

**PROMOTING PROPORTIONATE JUSTICE:  
A STUDY OF CASE MANAGEMENT AND PROPORTIONALITY**

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## **DECLARATION**

This thesis is the result of my own work and includes nothing which is the outcome of work done in collaboration except as declared in the Preface and specified in the text. I further state that no substantial part of my thesis has already been submitted, or, is being concurrently submitted for any such degree, diploma or other qualification at the University of Cambridge or any other University or similar institution except as declared in the Preface and specified in the text. It does not exceed the prescribed word limit for the relevant Degree Committee.

## **SUMMARY**

### **PROMOTING PROPORTIONATE JUSTICE: A STUDY OF CASE MANAGEMENT AND PROPORTIONALITY**

**ALEXANDRA ELIZABETH ALLAN**

This work examines the principles of proportionality and active case management that were introduced by the Civil Procedure Rules 1998 (the 'CPR'). The aim is to consider precisely what 'proportionality' means in a case management context, how it has been applied to date, and whether there is any need or scope for improvement.

Consideration is given to proportionality as a general principle of law. This establishes a conceptual background against which to consider the principle in an English procedural context. After reviewing the introduction and development of both proportionality and active case management in English civil procedure, case management proportionality is placed against that background. In doing so, and in identifying similarities and differences, the principle is given greater definition. The heart of this work is a review of case law dealing with case management issues. This identifies inconsistencies in both how proportionality has been applied and the extent to which courts have taken on the management role required of them by the CPR. It also highlights the fact that litigants and their legal representatives retain a crucial role in ensuring that litigation proceeds in a proportionate manner, but that in many instances that role is not fulfilled. The review also provides a wealth of information that may assist in tackling these issues and inconsistencies.

That information, together with points drawn from a review of management techniques in other common law jurisdictions, is taken forward into some proposals for the improvement of case management proportionality. Those proposals fall into two general categories: the publication of guidance and amendments to the CPR. The aim is to provide practical suggestions that may have a tangible impact on improving the consistency with which case management proportionality is applied, and thus improving the provision of access to proportionate justice.

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## **STATEMENT OF LENGTH**

This thesis does not exceed the word limit prescribed by the Degree Committee for the Faculty of Law.

Main text, footnotes and appendices: 93,639 words

Main text only: 79,709 words

## PREFACE AND ACKNOWLEDGEMENTS

I have been interested in the mechanics of how legal disputes are resolved since my time studying for the Graduate Diploma in Law. I feel incredibly privileged to have been able to spend the past three and a half years immersing myself in procedural law. The idea for this thesis first formed when I noticed, in my practice as a dispute resolution solicitor, that ‘proportionality’ and related terms were being used without any detailed consideration of what they might mean. Their use seemed to be based on no more than a general assumption that a proportionate decision or outcome was desirable. This led me to consider whether proportionality was being used as effectively as it could be to optimise access to justice. I have always believed strongly in the importance of truly equal access to civil justice. My hope is that this thesis might provide a useful, practical contribution to the continuing work of ensuring access to justice for all current and potential users of the civil justice system.

It would be impossible to name everyone who has helped and supported me over the past few years without forgetting someone, and then immortalising that forgetfulness in print. I am so grateful to everyone who has provided love, friendship, discussion, and distractions when needed. It is a cliché to say that they know who they are, but I am sure that they do.

*Æt þearfe mann sceal freonda to cunnian.*

## LIST OF ABBREVIATIONS

<b>ACTL</b>	American College of Trial Lawyers
<b>ADR</b>	Alternative Dispute Resolution
<b>ADR Act 1998</b>	Alternative Dispute Resolution Act 1998 (United States)
<b>C&amp;C-1</b>	Commercial and Corporations Practice Note (Federal Court, Australia)
<b>CCG</b>	Commercial Court Guide (England and Wales)
<b>CCSR</b>	Civil Courts Structure Review
<b>CDRA 2011</b>	Civil Dispute Resolution Act 2011 (Australia)
<b>CFCR</b>	Federal Court Rules (Canada)
<b>CJR</b>	Civil Justice Review
<b>CMC</b>	Case Management Conference
<b>CMIS</b>	Case Management Information Sheet (Commercial Court, England and Wales)
<b>CMR</b>	Chancery Modernisation Review
<b>CPA 2005</b>	Civil Procedure Act 2005 (New South Wales, Australia)
<b>CPA 2010</b>	Civil Procedure Act 2010 (Victoria, Australia)
<b>CPN-1</b>	Central Practice Note of the Federal Court of Australia
<b>CPR</b>	Civil Procedure Rules 1998 (England and Wales)
<b>ECHR</b>	European Convention on Human Rights
<b>ECJ</b>	European Court of Justice
<b>ECtHR</b>	European Court of Human Rights
<b>ENE</b>	Early Neutral Evaluation
<b>EU</b>	European Union

<b>FCAA 1976</b>	Federal Court of Australia Act 1976
<b>FCR 2011</b>	Federal Court Rules 2011 (Australia)
<b>FRCP</b>	Federal Rules of Civil Procedure 1938 (United States)
<b>FTS</b>	Flexible Trials Scheme
<b>IAALS</b>	Institute for the Advancement of the American Legal System
<b>ICL</b>	Inactive Cases List (Western Australia, Australia)
<b>NCF</b>	National Court Framework (Federal Court, Australia)
<b>PAP</b>	Pre-Action Protocol
<b>RSC</b>	Rules of the Supreme Court (England and Wales)
<b>SFTS</b>	Shorter and Flexible Trials Scheme
<b>STS</b>	Shorter Trials Scheme
<b>TCCG</b>	Technology and Construction Court Guide (England and Wales)
<b>TEU</b>	Treaty on European Union

## GLOSSARY

<b><i>Inter partes</i> procedural justice</b>	Procedural justice as between the parties to a given case.
<b><i>Inter partes</i> proportionality</b>	A determination of proportionality that considers and balances only the interests of, and prejudice to, the parties to a given case.
<b>Procedural justice</b>	The application of a fair procedure. The definition of 'fair' will depend on the aim of the civil justice system and the role of procedure within that system. Determines the scope of the inquiry to be made in the search for substantive justice. Under the CPR, incorporates <i>inter partes</i> and systemic aspects.
<b>Procedural law</b>	The law which dictates how parties vindicate their rights under the substantive law, and which sets out the formal structure within which rights and liabilities are determined.
<b>Substantive justice</b>	Justice done by adjudicating on parties' rights and liabilities, and by applying substantive law to findings of fact or agreed facts.
<b>Substantive law</b>	The law applied to findings of fact, or agreed facts, to determine parties' rights and liabilities.
<b>Systemic procedural justice</b>	Procedural justice provided through fairness in the allocation of judicial resources between all users of the civil justice system.
<b>Systemic proportionality</b>	A determination of proportionality in a given case that considers and balances the interests of, and prejudice to, all users of the civil justice system.
<b>The Overriding Objective</b>	Rule 1.1 of the Civil Procedure Rules 1998. Pre-April 2013: 'to deal with cases justly'. Post-April 2013: 'to deal with cases justly and at proportionate cost'.

## INTRODUCTION

Proportionality is central to the nature of justice provided by the modern English civil justice system. This principle, and active judicial case management as the means of its implementation, lie at the heart of the Civil Procedure Rules 1998 (the 'CPR'). The implementation of proportionality through case management should inform each step in a litigation action, thereby shaping and directing the progress of a case. It has been over twenty years since the CPR came into force, but certain questions remain under-investigated. There has been no detailed consideration of what precisely 'proportionality' means in a case management context, and no comprehensive analysis of the practicalities of its application (Chapter One). The author's aim is to fill those gaps and consider how implementation of proportionality within the case management process might be improved.

The starting point must be broader than civil procedure. It is instructive to consider the role and meaning of proportionality in areas of law that are either part of domestic English law or have close connections to it (Chapter Two). In some of these areas, detailed consideration has been given to the constituent parts of the proportionality analysis. In others, it is clear that some aspects of that analysis are already familiar to English judges. The focus can then be narrowed to proportionality in English civil procedure, through an overview of its place in the CPR's Overriding Objective, the aims and means of its introduction, and its development through amendments to the CPR (Chapter Three). Similar attention must be given to judicial case management, as the practical means by which the Overriding Objective and the principle of proportionality are implemented. The crucial role of parties in ensuring that litigation is proportionate must also be considered. The transfer of control of litigation to the court through the introduction of active judicial management did not render the parties irrelevant. At this point, the value of commencing with the broader analysis becomes clear, as it provides comparators which can be used to better define case management proportionality.

The core of this work is an analysis of post-CPR case law (Chapter Four). This identifies how proportionality has been applied in a case management context. There are clear inconsistencies in the extent to which judges actively manage cases, and in the factors that are taken into account when conducting the proportionality analysis. These inconsistencies cannot be explained by the fact-specific nature of either the analysis or of case management decisions

themselves. It is also clear that parties often fail to comply with their duty to assist the court in furthering the Overriding Objective. Yet more inconsistencies can be identified in how courts treat and deal with such behaviour. The inescapable conclusion is that neither proportionality nor judicial case management are as strongly embedded within the civil justice system as they could or should be. Identifying these inconsistencies is in itself valuable. However, the case law review also provides a wealth of information that can be drawn on to improve the application of case management proportionality. Before considering how that might be done, however, it is useful to consider how cases are managed in other common law jurisdictions, specifically the United States, Canada and Australia (Chapter Five). These jurisdictions featured in Lord Woolf's and Sir Rupert Jackson's procedural reviews. Each incorporates a concept of proportionality and some form of judicial management into its civil litigation system. An analysis of their procedural rules, in particular the management powers given to judges and the requirements imposed on parties and lawyers, illuminate different ways of controlling proceedings that might usefully be incorporated into the CPR.

Consideration can then be given to how, practically, the application of case management proportionality might be improved (Chapter Six). Three general points are drawn from the case law review, namely the inconsistencies referred to above, the importance of the relationship between parties and the court, and the fact-specific nature of the proportionality analysis. Before making specific suggestions, it is important to define what 'improvement' means in this context, and what the aims of any improvement measures should be. This allows the proposals that follow to be targeted and realistic. Those proposals fall into two categories: the publication of guidance for judges and practitioners, and amendments to the CPR. The former is aimed at removing, or at least reducing, inconsistencies by providing guidance on both broad questions of meaning and the practicalities of proportionate case management and progression. As part of this guidance, it is suggested that factors relevant to the proportionality analysis be collated in the form of a checklist (Appendix One). The proposed amendments to the CPR are aimed first at ensuring that the information available at the initial case management stage of proceedings is as comprehensive as possible, and secondly that parties and lawyers comply with their duty to assist the court in furthering the Overriding Objective. These two categories of proposals complement each other. The CPR provide the context within which any guidance is applied.

This work undertakes a close analysis of the principle of proportionality, and its application in civil case management, that has hitherto been missing from the procedural literature. The value of this analysis is that it provides an in-depth look at how the principle works at the granular, practical level of the decisions and actions that characterise every litigation matter. Proportionality can be discussed in conceptual terms, and there will be some such discussion, but conceptual analysis alone is insufficient. Case management is a practical exercise, undertaken by judges with real cases before them, supported by parties who have tangible interests in those cases and lawyers who must deal with the everyday tasks involved in running a litigation file. The analysis, and any resulting proposals for improvement, must embody this practical perspective. Only in doing so can improvements be made that will have a concrete, positive effect on the day-to-day management of cases and, by extension, on access to the balanced form of justice that underpins the civil justice system.

# CHAPTER ONE

## THE EXISTING LITERATURE

There is some discussion of proportionality in the context of case management in the literature. Andrews has highlighted the pervasiveness of proportionality in procedural law, including in case management<sup>1</sup> and litigation costs.<sup>2</sup> He identifies judicial control of process to ensure focus and proportionality as a core principle of civil justice.<sup>3</sup> Clark and Jackson give some explanation of what proportionality is and what it means, and provide examples of what might amount to 'proportionate' and 'disproportionate'.<sup>4</sup> Sorabji has considered the centrality of both individual<sup>5</sup> and collective<sup>6</sup> proportionality to the Woolf and Jackson reforms,<sup>7</sup> as well as the problems that plagued implementation of proportionate justice post-Woolf<sup>8</sup> and what may practically be required for its implementation.<sup>9</sup> In one of the most recent books devoted to civil procedure, De Saullés treated proportionality and case management as core aspects of the topic, in a broad consideration of objectives, operation and reform. He noted that proportionate preparation is 'one of the golden keys' to ensuring a fair hearing.<sup>10</sup> Zuckerman has recognised the importance of both *inter partes* and systemic conceptions of proportionality.<sup>11</sup> He states that considerations of proportionality 'come into almost all procedural decision-making',<sup>12</sup> and that it requires the terms and consequences of management orders to be proportionate to the aim which that order seeks to achieve.<sup>13</sup> Proportionality 'can only be achieved by way of a cost-benefit analysis' in which the crucial issue is the advantage that is likely to be gained from taking a particular procedural point, bearing in mind the features of the particular case, such as the complexity of

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<sup>1</sup> Neil Andrews, *Andrews on Civil Processes I: Court Proceedings* (2nd edn, Intersentia 2019) 178.

<sup>2</sup> *ibid* 529.

<sup>3</sup> *ibid* 696.

<sup>4</sup> Stephen Clark and Sir Rupert Jackson, *The Reform of Civil Justice* (2nd edn, Sweet & Maxwell 2018) 32-33.

<sup>5</sup> i.e. *inter partes* proportionality.

<sup>6</sup> i.e. systemic proportionality.

<sup>7</sup> John Sorabji, *English Civil Justice after the Woolf and Jackson Reforms: A Critical Analysis* (CUP 2014) 167-9.

<sup>8</sup> *ibid* ch 7.

<sup>9</sup> *ibid* 229ff.

<sup>10</sup> Dominic De Saullés, *Reforming Civil Procedure: The Hardest Path* (Hart 2019) 16.

<sup>11</sup> Adrian Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* (4th edn, Sweet & Maxwell 2021) ch 1, paras 1.58-1.63.

<sup>12</sup> *ibid* para 1.66.

<sup>13</sup> *ibid* ch 11, para 11.155.

the issues and their importance.<sup>14</sup> Elsewhere, he has summarised the interplay between proportionality and case management, stating that ‘the CPR provide the court with sophisticated means of matching process to dispute to ensure that the means of resolving the dispute are appropriate in view of the complexity of the issues, their importance, and the parties’ reasonable needs.’<sup>15</sup> He has also identified some specific ways in which the court may do this, for example by controlling the issues in dispute and excluding evidence.<sup>16</sup> These texts do not, however, consider the details of how proportionality works as a case management tool, nor precisely how a court might determine whether a particular management decision is proportionate.

There is often a focus on proportionality in the context of costs, which is understandable given the generally accepted failure of the Woolf reforms to reduce the costs of civil litigation,<sup>17</sup> and Sir Rupert Jackson’s explicit focus on rendering those costs proportionate.<sup>18</sup> Several commentators have considered proportionality in this context, both generally and in respect of specific aspects of the Jackson review and subsequent reforms.<sup>19</sup> There is also an occasional yet notable tendency to treat proportionality as an issue that relates only to costs. Dunne began an article entitled ‘Proportionality’ by stating that ‘[w]ith the introduction of the CPR came the new concept of proportionality in relation to costs’.<sup>20</sup> Gladwell, writing six months after the CPR came into force, only referred to proportionality in context of costs.<sup>21</sup> Regan, writing shortly after the Jackson Reforms, stated that ‘[w]hat is, perhaps, less obvious is that in recent times proportionality has been invoked to dismiss claims or to prevent them from being pursued’,<sup>22</sup> suggesting that little attention was paid to proportionality prior to Jackson. In O’Hare and Browne’s book, proportionality only has a separate index entry in relation to costs,<sup>23</sup> in respect

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<sup>14</sup> *ibid* ch 1, para 1.66.

<sup>15</sup> Adrian Zuckerman, ‘Litigation Management under the CPR: A Poorly-Used Management Infrastructure’ in Deirdre Dwyer (ed), *The Civil Procedure Rules Ten Years On* (OUP 2009) 93–94.

<sup>16</sup> Zuckerman, *Principles of Practice* (n 11) ch 11.

<sup>17</sup> See ch 3 at 60.

<sup>18</sup> *ibid*.

<sup>19</sup> John Sorabji, ‘Prospects for Proportionality: Jackson Implementation’ (2013) 32 C.J.Q. 213; Joshua Folkard, ‘Extending Jackson’s Patchwork Quilt: A Disintegrated Approach to the Costs-Shifting Rule’ (2015) 34 C.J.Q. 172; Masood Ahmed, ‘Costs Management and the Implied Approval of Incurred Costs’ (2016) 35 C.J.Q. 259; Andrew Higgins and Adrian Zuckerman, ‘Lord Justice Briggs’ “SWOT” Analysis Underlines English Law’s Troubled Relationship with Proportionate Costs’ (2017) 36 C.J.Q. 1; Simon Middleton, ‘Proportionality - CPR r.44.3(5) in Practice’ (2018) 4 C.J.Q. 8; Andrew Higgins, ‘Keep Calm and Keep Litigating’ in Andrew Higgins (ed), *The Civil Procedure Rules at 20* (OUP 2020).

<sup>20</sup> Robin Dunne, ‘Proportionality’ (2017) 2 JPIL 136.

<sup>21</sup> David Gladwell, ‘Modern Litigation Culture: The First Six Months of the Civil Justice Reforms in England and Wales’ (2000) 19 C.J.Q. 9, 15.

<sup>22</sup> Dominic Regan, ‘The P Word’ (2012) 162 NLJ 802.

<sup>23</sup> John O’Hare and Kevin Browne, *Civil Litigation* (19th edn, Sweet & Maxwell 2019) 733.

of which it also has a dedicated section.<sup>24</sup> There is no express reference to proportionality as a general management principle in the chapter on judicial case management, although there is reference to the concept of systemic proportionality.<sup>25</sup> Not all these sources are academic texts. However, practical texts should not be ignored when dealing with concepts that must be understood by practitioners and law students (many of whom are future practitioners) as well as academics.

Another focus within the literature is the vexed topic of relief from sanctions. This is unsurprising, given the potentially fatal effects that sanctions may have on litigation, and the well-publicised changes that were made to the regime post-Jackson. Those changes were then the subject of two major cases in *Mitchell v News Group Newspapers Ltd* (2013)<sup>26</sup> and *Denton v TH White Ltd and another* (2014).<sup>27</sup> This issue did not, however, come to the fore as a subject of commentary solely post-Jackson. Piggott examined this topic in 2005,<sup>28</sup> arguing that proportionality provided insufficient certainty to satisfy the systemic role of sanctions.<sup>29</sup> He considered the inconsistent balance struck between competing dimensions of justice in the context of strike out applications.<sup>30</sup> There was, however, an increase in the volume of literature on relief from sanctions as a result of Jackson, the subsequent amendments to CPR 3.9 and the decisions in *Mitchell* and *Denton*.<sup>31</sup> Higgins, writing after publication of the Jackson reports but before the amendments to CPR 3.9 came into force, proposed a two stage approach to relief from sanctions applications which linked the court's response to non-compliance to what he identified as its major case management responsibilities, namely protecting the right to fair trial and equitably allocating court resources.<sup>32</sup> Akerman commented on the balancing of competing,

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<sup>24</sup> *ibid* 591–596.

<sup>25</sup> *ibid* 516.

<sup>26</sup> [2013] EWCA Civ 1537.

<sup>27</sup> [2014] EWCA Civ 906.

<sup>28</sup> D.S. Piggott, 'Relief from Sanctions and the Overriding Objective' (2005) 24 CJK 103.

<sup>29</sup> *ibid*.

<sup>30</sup> *ibid* 123.

