of their case. Lord Hutton said:

> "I think that justice requires that the plaintiffs, after discovery and interrogation, should have the opportunity to cross-examine the Bank's witnesses as to their concerns before 1990 and as to their belief from April 1990 onwards that there would be a rescue operation. The fact that a plaintiff does not have direct evidence as to the belief or foresight or

> motives of the defendant is not in itself a reason to strike out the action.'' (at [147]–[148])

Lord Steyn said that he did not:

> ''share the confidence of the judge and the majority in the Court of Appeal that discovery and cross-examination will not produce significant materials assisting the claimants. It is a case that should be examined and tested with the procedural advantages of a fair and public trial.'' (at [6])

Lord Hope gave even more explicit encouragement to the claimants to try and wrestle from the Bank's officers the necessary support for their case. He accepted that as things stood there was little material to support the pleading that at the time of licensing BCCI, the Bank knew that loss was probable or that it had the state of mind regarding loss to depositors and potential depositors that amounted to recklessness. He also said that there was little chance of contemporary supportive evidence emerging (at [104]). Yet, he went on to make the following statement (at [105]):

> ''But it seems to me that, as events unfold, this part of the case gathers momentum and that the available material makes it clear that the Bank knew by April 1990 at the latest that, unless a rescue could be put in hand in time by the Abu Dhabi government, BCCI would collapse and that serious loss to depositors would then be inevitable. The pattern of events during this final period is complicated, as the majority in the Court of Appeal recognised . . . In my opinion the documents alone do not tell the full story, and the question whether the Bank knew that loss to depositors was probable or was reckless in the relevant sense cannot be answered satisfactorily without hearing oral evidence.''

These views expressed by the majority prompted the claimants to embark on a long and costly voyage to unearth evidence in support of their case.

The voyage of disclosure

Given these encouragements to see what they could turn up, it is not surprising that the claimants' legal team spent the next five years in a frantic and ever more desperate effort to seek access to every conceivable source of information. They were not content with the disclosure of contemporary records but sought access to materials generated by the Bank in connection with the presentation of their position in the Bingham Inquiry. It was at this juncture that Tomlinson J. took over the management of a case that would occupy much of his time until it was concluded, or almost concluded, in 2006.

The first couple of applications that Tomlinson J. had to deal with were relatively uncontroversial as they were mainly concerned with the mechanics of disclosure. Nevertheless, the troublesome nature of the process was clear from the start. He gave the first of his judgments concerning disclosure in *Three Rivers DC v Three Rivers DC v Bank of England (Disclosure) (No.1)* (also

known as: *Three Rivers DC v Bank of England (No.4), Three Rivers DC v Bank of England (No.5)* [2002] EWHC 1118 (Comm)). In it Tomlinson J. observed that he had to consider:

> ''the extent to which the court may and should lend its aid to the Claimants in their attempt to find out more than they presently know concerning these matters to which they were not privy. That attempt has been at times described as a 'fact-gathering exercise' and the submissions made to me have at times suggested that for the court to lend its aid to such an exercise is an improper and impermissible use of the court's powers to order disclosure of documents by a person not a party to the litigation'' (at [2])

That particular application was concerned with the ''Bingham Archive''. That is, the body of material assembled by Bingham L.J. in the course of his Inquiry and on the basis of which he prepared his Report. It consisted of 708 files. These files were not held by the Bank but were in the control of the Treasury and held in government archives. A three-day hearing was held before Tomlinson J., at the end of which he made an order of disclosure under CPR r.32.17, which empowers the court to order non-parties to make disclosure. Tomlinson J. ordered the disclosure of much of the material contained in the archive and made provisions for the preservation of confidentiality and ensuring that only relevant documents or parts of documents were disclosed. It is worth observing that at this point Gordon Pollock Q.C. seems to have joined Lord Neill as the claimant's leading counsel.

An appeal against Tomlinson J.'s judgment in *Three Rivers* [2002] EWHC 1118 (Comm) was taken to the Court of Appeal. The Court of Appeal dismissed the appeal on August 7, 2002. Following this decision, Tomlinson J. gave a further judgment concerning the working of the disclosure orders against the Treasury. This judgment was again mainly concerned with the mechanics of the process and with ensuring that the confidentiality of the materials was protected until such time as they were used at an eventual trial: *Three Rivers DC v Bank of England (Disclosure) (No.2)* [2002] EWHC 2309 (Comm), given on November 8, 2002.

Up to that point the disclosure proceedings were mere probing or consolidating exercises. The serious battle started with an application by the claimants to see documents for which the Bank sought legal professional privilege: *Three Rivers DC v Bank of England (Disclosure) (No.3)* [2002] EWHC 2730; [2003] C.P. Rep. 34. To understand the background to this application it is necessary to say something about the way in which the Bank was represented in the Bingham Inquiry.

The Bank retained Freshfields solicitors to advise on the Bank's communications with the Inquiry. A special unit was set up within the Bank with responsibility for the collection and provision of information to Freshfields, which was known as the Bingham Inquiry Unit (''BIU''). The Bank claimed privilege for documents generated within the Bank in order to provide information to Freshfields, with a view to enabling Freshfields to advise the Bank on its submissions to the Bingham Inquiry, or to provide the

Bank with legal advice concerning submissions to, evidence for and responses to requests from the Inquiry. The claimants wished to see all the materials prepared by the Bank's employees for submission to the Bank's solicitors. Tomlinson J. explained the issue as follows (at [3]):

> "The question which has arisen on this application is whether the subject matter of legal advice privilege is restricted to communications between solicitor and client . . . or whether it embraces also material brought into existence for the dominant purpose of obtaining legal advice, even though that material is not in itself a communication between solicitor and client."