<sup>31</sup> Adrian Zuckerman, 'The revised CPR 3.9: a coded message demanding articulation' (2013) 32 CJK 123; Steven Akerman, 'There Can Only Be (CPR) 1: The Reasonableness of Mitchell (and Litigation Generally) Is Confirmed' (2014) 3 JPIL 191; Stuart Sime, 'Sanctions after Mitchell' (2014) 33 CJK 133; Jack R. Williams, 'Well, That's a Relief (from Sanctions)! - Time to Pause and Take Stock of CPR r.3.9 Developments within a General Theory of Case Management' (2014) 33 CJK 394; Andrew Higgins, 'CPR 3.9: the Mitchell guidance, the Denton revision, and why coded messages don't make for good case management' (2014) 33 CJK 379; Stuart Sime, 'Lord Dyson and the implied sanctions doctrine' (2015) 34 CJK 267; Ravi Nayer, 'Post-Denton: an appraisal of Court of Appeal decisions on relief from sanctions' (2016) 35 CJK 97; D.J. De Saulles, 'Defending the Civil Justice System: The Function of Sanctions' (2017) 36 CJK 462.

<sup>32</sup> Andrew Higgins, 'The Costs of Case Management: What Should Be Done Post-Jackson?' (2010) 29 CJK 317, 323-334.

sometimes diametrically opposed, criteria of the Overriding Objective in this respect.<sup>33</sup> Sime, writing after *Mitchell* but before *Denton*, set out a number of procedural concerns in respect of the former case, perhaps the most worrying in his view being that the decision seemed to give undue precedence to resource considerations.<sup>34</sup> Ahmed, writing shortly after *Denton*, argued that the post-Jackson approach, even as clarified in *Mitchell* and *Denton*, failed to guide judges in appropriately balancing proportionality, efficiency and substantive justice.<sup>35</sup> He proposed changes in judicial understanding and approaches to the Overriding Objective, the imposition of a positive obligation on parties to keep the court informed of procedural progress, and robust enforcement of unless orders.<sup>36</sup>

De Saulles considered the function of sanctions post-*Mitchell* and *Denton*, noting that imposing sanctions that are proportionate is a continuing challenge for the civil justice system.<sup>37</sup> Higgins, writing now post-*Mitchell* and *Denton*, argued that the rule on relief from sanctions must give clear practical guidance to courts when exercising their discretion, including indicating the relevant factors, the weight to be given to each, and whether any are preconditions to granting relief.<sup>38</sup> He stated that, while the circumstances that lead to non-compliance may be infinite, the factors relevant to deciding whether to grant relief are not. This means that a rule can be devised that contains an exhaustive list of factors that a court should take into account, namely: whether non-compliance was intentional; whether granting relief would adversely affect this or other litigation; and whether there was a good reason for non-compliance.<sup>39</sup> In *Denton*, Higgins argued, the Court of Appeal could and should have made clear that the ‘trivial breach’ and ‘good reasons’ principles outlined in *Mitchell* are the relevant circumstances that have to be considered under CPR 3.9(1) to deal with the case justly. The focus of the literature on relief from sanctions is non-compliance. Sorabji has noted that this problem rests on an assumption that the initial case management order, which was not complied with, was consistent with the Overriding Objective.<sup>40</sup> He queries whether this assumption is always correct and identifies a so-called

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<sup>33</sup> Akerman (n 31) 202.

<sup>34</sup> Sime, 'Sanctions after Mitchell' (n 31) 147.

<sup>35</sup> Masood Ahmed, 'Procedural Non-Compliance and Relief from Sanctions after the Jackson Reforms: Striking the Balance' (2015) 5 LJPL 71, 91.

<sup>36</sup> *ibid* 92.

<sup>37</sup> De Saulles, *Reforming Civil Procedure* (n 10) 483.

<sup>38</sup> Higgins, 'CPR 3.9: the Mitchell guidance' (n 31) 392.

<sup>39</sup> *ibid*.

<sup>40</sup> John Sorabji, 'Compliance Problems and Digitizing Case Management in England and Wales' in Rabeea Assy and Andrew Higgins (eds), *Principles, Procedure and Justice: Essays in Honour of Adrian Zuckerman* (OUP 2020) 156.

‘compliance problem’ which may embed disproportionality through compliance with orders that are not consistent with the Overriding Objective.<sup>41</sup>

Some in-depth analyses have been undertaken in the relief from sanctions context. Nayer considered the post-*Denton* appeal decisions concerning CPR 3.9, organising a broad typology of situations into seven categories and considering how, as of 2016, relief from sanctions has been approached in each of those categories.<sup>42</sup> The focus is a review of past cases, with the main forward-looking assertion being a general one that the Court of Appeal must act to safeguard court resources by giving as little encouragement as possible to non-compliance, with mere exhortation being insufficient.<sup>43</sup> Nayer also noted that a review of lower court decisions is required to determine whether parties are ‘avoiding trivial breaches from descending into satellite litigation’.<sup>44</sup> Sorabji proposed a two-stage approach to dealing with proportionality in the context of relief from sanctions. He identified the need to turn a ‘nebulous theory’ into something that courts and parties can act upon, particularly where open-textured concepts like proportionality are concerned.<sup>45</sup> The first stage would require a party applying for relief to show that its default was no more than minimal in extent, requiring the court to consider the degree of amendment required to the case management timetable and the extent to which relief would cause prejudice to other court users and the efficient use of court resources, and that it arose from exceptional circumstances.<sup>46</sup> The second stage would require the court to consider three factors: first, whether delay and cost would be disproportionate as between the parties in terms of efficient and economical prosecution of the claim; secondly, whether any prejudice caused to the respondent could be compensated in costs; and finally, the nature and importance of the application in terms of the duty to secure substantive justice. This third factor would require it to be shown that the claim could not proceed to trial and judgment absent relief. Central to Sorabji’s two-stage approach is the fact that it considers systemic proportionality before *inter partes* proportionality, and indeed makes satisfaction of the former a condition precedent to consideration of the latter.<sup>47</sup>

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<sup>41</sup> *ibid* 157.

<sup>42</sup> Nayer (n 31).

<sup>43</sup> *ibid* 112.

<sup>44</sup> *ibid*.

<sup>45</sup> Sorabji, *English Civil Justice* (n 7) 235.

<sup>46</sup> *ibid* 247–8.

<sup>47</sup> *ibid* 246. For further discussion, see ch 6 at 218.

More detailed research into case management was conducted by Peysner and Seneviratne.<sup>48</sup> Their 2005 report set out the results of interviews and focus groups carried out in 2003-4.<sup>49</sup> They looked at case management on the fast and multi tracks in order to determine how the legal world had reacted to case management, whether the Woolf reforms had initiated a culture change, and whether there was generally more co-operation in the litigation process.<sup>50</sup> They concluded that overall litigation culture had changed for the better,<sup>51</sup> although there were mixed views on whether delay had been reduced. with some judges taking the view that case management actually increases delays.<sup>52</sup> On the practice of case management, they noted that case management conferences ('CMCs') are one of the major successes of the CPR,<sup>53</sup> and that the system is working well, with courts taking the lead in setting the pace of litigation.<sup>54</sup> They noted that case management can be directive, but that in many respects it is employed subtly, for example it is evident that many CMCs are preceded by discussions between parties and the filing of proposed agreed directions.<sup>55</sup> In the present context, however, this research has limitations. The first is the timeframe, in that it was published only six years after the CPR came into force. While it does set out in general terms how and the extent to which case management is seen as having achieved Lord Woolf's objectives, it does not go into detail on precisely how case management decisions are made, nor how proportionality is applied in the context of those decisions.

One point emphasized in Peysner and Seneviratne's report is that there is a perceived lack of clarity and certainty in respect of proportionality and case management decisions. Some practitioners thought that the Overriding Objective gave too much discretion to the court, meaning that the system had become inconsistent and unpredictable, especially at first as there was no practical guidance on interpretation and no precedents to follow.<sup>56</sup> The emphasis on proportionality under the CPR had resulted in procedural points not being argued in small cases, even where solicitors believed that this was unjust.<sup>57</sup> No details are given as to how procedural

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<sup>48</sup> John Peysner and Mary Seneviratne, 'The Management of Civil Cases: The Courts and Post-Woolf Landscape' (Department for Constitutional Affairs 2005) 9  
<[https://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/research/2005/9\\_2005\\_full.pdf](https://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/research/2005/9_2005_full.pdf)> accessed 29 November 2018.

<sup>49</sup> *ibid* 6.

<sup>50</sup> *ibid* 10.

<sup>51</sup> *ibid*.

<sup>52</sup> *ibid* 14.

<sup>53</sup> *ibid* 25.

<sup>54</sup> *ibid* 18.

<sup>55</sup> *ibid* 25.

<sup>56</sup> *ibid* 15.

<sup>57</sup> *ibid* 16.

points were being dealt with in order to prompt this response. However, this point on proportionality is made in the context of comments on uncertainty and solicitors stating that, because of this, they might not make applications where they would have done in the past.<sup>58</sup>

Lack of consistency and guidance is a common thread running through the literature. This first became visible not long after the CPR came into force. Piggott, writing on relief from sanctions before Jackson, noted that complete uncertainty as to how the court would respond to procedural non-compliance would mean that parties are unable to make informed choices about matters of procedure.<sup>59</sup> Unless the court's response is tolerably predictable, parties will not know whether to expect sanctions, and credibility will be lost. The CPR itself does not indicate where the balance between competing dimensions of justice should be struck.<sup>60</sup> Piggott also highlighted proportionality's limitations in striking this balance, in that intensity of proportionality review can vary greatly,<sup>61</sup> and its case by case operation can cause difficulties in terms of consistency of applicability and the lack of availability of guidance in previous cases.<sup>62</sup> Lord Dyson, writing shortly after Jackson, identified a lack of clarity and consistency in key aspects of case management which the changes to CPR 3.9 required to be remedied.<sup>63</sup> Sorabji identified the need for guidance from the courts on how proportionality is to be applied, in respect of both proportionality as a general facet of the Overriding Objective and the specific issue of costs.<sup>64</sup> This involves difficult questions, particularly in respect of CPR 1.1(2)(e), such as how much access for one set of proceedings is too much access, when weighed against the need to conserve a proper share of court resources for other litigants?<sup>65</sup> Sorabji warned that in the absence of guidance from the Court of Appeal, these questions are likely to be interpreted differently by different courts.<sup>66</sup> Elsewhere, he has noted that it is not enough for courts to simply reiterate the nature of the test for proportionality consistently and over a sustained

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<sup>58</sup> *ibid.*

<sup>59</sup> Piggott (n 28) 120.

<sup>60</sup> *ibid* 121.

<sup>61</sup> *ibid.*

<sup>62</sup> *ibid* 122. These and other limitations arising from the fundamental nature of proportionality will be important considerations in the analysis going forward.

<sup>63</sup> Lord Dyson, 'The Application of the Amendments to the Civil Procedure Rules (Eighteenth Lecture in the Implementation Programme)' (District Judges' Annual Seminar, Judicial College, 22 March 2013) 129 <<https://www.judiciary.uk/announcements/18-the-application-of-the-amendments-to-the-civil-procedure-rules/>> accessed 13 January 2019.

<sup>64</sup> Sorabji, 'Prospects for Proportionality' (n 19) 225.

<sup>65</sup> *ibid* 226.

<sup>66</sup> *ibid.*

period of time. They also need to explain the rationale underpinning the relevant test.<sup>67</sup> In the context of the ‘compliance problem’ identified above, Sorabji highlighted the importance not only of consistent and clear guidance over a sustained period from appellate courts,<sup>68</sup> but also of judges receiving sufficient information in each case to enable them to make management decisions that are consistent with the Overriding Objective.<sup>69</sup>

The central importance of proportionality and case management to the procedural regime governed by the CPR has been recognized by the existing literature, both in general terms and in relation to specific areas such as litigation costs and sanctions. Problems have been identified, and solutions proposed. What is missing is a detailed analysis of how proportionality works at a case-specific level. This is essential to understanding whether proportionality and active judicial management operate effectively and consistently. A picture of the extent to which cases are managed and litigated proportionately must comprise the practical actions and decisions of judges, parties and lawyers in individual cases. Such a close analysis will ensure that any improvement measures are evidence-based and appropriately targeted. The CPR has been in force for over twenty years, and this analysis is long overdue.

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<sup>67</sup> John Sorabji, ‘Late Amendment and Jackson’s Commitment to Woolf: Another Attempt to Implement a New Approach to Civil Justice’ (2012) 31 C.J.Q. 383, 399.

<sup>68</sup> Sorabji, ‘Compliance Problems’ (n 40) 160.

<sup>69</sup> *ibid* 161.

## CHAPTER TWO

### PROPORTIONALITY AS A GENERAL PRINCIPLE OF LAW

The concept of proportionality, although relatively new to procedure, has acquired a distinctive meaning in other legal contexts. Case management proportionality can be better defined and understood if it is placed within the context provided by that meaning. The word ‘proportionality’ and related terminology (such as ‘proportionate’ and ‘disproportionate’) import a common sense meaning which describes the relationship between two or more factors. The concept cannot exist in the abstract: something must be proportionate or disproportionate to something else. Proportionality suggests a relationship of appropriateness and balance, and of no one factor having either excessive prominence or insufficient weight in the analysis. It has been said that an appeal to proportionality ‘indicates a claim about the existence of a broad moral or practical equivalence or comparability between two different phenomena’, such as wrongful act and punishment, or perceived social problem and governmental response.<sup>70</sup> It has connections to general notions of justice and has been described as a ‘source of fairness, justice and hope’.<sup>71</sup> Those connections, and the principle itself, have ancient origins.

The idea at the core of proportionality was considered by, amongst others, Aristotle, Plato and Cicero. Aristotle, in the context of distributive justice, wrote that ‘the just in this sense is a mean between two extremes that are disproportionate, since the proportionate is a mean, and the just is the proportionate’.<sup>72</sup> For Plato, justice was ‘ultimately a question of proportional equality’,<sup>73</sup> with proportionality being ‘built into the very structure of the cosmos’.<sup>74</sup> Cicero distinguished between two forms of justice, *aequitas* and *aequabilitas*. Central to the latter was proportionate equality, the idea that more was owed to the ‘superior’ and less to the ‘inferior’.<sup>75</sup> Proportionality has been identified in clause 20 of Magna Carta, which stated that ‘[f]or a trivial

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<sup>70</sup> Nicola Lacey, ‘The Metaphor of Proportionality’ (2016) 43(1) J.L. & Soc. 27, 30.

<sup>71</sup> Sofia Ranchordás and Boudewijn de Waard, ‘Proportionality crossing borders: why it is still difficult to recognise sparrows and cannons’, in Sofia Ranchordás and Boudewijn de Waard (eds), *The Judge and the Proportionate Use of Discretion* (Routledge 2016) 1.

<sup>72</sup> Aristotle, *The Nicomachean Ethics: with an English Translation by H. Rackham* (London and Cambridge, 1962), 271-273 quoted in Izhak England, *Corrective and Distributive Justice: From Aristotle to Modern Times* (OUP 2009) 5.

<sup>73</sup> Thomas Poole, ‘Proportionality in Perspective’ (2010) 2 NZ L Rev 379.

<sup>74</sup> *ibid* 380.

<sup>75</sup> *ibid* 382.

offence a free man shall be fined only in proportion to the degree of his offence, and for a serious offence correspondingly but not so heavily as to deprive him of his livelihood'.<sup>76</sup> During the Middle Ages, the 'Just War' doctrine incorporated the need to balance the overall utility of war with the damage it may inflict.<sup>77</sup> Craig, in the context of administrative law, has identified 'a concept akin to that of proportionality' from the late sixteenth century<sup>78</sup> which was applied to the level and legitimacy of regulatory burdens. Blackstone, in his *Commentaries on the Laws of England*, stated that the concept of civil liberty should be found only within 'natural liberty so far restrained by human laws (and not farther) as is necessary and expedient for the general advantage of the public'.<sup>79</sup>

These concepts are not identical to modern ideas of proportionality. However, the core notions of balance, fairness, and the imposition of no greater detriment than necessary are central to those modern ideas. Today, much focus is given to proportionality as a global principle of constitutional, administrative and human rights law. In those spheres, it is generally seen as originating in late nineteenth century Prussian administrative law. In the *Kreuzberg* decision (1882), the Prussian supreme administrative court examined whether a measure taken by police exceeded in intensity that which was required by the pursued objective.<sup>80</sup> In cases following that decision, police conduct was deemed illegal when disproportionate.<sup>81</sup> Contemporary usage of the term 'proportionality' is not necessarily congruent with the historical one, and in the nineteenth century the question was essentially whether a measure was necessary.<sup>82</sup> The Prussian courts did, however, develop a substantive principle that constrained police measures by subjecting them to a judicially reviewable means-ends analysis.<sup>83</sup> Here, we see the judicial control of state action that is central to the modern proportionality principle in some contexts.

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<sup>76</sup> Aharon Barak, *Proportionality: constitutional rights and their limitations* (CUP 2012) 176.

<sup>77</sup> *ibid.*

<sup>78</sup> Paul Craig, 'Proportionality and Judicial Review: A UK Historical Perspective', in Stefan Vogenauer and Stephen Weatherill (eds), *General Principles of Law: European and Comparative Perspectives* (Hart 2017) 146.

<sup>79</sup> Barak (n 76) 177.

<sup>80</sup> Jürgen Schwarze, *European Administrative Law* (Sweet & Maxwell, 1992) 685.

<sup>81</sup> Barak (n 76) 179.

<sup>82</sup> Nikolaus Marsch and Vanessa Tümsmeyer, 'The principle of proportionality in German administrative law', in Sofia Ranchordás and Boudewijn de Waard (eds), *The Judge and the Proportionate Use of Discretion* (Routledge 2016), 27.

<sup>83</sup> Andrej Lang, 'Proportionality Analysis by the German Federal Constitutional Court' in Mordechai Kremnitzer, Talya Steiner and Andrej Lang (eds), *Proportionality in Action: Comparative and Empirical Perspectives on the Judicial Practice* (CUP 2020) 23.

The remainder of this chapter will focus on four legal topics. Proportionality is an established principle within the first three: European Union ('EU') law, European human rights law, and English public law. The first two topics have become embedded within English law,<sup>84</sup> and the third is the context in which the principle has developed most prominently in English law. The fourth area of focus is domestic private law. Although there is no established, structured principle of proportionality in that area, it makes clear that the thought processes underlying core aspects of proportionality are familiar to English judges. Those four areas will then be brought together in a discussion on the nature of the proportionality analysis.

## I. PURPOSE AND STRUCTURE

### THE ROLE OF PROPORTIONALITY

In EU law, European human rights law, and some aspects of domestic public law, proportionality is a review standard applied by courts with supervisory jurisdiction to actions taken or measures enacted by public bodies. Its purpose is to ensure a fair balance between the aims of such actions or measures and the rights and interests of those that will be affected by them. It aims to ensure that administrators show proper respect for individuals and that relationships of power between the state and individuals are understood as clear relationships of law.<sup>85</sup>

Proportionality is a general principle of EU law.<sup>86</sup> It applies to two categories of legal instruments. The first is EU-made law, being instruments made by EU institutions such as regulations, directives and decisions, and EU-derived national law, being national measures implementing those instruments. The second consists of measures taken by Member States under national law that qualify or impinge on EU law. Proportionality is enshrined in Article 5 of the Treaty on European Union ('TEU'), which states that '[u]nder the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties'. Protocol (No 2) on the application of the principles of subsidiarity and proportionality, annexed to TEU and the Treaty on the Functioning of the

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<sup>84</sup> At the time of writing it is not clear how, if at all, the UK's withdrawal from the EU will affect the use or development of proportionality in English law.

<sup>85</sup> Robert Thomas, *Legitimate Expectations and Proportionality in Administrative Law* (Hart 2000) 2, 15.

<sup>86</sup> Case C-331/88 *R v Ministry of Agriculture, Fisheries and Food ex parte Federation Europeene de la Sante Animale (FEDESA)* [1990] ECR I-4023 [13].

European Union by the Treaty of Lisbon, states that EU legislative acts ‘shall take account of the need for any burden ... to be minimised and commensurate with the objective to be achieved’. National authorities must enact EU measures ‘in compliance with the general rules of Community law’, including the principle of proportionality.<sup>87</sup>

The analysis is again part of a supervisory jurisdiction in European human rights law. Here, the jurisdiction is exercised by the European Court of Human Rights (‘ECtHR’) over actions of signatories to the European Convention on Human Rights (‘ECHR’). Proportionality is a tool for monitoring compliance with ECHR rights<sup>88</sup> and runs through the entire Convention,<sup>89</sup> although the terms ‘proportionality’ or ‘proportionate’ are not used. The most prominent use of proportionality is in the context of the qualified rights in Articles 8 to 11, which allow interference with a particular right where it is ‘necessary in a democratic society’.<sup>90</sup> Such necessary interferences may be, for example, in the interests of public safety or for the protection of health or morals.<sup>91</sup> The ECtHR has also identified a proportionality requirement in articles that do not permit ‘necessary’ restrictions.<sup>92</sup> Article 14 prohibiting discrimination, for example, is framed in absolute terms, but discrimination is possible where it is not disproportionate.<sup>93</sup> An unfair trial is never compatible with Article 6 no matter the objective pursued, but fairness depends on a proportionate relationship between procedures and the purposes for which they are provided.<sup>94</sup> Proportionality in the context of the ECHR is therefore based on the diptych structure of some articles and the interpretation of others.<sup>95</sup>

In domestic public law, proportionality is applied when courts review the actions of, and measures imposed by, government authorities and public bodies. The aim is to check the exercise of state power so that it does not have an overly detrimental effect on the rights or interests of those over whom it is exercised. In this domestic context, proportionality forms part of the constitutional doctrine of the separation of powers. The review process is contained

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<sup>87</sup> Joined cases C-480/00, C-481/00, C-482/00, C-484/00, C-489/00, C-490/00, C-491/00, C-497/00, C-498/00 and C-499/00 *Azienda Agricola Ettore Ribaldi v AIMA* [2004] ECR I-02943 [43].

<sup>88</sup> Catherine Haguénau-Moizard and Yoan Sanchez, ‘The principle of proportionality in European law’ in Sofia Ranchordás and Boudewijn de Waard (eds), *The Judge and the Proportionate Use of Discretion* (Routledge 2015) 143.

<sup>89</sup> *Sporrong and Lönnroth v Sweden* (1982) Series A No 52, para 69; *Bank Mellat v Her Majesty’s Treasury* [2013] UKSC 39 [70] (Lord Sumption).

<sup>90</sup> The meaning of this phrase is considered below at 30.

<sup>91</sup> ECHR Articles 8(2), 9(2), 10(2), 11(2).

<sup>92</sup> Haguénau-Moizard and Sanchez (n 88) 143.

<sup>93</sup> *ibid.*; *Belgian Linguistics Case* Series A No 6 [7].

<sup>94</sup> Timothy Endicott, *Administrative Law* (4th edn, OUP 2018) 94.

<sup>95</sup> Haguénau-Moizard and Sanchez (n 88) 144.

entirely within the constitutional framework of the United Kingdom, rather than as part of a supranational project. Proportionality is applied where the court deals with EU law or ECHR issues. It has been suggested that, at present, proportionality is not a general head of judicial review in English law.<sup>96</sup> It does remain tied to questions of EU law and fundamental rights, and views differ on its relationship to other domestic standards of review and the extent to which it should be extended beyond its current remit. A full discussion of the development of proportionality in English substantive law is beyond the scope of this work, however it seems unlikely that it has reached the end of its development process.

The main function of proportionality in each of these areas is as a control applied by courts to ensure the lawful exercise of power by national or public authorities. In fulfilling that function, the application of proportionality must focus on the facts of the case at hand.<sup>97</sup> However, application in an individual case may have a broader effect. This may be termed the ‘educative’ function of proportionality. Judicial application of proportionality can inform national authorities, public bodies and private parties as to the type of actions that may, for example, amount to illegitimate infringement of an ECHR right or inappropriate use of state power. This may in turn shape their future behaviour. The fact-specific nature of the proportionality analysis should not, therefore, be focused on to the exclusion of understanding the broader effect that its application in any one case may have.

### **PROPORTIONALITY TESTS**

There is no universally applicable ‘proportionality test’, but four limbs of the analysis can be identified. First, an action or measure must be in service of a legitimate aim. Secondly, it must be suitable or appropriate for achieving that aim. Thirdly, it must be necessary to achieve the aim, in that there is no less restrictive or burdensome means of doing so. Finally, the costs or detriments imposed by the measure must be proportionate to its benefits. This final limb is sometimes referred to as ‘proportionality *stricto sensu*’, or proportionality ‘in the strict sense’. Some of these limbs may be omitted, and the extent to which a structured test is applied may vary.

In EU law, the case most often cited as authority for the proportionality test is *Fedesa* (1990):

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<sup>96</sup> Paul Craig, *Administrative Law* (8<sup>th</sup> edn, Sweet & Maxwell 2016) 633.

<sup>97</sup> The fact-specific nature of the proportionality analysis is discussed below at 45.

[b]y virtue of [the principle of proportionality], the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the less onerous, and the disadvantages caused must not be disproportionate to the aims pursued.<sup>98</sup>

Each of the four limbs can be identified here. The ECJ in *Fromançais v FORMA* (1982), on the other hand, focused on the suitability and necessity limbs, stating that in order to establish whether a provision of Community law is proportionate, ‘it is necessary to establish, in the first place, whether the means it employs to achieve its aim correspond to the importance of the aim and, in the second place, whether they are necessary for its achievement’.<sup>99</sup> The UK Supreme Court in *R (Lumsdon) v Legal Services Board* (2015) stated that ‘[i]n practice [the ECJ] usually omits [the proportionality stricto sensu limb] from its formulation of the proportionality principle. Where the question has been argued, however, the court has often included it in its formulation and addressed it separately, as in [Fedesa]’.<sup>100</sup> Common to these tests are the requirements of suitability and necessity. *Fromançais* gives more detail on the suitability limb, which requires the means to ‘correspond to the importance of the aim’.<sup>101</sup> *Fedesa*, on the other hand, gives more detail on the necessity limb, stating that where there is ‘a choice between several appropriate measures recourse must be had to the less onerous’.<sup>102</sup> This requires the court to consider alternative means of achieving the same end. In doing so, the relevant objectives must be clearly identified. In *Fedesa*, the applicants’ argument that the measure in question was unnecessary was based on the premise that the only objective was allaying consumer anxieties. The ECJ identified additional objectives of health protection, the removal of barriers to trade and distortions of competition which could not have been achieved by the less onerous measure proposed by the applicants.<sup>103</sup>

The most structured approach applied by the ECtHR is a three-part enquiry. This asks whether the interference with or limitation of rights is in accordance with or prescribed by law, whether

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<sup>98</sup> *Fedesa* (n 86) [13].

<sup>99</sup> Case 66/82 *Fromançais v FORMA* [1983] ECR I-00395 [8].

<sup>100</sup> [2015] UKSC 41 [33] (Lord Reed and Lord Toulson).

<sup>101</sup> *Fromançais* (n 99) [8].

<sup>102</sup> *Fedesa* (n 86) [13].

<sup>103</sup> *ibid* [16]; *Lumsdon* (n 100) [46] (Lord Reed and Lord Toulson).

the aim of the interference or limitation is legitimate, and whether the interference or limitation is necessary in a democratic society.<sup>104</sup> Sometimes the ECtHR moves directly to the third question.<sup>105</sup> The court in *Silver v United Kingdom* (1983) summarised the meaning of ‘necessary in a democratic society’, the court’s functions in the examination of issues turning on that phrase and the manner in which it performs those functions:

(a) the adjective “necessary” is not synonymous with “indispensable”, neither has it the flexibility of such expressions as “admissible”, “ordinary”, “useful”, “reasonable” or “desirable” (see the *Handyside* judgment of 7 December 1976, Series A no. 24, p. 22, § 48);

(b) the Contracting States enjoy a certain but not unlimited margin of appreciation in the matter of the imposition of restrictions, but it is for the Court to give the final ruling on whether they are compatible with the Convention (*ibid.*, p. 23, § 49);

(c) the phrase “necessary in a democratic society” means that, to be compatible with the Convention, the interference must, *inter alia*, correspond to a “pressing social need” and be “proportionate to the legitimate aim pursued” (*ibid.*, pp.22-23, §§ 48-49);

(d) those paragraphs of Articles of the Convention which provide for an exception to a right guaranteed are to be narrowly interpreted (see the above mentioned *Klass and others* judgment, Series A no. 28, p. 21, § 42).<sup>106</sup>

The comments on the meaning of ‘necessary’, drawn from *Handyside v United Kingdom* (1979),<sup>107</sup> do not provide a clear definition. It has been said that they only make clear that necessity is a ‘rather vague’ notion.<sup>108</sup> The equation of ‘necessary in a democratic society’ to a ‘pressing social need’ also lacks clarity, but it does indicate that the relevant aim must have a high level of importance. Precisely what amounts to a ‘pressing social need’ will depend on an

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<sup>104</sup> Bernadette Rainey, Elizabeth Wicks, Clare Ovey, *The European Convention on Human Rights* (7<sup>th</sup> edn, OUP 2014) 342; Haguenu-Moizard and Sanchez (n 88) 145.

<sup>105</sup> Rainey, Wicks and Ovey (n 104) 342.

<sup>106</sup> (1983) Series A No 61, para 97.

<sup>107</sup> (1979) Series A No 24.

<sup>108</sup> Janneke Gerards, ‘How to improve the necessity test of the European Court of Human Rights’ (2013) 11(2) *Int. J. Const. Law* 466, 481.

analysis of the facts. The ECtHR often applies a more general ‘necessity’ test, in the sense of ‘relevancy’ or ‘pertinency’, as opposed to the ‘least restrictive means’ test favoured by the ECJ,<sup>109</sup> although the ECtHR does apply the latter in ‘rare cases’.<sup>110</sup>

In *B v Secretary of State for the Home Department* (2000), Sedley LJ sought to summarise proportionality in the context of English public law ‘in a nutshell’:<sup>111</sup>

[i]n essence, [proportionality] amounts to this: a measure which interferes with a Community or human right must not only be authorised by law but must correspond to a pressing social need and go no further than strictly necessary in a pluralistic society to achieve its permitted purpose; or, more shortly, must be appropriate and necessary to its legitimate aim.<sup>112</sup>

This suggestion of an identical approach in respect of EU and human rights law is contradicted by subsequent case law. In the context of fundamental rights, it is now generally accepted that a four-stage test applies, summarised by Lord Sumption in *Bank Mellat* (2013):

... the question demands an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community.<sup>113</sup>

The four limbs of the proportionality analysis can be identified, although the fourth refers to a balance between the rights of the individual and the interests of the community, rather than a more general ‘proportionate’ cost-benefit analysis. The ‘most important judgment to date’<sup>114</sup> on the meaning and application of proportionality in the domestic EU law context is *Lumsdon*.<sup>115</sup>

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<sup>109</sup> *ibid* 483.

<sup>110</sup> *ibid*.

<sup>111</sup> Michael Fordham, *Judicial Review Handbook* (6th edn, Hart 2012) 427.

<sup>112</sup> [2000] UKHRR 498 [17].

<sup>113</sup> *Bank Mellat* (n 89) [20].

<sup>114</sup> Eirik Bjorge and Jack R. Williams, ‘The Protean Principle of Proportionality: How Different is Proportionality in EU Contexts’ (2016) 75(2) CLJ 186, 187.

<sup>115</sup> *Lumsdon* (n 100).

Lords Reed and Toulson stated that proportionality in the EU context differs from that under the ECHR and that while there is some common ground, the four stage *Bank Mellat* analysis is not applicable to proportionality in EU law.<sup>116</sup> The extent of the differences, however, was left unexplained.<sup>117</sup> The Supreme Court in *Lumsdon* set out a two stage test dealing with suitability and necessity, and noted that there was ‘some debate’ about the existence of a third question, ‘namely, whether the burden imposed by the measure is disproportionate to the benefits secured’.<sup>118</sup> This is the ‘proportionality in the strict sense’ analysis that is sometimes, but not always, conducted by the ECJ. Borge and Williams identify an overlap, in that there will be instances in the context of fundamental rights where a court will not pose all four *Bank Mellat* questions, or will apply a less intense version, meaning that much of what the Supreme Court said about EU proportionality in *Lumsdon* will apply in other contexts.<sup>119</sup>

Three fundamental notions underpin these tests. The first is the nature of the objective, which must be ‘legitimate’ or ‘sufficiently important’ to justify the imposition of a limitation of rights or a detrimental effect to interests. The second is the relationship between means and ends, reflected in the ‘suitability’ and ‘necessity’ limbs. The former requires analysis of whether a particular means is appropriate for achieving the specified end. The latter incorporates a ‘least restrictive means’ analysis, requiring consideration of whether there are alternative, less burdensome, ways to achieve the same objective. This ties into the final common thread, the cost-benefit analysis, in that a measure that imposes a more onerous than necessary burden is more likely to fail that analysis. Even if the means employed to achieve a legitimate objective are suitable and necessary, they must also be proportionate to that objective. This requires balancing the value of attaining an objective with the costs incurred in achieving it. It involves a means-end analysis, but one that weighs and compares the relative values and costs of those means and ends.<sup>120</sup> Balancing does not always involve a means-end relationship, but proportionality is a relational concept which requires analysing the quality of the relationship between factors rather than simply considering whether one is weightier than another.<sup>121</sup> This final limb has been called ‘notoriously vague’.<sup>122</sup> Certainly, requiring a determination of

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<sup>116</sup> *ibid* [26].

<sup>117</sup> Borge and Williams (n 114) 187.

<sup>118</sup> *Lumsdon* (n 100) [33] (Lord Reed and Lord Toulson).

<sup>119</sup> Borge and Williams (n 114) 187.

<sup>120</sup> Stephen Gardbaum, ‘Positive and Horizontal Rights: Proportionality’s Next Frontier or a Bridge Too Far?’ in Vicki C. Jackson and Mark Tushnet (eds), *Proportionality: New Frontiers, New Challenges* (CUP 2017) 226.

<sup>121</sup> *ibid* 227.

<sup>122</sup> Francisco J. Urbina, *A Critique of Proportionality and Balancing* (CUP 2017) 6.

‘proportionality’ within a test for proportionality is not particularly helpful. Referring to this third limb as a cost-benefit analysis, rather than using the term ‘proportionality in the strict sense’, would ensure greater clarity.

## II. EUROPEAN AND ENGLISH PUBLIC LAW

The application of the proportionality analysis is not homogenous, and the intensity of review that courts undertake will vary. The term ‘intensity of review’ refers to the level of scrutiny that a court will apply. It determines how close the court’s analysis will be and the height of the bar at which a measure will be deemed disproportionate. The standard applied will be more or less exacting depending on the character and context of the measure under review.<sup>123</sup> The court is not the primary decision-maker, rather it is reviewing a decision of another autonomous body. The proportionality analysis will be affected by the relationship between the court and that other body, the subject and circumstances of the decision, and the extent of the decision-making body’s discretion in taking it.

Under EU law, in areas where EU institutions are given a wide discretion, proportionality is applied with minimal intensity. A measure will only be disproportionate if it is ‘manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue’.<sup>124</sup> The same approach is taken to the review of national action implementing EU measures, where those measures require the national authority to exercise a discretion involving political, economic or social choices, especially where a complex assessment is required.<sup>125</sup> Greater intensity is applied where a national measure is alleged to interfere with rights conferred by the EU treaties and the four fundamental freedoms.<sup>126</sup> The court must first determine whether the measure is suitable to achieve the legitimate aim in question, and then whether it is no more onerous than is required to achieve that aim, if there is a choice of equally effective measures.<sup>127</sup> The justification for the restriction will be examined in detail,<sup>128</sup> and close

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<sup>123</sup> Francis Jacobs, ‘Recent Developments in the Principle of Proportionality in European Community Law’ in Evelyn Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (Hart 1999) 3.

<sup>124</sup> *Fedesa* (n 89) [14].

<sup>125</sup> *Lumsdon* (n 100) [73] (Lord Reed and Lord Toulson) citing Case C-44/94 *R v Minister of Agriculture, Fisheries and Food ex parte National Federation of Fishermen’s Organisations* [1995] ECR I-3115 as an example.

<sup>126</sup> Thomas (n 85) 51.

<sup>127</sup> *Lumsdon* (n 100) [55] (Lord Reed and Lord Toulson).

<sup>128</sup> *ibid* [56].

examination will be given to whether other measures could have been equally effective but less restrictive of the freedom in question.<sup>129</sup>

Proportionality is central to the relationship between the judiciary and the legislature and to the division of powers between the EU and Member States.<sup>130</sup> It highlights the appropriate degree of Community interference and that, where possible, Member States' legal systems should be respected.<sup>131</sup> In areas such as the Common Agricultural Policy and Common Transport Policy, efficiency requires decision-making institutions to be given a degree of latitude when making economic policy choices.<sup>132</sup> The term 'manifestly inappropriate' delineates the ECJ's perception of the limits of the judicial function regarding the review of measures involving economic policy choices.<sup>133</sup> The ECJ retains tighter control in cases concerning potential infringement on Treaty rights and the four freedoms. National governments and institutions cannot be permitted such broad latitude where EU-wide fundamental principles are concerned. Even in that context, however, where a relevant public interest is engaged in an area where EU law has not imposed complete harmonisation, a Member State is allowed a margin of appreciation in choosing an appropriate measure and in deciding on the level of protection to be given to the public interest in question.<sup>134</sup>

The ECtHR also allows a margin of appreciation which reflects the level of discretion allowed to contracting states in fulfilling their ECHR obligations.<sup>135</sup> The margin of appreciation doctrine was created to 'preserve state autonomy in assessing the solutions needed to solve problems'.<sup>136</sup> The ECtHR in *Handyside* explained the relationship between the court and national institutions embodied in the margin of appreciation: 'it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of "necessity"'.<sup>137</sup>

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<sup>129</sup> *ibid* [61].

<sup>130</sup> Jan H. Jans, 'Proportionality Revisited' (2000) 27(3) *LIEI* 239, 242.

<sup>131</sup> *ibid* 243.

<sup>132</sup> Albertina Albors-Llorens, 'Edging Closer Towards Scrutiny? The Court of Justice and Its Review of the Compatibility of General Measures with the Protection of Economic Rights and Freedoms' in Anthony Arnall (ed), *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood* (Hart 2011) 254.

<sup>133</sup> Takis Tridimas, 'Proportionality in Community Law: Searching for the Appropriate Standard of Scrutiny' in Evelyn Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (Hart 1999) 71.

<sup>134</sup> *Lumsdon* (n 100) [64] (Lord Reed and Lord Toulson).

<sup>135</sup> Jeffrey Brauch, 'The Margin of Appreciation and the European Court of Human Rights: Threat to the Rule of Law' (2004) 11 *CJEL* 113, 119.

<sup>136</sup> *Haguenau-Moizard and Sanchez* (n 88) 149.

<sup>137</sup> *Handyside* (n 107), para 48.