Had the Bingham Inquiry been considered as litigation, the documents in question would have been protected by litigation privilege. But it was accepted that the Inquiry did not amount to litigation and that only advice privilege could be claimed. Nonetheless, Tomlinson J. held (on December 13, 2002) that LPP extended to documents prepared by someone other than the client, which were preparatory to a communication between lawyer and client for the purpose of obtaining legal advice, so long as the maker of the documents created them at the request of the client with the dominant purpose of enabling the client to obtain legal advice.

This decision was appealed to the Court of Appeal: *Three Rivers DC v Bank of England (Disclosure) (No.5)* (also known as (No.3)) [2003] EWCA Civ 474; [2003] Q.B. 1556. The Court of Appeal reversed Tomlinson J.'s decision and held that advice privilege, unlike litigation privilege, attached only to communications between the client and his legal advisers (i.e. between BIU and Freshfields). It did not extend to information given by an employee to an employer or fellow employee to enable the employer to obtain legal advice. In short, legal advice privilege only covered communications passing directly between the solicitor and the client and did not protect documents prepared by third parties in order to enable the client to obtain legal advice. Leave to appeal this decision to the House of Lords was refused.

Up to that point the claimants had not sought disclosure of documents passing between the Bank of England's solicitors and the BIU. But in the light of certain comments made in the course of the Court of Appeal judgment, and presumably still short of evidence to substantiate their claims, the claimants withdrew their concession and argued that communications between BIU and the solicitors were not covered by legal advice privilege. An application was accordingly made to Tomlinson J., which he determined in *Three Rivers DC v Bank of England (Disclosure) (no.4)* [2003] EWHC 2565 (Comm), November 4, 2003. He permitted the claimants to withdraw their concession. He formed the view that the Court of Appeal had, in the last-mentioned judgment, decided that requests for and provision of advice as to how material should be presented to the Inquiry, so as to present the Bank in the best possible light, did not constitute legal advice for the purpose of legal advice privilege. He therefore ordered disclosure of the communications between the Bank and Freshfields in connection with the Bingham Inquiry.

The Bank appealed to the Court of Appeal, contending that the scope of legal advice privilege included the provision of advice in relation to an inquiry of the kind under consideration. The Court of Appeal held a three-day hearing and dismissed the appeal in *Three Rivers DC v Bank of England (No.5)* [2004] EWCA Civ 218; [2004] 3 All E.R. 145, March 1, 2004. It held that privilege did not apply where the dominant purpose of a solicitor-client relationship was not the obtaining of advice and assistance in relation to legal rights and obligations.

An appeal against this decision was taken to the House of Lords in *Three Rivers DC v Bank of England (No.6)* [2004] UKHL 48; [2005] 1 A.C. 610; [2005] 4 All E.R. 948, even though the Bank had already complied with Tomlinson J.'s order and made the required disclosure. After a four-day hearing the House of Lords allowed the appeal on November 11, 2004. It held that legal professional privilege attached not only to advice about rights and obligations but also to advice as to what should prudently and sensibly be done in the relevant legal context. In the instant case the preparation of evidence and submissions to be made to the Bingham Inquiry on behalf of the Bank had been for the purpose of enhancing the Bank's prospects of persuading the inquiry that its discharge of its public law obligations had not been deserving of criticism and had been reasonable in the circumstances. The presentational advice given by the lawyers in that context was advice as to what should prudently and sensibly be done in the relevant legal context and was therefore privileged.

The House of Lords refused, however, to revisit the Court of Appeal's decision in [2003] EWCA Civ 474 that LPP did not attach to reports by the Bank's employees. Now that the extent to which the claimants could obtain access to Bank of England documents had been finally determined, the case was ready to proceed to trial. However, before describing the trial arrangements, mention needs to be made of two other decisions given by Tomlinson J.

Once the bulk of disclosure was completed, the claimants sought an amendment. The application required a four-day hearing before Tomlinson J.: *Three Rivers DC v Bank of England (Amendment of Particulars of Claim)* [2003] EWHC 1269 (Comm), June 6, 2003. The amendment was intended to make explicit that officials in the Banking Supervision Division, other than the seven most senior officers that has already been identified, participated in the Bank's dealings with BCCI with knowledge that the Bank's conduct was in the relevant sense unlawful. The concluding paragraph of Tomlinson J.'s decision contains the following telling statement:

> ''24. In case my judgment attracts any wider currency than the parties' legal advisers I should just make it clear that the fact that I have allowed these amendments to the pleadings does not indicate that I have reached a conclusion as to the likely success of the arguments which they contain. The House of Lords has already ruled that the Claimants have an arguable case which is fit to proceed to trial. It is not my task to pronounce upon arguability—it is my task as soon as reasonably possible to read and hear all of the evidence at trial and to make my own final judgment on the

> basis of the totality of the tested evidence. I regard what I have done in response to this application as simply an exercise in trial management. It was in my judgment inherent in what their Lordships ordered that the Claimants should be permitted to argue their case in this way. All that I have done is to attempt faithfully to give effect to their Lordships' ruling.''

Clearly, whatever misgivings the trial judge may have had about the soundness of the claimants' case, they had to be put to one side as a result of the House of Lords decision.

The other interim decision that needs mention is *Three Rivers DC v Bank of England (Permission to Amend)* [2003] EWHC 2950 (Comm) of December 4, 2003. In his decision Tomlinson J. allowed the claimants to add serious allegations against yet another bank official. But again he recorded his misgivings saying:

> ''55. If anything ever needs to be said about the allegations made against Mr Langley, or the basis upon which they are made, or indeed about the allegations against any of the bank's officials or the basis upon which any of those are made, I for my part propose only to say it after I have heard all of the evidence and considered all of the arguments in this complex case.''

The trial—troublesome 256 days

A further aspect of the last-mentioned decision ([2003] EWHC 2950) concerned the preparations for trial and it provides some indication of the claimants' worries about the impending trial. In addition to adding allegations against yet another Bank official, the claimants applied for an order to exclude the Bank's witnesses from the court during the evidence stage of the trial until they were themselves called to give evidence. The judge rejected the application for two reasons. The first was that the level of public interest likely to be shown in the trial would render such an order unrealistic, unworkable, unenforceable and thus wholly undesirable. The second was that given the nature of the allegations made against these witnesses fairness required that they should be at liberty to hear all the evidence given at the trial.

The trial of the claim started on January 13, 2004. Opening speeches lasted for 205 days. On May 4, 2005, the Bank announced that it only intended to call two witnesses, Mr Quinn and Mr Cooke. On May 5, 2005 Tomlinson J. fixed June 13, 2005 as the day on which Mr Quinn's evidence would start. The claimants indicated that they expected the cross-examination of Mr Quinn, whose witness statement ran to 1,008 pages, to take not less than 12 weeks. On June 3, 2005 Mr Quinn received medical advice that it was likely that he would need an operation that autumn, which would result in Mr Quinn being unfit to resume cross-examination until January 2006. Cross-examination of Mr Quinn began on June 13, 2005. On June 23, 2005 Tomlinson J. heard an application by the Bank to limit the duration of Mr Quinn's cross-examination and ordered that the cross-examination be completed by July 28, 2005, on the

grounds that it was unnecessary for it to last longer than the end of term and that any prejudice to the claimants was outweighed by the prejudice to Mr Quinn.

The claimants appealed this decision to the Court of Appeal: *Three Rivers DC v Bank of England (Restriction on Cross Examination)* [2005] EWCA Civ 889; [2005] C.P. Rep. 46. The Court of Appeal dismissed the appeal holding that the decision to limit cross-examination pursuant to the express power granted by the CPR was peculiarly a matter for the judges' discretion and would only be disturbed on appeal if it was outside the generous range allowed for such decisions, in other words if it was plainly wrong. The Court of Appeal held that on the facts there was no basis to interfere with the judge's view that a cross-examination of seven weeks would be sufficient. Immediately following this judgment the Bank applied to the Court of Appeal for an order that its judgment should not be made public in order to protect the confidentiality of Mr Quinn's medical condition. But the Court of Appeal dismissed the application: *Three Rivers DC v Bank of England (Application for Judgment in Private)* [2005] EWCA Civ 933; [2005] C.P. Rep. 47.

Mr Quinn's cross-examination was accordingly completed at the end of July 2005. In October 2005 Tomlinson J. ruled that Mr Cooke's cross-examination, which had already lasted for 20 days, should also be curtailed. The case collapsed soon afterwards. On day 256 of the trial the claimants discontinued their action and agreed to pay the bank's costs on an indemnity basis, though without admitting a legal liability to pay indemnity costs.

The fallout

This was by no means the end of the matter because the claimants did not publicly withdraw the serious allegations made against Bank of England officers nor proffer any apology. The Bank and the impugned officials were left in an invidious position because the allegations against them had been given considerable publicity but were left hanging in the air as a result of the inconclusive outcome of the proceedings. The Bank therefore applied to the court to state that the allegations against the Bank and its officials and former officials were unfounded and wholly unsupported by the evidence and should not have been made or maintained by the claimants and asked the judge to give reasons for that conclusion.

In *Three Rivers DC v Bank of England (Indemnity Costs)* [2006] EWHC 816 given on April 14, 2006, Tomlinson J. considered whether he should accede to the Bank's invitation (a) to declare that it was entitled in law to the indemnity costs, (b) to exonerate the Bank's officials, and (c) to give guidance to the costs judge. The judge's reasons for acceding to the application shed a great deal of light on the nature of the claimants' case and the manner in which it was pursued.

Tomlinson J. revealed (at [23]) that for about a year it had been a matter of surprise to him that the action was being pursued. Towards the end of November or at the beginning of December 2004, after he had been listening

for many weeks to Mr Stadlen's opening submissions on behalf of the Bank, he became so concerned about the case that he consulted the Lord Chief Justice about it. He told Lord Woolf that the case was a farce. Tomlinson J. reports:

> "I told Lord Woolf that it seemed to me that allegations of dishonesty were being levelled against officials or former officials of the Bank for no better reason than that if their conduct was presumed to have been honest it represented an insuperable obstacle to the liquidators proving their case. By the close of the liquidators' case the logic of that case as I have already pointed out had driven them to level accusations of dishonesty at over forty officials of the Bank. I told the Lord Chief Justice that the case as it was being pursued before me bore little or no relation to that which the House of Lords had considered fit to proceed to trial. I warned the Lord Chief Justice that I feared that the case had the capacity to damage the reputation of our legal system. This was after Mr Stadlen had drawn to my attention many, as I thought, highly relevant documents in the material disclosed by the Bank which I had not hitherto seen, and after he had ruthlessly exposed just some of the myriad hopeless inconsistencies and implausibilities in the liquidators' case. The Lord Chief Justice and I discussed whether there were any measures which might be taken either by me or by both of us together in order to persuade the liquidators of the folly of their enterprise. I take full responsibility for the conclusion, which was essentially mine anyway, that there was nothing which could usefully be done. The liquidators were represented by a legal team of the greatest eminence. What was apparent to me as a result of Mr Stadlen's exposition must have been as apparent to them, although unfortunately Lord Neill and Mr Pollock absented themselves from large parts of Mr Stadlen's address so that the immediate impact thereof may have been lost on them. In the event the trial then proceeded for very nearly another year, hence my remark on 2 November 2005."