Contracting states are not, however, given ‘an unlimited power of appreciation’.<sup>138</sup> The ECtHR is ‘empowered to give the final ruling on whether a “restriction” or “penalty” is reconcilable’ with the right in question, and ‘[t]he domestic margin of appreciation thus goes hand in hand with a European supervision’.<sup>139</sup> The UK Supreme Court has noted that the margin of appreciation ‘reflects a recognition on the part of the Strasbourg court that in certain circumstances, and to a certain extent, national authorities are better placed than an international court to determine the outcome of the process of balancing individual and community interests.’<sup>140</sup>

The margin of appreciation is flexible, its scope varying ‘according to the subject-matter and its background’.<sup>141</sup> It ties into the intensity with which the ECtHR scrutinises the decisions of national authorities, which in turn will depend on the circumstances and the ECHR rights involved. The ECtHR will be more deferential in two categories of case: those where there is no consensus among contracting states on the rights accruing to individuals, the idea being that the less consensus there is, the better placed national authorities are to decide; and those where the national authority is better placed to decide on politically sensitive issues.<sup>142</sup> In the context of morals, for example, the ECtHR has stated that ‘it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals’, meaning that ‘State authorities are in principle in a better position than the international judge’ to determine the content of measures in that sphere.<sup>143</sup> A wide margin of appreciation has also been allowed in the context of national security.<sup>144</sup> In *Sunday Times v United Kingdom* (1979), the ECtHR drew a comparison between *Handyside* and ‘the far more objective notion of the “authority” of the judiciary’, in respect of which there is a ‘fairly substantial measure of common ground’ between contracting states.<sup>145</sup> Accordingly, ‘a more extensive European supervision’ corresponds to ‘a less discretionary power of appreciation’.<sup>146</sup>

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<sup>138</sup> *ibid.*

<sup>139</sup> *ibid* [49].

<sup>140</sup> *AXA General Insurance Ltd v The Lord Advocate* [2011] UKSC 46 [131] (Lord Reed).

<sup>141</sup> *Rasmussen v Denmark* (1984) Series A No 87, para 40.

<sup>142</sup> George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (OUP 2007) 91.

<sup>143</sup> *Handyside* (n 107), para 48.

<sup>144</sup> *Klass v Germany* (1978) Series A No 28.

<sup>145</sup> Series A No 30, para 59.

<sup>146</sup> *ibid.*

In domestic public law, proportionality is to be applied ‘with considerable flexibility dependent on the nature of the case’.<sup>147</sup> Where the measure under review implements EU law into domestic law, the domestic courts must apply the level of intensity that would be applied by the ECJ, ‘neither more nor less, and not the level which [they] would prefer to apply if free to do so’.<sup>148</sup> Where human rights are concerned, the court will conduct a ‘rigorous and intensive’ review.<sup>149</sup> Lord Bingham in *R v Shayler* (2002) stated that ‘in any application for judicial review alleging an alleged violation of a convention right the court will now conduct a much more rigorous and intrusive review than was once thought to be permissible’.<sup>150</sup> Lord Hope, in the same case, noted that ‘[a] close and penetrating examination of the factual justification for the restriction is needed if the fundamental rights enshrined in the Convention are to remain practical and effective’.<sup>151</sup>

As under EU and European human rights law, proportionality in domestic public law is indivisible from the relationship between the court and the body whose decision is under review. The language of deference, however, is something to which English judges have expressed strong antipathy. It has been said to have overtones of ‘servility’<sup>152</sup> and ‘of cringing abstention in the face of a superior status’.<sup>153</sup> English judges prefer to ‘give weight’ to a public body’s decision. In *Carlile* (2014), Lords Sumption and Neuberger expressed deference in terms of ascribing weight to the decision-maker’s judgments.<sup>154</sup> The House of Lords in *Huang v Secretary of State for the Home Department* (2007) had previously stated that where a court exercises restraint, it is not ‘apt’ to say that it is ‘deferring’ to the decision-maker, rather it is performing ‘the ordinary judicial task of weighing up the competing considerations on each side and according appropriate weight to the judgment of a person with responsibility for a given subject matter and access to special sources of knowledge and advice’.<sup>155</sup> Lord Sumption stated in *Carlile* that beyond an elementary principle that ‘deference’ is no more than a recognition that a review court does not usurp the function of the decision-maker, ‘the assignment of weight to the decision-maker’s judgment has nothing to do with deference in the

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<sup>147</sup> *R (Sinclair Collis) v Secretary of State for Health* [2011] EWCA Civ 437 [133] (Arden LJ) following *R v Secretary of State for Health ex parte Eastside Cheese* [1999] 3 CMLR 123.

<sup>148</sup> *Sinclair Collis* (n 147) [133] (Arden LJ).

<sup>149</sup> Fordham (n 110) 428.

<sup>150</sup> [2002] UKHL 11 [33].

<sup>151</sup> *ibid* [61].

<sup>152</sup> *R (Pro-life Alliance) v BBC* [2003] UKHL 23 [75] (Lord Hoffman).

<sup>153</sup> *R (Lord Carlile) v Secretary of State for the Home Department* [2014] UKSC 60 [22] (Lord Sumption).

<sup>154</sup> *ibid* [22], [68].

<sup>155</sup> [2007] UKHL 11 [16].

ordinary sense of the term'.<sup>156</sup> The precise approach to the review of a particular action or decision will depend on the facts, as highlighted by Lord Neuberger's comment in *Carlile* that there is:

a spectrum of types of decision, ranging from those based on factors on which judges have the evidence, the experience, the knowledge, and the institutional legitimacy to be able to form their own view with confidence, to those based on facts in respect of which judges cannot claim any such competence, and where only exceptional circumstances would justify judicial interference.<sup>157</sup>

Lord Donaldson stated in *R v Secretary of State for the Home Department ex parte Brind* (1991) that judicial review is a supervisory, rather than appellate, jurisdiction and that:

acceptance of 'proportionality' as a separate ground for seeking judicial review rather than a facet of 'irrationality' could easily and speedily lead to courts forgetting the supervisory nature of their jurisdiction and substituting their view of what was appropriate for that of the authority whose duty it was to reach that decision.<sup>158</sup>

This highlights an important point in the domestic context regarding the relationship between courts and decision-makers: the difference between the irrationality head of judicial review, with its associated notion of '*Wednesbury* unreasonableness', and proportionality. *Wednesbury* unreasonableness, as originally articulated, states that an administrative decision that satisfies both the illegality and procedural impropriety heads of judicial review may be struck down by the court if it is 'so unreasonable that no reasonable authority could ever have come to it'.<sup>159</sup> A 'heightened scrutiny' *Wednesbury* test in a human rights context was endorsed by Lord Bingham in *R v Ministry of Defence ex parte Smith* (1996).<sup>160</sup> That test stated that, while the court may only interfere with administrative discretion where it is satisfied that the decision is 'unreasonable in the sense that it is beyond the range of responses open to a reasonable decision-maker ... the more substantial the interference with human rights, the more the court

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<sup>156</sup> *Carlile* (n 153) [22] (Lord Sumption).

<sup>157</sup> *ibid* [68].

<sup>158</sup> [1991] 1 AC 696, 722.

<sup>159</sup> *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223, 230 (Lord Greene).

<sup>160</sup> [1996] QB 517.

[would] require by way of justification before it [was] satisfied that the decision [was] reasonable'.<sup>161</sup>

It has been said that there is no bright line between proportionality and reasonableness, with the question being context dependent.<sup>162</sup> Judicial views differ as to how the two standards relate to each other. They have been described as 'different models – one looser, one tighter – of the same juridical concept, which is the imposition of compulsory standards on decision-makers so as to secure the repudiation of arbitrary power'.<sup>163</sup> Unreasonableness is the 'looser' model, exemplified by the ECtHR's determination that even the heightened scrutiny *Wednesbury* test was insufficient to protect human rights:

the threshold at which the High Court and the Court of Appeal could find the Ministry of Defence policy irrational was placed so high that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicants' rights answered a pressing social need or was proportionate to the national security and public order aims pursued, principles which lie at the heart of the Court's analysis of complaints under Article 8 of the Convention.<sup>164</sup>

Lord Mance, in *Kennedy v Information Commissioner* (2014), stated that while both standards involve considerations of weight and balance, with weight and intensity of scrutiny depending on context, the advantage of the terminology of proportionality is that it 'introduces an element of structure into the exercise, by directing attention to factors such as suitability or appropriateness, necessity and the balance or imbalance or benefits and disadvantages'.<sup>165</sup> This suggests that proportionality offers a more systematic way of analysing issues that at their core are essentially the same. Lord Steyn, in *R (Daly) v Secretary of State for the Home Department* (2001), noted that there is some overlap between the two, in that 'most cases would be decided in the same way whichever approach is adopted', but the intensity of review is 'somewhat

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<sup>161</sup> *ibid* 554.

<sup>162</sup> Jessica Simor QC, 'Is the civil law interpretation of proportionality causing the Court to become political and therefore harder to predict?', 6 <<https://www.matrixlaw.co.uk/wp-content/uploads/2016/03/Does-the-proportionality-test-make-judges-too-political.pdf>> accessed 28 November 2020.

<sup>163</sup> *R v Ministry of Agriculture, Fisheries and Food ex parte First City Trading* [1997] 1 CMLR 250; [1996] Lexis Citation 3498, 22.

<sup>164</sup> *Smith and Grady v United Kingdom* ECHR 1999-VI, para 138.

<sup>165</sup> [2014] UKSC 20 [54].

greater' under proportionality.<sup>166</sup> The differences between the principles that Lord Steyn set out give an insight into what 'intensity of review' means. Proportionality may require the reviewing court to assess the balance struck by the decision-maker, not merely whether it is within the range of reasonable or rational decisions, and it may go further than traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations.<sup>167</sup> The former point was highlighted by Lord Neuberger in *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* (2015), in the context of commenting that the move from rationality to proportionality 'would appear to have potentially profound and far reaching consequences'<sup>168</sup> as it would involve the court considering the merits of the decision at issue, suggesting a more substantial distinction between the two standards.

The relationships between courts and the parties to cases before them are not identical in the areas of law considered above. In each area, however, the focus of the relevant court's role is the setting and maintaining of boundaries. The ECtHR and ECJ exercise supervisory jurisdiction within different contexts. The ECHR does not create a distinct legal order, and the ECtHR is separate from the constitutional orders of the ECHR contracting states. The latter have a substantial degree of autonomy as to how they give effect to their ECHR obligations, but the ECtHR ensures that they do not disproportionately infringe an ECHR right by overstepping the bounds of that autonomy. The EU treaties, on the other hand, have been treated by the ECJ as creating a distinct legal order embracing the EU institutions, Member States and their citizens.<sup>169</sup> The ECJ maintains the balance of power within the EU by ensuring that all acts of EU law, whether by EU institutions or Member States, are lawful. It also maintains appropriate boundaries between national and EU law such that the former does not disproportionately impinge on the latter. In the domestic context, the courts and the authorities whose decisions they review are both internal to the UK constitutional structure. The relevant standard of review is applied within the context of the separation of powers. The courts' desire not to overstep their bounds may lie behind the cautious development of proportionality as a standard of review in domestic law, given that it is more intrusive than *Wednesbury* unreasonableness, even in the latter's heightened form. This is reflected in, for example, Lord Neuberger's judgment in *Keyu*<sup>170</sup> and Lord Lowry's judgment in *Brind*. The latter referred, disapprovingly, to

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<sup>166</sup> [2001] UKHL 26 [27].

<sup>167</sup> *ibid.*

<sup>168</sup> [2015] UKSC 69 [133].

<sup>169</sup> Case 26/62 *NV Algemene Transport en Expeditie Onderneming Van Gend & Loos v Nederlandse Administratie Der Belastingen* 12.

<sup>170</sup> *Keyu* (n 168).

proportionality moving the focus of a judicial review discussion ‘into an area in which the court will feel more at liberty to interfere’.<sup>171</sup> This aspect of proportionality is of most interest for present purposes because it embodies the greatest difference between the principle in these contexts, and in the procedural case management context.<sup>172</sup>

### III. ENGLISH PRIVATE LAW

The language of proportionality has become prominent in some areas of private law. Two clear examples are contractual damages, specifically liquidated damages and assessment in a cost of cure context, and proprietary estoppel. The law on liquidated damages was fundamentally rewritten<sup>173</sup> in *Makdessi v Cavendish Square Holdings BV* (2015).<sup>174</sup> Lords Sumption and Neuberger stated that:

the true test [for whether a liquidated damages clause should be invalidated as a penalty clause] is whether the impugned provision is a secondary obligation which imposes a detriment on the contract breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation.<sup>175</sup>

Here we see the language of interests and detriments that is ubiquitous in discussions of proportionality. Lord Hodge, similarly, used the term ‘wholly disproportionate to the loss suffered’.<sup>176</sup> The language used in *Makdessi* reflects an extreme form of proportionality, present in phrases such as ‘out of all proportion’,<sup>177</sup> ‘wholly disproportionate’<sup>178</sup> and ‘extravagant disproportion’ [emphasis added].<sup>179</sup> This suggests that proportionality forms a spectrum at the far end of which, in a liquidated damages context, disproportionality becomes indefensible. Similar language was used in *Ruxley Electronics and Construction Ltd v Forsyth* (1996), in which Lord Lloyd stated that the cost of reinstatement of defective work is not the appropriate

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<sup>171</sup> *Brind* (n 158) 766.

<sup>172</sup> This is discussed further in ch 3 at 82-83.

<sup>173</sup> Hugh Beale, *Chitty on Contracts* (33rd edn, Sweet & Maxwell 2018) para 26-178.

<sup>174</sup> [2015] UKSC 67.

<sup>175</sup> *ibid* [17].

<sup>176</sup> *ibid* [226].

<sup>177</sup> *ibid* [32], [287].

<sup>178</sup> *ibid* [227].

<sup>179</sup> *ibid* [255].

measure of damages if ‘the expenditure would be out of all proportion to the benefit obtained’.<sup>180</sup>

In the context of proprietary estoppel, the authorities were reviewed in *Jennings v Rice* (2002).<sup>181</sup> The Court of Appeal noted that ‘the most essential requirement’ to doing justice where an equity arises after the elements of proprietary estoppel are established ‘is that there must be proportionality between the expectation and the detriment’.<sup>182</sup> The more recent case of *Davies v Davies* (2016)<sup>183</sup> highlighted a consideration akin to the ‘least restrictive means’ aspect of proportionality. While there must be proportionality between the remedy and the detriment which its purpose is to avoid, ‘[t]his does not mean that the court should abandon expectations and seek only to compensate detrimental reliance, but if the expectation is disproportionate to the detriment, the court should satisfy the equity in a more limited way’.<sup>184</sup>

The terminology is less prominent, but some of the same principles can be discerned, in codified schemes for assigning liability. In the context of contribution claims, s.2(1) Civil Liability (Contribution) Act 1987 states that ‘the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person’s responsibility for the damage in question’. When considering whether to make an unequal apportionment, the court will consider three rules:<sup>185</sup> whether the actions of one party were more causatively potent,<sup>186</sup> whether one party was more morally blameworthy,<sup>187</sup> and the rule on retention of gains, embodied in the maxim that ‘he who takes the benefit must bear the burden’.<sup>188</sup> No party should bear a greater burden than necessary in respect of damage for which they are partially responsible. The same is true of contributory negligence, in respect of which s.1(1) Law Reform (Contributory Negligence) Act 1945 states that where a party that suffered damage was at fault, ‘the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant’s share in the responsibility for the damage’. Again, each party should only bear

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<sup>180</sup> [1996] AC 344, 367.

<sup>181</sup> [2002] EWCA Civ 159.

<sup>182</sup> *ibid* [36] (Aldous LJ).

<sup>183</sup> [2016] EWCA Civ 463.

<sup>184</sup> *ibid* [38] (Lewison LJ).

<sup>185</sup> Charles Mitchell, Paul Mitchell and Stephen Watterson (eds), *Goff & Jones: The Law of Unjust Enrichment* (9<sup>th</sup> edn, Sweet & Maxwell 2016) para 20-90.

<sup>186</sup> *ibid* para 20-92.

<sup>187</sup> *ibid* para 20-96.

<sup>188</sup> *ibid* para 20-99.

an appropriate burden having had their responsibility for the damage assessed. The principle at the heart of the law on contributions, that no party should have to bear excessive responsibility for damage caused, recalls the idea central to proportionality that no party should suffer a greater detriment than necessary.

There is no structured principle of proportionality in these contexts that is directly comparable to the principle established in European and domestic public law. Some fundamental differences stem from the nature of the relationships between interested parties and the court. Assessment of damages and the penalty doctrine are facets of the law of contract. The rule on penalty clauses is a major qualification upon the operation of the principle of freedom of contract.<sup>189</sup> By entering into a contract, parties define the relationship between them, as opposed to one party being subject to measures imposed by the other, the content of which they are unable to control. In some cases the parties will not have equal bargaining power, but this is not decisive when deciding whether a clause is a penalty, although it may affect the application of the test, particularly in determining what amounts to ‘unconscionable’ or ‘extravagant’ in the circumstances.<sup>190</sup> Considerations of proportionality are, therefore, applied in a context in which ‘the court has to be careful not to set too stringent a standard and bear in mind that what the parties have agreed to should normally be upheld’.<sup>191</sup>

Different interests are involved in these private law contexts, where the court gives effect to rights under the substantive law of obligations. The court enforces rights and obligations that exist between parties in their private capacity, rather than protecting the rights of one private party from unlawful interference by a party acting in its capacity as a public or governmental authority. This difference feeds into the relationship between the parties and the court, and the role of the latter. The court is not reviewing the actions of one party as a check on potential abuses of power. It does not have to defer to, or give weight to, the decisions of non-judicial bodies. The court is the adjudicator of a dispute, rather than part of a review mechanism aimed at maintaining an appropriate balance of administrative powers. One manifestation of these differences may be in the approach to the distinction between proportionality and reasonableness. In a public law context, courts have taken a cautious approach to the relationship between these principles.<sup>192</sup> In *Ruxley*, however, unreasonableness was equated to

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<sup>189</sup> *Makdessi* (n 174) [33] (Lord Neuberger and Lord Sumption).

<sup>190</sup> *Chitty* (n 173) para 26-227.

<sup>191</sup> *Philips Hong Kong Ltd v Attorney General of Hong Kong* (1993) 61 BLR 41, 59 (Lord Woolf).

<sup>192</sup> See above at 38-40.

being ‘wholly disproportionate’<sup>193</sup> or ‘out of all proportion’.<sup>194</sup> The boundaries of the separation of powers may mean that principles develop differently in public and private law contexts.

There are, however, some fundamental similarities between these private law contexts and proportionality as applied in European and domestic public law. There must be an appropriate relationship between means and ends, incorporating an aspect of necessity. The central question of the *Makdessi* test is whether, in protecting one party’s legitimate interests, the clause in question imposes no greater detriment than necessary on the other contracting party. That case evidences a shift towards the language and concept of proportionality, in terms of both the necessity of any detriment imposed and the legitimacy of the aim to which the means imposing that detriment are connected. The statutory law examples use the language of justice and equity rather than aims, benefits and detriments, but similarities remain. The payment of a contribution or a reduction in damages due to contributory negligence is a financial detriment to the party who pays or receives less than they claimed. The ‘just and equitable’ standard requires the detriment to be no greater than necessary to accurately reflect that party’s responsibility. Again, there must be an appropriate relationship between means and ends, with the end being compensation for damage suffered and the means being apportionment of that compensation between those responsible. The thought patterns at the heart of the proportionality analysis are clearly familiar to English judges, even if they do not always bear the ‘proportionality’ label. This may reflect the fact that proportionality, in a broad sense, expresses fundamental notions of justice and fairness. Cases such as *Makdessi* and *Jennings* illustrate an articulation of those general intuitions in the language of proportionality.

#### IV. COMMON THEMES

Some common themes can be identified which shape the kind of analysis proportionality requires. An important initial point is that proportionality is not a rule, rather it provides an analytical framework. It has been described as a ‘reasoning framework’,<sup>195</sup> an ‘argumentation’<sup>196</sup>

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<sup>193</sup> *Ruxley* (n 180) 363 (Lord Lloyd).

<sup>194</sup> *ibid* 369 (Lord Lloyd).

<sup>195</sup> Mordechai Kremnitzer, Talya Steiner, Andrej Lang, ‘Introduction’ in Mordechai Kremnitzer, Talya Steiner and Andrej Lang (eds), *Proportionality in Action: Comparative and Empirical Perspectives on the Judicial Practice* (CUP 2020) 1.

<sup>196</sup> Alec Stone Sweet and Jud Mathews, ‘Proportionality Balancing and Global Constitutionalism’ (2008) 47 *Colum. J. Transnat’l L.* 72, 88.

and ‘balancing’ framework,<sup>197</sup> an ‘analytical structure’<sup>198</sup> and an ‘analogical concept’.<sup>199</sup> Other than in a general sense (‘X must be proportionate to Y’), there is no ‘proportionality rule’. There is no rule that specifies precisely how factors relevant to X and Y, and indeed X and Y themselves, are to be weighed against each other. There is no formula that when applied to a given situation will guarantee a proportionate result. The statement ‘X must be proportionate to Y’ opens the door to an analytical framework which allows relevant factors to be balanced as required by the situation at hand. The proportionality tests give shape to that framework by identifying core concepts within which case-specific factors can be considered.

The proportionality tests considered above are general in tone and content. There is no attempt to be prescriptive, for example as to how concepts such as suitability and necessity might be defined. This is due to another fundamental feature of the proportionality analysis: it needs to be flexible and applicable to the widest range of factual situations. Lord Toulson in *Makdessi* stated that it was ‘impossible to lay down abstract rules about what may or may not be “extravagant and unconscionable”, because it depends on the particular facts and circumstances in the individual case’.<sup>200</sup> This applies beyond the context of liquidated damages and penalty clauses. It is impossible, for example, to set down precise rules as to what is ‘necessary’, because the content of that requirement will always be tied to the facts of a case. The necessity requirement in each case binds together a unique combination of objective, the means of achieving it, and any detriment imposed by those means. The ECtHR has equated necessity with a ‘pressing social need’, which gives some additional definition through a broad indication of the strength of the case that needs to be made out, but it is still an addition to the analytical framework rather than a precise rule. The same can be said of the phrases ‘out of all proportion’ and ‘wholly disproportionate’ used in *Makdessi*. Guidance may be drawn from case law on the sub-factors to take into account when considering suitability and necessity, and how courts have weighed those factors in previous cases, but the analysis must always be fact specific. Not only is it impossible to lay down prescriptive rules, it is in some respects undesirable. The flexibility of the proportionality analysis is one of its greatest strengths. It would be lost, or at best eroded, by imposing rules on issues such as meaning and how relevant factors are to be weighed against each other. On the other hand, a lack of clear rules can lead

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<sup>197</sup> *ibid* 75.

<sup>198</sup> *ibid*.

<sup>199</sup> Lacey (n 70) 30.

<sup>200</sup> *Makdessi* (n 174) [293].

to inconsistency of decision-making. The provision of sufficiently detailed reasoning could, however, minimise any loss of consistency.

A less beneficial feature of the proportionality analysis is incommensurability, which states that the factors relevant to a determination of proportionality cannot be properly balanced.<sup>201</sup> One way in which incommensurability is used to criticise proportionality stems from the view that rights hold a special normative force that lends them an absolute or near-absolute priority over competing considerations, such as conflicting interests, and makes talk of balancing misleading.<sup>202</sup> Endicott articulates the ‘incommensurability problem’ as being that ‘if there is no rational basis for deciding one way rather than the other, then the result seems to represent a departure from the rule of law, in favour of arbitrary rule by judges’.<sup>203</sup> Lord Reed commented on the problem in the context of contributory negligence in *Jackson v Murray* (2015):

It is not possible for a court to arrive at an apportionment which is demonstrably correct. The problem is not merely that the factors which the court is required to consider are incapable of precise measurement. More fundamentally, the blameworthiness of the pursuer and the defender are incommensurable. The defender has acted in breach of a duty ... which was owed to the pursuer; the pursuer, on the other hand, has acted for want of regard for her own interests. ... The court is not comparing like with like.<sup>204</sup>

This issue can be identified in other areas of law, taking as examples some of the cases cited above. In *Fedesa*, the ECJ considered the benefits to consumers of harmonising conditions of supply and administration to farm animals of hormonal substances as against the disadvantages of those measures, including considerable financial loss, to certain traders.<sup>205</sup> In *Handyside*, the ECtHR balanced the Article 10 right to freedom of expression with the aim of the UK’s Obscene Publications Acts 1959 and 1964 to ‘wage war’ on obscene publications defined by a tendency to ‘deprave and corrupt’. The effect of measures taken under those Acts on the Article 10 right, which was both an individual right that accrued to Mr Handyside and an ‘essential foundation’

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<sup>201</sup> A.C.L. Davies and J.R. Williams, ‘Proportionality in English Law’ in Sofia Ranchordás and Boudewijn de Waard (eds), *The Judge and the Proportionate Use of Discretion* (Routledge 2015) 95.

<sup>202</sup> Kai Möller, ‘Proportionality: Challenging the Critics’ (2012) 10(3) *Int. J. Const. Law* 709, 710.

<sup>203</sup> Timothy Endicott, ‘Proportionality and Incommensurability’ in Grant Huscroft, Bradley Miller and Grégoire Webber (eds), *Proportionality and the Rule of Law: Rights, Justification and Reasoning* (CUP 2014) 317.

<sup>204</sup> [2015] UKSC 5 [27].

<sup>205</sup> *Fedesa* (n 86) [16]-[17].

of a democratic society,<sup>206</sup> had to be taken into account alongside the effects that the publication in question would be likely to have on its target audience. In *Daly*, the applicant challenged a requirement that a prisoner may not be present when legally privileged correspondence was examined by prison officers. The House of Lords considered on the one hand the aim of security, preventing crime and maintaining order and discipline, and on the other hand prisoners' right to communicate confidentially with a legal adviser under the seal of legal professional privilege, and the relationship of the challenged measure to both of those factors.<sup>207</sup> In none of those cases was the court 'comparing like with like'.

Two related aspects of incommensurability have been identified: first, that it is impossible to assign precise values to rights and interests, and secondly that the rights and interests in question cannot be weighed using the same common scale.<sup>208</sup> This means that a determination of proportionality will ultimately be a question of intuitive, although informed, judgment on the part of the court. This is not unfamiliar to English judges. Many areas of substantive law present decisions which require the weighing of incommensurable values. Determining quantum of damages, for example, may require different forms of damage and different measures of value to be weighed against each other. Neither Endicott nor Lord Reed see incommensurability as an insurmountable problem. The former argues that the rule of law demands a system in which independent tribunals can reconcile incommensurable values, and that judicial decision-making does not become arbitrary in the sense relevant to the rule of law where judges undertake this exercise.<sup>209</sup> Lord Reed notes that while incommensurability does make the apportionment of responsibility in contributory negligence cases a 'somewhat rough and ready exercise', this is consistent with the broad 'just and equitable' apportionment requirement.<sup>210</sup> It follows that judges' differing views should be respected, within the limits of reasonable disagreement.<sup>211</sup> This is analogous to the approach taken to case management decisions on appeal.<sup>212</sup>

Incommensurability highlights the importance of how the proportionality analysis is carried out and the way that judges articulate the process and results of the analysis. It can compound

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<sup>206</sup> *Handyside* (n 107) [49].

<sup>207</sup> *Daly* (n 166) [5], [13] (Lord Bingham).

<sup>208</sup> *Davies and Williams* (n 201) 95.

<sup>209</sup> Endicott, 'Proportionality and Incommensurability' (n 203) 341.

<sup>210</sup> *Jackson* (n 204) [28].

<sup>211</sup> *ibid.*

<sup>212</sup> See ch 4 at 94-5.

problems caused by lack of transparency. Although the absence of clear reasoning is always undesirable, it is particularly problematic where it is not obvious how factors relevant to a decision can be weighed against each other. In that situation, explanation by the decision-maker is required in order to fully understand the decision. Simply saying that a particular outcome is 'proportionate' gives no insight into the underlying reasoning. Incommensurability and lack of transparency also make consistency of decision-making more difficult. Even if there is clarity as to the reasoning underlying a decision, if the factors to be considered are incommensurable then it will be difficult to provide any useful, concrete guidance that may be followed in subsequent cases. This is also a consequence of the fact-specific nature of the proportionality analysis. These issues are central to the proposals set out in Chapter Six, as they affect the nature of any guidance given on the application of proportionality.<sup>213</sup>

## V. CONCLUSIONS

This chapter has shown that proportionality is not unique to English civil procedural law. It is a fundamental principle in EU law and European human rights law, and is familiar to English judges in those contexts. Some of its constituent parts can also be identified in areas of domestic private law. There is no single test by which proportionality is applied, but the structure of an analytical framework has been identified. It incorporates a relationship between means and ends, specifically that the means of achieving a legitimate end must be suitable and necessary, and a cost-benefit analysis which balances the rights and interests, and the value and burdens, accruing to relevant parties. In EU law, European human rights law and domestic public law, the courts apply proportionality as part of a review jurisdiction. The principle is tied to the role of the court, to the relationship between the court and the parties to the dispute before it, and to the subject matter of the dispute. These factors affect the intensity with which the analysis is applied, and the latitude afforded to those making decisions under the powers that are being reviewed. In domestic private law, proportionality has not developed as a structured principle, but core elements of the analysis have been identified, notably the balancing of rights and interests and the need to ensure that any burden imposed is no greater than required to achieve a specified aim. In all areas, the concept of proportionality imports fundamental notions of fairness.

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<sup>213</sup> See ch 6 at 210-212.

This broader perspective is important. If one were to ignore the fact that proportionality has history, meaning and application outside the procedural context, it might misleadingly suggest that this principle is unique to procedural law. This limits our ability to understand the procedural principle, because it excludes a body of established comparators that can be used to give that principle definition. Each constituent part of the proportionality analysis identified in this chapter can be analysed in the context of procedural proportionality. Exploration of similarities and differences allows us to go beyond the general terms 'proportionate' and 'disproportionate' to determine what those terms mean in a case management context. Those comparisons will be carried out in the next chapter. It will be seen that all the constituent parts of the analysis identified in this chapter are present in case management proportionality, but that there is greater divergence in the role of the court and its relationship to the parties before it. First, however, we must review the development of proportionality and case management in English procedural law.

## CHAPTER THREE

### PROPORTIONALITY AND ACTIVE CASE MANAGEMENT IN ENGLISH CIVIL PROCEDURE

This chapter will consider the meaning and nature of procedural proportionality and active judicial case management, the reasons for their introduction and their importance in the ongoing development of the CPR. Case management proportionality will be compared with the general principle explored in the previous chapter with the aim of defining the principle as precisely as possible. First, however, consideration must be given to certain fundamental concepts of justice.

#### I. SUBSTANCE AND PROCEDURE

In the civil justice system governed by the CPR, ‘procedural justice is as important as substantive justice’.<sup>214</sup> An understanding of the meaning of substantive law and justice on the one hand, and procedural law and justice on the other, is crucial to analysing any part of the CPR.

#### SUBSTANTIVE AND PROCEDURAL LAW

The substantive law is that which is applied by the court to findings of fact in order to determine parties’ rights and liabilities. Procedural law, on the other hand, sets out the mechanics of how parties enforce their rights and the formal structure within which they do so. It operates on multiple levels. At an elevated level, procedural law embraces overarching concepts that shape a litigation system as a whole, such as the right to an impartial tribunal, to a public hearing, and to equality of arms. At a case-specific level, it embraces the rules and decisions which determine how, on a step-by-step basis, litigation is conducted. Those case-specific aspects of procedural law must comply with the higher-level overarching procedural concepts. Lord Woolf referred to ‘procedural tools for conducting litigation’,<sup>215</sup> emphasising the role of procedure in the logistics of how a case proceeds through the court system.

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<sup>214</sup> Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the civil justice system in England and Wales* (HMSO 1995) ch 26, para 29.

<sup>215</sup> *ibid* ch 3, para 8.

These two bodies of law are linked. Procedure exists to serve a particular aim and has no meaning in isolation.<sup>216</sup> On a basic level, procedural law dictates the means by which parties enforce rights accorded to them under the substantive law. This apparently simple connection poses more complex questions as to the kind of substantive outcomes that procedural law should support, and the extent to which the nature of procedure itself should form part of the 'justice' provided by the court. It is here that the concepts of 'substantive justice' and 'procedural justice' come into play.

### **SUBSTANTIVE AND PROCEDURAL JUSTICE**

Substantive justice is achieved when a right or duty is vindicated in accordance with the relevant substantive law. The term imports a notion of strict and precise enforcement, embodying the idea that the relevant legal norm has been accurately identified and precisely applied. This requires a scrupulous and unerring quest to ascertain the facts. If it is necessary to apply the correct substantive law to accurately identified facts, both law and fact must be determined without any allowance for error. However, this conception represents an ideal of substantive justice which, for two reasons, fails to provide a true picture of the civil justice system. First, many cases do not proceed through the system to trial. A court can make different types of judgment, not all of which involve an attempt at a definitive ascertainment of fact. Summary judgment, for example, is a final disposition based on a truncated assessment of the evidence. Decisions to grant interim injunctions are similarly based on a preliminary assessment of the evidence, although rather than being a final disposition they reflect an acknowledgement that a full investigation may be warranted in future, with the decisive question being where the balance of convenience lies.<sup>217</sup> Default judgments involve no attempt by the court to get to the root of a case. The quest to achieve the perfect result is not embarked on in every case; at most, it represents an ideal that must in reality be subordinated to the practical needs of managing the civil justice system.

Secondly, it is arguable that the very concept of objective truth has no place in civil litigation.<sup>218</sup> As a general proposition, it is impossible to ignore the 'human factor': all participants in the

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<sup>216</sup> D.J. Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* (Clarendon 1996) 8, 55. Galligan was writing in an administrative law context, but the comment has broad applicability.

<sup>217</sup> *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, 406 (Lord Diplock).

<sup>218</sup> The importance of the establishment of truth was expounded by, for example, Franz Klein. (Susanne Frodl, 'The heritage of the Franz Klein reform of Austrian civil procedure in 1895-1896')

administration of civil justice are fallible, and systems are imperfect. There is also a more particular consideration with respect to litigation conducted within an adversarial system, which reflects the state's interest in the resolution of civil disputes. The court has no independent function to determine the 'truth' of a matter, rather it determines which of the cases presented to it is the more truthful. As Lord Wilberforce noted in the pre-CPR case of *Air Canada v Secretary of State for Trade (No.2)* (1983):

[t]here is no higher or additional duty to ascertain some independent truth. It often happens ... that an adjudication has to be made which is not, and is known not to be, the whole truth of the matter: yet if the decision has been in accordance with the available evidence and with the law, justice will have been fairly done.<sup>219</sup>

It has been said that the provision of substantive justice requires the application of right law to true fact.<sup>220</sup> In the context of judicial decision-making under English law, it is more precise to say that right law is applied to a tolerably accurate finding of fact. This is reflected in the civil burden of proof: 'on the balance of probabilities' does not express precision and accuracy in fact finding. That is the context in which parties put their cases and evidence to the court and to their opponents. Parties also are unlikely to be concerned with an objective truth, rather they will want the dispute to be resolved as advantageously as possible. The presentation of their case is governed by procedural rules. The principles of substantive law and the findings of fact to which they are applied are therefore based on the pleadings and evidence that are permitted by those rules. This raises two questions. If, realistically, the court can only try to get as close to the truth as the relevant procedure allows, how close should that be? Is there a point at which greater proximity to the truth must be sacrificed in favour of other interests? It is here that procedural justice becomes relevant.

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(2012) 31(1) CJC 2012 43, 59-60.) His concept of 'utmost truth' exists in the context of a system that attaches importance to procedural economy. There are similarities between Klein's thesis and Woolf's approach, although a central difference between Klein and Woolf is that the former's thesis was grounded in a concept of the social welfare state. The search for truth is considered by *inter alia* Finkelstein and Hurter. Finkelstein asserts that lawyers will mold their clients' versions of events into the narrative most likely to win the case (Ray Finkelstein, 'The Adversarial System and the Search for Truth', (2011) 37 Monash UK Rev. 135, 136). Hurter sees it as 'unfortunate' that practitioners are painted as 'players in the system' who will obscure the truth in their lust for winning (Estelle Hurter, 'Seeking Truth or Seeking Justice: Reflections on the Changing Face of the Adversarial Process in Civil Litigation', (2007) J. S. Afr L 240, 246).

<sup>219</sup> [1983] 2 AC 394, 438.

<sup>220</sup> Sorabji, *English Civil Justice* (n 7) 2.

Procedural justice does not connote a search for unattainable standards. It involves the more attainable concept that procedures themselves should be fair in light of all the circumstances (although deciding whether a procedure is fair is not necessarily a simple task, as a delicate balance may need to be struck between different interests and principles). Just as procedural law operates at multiple levels, so does procedural justice. The focus in this work will be on justice as delivered at the level of specific procedural decisions in individual cases, as opposed to the higher, overarching level of, for example, delivering justice by providing impartial judges or public hearings. Assessment of a procedure as fair and just depends first on the aim of the justice system and the role of procedure in facilitating that aim. Secondly, it depends on whether the assessment is directed at the rights of the parties in the specific case, or at the operation of the civil justice system as a whole. This means that there are two types of procedural justice, which can be termed respectively '*inter partes*' and 'systemic' procedural justice.

*Inter partes* procedural justice is case specific. If the primary aim is to get a case to trial so that substantive justice can be done, the role of procedure is to facilitate that aim. *Inter partes* procedural justice in the context of this aim includes, for example, the right to frame one's case in the precise manner of one's choosing and to present all chosen supporting evidence, including a lenient approach by the courts to the amendment of pleadings and applications to adduce evidence. If, however, the aim is to provide a broader concept of justice in which expenditure of time, cost and resources must be kept at a proportionate level, then procedures must promote that aim. *Inter partes* procedural justice in that context may include, for example, refusing to allow an amendment or evidence where the benefit to the parties and the case does not justify the consequential expenditure that would be incurred. In service to both of these aims, procedural justice defines the scope of the inquiry to be made in the search for substantive justice. The latter aim requires that some proximity to the truth be sacrificed because the proportionate nature of the process itself is of equal importance.

Systemic procedural justice, by contrast, broadens the perspective. It involves assessment of not only the present dispute, but its place within the litigation system as a whole. If the aim is to ensure that the system runs efficiently and economically, and that finite resources are used for the benefit of all litigants, then a just procedure is one that uses no more than a fair share of those resources. This requires a stricter approach to, for example, amendment of pleadings and breaches of rules and court orders. Courts must consider how the time and resources used

as a result of a procedural decision in one case impact on other cases (although the extent to which this is an assessment that a judge can accurately make is questionable). Systemic procedural justice may, for example, require refusing an amendment or additional evidence because allowing it would require adjourning a hearing, thereby wasting limited court resources. Once again, the attainment of substantive justice and proximity to the truth of a matter is restricted, this time by giving weight to the interests of all litigants in having access to a fair share of court resources. The system governed by the CPR gives equal importance to substantive and procedural justice, and to the *inter partes* and systemic aspects of the latter. This reflects a change in the nature of the justice provided by the civil litigation system.<sup>221</sup>

Procedural justice determines the scope of the inquiry to be made in the search for substantive justice. This means that at the level of practical application it is not always easy, or indeed possible, to draw a clear distinction between questions of substance and procedure. There is likely to be an interplay between the two in every case, the extent of which will depend on the circumstances. The provision of substantive justice through determination of rights does not occur in a vacuum: a process is required to get to that determination, and to put before the court the necessary information and evidence. The rules and decisions that form part of the process can affect the substantive justice that is delivered, for example those that limit the evidence before the court, or that provide for a timescale that does not permit exhaustive investigation. In limiting the evidence on which the court is able to base a substantive decision, procedural decisions may reduce the accuracy of that decision. Conversely, some procedural decisions cannot be made without some evaluation of substance. Considering whether to strike out where there are no reasonable grounds for bringing or defending a claim,<sup>222</sup> for example, involves clear questions of substance. The same is true of a decision on whether to permit an amendment to a statement of case, which requires consideration of the amendments' prospects of success. In both cases, procedural decisions can affect substantive rights, sometimes by depriving a party altogether of the adjudication of some or all of their rights. The court's powers to strike out and to allow or refuse amendments do, nevertheless, remain procedural tools, because they further the aims of whichever concept of procedural justice the system aims to provide.