Tomlinson J. held that he had jurisdiction to accede to the Bank's application. First, although the liquidators had offered to pay costs on an indemnity basis, they denied that the Bank was in fact entitled to such an order. This created a sufficient *lis* to justify dealing with the Bank's application. Secondly, he thought that it was incumbent on the trial judge to express his views about the parties' conduct of the litigation in order to assist the costs judge to assess the costs. Finally, Tomlinson J. held, there was the more general consideration that there was a public interest in knowing what was revealed by the trial about the allegations of dishonesty made therein which were so widely publicised by the liquidators.

The judge observed that the claimants' case was substantially different from the one that persuaded the House of Lords to allow them to continue their action ([2006] EWHC 816 at [34]). For while the House of Lords thought that the claimants had a real prospect of establishing that the Bank knew from April 1990 onwards of the parlous state of BCCI and was reckless as to whether there would be a rescue plan, the claimants did not have an equally arguable case with respect to the Bank's state of mind prior to that date. Yet, Tomlinson

J. observed, the claimants energetically sought to establish a case of misfeasance with regard to the earlier period. However, given the comments made by the House of Lords majority judges with regard to the claimants' right to seek support for their allegations, as already noted above, it is hardly surprising that they relentlessly explored all possible avenues.

Describing the proceedings before him, Tomlinson J. said that on day 130 of the trial he asked the claimants' counsel to indicate the occasions on which the Bank acted unlawfully. He reports that he "was pointed to no occasion upon which it was alleged by the Claimants that the Bank unlawfully decided not to revoke [BCCI's licence]" (at [39]). He observed that throughout the trial the claimants' legal team adopted a strategy of abandoning no allegation, however hopeless it had become. Throughout the trial the claimants continued to make serious allegations against the Bank and its employees for which there were no reasonable grounds. Referring to the way in which the claimants' case was conducted he said:

> "46. . . . I can only think that it was inspired by a desire not to abandon any point, however bad, in an effort to keep the show on the road for long enough to be able to cross examine the Bank's witnesses. Apart from many other things I could say about it, it wasted time and it prevented the Bank (and me) from ever knowing quite what case it was expected to meet and meant that it had to prepare to meet all eventualities, even those which had been apparently abandoned. This has obvious implications for any assessment of the reasonableness of the Bank's expenditure."

By day 130 of the trial it was already apparent to Tomlinson J. that the claimants' post-licensing case was simply incoherent. He had by now reported to the Lord Chief Justice in the terms mentioned above. Tomlinson J. found it extraordinary how the claimants' case was made to change to fit the exigencies of the moment. That fact alone, he considered, justified an award of indemnity costs and would also be highly relevant to any consideration by the costs judge of the reasonableness of the Bank's expenditure in preparing to meet these many and varied allegations (at [62]).

In an effort both to clarify the position and to encourage the claimants to face up to their difficulties he presented them with four questions. From the claimants' response to these questions it was clear to him that their case was hopeless. The approach of the claimants' legal representatives was, according to the judge:

> "informed by a desperation to keep the trial alive for long enough to expose the Bank's witnesses to cross examination which, as long ago as 24 September 2004, the liquidators' solicitor Mr Grierson of Messrs Lovells had told the Evening Standard would be 'bloody'." ([2006] EWHC 816 at [59])

In his view the claimants:

> "never grappled with the fact that the logic of their case compelled them to attribute to these perfectly decent people trying to do their job ever

> more disgraceful and dishonest conduct such as would not ordinarily be contemplated by perfectly decent people.'' (at [65])

Tomlinson J.:

> ''formed the view that the Claimants' case, the structure upon which those allegations were hung, was itself most unsound. It was a structure built on occasion not even on sand but rather on air. It was inevitable that allegations of dishonesty made in support of such a case would themselves be without foundation . . .'' (at [120])

He concluded by pointing out that the:

> ''liquidators alleged that the Bank by 22 of its officials had acted deliberately unlawfully and in bad faith and that at least 42 of its officials had employed widespread dishonesty in order to ensure that this conduct could take place and that it would go undetected. In this judgment I have sought briefly to explain why in my view the Bank's officials should be exonerated of the grave allegations made against them.'' (at [136])

On the reasonableness of the conduct of the claimants' case he said:

> ''131. At the close of the Bank's case Mr Pollock told me that on reflection the Claimants had determined that their pleadings did not require amendment, but that the case would be put to the witnesses as he had opened it, there having been ample opportunity for the witnesses to know what were the allegations which were being made. The untackled problem was of course that the allegations which were being made were inconsistent and contradictory, both with themselves and with the pleaded allegations. Sooner or later this would have caused the Claimants insuperable problems in cross examination. In the event the liquidators discontinued before they encountered them. It will be a feature to be borne in mind by the Costs Judge. Nothing in the Claimants' case was ever abandoned, and indeed on the one occasion when something apparently was abandoned it was then sought to reinstate it. Any suggestion that the Defendants incurred costs on an unreasonable scale will need to be tested against the background of litigation apparently conducted by the liquidators and their legal advisers by reference to standards which I did not recognise.''

Tomlinson J. had this to say about the manner with which Mr Pollock Q.C., for the claimants, conducted himself (at [135]):

> ''Mr Pollock was only infrequently rude to me and I ignored it. Not everything said by Mr Pollock is intended to be taken seriously and sometimes his offensive remarks are the product of a well-intentioned but ill-judged attempt to lighten the mood. I propose to say no more about some of the things said in the course of the trial about the Bank, its officials and its legal advisers with the exception however of Mr Stadlen. Mr Pollock's sustained rudeness to his opponent was of an altogether different order. It was behaviour not in the usual tradition of the Bar and

> it was inappropriate and distracting. I should have done more to attempt to control it, although I doubt if I should have been any more successful than evidently were Mr Pollock's colleagues whom on at any rate one occasion I invited to attempt to exercise some restraining influence. Whether this is a ground upon which an award of indemnity costs should be considered I do not need to decide."

Finally he stated:

> "138. There remain the Bank's costs of this application incurred subsequent to 9 December 2005. In my judgment the Bank was fully entitled to pursue this application. It would have been an affront to justice and contrary to the public interest had the liquidators successfully stifled publication of the Court's conclusions. It was of itself unreasonable of the liquidators to deny the Bank's entitlement to the costs order which it sought. This application enabled the consequences of the liquidators' conduct fully to be worked out and in my judgment it is appropriate that the Claimants should pay the costs thereof on the same indemnity basis as they must pay the costs of the action."

The seed of wreck—misinterpretation of the overriding objective by the House of Lords

It can hardly be disputed that there has been a serious failure of case management in this lamentable saga. It is true that the litigation commenced some six years before the Civil Procedure Rules 1998 came into effect in April 1999. But this does not provide a full explanation for the debacle. First, even before the CPR the court had ample powers to bring hopeless actions to an early conclusion. More important still, the key House of Lords decision allowing the case to proceed was given on March 22, 2001, nearly two years after the CPR came into force. It is therefore necessary to examine more closely why the courts failed to exercise their ample powers to bring these proceedings to an early conclusion when five of the nine judges who dealt with the decision to strike out the action considered that the action had no real prospect of success.

If, as is suggested, the cause of the management failure arises from a misunderstanding of the overriding objective of the CPR, there is a serious risk that the BCCI case will not be an isolated wreck and that other cases, big or small, may similarly get out of control and absorb inordinate party and court resources. It is therefore necessary to say something about the overriding objective of the CPR and to examine in somewhat greater detail the reasons that led the House of Lords to take issue with Clarke J.'s dismissal of the claim on the threshold.

At the foundation of the overriding objective of the CPR lies the idea that the court should ensure that disputes are resolved by means of proportionate use of court and party resources. The court must see to it that the dispute resolution process bears a reasonable correlation to the importance and complexity of the

dispute. The court must decide which issues need full investigation and trial and which may be adequately disposed of summarily (CPR r.1.4(2)(c)). It must consider whether the likely benefits of taking a particular step justify the cost of taking it (CPR r.1.4(2)(h)). In the very first paragraph of his speech Lord Hobhouse explained the implications of the overriding objective for the issue under consideration ([2001] UKHL 16 at [153]):

> ''It has been estimated that the trial of this action will occupy a whole year; I sincerely hope that this is too pessimistic. But, on any view, the continuation of the action will involve the application of very substantial resources both at the trial and in preparation for it by both of the parties and the system of justice. The volume of paper, forensic and evidential, is already formidable and the events which will have to be trawled over extend over some 15 years. The investigation of those events gave rise to a report (Inquiry into the Supervision of the Bank of Credit and Commerce International (HC Paper 198 (1992-93))) (the Bingham report) which runs to 218 printed pages together with eight volumes of (unpublished) appendices recounting the history in greater detail. It was thus understandable that it should have been thought right to examine whether such a trial and such proceedings were really appropriate and necessary in order to determine the just outcome to the parties' dispute. Indeed, under Pt 1 of the Civil Procedure Rules 1998, SI 1998/3132, now in force it is the overriding objective, and the duty of the courts and the parties, that cases should be dealt with justly and that this includes dealing with cases in a proportionate manner, expeditiously and fairly, without undue expense and by allotting only an appropriate share of the court's resources while taking into account the need to allot resources to other cases. This represents an important shift in judicial philosophy from the traditional philosophy that previously dominated the administration of justice. Unless a party's conduct could be criticised as abusive or vexatious, the party was treated as having a right to his day in court in the sense of proceeding to a full trial after having fully exhausted the interlocutory pre-trial procedures.''

Much was made by the majority of the complexity of the issues, but Lord Hobhouse was of the view that (at [156]–[157]):

> ''The volume of documentation and the complexity of the issues raised on the pleadings should be the subject of critical scrutiny and should not without more deter the judge from considering whether it is really necessary to commit the parties and the court to a lengthy trial and all the preparatory steps which that will involve. Indeed it can be submitted with force that those are just the sorts of case which most strongly cry out for the exclusion of anything that is unnecessary for the achievement of a just outcome for the parties.
>
> The present case illustrates these considerations. The commercial judge was faced with an action dependent upon a cause of action of which the parameters were not wholly certain and a statement of claim which may

> or may not have disclosed a case sufficient in law to enable the plaintiffs to succeed. He ordered the trial of preliminary questions of law. He was clearly right to do so even though the decision of those questions has led to appeals to your Lordships' House.''