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<sup>221</sup> See below at 56ff.

<sup>222</sup> CPR 3.4(2).

There is potential for conflict in this interplay between substance and procedure. In a system with finite resources, securing procedural justice may require acceptance that ideal substantive justice is unattainable. Providing procedural justice to parties with unequal resources, for example, may mean limiting disclosure or expert evidence that would be justified by an exhaustive search for substantive justice. Pursuing any stage of litigation in a manner aimed at that exhaustive search might consume such a proportion of court time and resources, through interlocutory disputes and applications, as to deprive other users of access to the system. In a system where substantive justice takes precedence over both forms of procedural justice, there is a clear basis for resolution of such conflicts. They may prove more difficult to resolve where substantive and procedural justice have equal importance. A more useful way to approach this issue is to see the relationship between substantive and procedural justice not as a conflict to be resolved, but as a balance to be struck between subsets of an overarching concept of justice. In taking that approach there is no ‘correct answer’ that will ‘solve’ the problem of competing interests. Instead, there must be some compromise between them. This approach formed the basis of Lord Woolf’s review and the resulting CPR. ‘Justice’ as a concept in the civil litigation system now requires an appropriate balance between the substantive and the procedural. This is a balance that must be struck by judges when making case management decisions.

## II. THE CPR AND PROPORTIONALITY

### THE OVERRIDING OBJECTIVE

When the CPR came into force, the ‘Overriding Objective’ of the rules was to enable the court to ‘deal with cases justly’.<sup>223</sup> The Overriding Objective governs the operation of the CPR and the court’s interpretation of them in making management decisions.<sup>224</sup> Reference to the Overriding Objective is the means to resolve issues of meaning or application.<sup>225</sup> The term ‘objective’ elevates CPR 1.1 beyond a mere tool of interpretation: it ties that rule to the aims of the civil justice system and to the purpose of the courts. This was the first time that the procedural rules had contained an explicit provision of this kind, although it has been argued that the Rules of

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<sup>223</sup> CPR 1.1 in force on 26 April 1999.

<sup>224</sup> Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the civil justice system in England and Wales* (HMSO 1996) ch 23, para 11.

<sup>225</sup> *ibid* ch 26, para 23.

the Supreme Court ('RSC') contained an implicit Overriding Objective aimed at the provision of *inter partes* substantive justice.<sup>226</sup>

To 'deal' with a case encompasses more than providing a final judicial adjudication by applying substantive law to findings of fact (in other words, more than the provision of substantive justice). Lord Woolf stated that dealing with cases justly includes 'handling the case in ways which are proportionate' and 'ensuring that the case is handled and completed expeditiously'.<sup>227</sup> 'Handling' refers to management of procedural and pre-trial matters, and the phrase 'handled and completed' draws a distinction between that management and final disposal of the case. The terminology changed in the Final Report and the CPR, with 'handling' and 'handled and completed' replaced with 'dealing' and 'dealt' respectively.<sup>228</sup> Some clarity of meaning was lost as a result, but there is nothing to suggest that the Final Report's updated objective should be given a different meaning. The word 'deal' places process at the heart of the Overriding Objective. It is a broad term that encompasses not only all matters preceding trial<sup>229</sup> and adjudication at trial itself, but also disposal of a case by any other means.

To understand the word 'justly' in the context of the Overriding Objective, consideration must be given to Lord Woolf's approach to reform and the new concept of justice which it embodied. Rather than concentrating 'exclusively on the final product' as it had in the past,<sup>230</sup> the system had to balance achievement of the 'right result' against the expenditure of time and money needed to achieve that result. The recommended working objectives were aimed at a wider set of goals.<sup>231</sup> Lord Woolf's approach to reform manifested in two interrelated ways that embodied this change in the concept of justice, with emphasis on the mode and focus of dispute resolution. The first is that the objectives of the system were broadened such that aiming to achieve ideal substantive justice in each case, regardless of cost, was no longer the overriding consideration. The system governed by the RSC had given primacy to the provision of substantive justice at trial. In *Tildesley v Harper* (1878), Thesiger LJ stated that the 'object of [the rules of Court as to pleading was] to obtain a correct issue between the parties',<sup>232</sup> while in *Cropper v Smith* (1884), Bowen LJ stated that 'it is a well established principle that the object

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<sup>226</sup> Sorabji, *English Civil Justice* (n 7) 112.

<sup>227</sup> Woolf, *Interim Report* (n 214) ch 26, para 31.

<sup>228</sup> Woolf, *Final Report* (n 224) ch 20, para 11; CPR r.1.1(2).

<sup>229</sup> Sorabji, *English Civil Justice* (n 7) 126.

<sup>230</sup> Woolf, *Interim Report* (n 214) ch 4, para 5.

<sup>231</sup> *ibid* para 7.

<sup>232</sup> (1878) 10 Ch D 393, 397.

of the Courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights'.<sup>233</sup> This focus on providing substantive justice at trial was referred to by Jenkins LJ in *GL Baker Ltd v Medway Building and Supplies Ltd* (1958) as a 'guiding principle of cardinal importance'.<sup>234</sup> A brake was only placed on its pursuit if it would cause injustice to one or other of the parties, particularly an injustice that could not be compensated in costs.<sup>235</sup> The subordinate role of procedure and its place external to the concept of justice applied by the courts were summarised by Lord Collins MR's comment that 'the relation of rules of practice to the work of justice is intended to be that of handmaid rather than mistress'.<sup>236</sup>

Lord Woolf broadened the civil justice system's objectives to create 'a system ... substantively just in the results it delivers as well as in the way in which it does so'.<sup>237</sup> In doing so, he redefined the nature of the justice to be provided by the system. Substantive and procedural justice would have equal importance. Procedural justice was not unknown in the pre-CPR system: it was embodied, for example, in the right to submit evidence, the right to contest a case and the right to adjudication by an impartial judge. Procedure at the level of the logistical steps required to take a case through the litigation system, however, was viewed as an adjunct to and facilitative of achieving *inter partes* substantive justice. Lord Woolf reformulated procedural justice at that granular level and gave it a central role within the procedural rules. He identified four principles of procedural justice 'fundamental to an effective contemporary system of justice': equality, economy, proportionality and expedition.<sup>238</sup> He did not explicitly state what those four principles mean, but some detail can be drawn from the reports. Equality requires that procedures do not benefit wealthy or powerful litigants and disadvantage poorer ones.<sup>239</sup> Economy requires litigation to be conducted at the minimum cost necessary, in light of Lord Woolf's conclusion that litigation is too expensive.<sup>240</sup> The conclusion that delay is endemic<sup>241</sup> underpins the principle of expedition. Proportionality, as articulated in Lord Woolf's reports, requires procedures to be 'appropriate' to the amount and importance, in financial and non-

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<sup>233</sup> (1884) 26 Ch D 700, 711.

<sup>234</sup> [1958] 1 WLR 1216, 1231.

<sup>235</sup> *ibid.*

<sup>236</sup> *Re Coles and Ravenshear* [1907] 1 KB 1, 4.

<sup>237</sup> Woolf, *Final Report* (n 224) Section I, para 8.

<sup>238</sup> *ibid* Section I, para 8.

<sup>239</sup> Woolf, *Interim Report* (n 214) Section I, paras 2 and 9.

<sup>240</sup> *ibid* ch 2, para 1; Woolf, *Final Report* (n 223) Section I, para 2.

<sup>241</sup> Woolf, *Interim Report* (n 214) ch 3, para 29ff.

financial terms, of the issues in dispute.<sup>242</sup> It would no longer be the case that prejudice imposed on a party as a result of a procedural decision, such as delay or additional work, would be acceptable if it could be compensated in costs. Waller LJ, in *Worldwide Corporation Ltd v GPT Ltd, GPT Middle East Ltd* (1998) (handed down between publication of Lord Woolf's final report and the introduction of the CPR), drew a distinction between the approach of 'previous eras', when it was assumed that payment of costs was sufficient compensation, and the 'modern era', when it was recognised that payment of costs may be inadequate to compensate a party for prejudice suffered.<sup>243</sup> As will be seen in Chapter Four, prejudice relevant to case management decisions takes many forms, not all of which can be assigned a monetary value.

Lord Woolf's four principles of procedural justice are the focus of CPR 1.1(2), which sets out guidance on what it means to deal with a case 'justly'. Certain sub-rules relate to certain principles, but they cannot be entirely separated. Lord Woolf's 'procedural justice', embodied in those four principles, encompasses both *inter partes* and systemic procedural justice. On the *inter partes* level, his approach to civil litigation in general was one that would ensure 'fairness of procedure and reasonable equality between the parties involved' in litigation.<sup>244</sup> From a systemic perspective, one of his working objectives was that in considering whether to depart from pre-determined trial dates or to extend a trial, courts should 'take into account the effect of doing so not only upon the parties involved in the proceedings but also on other proceedings awaiting a hearing and the resources of the court'.<sup>245</sup> The inclusion of systemic procedural justice is one of the main ways in which Lord Woolf departed from previous reform attempts. It was driven by a need to deploy 'limited' court resources 'in the most effective manner for the benefit of everyone involved in civil litigation'.<sup>246</sup> Judges can only do so much with the time available to them.

The second manifestation of Lord Woolf's approach to reform was a change in litigation culture to one that encouraged co-operation, alternative dispute resolution ('ADR') and settlement. An 'unrestrained adversarial culture' was identified as underlying the system's failure to conform with and support the principles of a functioning civil justice system.<sup>247</sup> Not only were settlement

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<sup>242</sup> *ibid* ch 1, para 3; Woolf, *Final Report* (n 224) ch 2, para 19.

<sup>243</sup> Unreported, 2 December 1998; 1998 WL 1120764 6.

<sup>244</sup> Woolf, *Interim Report* (n 214) ch 16, para 1.

<sup>245</sup> *ibid* ch 4, para 7.

<sup>246</sup> *ibid* para 1.

<sup>247</sup> *ibid*.

and the use of ADR to be encouraged, but litigation was to be seen as a last resort.<sup>248</sup> Lord Woolf's 'new landscape'<sup>249</sup> sought to create a culture where litigation would be avoided wherever possible.<sup>250</sup> Settlement offers were identified as a 'procedural tool'<sup>251</sup> on the basis that increased flexibility with regard to written offers would reduce cost, complexity and delay. Under the new CPR 36, a settlement offer that would previously have been made outside the ambit of the procedural rules became a tool by which court proceedings could be controlled.<sup>252</sup> Encouraging and facilitating settlement formed a central part of the court's management duties.<sup>253</sup> This change in litigation culture is one of the clearest manifestations of Lord Woolf's move away from the pursuit of substantive justice as the system's primary aim. To bring methods of dispute resolution other than judicial determination at trial within the system governed by the procedural rules was to fundamentally change the aims of that system.

#### THE PRINCIPLE OF PROPORTIONALITY

It has been said that the notion of proportionality in the CPR is 'not easy to define with precision'.<sup>254</sup> It is true that no precise definition is provided in either of Lord Woolf's reports or the CPR itself. However, a close look at those reports, the CPR and subsequent reforms provides some detail. Proportionality is a pervasive concept relevant to all aspects of dispute resolution. One of Lord Woolf's objectives was to provide 'appropriate and proportionate means of resolving disputes',<sup>255</sup> and his approach to civil litigation in general was that 'it should provide a means of resolving disputes which is proportionate to the amount or importance of the matter at issue, which is achieved within an appropriate timescale and which ensures fairness of procedure and reasonable equality between the parties involved'.<sup>256</sup> The principle is also referred to in more specific contexts. Procedures and cost should be 'proportionate to the nature of the issues involved',<sup>257</sup> the approach to a case must be 'proportionate to [its] weight',<sup>258</sup> timescales must be proportionate to litigants' needs,<sup>259</sup> and sanctions must be proportionate

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<sup>248</sup> *ibid.*

<sup>249</sup> Woolf, *Final Report* (n 224) Section I, para 8.

<sup>250</sup> *ibid* para 9.

<sup>251</sup> Woolf, *Interim Report* (n 214) ch 4, para 27.

<sup>252</sup> *ibid.*

<sup>253</sup> CPR 1.4(2).

<sup>254</sup> *Zuckerman on Civil Procedure* (n 11) ch 1, para 1.58.

<sup>255</sup> Woolf, *Interim Report* (n 214) ch 5, para 1.

<sup>256</sup> *ibid* ch 16, para 1.

<sup>257</sup> *ibid* ch 1, para 3.

<sup>258</sup> *ibid* ch 6, para 12.

<sup>259</sup> *ibid* ch 16, para 1.

and ‘tailored to fit the seriousness of the breach’.<sup>260</sup> When the CPR first came into force, there was only one explicit reference to proportionality in the Overriding Objective. Dealing with a case justly included, ‘so far as ... practicable’, dealing with the case in ways which were proportionate to the amount of money involved, the importance of the case, the complexity of the issues and the financial position of each party.<sup>261</sup> The breadth of the comments in Lord Woolf’s reports, and the case law analysis in the next chapter, indicate that the principle is in reality far more pervasive. Those comments and CPR 1.1 itself make clear that proportionality defines the relationship between two or more factors. In a procedural context, that relationship is between how a case progresses through the litigation system and the nature and needs of the case, the parties and the system as a whole.

Proportionality has remained central to post-Woolf amendments to the CPR. Sir Rupert Jackson was appointed in November 2008 to undertake a review of civil litigation costs<sup>262</sup> because ‘[d]espite the general success of the Woolf reforms, the cost of civil litigation continued to rise’.<sup>263</sup> The Woolf reforms themselves were identified as a partial cause: pre-action protocols (‘PAPs’) and the CPR led to a front-loading of costs; the requirements of the CPR and case management orders caused parties to incur costs that would not previously have been incurred; and where cases settled between issue and trial, the costs of achieving settlement were sometimes higher than before.<sup>264</sup> Jackson’s objective was ‘[t]o carry out an independent review of the rules and principles governing the costs of civil litigation and to make recommendations in order to promote access to justice at proportionate cost’.<sup>265</sup> This included establishing ‘the effect case management procedures have on costs and consider[ing] whether changes in process and/or procedure could bring about more proportionate costs’.<sup>266</sup> There was a continued focus on some of the same problems Lord Woolf had tried to tackle, and an acknowledgement that this most recent attempt to solve them had not been entirely successful. Jackson did not examine the fundamental basis on which litigation was carried out, but accepted that the proper approach was that which underpinned the CPR and embodied a

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<sup>260</sup> Woolf, *Final Report* (n 224) ch 6, para 10.

<sup>261</sup> CPR 1.1(2)

<sup>262</sup> Lord Justice Jackson, *Review of Civil Litigation Costs: Preliminary Report Volume One*, May 2009; Lord Justice Jackson, *Review of Civil Litigation Costs: Preliminary Report Volume Two*, May 2009; Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report*, December 2009.

<sup>263</sup> Jackson, *Preliminary Vol.1* (n 262) 1.

<sup>264</sup> *ibid.*

<sup>265</sup> *ibid* 3.

<sup>266</sup> *ibid.*

commitment to proportionality.<sup>267</sup> He examined the issue of costs on the assumption that litigation was to be conducted consistently with that approach.<sup>268</sup> Jackson did not take a philosophically or fundamentally different approach. His recommendations, informed by a decade of seeing how the CPR worked in practice, built on the changes introduced as a result of Lord Woolf's review. One way in which they did so was to clarify and make more explicit certain of those changes. The Overriding Objective was amended to require courts to deal with cases justly 'and at proportionate cost',<sup>269</sup> an amendment that was not recommended by Jackson, but which echoes language that recurs throughout his reports. This made 'explicit what [was] already implicit'.<sup>270</sup> Jackson himself noted that from the moment the CPR came into force, courts were 'obliged to have regard to costs when seeking to give effect to the overriding objective'.<sup>271</sup> The focus on proportionate cost was not new, rather it was an express reference to an existing requirement.

Jackson was more specific than Lord Woolf in considering the meaning of proportionality, noting that:

[p]roportionality is an open-textured concept. It now pervades many areas of the law, both substantive and adjectival. The essence of proportionality is that the ends do not necessarily justify the means. The law facilitates the pursuit of lawful objectives, but only to the extent that those objectives warrant the burdens thereby being imposed upon others.

Here we see central aspects of the principle that were identified in the previous chapter, notably the means-end analysis and the requirement that burdens imposed in pursuit of an objective should be no greater than necessary. Jackson also recommended the introduction of a new rule to include a definition of proportionate costs,<sup>272</sup> which was adopted in substantially the same form as CPR 44.3(5):

[c]osts incurred are proportionate if they bear a reasonable relationship to – (a) the sums in issue in the proceedings; (b) the value of any non-monetary relief in issue

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<sup>267</sup> Sorabji, 'Late Amendment' (n 67) 393.

<sup>268</sup> *ibid.*

<sup>269</sup> CPR 1.1 in force from 1 April 2013.

<sup>270</sup> Dyson, 18th Implementation Lecture (n 63) 126.

<sup>271</sup> Jackson, *Preliminary Vol 1* (n 262) 18.

<sup>272</sup> Jackson, *Final Report* (n 262) 38.

in the proceedings; (c) the complexity of the litigation; (d) any additional work generated by the conduct of the paying party; and (e) any wider factors involved in the proceedings, such as reputation or public importance.

Once again, the core of proportionality is a relationship between two or more factors. In that regard, it is notable that Jackson and the rule-makers drew an explicit connection between proportionality and reasonableness. The latter is itself a concept that cannot be precisely defined, and its relationship with proportionality in a procedural context is not entirely clear. Sometimes, the two terms appear to be interchangeable, for example in the context of disclosure. Standard disclosure requires a ‘reasonable’ search,<sup>273</sup> an approach ‘justified by considerations of proportionality’.<sup>274</sup> The ‘reasonable search’ requirement has been cited as an example of making do with ‘a lesser procedure even though it may result in the justice being rougher’.<sup>275</sup> This articulates the fundamental requirement of procedural proportionality that process be matched to the needs of the case. At other times, proportionality and reasonableness are treated as distinct concepts, notably in the context of costs. Reasonable costs are not the same as proportionate costs, as evidenced by the distinction between the standard and indemnity bases of assessment. This is despite the fact that the definition of proportionality introduced post-Jackson explicitly ties the two concepts together. Use of these nebulous terms is a double-edged sword. On the one hand, it allows questions of case management and costs to be tailored to the needs of a case, but on the other hand, lack of clarity can breed inconsistency. That in turn can be a barrier to the full implementation of reforms such as the Overriding Objective and principles such as proportionality.

A few years after Jackson’s final report, Lord Justice Briggs was commissioned to undertake two separate reviews: the Chancery Modernisation Review (‘CMR’), reports of which were published in 2013,<sup>276</sup> and the Civil Courts Structure Review (‘CCSR’), reports of which were published in 2015<sup>277</sup> and 2016.<sup>278</sup> Both took as their starting point the civil justice system created by the Woolf reforms and the CPR, and enhanced by Jackson. This was explicitly stated in the final CMR report: ‘the requirement in my terms of reference to take into account (and

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<sup>273</sup> CPR 31.7.

<sup>274</sup> *Digicel (St Lucia) Ltd v Cable & Wireless Plc* [2008] EWHC 2522 (Ch) [46].

<sup>275</sup> *Nichia Corporation v Argos Ltd* [2007] EWCA Civ 741 [51] (Jacob LJ).

<sup>276</sup> Lord Justice Briggs, *Chancery Modernisation Review: Provisional Report*, July 2013; Lord Justice Briggs, *Chancery Modernisation Review: Final Report*, December 2013.

<sup>277</sup> Lord Justice Briggs, *Civil Courts Structure Review: Interim Report*, December 2015.