That the case cried out for help was plain throughout the pre-trial proceedings. Indeed, as noted earlier the trial judge himself took the matter up with the Lord Chief Justice. But unfortunately once the House of Lords allowed the case to proceed on the basis that the claimants were to be allowed to exhaust all disclosure and cross-examination opportunities, there was little anyone could do.

Effective case management requires that cases that may be disposed of summarily should not be allowed to proceed to the full trial process. Summary judgment under CPR Pt 24 may be given against a party who has no real prospect of successfully prosecuting the claim or defence and there is no other compelling reason why the case or issue should be disposed of at a trial. Whether a party has a real prospect of success depends on an assessment of two distinct matters: first, on whether the party has a real prospect of success on the basis of the facts that are known at the time, and, secondly, on whether there is a real prospect that some additional support for the party's case would emerge if the case followed the normal procedural route. It is only when the court is convinced that the party has no real prospect in respect of both these matters that the use of the normal process would be wasteful.

Mindful of these considerations, Lord Hobhouse, in a minority, said that a claimant making an allegation of dishonesty should be required to show a proper basis for making it in his pleading. ''The hope'', he said ''that something may turn up during the cross-examination of a witness at the trial does not suffice. It is of course different if the admissible material available discloses a reasonable prima facie case which the other party will have to answer at the trial'' (at [160]). The other minority judge, Lord Millett, went further and said that in ''the absence of evidence to support the allegation, it would be an abuse of process to make it'' (at [181]).

Much of the trouble that ensued was due to the lack of evidential support for the pleaded allegations. As a result of the scant support the claimants were forced to avoid too much specificity in their pleadings in order to be able to accommodate their case to any supporting evidence that might turn out, as Tomlinson J. was at pains to explain in his final pronouncement on the case. Yet the lack of a precise definition of the issues was evident from the start. Lord Millett pointed out that:

> ''the depositors . . . make the allegations necessary to establish the tort, but the particulars pleaded in support are consistent with mere negligence. In my opinion, even if the depositors succeeded at the trial in establishing all the facts pleaded, it would not be open to the court to draw the inferences necessary to find that the essential elements of the tort had been proved'' ([2001] UKHL 16 at [190])

He concluded as follows:

> ''[193] In my opinion the depositors cannot establish the requisite elements of the tort in respect of any matter of complaint. They have either failed to make the necessary allegations, or where they have done so they have pleaded insufficient facts in support to entitle the court to draw the necessary inferences. They have produced no document which supports their case, and every document which they have produced and on which they have placed reliance is either neutral or more often contradictory of their case. When in addition regard is had to the seriousness and sheer improbability of their case and the cogency of the evidence required to prove it, the conclusion is inescapable that it has no real prospects of success.''

In his view it was ''not just to defendants to subject them to a lengthy and expensive trial to defend their integrity when there is no foundation in the evidence for the attack upon it'' (at [192]).

These arguments did not, however, persuade the majority judges. Lord Hope did not think very much of the argument from efficiency. He stated ([2001] UKHL 16 at [106]):

> ''I agree with my noble and learned friend Lord Hobhouse that the overriding objective of dealing with cases justly includes dealing with them in a proportionate manner, expeditiously, fairly and without undue expense. As he says, each case is entitled only to an appropriate share of the court's resources. Account has to be taken of the need to allot resources to other cases. But I do not believe that the course which I favour offends against these important principles. The most important principle of all is that which requires that each case be dealt with justly. It may well be that the claimants, on whom the onus lies, will face difficulties in presenting their case. They must face the fact that each and every allegation of bad faith will be examined rigorously. A trial in this case will be lengthy and it will be expensive. There is only so much that astute case management can do to reduce the burdens on the parties and on the court. Nevertheless it would only be right for the claim to be struck out if it has no real prospect of succeeding at trial. I do not think that one should be influenced in the application of this test by the length or expense of the litigation that is in prospect. Justice should be even-handed, whether the case be simple or whether it be complex. It is plain that the situation in which the claimants find themselves was not of their own making, nor are they to be blamed for the volume and complexity of the facts that must be investigated. I would hold that justice requires that the claimants be given an opportunity to present their case at trial so that its merits may be assessed in the light of the evidence.''

It seems that Lord Hope believed that the requirement that ''each case be dealt with justly'' was different from, and independent of, the overriding objective of dealing with cases in a proportionate and expeditious manner. Yet, at the

very heart of the CPR lies the recognition that proportionality and expedition are part and parcel of doing substantive justice.

The CPR are founded on three imperatives: reaching substantively correct outcomes, by means of proportionate resources, and in a reasonable time. The overriding objective consists in "enabling the court to deal with cases justly" (CPR r.1.1(1)). Doing justice is the goal of any enlightened system of civil litigation. However the notion of doing justice is capable of a variety of interpretations. Under the previous system doing justice was thought to require merely arriving at a judgment that was correct as a matter of fact and of law. That is to say, doing justice consisted of reaching a correct decision no matter how long it took and how much it cost the litigants and the court. The CPR broke with this tradition by establishing that doing justice on the merits is not the sole overarching principle. Rather, justice on the merits has to be achieved within a reasonable time and by using no more than proportionate resources. Lord Hobhouse drew attention to this aspect when he said that the CPR system:

> "represents an important shift in judicial philosophy from the traditional philosophy that previously dominated the administration of justice. Unless a party's conduct could be criticised as abusive or vexatious, the party was treated as having a right to his day in court in the sense of proceeding to a full trial after having fully exhausted the interlocutory pre-trial procedures" (at [153])

A continuing erosion of the court's case management authority

At the root of the majority's decision lay the failure to appreciate the true nature of the overriding objective. It led their Lordships to allow the case to go forward when it should have been stopped, as Clarke J. appreciated at the outset. While such colossal wrecks are likely to be rare, it remains the case that persistent misinterpretation of the overriding objective continues to emasculate the ability of trial courts to manage cases effectively and risks defeating the laudable aims of the CPR and returning civil litigation to the sad state from which the Woolf reforms sought to redeem it.

The tendency of some judges to give the overriding objective a meaning that it was never intended to have is illustrated by the House of Lords decision in *Moy v Pettman Smith (a firm)* [2005] UKHL 7; [2005] 1 All E.R. 903. The claimant brought proceedings for medical negligence against a health authority ("HA") in 1994. HA admitted liability but denied that its negligence caused the loss or damage. Notwithstanding that the claimant had doubtful medical support for his claim at that stage, the claimant's solicitors agreed an order on February 13, 1997 that a schedule of special damages and an estimate of future expenses and losses was to be served by the claimant within 28 days, and that there be leave to adduce expert evidence limited to one medical expert on each side, whose reports were to be exchanged within three months of the

date of the order. On April 15, 1997 the claimant's solicitors learnt that their first medical expert was not prepared to support their case. As a result they sought support from Professor Saleh, who had operated on the claimant. HA agreed an extension of time for the exchange of the medical reports to July 18, 1997. No schedule for special damages having been served, HA obtained on June 20, 1997 a further order that unless such a schedule was served by July 18, 1997, the claim was to be struck out. The claimants tried to obtain a report from Professor Saleh but were unsuccessful. By the autumn, no medical reports had been exchanged. HA applied for a further pre-trial review. This review was heard on November 27, 1997, at which time it was expected that the trial would take place at some time in February 1998. The court ordered that medical evidence be exchanged by January 9, 1998 ''and in default no evidence not so disclosed shall be admissible save with leave of the court.''

Professor Saleh examined the claimant again at the end of January 1998, well after the deadline for exchange of expert reports. He provided a third report on 12 February 1998 in which he confirmed that the claimant was suffering from significant continuing disability, but crucially did not attribute the claimant's harm to HA's negligence.

The claimant applied on February 26, 1998 to adduce further evidence in the form of oral testimony by Professor Saleh, but the deputy district judge refused the application. An appeal to the circuit judge was dismissed March 6, 1998. At some point before the trial the claimant's counsel advised the claimant to decline a payment into court and instead to apply to the trial judge to accept further evidence from Professor Saleh. The trial started in April 1998. The judge expressed his concern that the matter had been left so late and that the claimant's condition might not be adequately dealt with in the reports which were already before him, but indicated that there were formidable difficulties in persuading him to re-open the issue, which had already been heard, by the district judge and the circuit judge. He then rose to consider the third report from Professor Saleh. Counsel appreciated that the chances were that the judge would not permit her to adduce the further evidence, and advised Mr Moy that he should accept whatever offer by HA was then available, which was considerably worse than an earlier offer that the claimant had turned down. The claimant accepted the offer and sued his solicitors in negligence, who in turn sought contribution from counsel.

The judge gave judgment against the solicitors for £210,000, but held that counsel had not been negligent. The solicitors appealed. The Court of Appeal refused to interfere with the judge's finding that counsel had not been negligent in her assessment of the prospects of success of the application to adduce the surgeon's evidence, but went on to hold that she had been negligent in failing to give the claimant sufficiently detailed advice, and that she was therefore liable for a proportion of the damages payable to the claimant. An appeal was made to the House of Lords. For the present purposes it is only necessary to discuss the difference in approach between Court of Appeal and the House of Lords to the refusal by the district judge, the circuit judge and, in effect, the trial judge to allow the claimant to call further evidence.

Although the claimant's action was concluded before the CPR, the Court of Appeal drew attention to the fact that changes in the judicial approach to failure to comply with court orders had already been developing as a result of the Lord Woolf Report on *Access to Justice*. It cited three Court of Appeal judgments, decided before the events in question, in which the Court of Appeal stated that the court would approach with greater rigour than before any application to adduce such evidence out of time. In one of these, *Beachley Property Ltd v Edgar*, *The Times*, Law Reports, July 18, 1996, Lord Woolf said that the court had to consider not only justice as between the parties, but also justice in the wider sense, and in particular the disruption to court timetables and injustice to other litigants waiting their turn before the court. In *Letpak Ltd v Harris*, *The Times*, Law Reports, December 6, 1996, Waller L.J. said that the "wind of change was blowing fast and practitioners should be aware of the decision in *Beachley*." In *The Mortgage Corporation Ltd v Sandoes*, *The Times*, Law Reports, December 27, 1996, Millett L.J. said that "[e]xtensions of time which involve the vacation or adjournment of trial date should therefore be granted only as a last resort."