<sup>278</sup> Lord Justice Briggs, *Civil Courts Structure Review: Final Report*, July 2016.

therefore to assume the implementation of) the Jackson reforms means that it is the Overriding Objective as modified by the recent rule changes that I must treat as lying at the heart of any process of chancery modernisation'.<sup>279</sup> Briggs identified a continuing debate over whether courts' attempts to grapple with proportionality had been a 'more time-consuming and expensive cure than the malady sought to be treated'.<sup>280</sup> The cost of front-loading was thought by many to be greater than the savings sought to be achieved, a criticism that had been levelled at the Woolf reforms and the CPR in general.<sup>281</sup> Briggs identified similar issues underlying criticisms of Jackson and the consequent rule changes.<sup>282</sup> He advocated a culture change which embodied an 'unhesitating acceptance' that the court is entitled and required to ration parties' use of court resources.<sup>283</sup> This should be done by reference not to what parties think they require, but to what the court regards as a fair share of its limited resources, proportionate to the value at risk and to the importance and complexity of the dispute.<sup>284</sup> In other words, a culture that fully embraced systemic procedural justice and proportionality. This was the culture that should have been adopted after both Woolf and Jackson, and the fact that it needed reiterating yet again indicates that it was not taking root.

Briggs' CCSR built on the foundation that the procedure for every case must be proportionate. Issues that had been at the heart of previous procedural reforms surfaced again, in the form of the 'inevitable need to focus on efficiency and economy in a time of austerity'.<sup>285</sup> There was a particular focus on structural proportionality, with one of the guiding principles of the review being to ensure a 'system which is proportionate and segmented – with the "majesty of the court" when needed and lower cost, lower burden (mostly digital) channels where not'.<sup>286</sup> One of CCSR's major recommendations was the Online Court, the intention behind which was to 'design from scratch and build from its foundations a wholly new court'<sup>287</sup> that would allow smaller and less complex cases to be dealt with electronically, with a simplified procedure and little or no input from legal representatives. Briggs' focus was on ending the accumulation of disproportionate *inter partes* costs in such cases,<sup>288</sup> however there are clear systemic advantages

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<sup>279</sup> Briggs, *CMR Final Report* (n 276) 31.

<sup>280</sup> Briggs, *CMR Provisional Report* (n 276) 28.

<sup>281</sup> *ibid.*

<sup>282</sup> *ibid.*

<sup>283</sup> *ibid.*

<sup>284</sup> *ibid.*

<sup>285</sup> Briggs, *CCSR Interim Report* (n 277) 4.

<sup>286</sup> *ibid.*

<sup>287</sup> *ibid.* 68.

<sup>288</sup> *ibid.* 76.

to a functional online dispute resolution system. Briggs emphasised that the Online Court process would not ‘in any way be second class’.<sup>289</sup> The development of this court further embeds the principle of proportionality into the structure of the civil justice system and reflects an understanding that applying a simpler process where appropriate is not a denial of justice. The centrality of structural proportionality continued with a further review by Sir Rupert Jackson published in July 2017,<sup>290</sup> which developed proposals for extending the fixed recoverable costs regime on the fast track. He proposed a new ‘intermediate track’ for fixed costs cases, to lie between the fast and multi-tracks,<sup>291</sup> with statements of case, disclosure and evidence to be limited and the court taking firm control of the action from the start.

There are two other notable recent initiatives: the Disclosure Pilot for the Business and Property Courts (‘Disclosure Pilot’) and the Shorter and Flexible Trials Scheme (‘SFTS’). Both embody an ongoing commitment to proportionality and an acceptance that the provision of proportionate justice has not yet been optimised. The Disclosure Pilot commenced on 1 January 2019. It aims to address concerns that reforms to CPR 31 had failed to introduce a more proportionate, economical and efficient approach to disclosure.<sup>292</sup> There was concern that the full range of disclosure options in CPR 31.5 were not being used, that standard disclosure too often remained the default, and that CPR 31 was insufficiently able to deal with e-disclosure.<sup>293</sup> The Disclosure Pilot aims to ensure that disclosure is directed to the issues with a scope no wider than was reasonable and proportionate.<sup>294</sup> Vos C in *UTB LLC v Sheffield United* (2019) stated that the Disclosure Pilot is ‘not simply a rewrite of CPR Part 31. It operates along different lines driven by reasonableness and proportionality ... with disclosure being directed specifically to defined issues arising in the proceedings’.<sup>295</sup> This suggests that the Disclosure Pilot takes a radically different approach, but the underlying principles are those that have always formed the foundation of the CPR. Everything that can be done within the Disclosure Pilot could have been done before it came into force. The scheme does, however, provide a detailed structure within the rules as to how disclosure may proceed, which can then be tailored as required. That level of detail is more likely to steer litigants, lawyers and judges to a more proportionate

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<sup>289</sup> Briggs, *CCSR Final Report* (n 278) 38.

<sup>290</sup> Lord Justice Jackson, *Review of Civil Litigation Costs: Supplemental Report, Fixed Recoverable Costs*, July 2017.

<sup>291</sup> *ibid* 36.

<sup>292</sup> *Civil Procedure* (Sweet & Maxwell 2021) para 51UPD.0.

<sup>293</sup> *ibid*.

<sup>294</sup> Practice Direction 51U, para 2.4.

<sup>295</sup> [2019] EWHC 914 (Ch) [75].

approach as it removes, or at least lowers, the risk that all involved will simply revert to what they know (in this instance, standard disclosure).

The SFTS, operating since 1 October 2018 in the Business and Property Courts, provides a procedural framework for shorter and flexible trials. The Shorter Trials Scheme ('STS') applies where a trial will be no longer than four days.<sup>296</sup> The provisions impose *inter alia* pre-action requirements,<sup>297</sup> length and content limits for statements of case and witness statements,<sup>298</sup> compulsory matters for consideration at CMCs,<sup>299</sup> and limits on post-CMC applications.<sup>300</sup> The Flexible Trials Scheme ('FTS') enables parties to adapt pre-trial and trial procedures to the needs of their case.<sup>301</sup> A standard procedure, aimed at focusing and limiting disclosure, evidence and cross-examination at trial,<sup>302</sup> may be varied by agreement<sup>303</sup> (although it is not specified how this should be done and the standard procedure will apply 'unless otherwise ordered'<sup>304</sup>). The STS and FTS seek to ensure that cases are dealt with by way of a procedure proportionate to their needs. Although there is no mention of systemic considerations in Practice Direction 57AB, one result of tailoring procedure in this way is a proportionate allocation of court resources. As with the Disclosure Pilot, there is nothing within the SFTS that could not have been done before it came into force. The court can, for example, limit the length of statements of case and witness statements, or impose content requirements, under its general case management powers. Once again, however, specificity is likely to steer all involved towards a more proportionate approach.

Proportionality may have been central to the CPR since they came into force, but a concept cannot stand alone. It must be implemented if it is to have any effect, and the means of implementation are as relevant as the concept itself. Active judicial case management provides the means by which procedural proportionality is implemented and the practical context within which it is applied.

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<sup>296</sup> Practice Direction 57AB, para 2.3.

<sup>297</sup> *ibid* para 2.16-2.19.

<sup>298</sup> *ibid* paras 2.21-2.23 and 2.30-2.32; para 2.44-2.45.

<sup>299</sup> *ibid* para 2.38.

<sup>300</sup> *ibid* para 2.43.

<sup>301</sup> *ibid* para 3.2.

<sup>302</sup> *ibid* para 3.9.

<sup>303</sup> *ibid* para 3.5.

<sup>304</sup> *ibid* para 3.9.

### III. ACTIVE JUDICIAL CASE MANAGEMENT

The context for a discussion of active case management is the adversarial principle, central to which is party control of litigation. Under the RSC, responsibility for the initiation, conduct, preparation and presentation of civil proceedings lay with the parties.<sup>305</sup> This bred adversarial attitudes and opportunistic behaviour. Lord Denning MR in *Burmah Oil Co Ltd v Governor and Company of the Bank of England* (1979) likened litigation to war: '[i]f one side makes a mistake, the other side can take advantage of it. No holds are barred.'<sup>306</sup> This combative culture was not discouraged, with Mustill LJ in *Wright v Morris* (1997) stating that 'no word of criticism [could] be addressed to the defendants or their advisers for exploiting the present rules to the maximum advantage'.<sup>307</sup> Echoing Denning's metaphor, Lord Woolf identified this entrenched adversarial culture as the source of the civil justice system's woes<sup>308</sup> which, if uncontrolled, would cause the system to 'degenerate into an environment in which the litigation process is seen as a battlefield where no rules apply'.<sup>309</sup> The judge's role in such a system was to adjudicate on issues selected by the parties when they chose to present them to the court. In such an environment, questions of expense, delay, compromise and fairness may have a low priority, resulting in excessive, disproportionate and unpredictable expense, and unreasonable delay.<sup>310</sup> Effective implementation of Lord Woolf's Overriding Objective required the combative culture to change, and this required effective judicial control of litigation. There was 'now no alternative to a fundamental shift in the responsibility for the management of civil litigation from litigants and their legal advisers to the courts'.<sup>311</sup> The introduction of judicial case management was 'crucial to the programme of change' and the means by which Lord Woolf intended to achieve many of his objectives.<sup>312</sup>

Judicial management was not unknown prior to Lord Woolf's review, however it existed within the context of the traditional adversarial principle, the concept of party control, and the primacy of *inter partes* substantive justice at trial. This can be seen in reform efforts, rule changes and judicial commentary. The Summons for Directions, introduced in 1883, allowed the court to limit the issues to be tried and evidence to be called at trial, powers that the

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<sup>305</sup> Sir Jack Jacob, *The Fabric of English Civil Justice* (Stevens & Sons 1987) 9-12.

<sup>306</sup> [1979] 1 WLR 473 (CA) 484.

<sup>307</sup> [1997] FSR 218, 229.

<sup>308</sup> Woolf, *Interim Report* (n 214) ch 3, para 4.

<sup>309</sup> *ibid.*

<sup>310</sup> *ibid* para 3.

<sup>311</sup> *ibid* ch 4, para 2.

<sup>312</sup> *ibid* para 8.

Evershed Committee recommended be strengthened in 1953.<sup>313</sup> The resulting Order 25 of the RSC provided the court with significant flexibility as to how it dealt with a matter once a Summons came to be heard. However, the robust tool envisaged did not materialise,<sup>314</sup> because the Summons operated within a system where control of litigation lay with the parties.<sup>315</sup> The Civil Justice Review ('CJR')<sup>316</sup> and the Heilbron/Hodge report<sup>317</sup> both made management recommendations, but in the context of a focus on adjudication at trial. The CJR noted that the disadvantages of adversarial conduct should be checked by court control.<sup>318</sup> Nevertheless, the focus on substantive justice is clear in recommendations such as issues, evidence and argument being presented in 'as economical a manner as justice permits',<sup>319</sup> where no consideration has been given to changing the concept of justice that underpins the procedural rules. Heilbron/Hodge gave case management a prominent role in its basic principles of reform,<sup>320</sup> with judges required to be 'active'<sup>321</sup> and judicial intervention 'forceful'.<sup>322</sup> These recommendations, however, were still made in the context of reaching adjudication at trial, in that they were 'designed to make more efficient the stages leading up to trial'.<sup>323</sup> An issue with both the CJR and Heilbron/Hodge was that no system-wide case management measures were introduced as a result of their recommendations. In respect of the former, Lord Woolf noted that 'a significant opportunity for reform was lost'.<sup>324</sup>

An important precursor to the CPR's active case management was the Practice Direction (HC: Civil Litigation: Case Management) (1995), which stated that '[t]he paramount importance of reducing the cost and delay of civil litigation makes it necessary for judges sitting at first instance to assert greater control over the preparation for and conduct of hearings than has hitherto been customary'.<sup>325</sup> Despite this, the onus remained with the parties, who were made

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<sup>313</sup> *Final Report of the Committee on Supreme Court Practice and Procedure* (HMSO 1953) 75-78.

<sup>314</sup> Michael Zander, 'What Can Be Done About Cost and Delay in Civil Litigation?' (1997) 31 *Isr Law Rev* 703, 706.

<sup>315</sup> Lord Neuberger, 'Docketing: Completing Case Management's Unfinished Revolution: Ninth Lecture in the Implementation Programme' (Solicitors' Costs Conference 2012) 6 <<https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Speeches/mor-speech-solicitors-cost-conference-lecture-feb2012.pdf>> accessed 13 January 2019.

<sup>316</sup> *Civil Justice Review: Report of the Review Body on Civil Justice* (HMSO 1988).

<sup>317</sup> *'Civil Justice on Trial – the Case for Change': Report of the Independent Working Party set up jointly by the General Council of the Bar and the Law Society* (Bar Council / Law Society 1993).

<sup>318</sup> CJR (n 316) 15

<sup>319</sup> *ibid.*

<sup>320</sup> Heilbron/Hodge (n 317) 6-7.

<sup>321</sup> *ibid* 86.

<sup>322</sup> *ibid* 33.

<sup>323</sup> *ibid* 30.

<sup>324</sup> Woolf, *Interim Report* (n 214) ch 4, para 2.

<sup>325</sup> [1995] 1 WLR 508 [1].

subject to additional duties, for example applying for a pre-trial review<sup>326</sup> and lodging a pre-trial checklist,<sup>327</sup> while the language setting out the court's management actions was non-compulsory. In *Worldwide Corporation*,<sup>328</sup> Waller LJ noted that the checklists required by the Practice Direction followed the format used for some time in the Commercial Court,<sup>329</sup> where judges had 'for many years been particularly pro-active in managing litigation brought before it for the benefit of all users'.<sup>330</sup> Nevertheless, this was still management within the framework of the RSC's focus on *inter partes* substantive justice. Waller LJ cited the Guide to Commercial Court Practice, stressing that it recognised the 'well-established principle' that amendments to pleadings would normally be allowed so as to reflect the true issues between the parties by encouraging consent orders.<sup>331</sup> The limited nature of judicial management under the RSC is highlighted by *Charles v Osman* (1997).<sup>332</sup> Henry LJ noted that the Summons for Directions empowered judges 'actively to case manage' and gave them an 'early opportunity to do so'.<sup>333</sup> However, the Summons left much of the initiative with the parties. 'Actively' as used in this case did not have the same meaning as it would under the CPR. The judgment makes clear that the RSC provisions were not compatible with truly proactive case management, with Henry LJ stating that 'under the Rules in their present form effective judicial case management will be difficult to enforce without much greater use of the peremptory order'.<sup>334</sup> The court did not have the necessary weight to bring to bear in order to manage cases effectively. Under the RSC, judges could only be 'active' to the extent permitted by the adversarial principle. Lord Woolf did not, however, remove this principle, rather he modified it. The question then is what, precisely, did Lord Woolf mean by 'case management'?

The Interim Report sets out his conception of case management:

[c]ase management for the purposes of this report involves the court taking the ultimate responsibility for progressing litigation along a chosen track for a pre-determined period during which it is subjected to selected procedures which culminate in an appropriate form of dispute resolution before a suitably experienced

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<sup>326</sup> *ibid* [6].

<sup>327</sup> *ibid* [7].

<sup>328</sup> *Worldwide Corporation* (n 243).

<sup>329</sup> *ibid* 9.

<sup>330</sup> *ibid* 10.

<sup>331</sup> *ibid*.

<sup>332</sup> Unreported, 4 March 1997.

<sup>333</sup> *ibid* 3.

<sup>334</sup> *ibid* 7.

judge. Its overall purpose is to encourage settlement of disputes at the earliest appropriate stage; and, where trial is unavoidable, to ensure that cases proceed as quickly as possible to a final hearing which is itself of strictly limited duration<sup>335</sup>

Five objectives underpinned this general conception.<sup>336</sup> Early settlement was to be achieved where practical, cases were to be diverted to ADR where this was likely to be beneficial, co-operation between parties was to be encouraged and unnecessary combativeness avoided.<sup>337</sup> Issues in dispute were to be identified and reduced as a basis for appropriate case preparation.<sup>338</sup> Where a case did progress to trial, this was to be done as speedily and at as little cost as appropriate.<sup>339</sup> Two main features of Lord Woolf's case management are visible here: first, the encouragement of disposal by methods other than trial, in particular ADR and settlement; and secondly, management of the progress of cases through the system to trial. These can also be found in the CPR which, for example, requires the court to encourage ADR if appropriate,<sup>340</sup> help parties settle all or part of a case,<sup>341</sup> decide promptly which issues need full investigation and trial,<sup>342</sup> and consider whether the likely benefits of a particular step justify the cost of taking it.<sup>343</sup> Many of the actions listed in CPR 1.4(2) are incompatible with an adversarial, party-controlled approach to litigation.<sup>344</sup> The court must actively intervene in how parties present their cases and it may take action of its own initiative.<sup>345</sup> Case management under the CPR is not reactive, and there is no requirement that a party must make an application before a particular step can be taken.

#### **CASE MANAGEMENT AFTER WOOLF**

Case management is central to post-Woolf amendments to the CPR. Jackson identified a general theme that the court could and should do more to actively manage cases and to exert greater control over the conduct, and therefore costs, of proceedings.<sup>346</sup> Several submissions to

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<sup>335</sup> Woolf, *Interim Report* (n 214) ch 5, para 16.

<sup>336</sup> *ibid* para 17.

<sup>337</sup> *ibid*.

<sup>338</sup> *ibid*.

<sup>339</sup> *ibid*.

<sup>340</sup> CPR 1.4(2)(e).

<sup>341</sup> CPR 1.4(2)(f).

<sup>342</sup> CPR 1.4(2)(c).

<sup>343</sup> CPR 1.4(2)(h).

<sup>344</sup> CPR 1.4(2)(d).

<sup>345</sup> CPR 3.3.

<sup>346</sup> Jackson, *Preliminary Report Vol 2* (n 262) 416-7.

Phase 1 of his review suggested that the appropriate framework for this control existed within the CPR, but that it was not being implemented properly or consistently.<sup>347</sup> The court tended to shy away from using the weapons in its armoury.<sup>348</sup> Many submissions pointed to a failure to impose strict enough sanctions for delay and non-compliance.<sup>349</sup> Jackson's view was that greater weight needed to be given to 'the prejudice to the judicial system as a whole suffered as a consequence of widespread delays and disregards for procedural deadlines and the resulting inflation of costs as well as the impact on judicial resources'.<sup>350</sup> Courts were not striking the required balance between *inter partes* and systemic considerations, despite Lord Woolf's exhortation that they be given equal importance.

Post-Jackson amendments to the CPR, implemented in 2013, reinforced the requirement that courts must take a less lenient approach to compliance. 'Dealing with a case justly and at proportionate cost' now explicitly included 'enforcing compliance with rules, practice directions and orders'.<sup>351</sup> The list in CPR 3.9 of nine non-exhaustive factors relevant to relief from sanctions was replaced with wording that created an explicit link to the Overriding Objective and emphasised the need to enforce compliance. These amendments were not merely in line with Lord Woolf's review, they expressed the same position. Lord Woolf had noted that 'the existing rules of court were being flouted on a vast scale'<sup>352</sup> and '[t]here was overwhelming support from all sides for effective, appropriate and fair sanctions',<sup>353</sup> with the right to apply for relief being 'limited'.<sup>354</sup> Crucially, he had determined that the effectiveness of sanctions would 'to a large extent ... revolve around judicial attitudes'<sup>355</sup> and judges would 'need to develop a more robust approach to the task of managing cases and ensuring that their orders are not flouted'.<sup>356</sup> If judges and practitioners had fully bought into and applied the principles underlying Lord Woolf's reports and the CPR as originally enacted, there should have been no need for Jackson to emphasise compliance nor for the CPR to be amended in that regard. The post-Jackson amendments spelt out explicitly requirements that were already contained within the CPR.

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<sup>347</sup> *ibid* 417.

<sup>348</sup> *ibid* 421.

<sup>349</sup> *ibid* 431.

<sup>350</sup> *ibid*.

<sup>351</sup> CPR 1.1(2)(f).

<sup>352</sup> Woolf, *Final Report* (n 224) ch 6, para 1.

<sup>353</sup> *ibid* para 2.

<sup>354</sup> *ibid* para 14.

<sup>355</sup> *ibid* para 15.

<sup>356</sup> *ibid*.