In the *Moy* case Latham L.J. therefore concluded that in:

> "the light of these authorities and the earlier unsuccessful applications, the respondent's assessment of the chances of persuading the court to accede to her application could be charitably described as sanguine. But it seems to me that it is difficult for this court to say that the judge was wrong in the assessment that he made of the evidence of the respondent, in the light of his own experience and in the absence of any discussion in argument or evidence of these authorities." ([2002] EWCA Civ 875 at [41])

He was therefore of the view that counsel was negligent in thinking that an application to admit the evidence stood a reasonable chance of success.

Brooke and Hart L.JJ. agreed with Latham L.J. Indeed, Brooke L.J. drew attention to the fact that in *The Mortgage Corporation* case Millett L.J. stated that the guidelines for dealing with such cases had been endorsed by Lord Woolf M.R., and by Sir Richard Scott V.-C., who was at the time responsible for civil justice. Brooke L.J. also noted that the difficulty faced by the claimant's application for admission of late evidence was made worse by the fact that he had been subject to an unless order which put him on notice of what would happen if he failed to comply.

This was a clear case where the overriding objective of the CPR required that the decisions of the deputy district judge and of the circuit judge should be supported. Yet, on an appeal to the House of Lords the very opposite proved to be the case. Lord Carswell stated ([2005] UKHL 7):

> "[42] It must no doubt be frustrating for district judges who have charge of case management of actions before trial to be faced constantly with delays which result from inefficiency, incompetence or downright neglect on the part of the practitioners whose duty it is to prepare them. One is left with the very clear impression, however, that Deputy District Judge Stary either was over-influenced by the defects on the part of the solicitors

> in preparing the case and by the imperative of efficiency in managing a stream of actions for trial, or else she failed to appreciate how considerable an effect on the value of the claim the new medical evidence would have. She did not at any stage go into the question of the degree of prejudice which would be sustained by the health authority, which could readily be met by an order for costs. She either failed to carry out any balancing exercise or misunderstood the profound effect of the medical evidence which the claimant wished to adduce. Whatever the reason, the result of her decision was a drastic reduction in the amount which the claimant was likely to recover at trial, which the claimant and his advisers may justifiably have regarded as a serious injustice.''

Later on he stated:

> ''[61] Ms Perry [the claimant's counsel] was faced on the morning of trial on 6 April 1998 with a very difficult situation, not of her own making or that of the claimant. The decisions of the deputy district judge and circuit judge appear to have been largely driven by listing necessities and the need for enforcing a greater degree of efficiency and promptness on the part of practitioners. In the process the imperative of doing justice to the parties was subordinated, and Ms Perry may not unreasonably have felt that the trial judge would pay rather more regard to that imperative and be receptive to her application to be allowed to adduce the vital further evidence of Professor Saleh.''

What these dicta suggest is that if a refusal to allow late compliance with process requirements would cause a litigant prejudice, permission must be given no matter how serious the failure to comply has been, no matter how clearly the consequences of default were stated in a court order, and no matter how disruptive it would be to the trial and the court's arrangements. Such principle takes the litigation process back to the pre-CPR procedure, when the management of court proceedings was at the whim of the parties and when the court could only hope that sooner or later the parties would allow it to proceed to an adjudication of the merits.

It is extraordinary that the above dicta should have been made without any reference to the numerous Court of Appeal decisions on the subject. Stranger still is the fact that such a sweeping statement about litigation practice should have been made at all, given that the House of Lords had indicated in *Callery v Gray (Nos 1 and 2)* [2002] UKHL 28; [2002] 3 All E.R. 417 at [8]–[9], that the responsibility for monitoring, controlling and developing guidelines for litigation practice lies with the Court of Appeal and not with the House of Lords. Although this was said in the context of conditional fee agreements, Lord Bingham was clearly expressing a general policy applicable to all aspects of litigation practice. Indeed, he stressed that the House of Lords cannot respond to changes in practice with the speed and sensitivity of the Court of Appeal, before which a number of cases are likely to be considered over time to come, whereas the House of Lords hears very few cases concerning procedure.

Lord Carswell's dicta suggest that the House of Lords does not regard the need to promote efficiency and promptness on the part of practitioners as carrying much weight. This may have been an obiter dictum, but it is nonetheless calculated to deter trial judges from adopting a robust approach to party default and from imposing the court's authority on the litigation process. This approach can only be accounted for by a failure to grasp what is involved in court responsibility for the efficient conduct of litigation under the CPR. It reflects the pre-CPR philosophy that delay should be excused no matter how inordinate and how lacking in good reason it may have been, as long as the opponent has suffered no prejudice and the evidence has not deteriorated. Those holding such a view seem oblivious to its consequences for the administration of justice as a whole. They seem to ignore the fact that failure to enforce court directions, especially concerning deadlines, encourages sloppy practice, leads to satellite litigation and increases the unpredictability of litigation costs. They seem to overlook the fact that court resources (not to mention those of litigants) are finite and that by allowing one litigant to disrupt its timetable and consume disproportionate court time the court is denying others timely justice.

It was this kind of misapprehension of the philosophy and of the constraints of modern litigation practice that led a majority of the House of Lords in the *Three Rivers* case to deny its support to Clarke J.'s decision to strike out the claim and, indirectly, to undermine Tomlinson J.'s ability to get a firmer grip on a case that was getting out of control. It is therefore clear that unless all levels of judiciary can be persuaded to embrace the overriding objective that incorporates the requirements of proportionality and expedition, as well as of the need to do justice on the merits, the entire CPR system may become a colossal wreck.