The same is true in respect of disclosure and costs management. Jackson noted a tendency to order standard disclosure rather than consider whether a ‘bespoke’ order might be appropriate. The CPR as adopted after Lord Woolf’s review supported such an approach, in that CPR 31 provided ‘a strong steer towards standard disclosure in every case. Rule 31.5 provide[d] that standard disclosure [was] the default position’.<sup>357</sup> The courts were not, however, required to order standard disclosure, rather they simply tended in that direction. Jackson noted that the court ‘has the power to limit standard disclosure and such power should be exercised in accordance with the overriding objective. Currently, it seems that the utilisation of this power to restrict disclosure is not often given serious consideration’.<sup>358</sup> This is in line with Lord Woolf’s statement that as ‘part of the case management process, the judiciary will have both the means and the responsibility to ensure that discovery is limited to what is really necessary’.<sup>359</sup> Jackson’s introduction of a ‘menu option’ for disclosure orders<sup>360</sup> did not provide any new powers, rather it set out in greater detail how the court should exercise its powers in line with the principle of proportionality. Costs management too was an extension and clarification of powers already embedded, although not spelt out in terms, in the CPR.<sup>361</sup>

CPR rule 1.1 imports two essential Overriding Objectives which directly lend themselves to costs management: saving expense and dealing with cases in ways which are proportionate. Within these two Overriding Objectives underpinning the court’s case management powers, it is axiomatic that the court has the jurisdiction actively to costs manage.<sup>362</sup>

Jackson added detail and structure to these powers, such as the development of a standard procedure,<sup>363</sup> but the basis for them already existed. This reflects a theme running through Jackson’s reports: that the changes of attitude and approach underpinning Lord Woolf’s review and the CPR had not been implemented on a sufficiently fundamental basis. Clarification and more explicit statements in the rules were required. This is reminiscent of a statement in the Evershed report, that ‘exhortations will be likely to fail of their best effect without the impetus of some practical suggestion’.<sup>364</sup> It is human nature to follow the path of least resistance and to

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<sup>357</sup> Jackson, *Final Report* (n 262) 368.

<sup>358</sup> Jackson, *Preliminary Report Vol 2* (n 262) 388-9.

<sup>359</sup> Woolf, *Interim Report* (n 214) ch 21, para 20.

<sup>360</sup> Jackson, *Final Report* (n 262) 372; CPR 31.5(7).

<sup>361</sup> Jackson, *Preliminary Report Vol 2* (n 262) 484.

<sup>362</sup> *ibid* 485.

<sup>363</sup> Jackson, *Final Report* (n 262) 419.

<sup>364</sup> Evershed Report (n 313) 9.

act in accordance with familiar practices unless presented with a clear requirement to act to the contrary. Lord Woolf's exhortations and the resulting general requirements in the CPR were insufficient, and required the additional detail and clarity provided by Jackson.

Briggs' CMR stated that Jackson's 'confirmation' of hands-on judicial management as the preferred means of achieving proportionality had to be 'part of the bedrock' of the review.<sup>365</sup> Case management was at the heart of the 'new' culture advocated by Briggs, and is present in all three of that culture's central elements.<sup>366</sup> First, the court should identify the main issues as early as possible, and they should be the basis for all case management that followed.<sup>367</sup> Secondly, proportionality should become 'an invariable and important consideration in every case management decision'<sup>368</sup> and should lead, where necessary, to the imposition of constraints (in terms of preparation) and rationing (in terms of trial time and use of judicial resources).<sup>369</sup> Enforcement should be firm, and consequences for non-compliance serious.<sup>370</sup> Finally, there should be a single CMC in as many cases as possible.<sup>371</sup> None of these elements would have been inapplicable under the CPR when it first came into force.

Concerns that courts were still not taking a sufficiently robust approach to case management came to the fore once more in Sir Rupert Jackson's 2017 supplementary review. In the context of the disclosure rules introduced after his initial review, the London Solicitors Litigation Association suggested that neither practitioners nor judges were making adequate use of the new disclosure rules in CPR 31.5:

[t]he onus must be not only on the parties and their advisers to explore and agree a proportionate approach to disclosure in advance of the case management conference ... but also on the courts proactively to challenge parties where they have failed to do so. A more robust and challenging case management approach to disclosure by the courts would be welcomed by many<sup>372</sup>

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<sup>365</sup> Briggs, *CMR Provisional Report* (n 276) 29.

<sup>366</sup> *ibid* 64.

<sup>367</sup> *ibid*.

<sup>368</sup> *ibid* 65.

<sup>369</sup> *ibid*.

<sup>370</sup> *ibid*.

<sup>371</sup> *ibid*.

<sup>372</sup> Jackson, *Supplemental Report* (n 290) 36.

This is one of the most recent iterations of a theme running through the post-Woolf development of judicial case management: that it is not as consistently active as it could or should be. This is supported by the case law review in Chapter Four. One aim of the proposals in Chapter Six is to increase the consistency with which cases are actively managed.

#### IV. THE PARTIES: COMPLIANCE AND CO-OPERATION

Despite the shift of control from parties to the court, the former retain a crucial role in ensuring that judicial management effectively implements the Overriding Objective. Lord Woolf highlighted the importance of parties co-operating with the court and with each other. In the context of the multi-track, he stated that ‘whatever the type of management, the parties must co-operate with it’.<sup>373</sup> The court is an outsider to a dispute, while the parties possess the relevant information, meaning that ‘[u]nless the parties themselves are willing to co-operate, there is no functional means in practice for the court to determine at an early stage what the issues are’.<sup>374</sup> Where parties do not co-operate, ‘not only are they likely to incur costs which are unnecessary, but the litigation process is likely to be drawn out and the court’s task more difficult’.<sup>375</sup> The importance of parties’ behaviour is reflected in CPR 1.3, which requires them ‘to help the court to further the overriding objective’. Active case management includes ‘encouraging the parties to co-operate with each other in the conduct of the proceedings’.<sup>376</sup> This may reflect an acknowledgement that, despite CPR 1.3, if left to their own devices parties are unlikely to co-operate. Their behaviour, and the extent to which they co-operate with each other and the court, will (or at least should) affect how the court manages a case.

Party co-operation has retained its importance as the CPR has developed. Briggs noted that, when considering questions of judicial allocation or choice of management track, much will depend on the Master or judge’s ‘feel for the extent to which particular parties and their legal teams are likely to be economical and co-operative in preparation for trial. Even the largest cases, conducted between and by such persons, may need minimal management’.<sup>377</sup> The Disclosure Pilot requires co-operation between parties, and between parties and the court.<sup>378</sup> Where Extended Disclosure is likely to be requested parties are required, before the first CMC,

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<sup>373</sup> Woolf, *Final Report* (n 224) ch 5, para 3.

<sup>374</sup> Woolf, *Interim Report* (n 214) ch 20, para 5.

<sup>375</sup> *ibid* ch 19, para 7.

<sup>376</sup> CPR 1.4(2)(a).

<sup>377</sup> Briggs, *CMR Provisional Report* (n 276) 53.

<sup>378</sup> Practice Direction 51U, para 2.3.

to try to agree a list of Issues for Disclosure.<sup>379</sup> They may seek guidance from the court concerning the scope or implementation of Extended Disclosure, but only where real efforts have been made to resolve disputes, and where the absence of guidance is likely to have a material effect either on the court's ability to hold an effective CMC or on parties' ability to carry out the court's management directions effectively.<sup>380</sup> This additional detail on the requirements of co-operation is one way in which the Disclosure Pilot differs from the rest of the CPR.

The content of the CPR 1.3 duty has not been precisely defined, and that which has been defined is derived from case law. Parties must progress cases efficiently, with unacceptably slow progress being 'contrary to the underlying principles of the CPR'.<sup>381</sup> They must not take steps that will cause unnecessary delay.<sup>382</sup> Procedural points must be taken promptly, particularly if they will, if correct, mean that costs are wasted by the other side.<sup>383</sup> Delay and related uncertainty regarding trial dates affect not only the parties to a given case but all users of the court system, meaning that practices involving a disproportionate allocation of the court's resources to a single case comply with neither the Overriding Objective nor parties' duties and are 'unacceptable'.<sup>384</sup> Co-operation between opponents is essential, as without it 'litigation cannot be conducted efficiently and at proportionate cost'.<sup>385</sup> This includes, for example, giving serious consideration to ADR,<sup>386</sup> engaging constructively with correspondence,<sup>387</sup> and agreeing reasonable extensions of time where necessary.<sup>388</sup> A tactical approach to litigation, which is a manifestation of the aggressive approach eschewed by the architects of the CPR, is likely to run counter to CPR 1.3. In the context of an error known to both parties, it is 'wholly inappropriate' for parties to take advantage of opponents' mistakes in the hope that relief from sanctions will be denied and they will gain a windfall strike out or other advantage.<sup>389</sup> Where only one party

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<sup>379</sup> *ibid* para 7.

<sup>380</sup> *ibid* para 11.1.

<sup>381</sup> *Dass v Dass* [2013] EWHC 2520 (QB) [8].

<sup>382</sup> *Calden v Dr Nunn & Partners* [2003] EWCA Civ 200 [41] (Brooke LJ).

<sup>383</sup> *McGann v Bisping* [2017] EWHC 2951 (Comm) [24].

<sup>384</sup> *R (Network Rail Infrastructure Ltd) v The Secretary of State for the Environment, Food and Rural Affairs* [2017] EWHC 2259 (Admin) [11].

<sup>385</sup> *Denton* (n 27) [40] (Lord Dyson MR and Vos LJ).

<sup>386</sup> *Dunnett v Railtrack Plc* [2002] EWCA Civ 303 [12]-[13] (Brooke LJ).

<sup>387</sup> *Gotch v Enelco* [2005] EWHC 1802 (TCC) [45]; *Lifestyle Equities CV v Royal County of Berkshire Polo Club Ltd* [2019] EWHC 2413 (Ch) [31].

<sup>388</sup> *Hallam Estates v Baker* [2014] EWCA Civ 661 [12] (Jackson LJ); *Emmanuel v The Commissioners for Her Majesty's Revenue and Customs* [2017] EWHC 1253 (Ch) [46]-[47].

<sup>389</sup> *Denton* (n 27) [41] (Lord Dyson MR and Vos LJ).

is aware of the mistake, there is no general duty to point out an opponent's procedural error,<sup>390</sup> however genuine misunderstandings must be cleared up. Parties must take reasonable steps to ensure, as far as possible, that there is a clear common understanding between them as to *inter alia* the identity of the issues in dispute and procedural arrangements.<sup>391</sup> Any breakdown in that misunderstanding is likely to increase expenditure of time, costs and resources and hamper the efficient progress of the case.<sup>392</sup>

The crucial point for present purposes is that parties must take active steps to litigate proportionately, in both an *inter partes* and systemic sense. In order to do so they, and their legal representatives, need to be able to determine what will be 'proportionate' in any given situation. A clear, consistent approach to case management by the court will make those judgment calls easier. Parties' actions will then tie into how the court manages a case, for example in terms of how 'hands on' management needs to be and the extent to which sanctions are required. A robust approach by the court to breaches of CPR 1.3 should encourage more compliant, co-operative behaviour. There is a clear interplay between how the court and the parties conduct litigation, with the actions of one affecting those of the other. The importance of this interplay will be explored further in the case law analysis in Chapter Four, and the proposals for reform in Chapter Six.

## V. CASE MANAGEMENT PROPORTIONALITY IN CONTEXT

In the previous chapter, proportionality as a general principle of law was broken down and its role, meaning and constituent parts analysed. By applying each of those points to procedural proportionality, we can give it more definition than the general language of the reform reports and the CPR allows.

### THE ROLE OF PROPORTIONALITY

On a general level, the role of proportionality in case management is the same as in other areas of law. It provides a framework within which an analysis can be undertaken that balances means, ends, costs, benefits and competing interests in pursuit of a specific aim. Beyond that, however, the roles diverge. In a case management context, proportionality is a tool that assists

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<sup>390</sup> *Thames Trains Ltd v Adams* [2006] EWHC 3291 (QB) [37]; *McGann* (n 383) [24].

<sup>391</sup> *OOO Abbott v Econowall UK Ltd* [2016] EWHC 660 (IPEC) [40].

<sup>392</sup> *ibid.*

a judge in making management decisions that comply with the Overriding Objective. It is not used as a standard by which the court reviews powers exercised by external decision-making authorities, rather the court itself is the primary decision-maker and its decisions are internal to the litigation process. Proportionality in a case management context is also not so firmly fixed as an *ex post* analysis. The court will apply proportionality in reviewing litigants' actions, for example when considering the effect of conduct on costs or when considering whether to grant relief from sanctions, but this is a different kind of review.<sup>393</sup> Equally, the court must apply proportionality *ex ante* in making management decisions about the future conduct of a matter.

Application of proportionality in a case management context also serves the educative function identified in Chapter Two,<sup>394</sup> both within the context of individual cases and across the system as a whole. Within the bounds of a given case, the court's approach to management informs parties and lawyers as to how the matter is likely to progress and steers their behaviour accordingly. A robust approach to a missed deadline, for example, may mean that parties work harder to ensure that future deadlines are met. Practitioners may then take what they learn in one case, in terms of how the court responds to a particular situation, and apply it to other cases. The court's application of proportionality can educate parties and practitioners on acceptable litigation conduct, which can in turn shape future behaviour. The more frequently courts take a robust approach to parties' failure to comply with CPR 1.3, for example, the more likely it is that such an approach will continue to be adopted, and the greater the effect it will have on curbing parties' disproportionate conduct. This educative function is particularly important in a case management context. Management decisions are made within a single system that has identifiable objectives and, at least in theory, a cohesive culture. The number of decisions made and the number of actors participating in the making of those decisions is vast. Discretion is broad and oversight is limited.<sup>395</sup> In this context, the educative function of proportionality creates a virtuous circle. Its application in line with the system's objectives and culture spreads through the system, by informing lawyers and judges as to how it is applied in different circumstances. They then take that knowledge forward into future cases. It is, however, important to remember that proportionality, as with all legal principles, needs to be applied. Human agency is required, from judges, parties and lawyers. This function can only be properly served if there is sufficient consistent application to give momentum to the virtuous

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<sup>393</sup> See below at 83.

<sup>394</sup> See ch 2 at 29.

<sup>395</sup> See ch 4 at 93-95.

circle. The encouragement of consistency lies at the heart of the proposals for improvement set out in Chapter Six.

### **PROPORTIONALITY TESTS: MEANS VS ENDS AND COSTS VS BENEFITS**

Certain core aspects can be identified in the proportionality tests considered in Chapter Two: a legitimate aim; suitable or appropriate means for achieving that aim; that no greater detriment than necessary is imposed in enacting those means, and there is no less burdensome means available; and a cost-benefit analysis. This framework can be applied to case management proportionality, although clear and precise terminology must be used.

#### **Legitimate aim**

The 'legitimate aim' to which case management measures must be connected is the aim of active case management, that is to say dealing with cases justly and at proportionate cost. This incorporates the objectives of case management identified by Lord Woolf.<sup>396</sup> Each management decision also has an objective specific to the circumstances in which it is made, such as determining a dispute about the scope of disclosure or deciding whether late evidence should be admitted. These focused objectives are subsumed within the more general one, as each individual management decision must be made in accordance with the Overriding Objective. Neither the identification nor the legitimacy of the aim will form a major part of the proportionality analysis in a case management context, as they are specified in the CPR.

In this context, proportionality forms part of both the aim and the means for achieving it. This could theoretically raise an issue of lack of clarity. If the same terminology, without definition, is used to identify both an aim and the means of achieving it, each feeds into the other and provides no concrete value in terms of understanding either the aim or the means. At the level of practical case management decision-making, however, this is less problematic. On a general level, the aim and means are closely related and can be compounded into a single requirement: proportionate case management. In the context of a single decision, it should be possible to be sufficiently precise as to the available means of complying with the Overriding Objective that context-specific clarity is provided.

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<sup>396</sup> See above at 69.

## Suitability

There is no statement in any of the reform reports or the CPR that connects suitability, alternatively appropriateness, and proportionality. Nevertheless, this connection can be deduced. Lord Woolf stated that the purpose of pleadings was *inter alia* to ‘illuminate the nature of disputed matters, so that the most suitable method of disposal can be chosen<sup>397</sup> and recommended that ‘the courts should have the final responsibility for determining what procedures were suitable for each case’ [emphasis added].<sup>398</sup> In both instances, the term ‘suitable’ connects the objective of dealing with a case, i.e. disposing of it or taking it through the court system in accordance with the Overriding Objective, and the means by which it is done. A particularly clear example is the track allocation system, the aim of which is to match cases with procedures that are suitable to the needs of both the case and the justice system as a whole. The relationship between those needs and procedures underpins every management decision. In a case with a potentially vast number of disclosable documents, for example, a staged approach to disclosure may be more suitable to minimising costs and keeping the exercise focused on the issues in dispute than a single, unstructured, exercise. Where determination of a discrete issue may resolve a case or encourage settlement, a preliminary issue trial may be more suitable to minimising expenditure of time, costs and resources than a single trial of all issues.

## Necessity

This is the most difficult facet of case management proportionality to pin down. ‘Necessity’ is a concept that comes with a certain amount of baggage in a procedural context. The relationship between proportionality and necessity came to the fore in the context of assessment of recoverable costs during Jackson’s costs review. The Court of Appeal, in *Lownds v Home Office* (2002),<sup>399</sup> had made necessity ‘a crucial part of the exegesis of proportionality<sup>400</sup> in terms of assessment of costs. The second stage of the *Lownds* approach to assessment required the court, if costs as a whole appeared disproportionate, to satisfy itself as to whether the work in respect of each item was necessary and, if so, that the cost of that item was reasonable.<sup>401</sup> This harked

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<sup>397</sup> Woolf, *Interim Report* (n 214) ch 20, para 20.

<sup>398</sup> Woolf, *Final Report* (n 224) Section I, para 3.

<sup>399</sup> [2002] EWCA Civ 365.

<sup>400</sup> Jackson, *Final Report* (n 262) 33.

<sup>401</sup> *ibid* 31.

back to the test for recoverable costs that had applied under the RSC until 1986, which allowed recovery of costs that were ‘necessary and proper for the attainment of justice’.<sup>402</sup> Jackson recommended that *Lownds* be reversed.<sup>403</sup> That recommendation was subsequently implemented by the introduction of CPR 44.3(2). He stated that the necessity of incurring certain costs is relevant to, but not decisive of, the question of whether those costs were proportionate.<sup>404</sup> Disproportionate costs do not become proportionate because they were necessary.<sup>405</sup> CPR 44.3(2) states in relevant part that ‘[w]here the amount of costs is to be assessed on the standard basis, the court will – (a) only allow costs which are proportionate to the matters in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred.’ The role of necessity was downgraded, with the main touchstones for assessment of costs being reasonableness and proportionality. This is made clear by the costs management rules, which refer to the determination of ‘reasonable and proportionate costs’<sup>406</sup> but make no mention of necessity.

No precise meaning was given to necessity either in *Lownds* or by Jackson in his report. In *Lownds*, the Court of Appeal seemed to take the approach that its meaning was obvious, stating that ‘in assessing costs judges should have no difficulty in deciding whether, in order to conduct the litigation successfully, it was necessary to incur each item of costs’.<sup>407</sup> The concept was tied to ‘conducting the litigation successfully’, which itself is a nebulous phrase that could bear more than one meaning. Lord Neuberger, in one of the Jackson implementation lectures, tied necessity to the RSC aim of achieving substantive justice.<sup>408</sup> In his view, the most appropriate approach to assessment of costs was to remove necessity and have work done by reference to reasonableness and then to proportionality itself.<sup>409</sup> This would not carry with it the potential to mislead the parties and the court into thinking that costs incurred in work done which is necessary to secure the right result is capable of trumping proportionality.<sup>410</sup>

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<sup>402</sup> *Lownds* (n 399) [28] (Lord Woolf CJ).

<sup>403</sup> Jackson, *Final Report* (n 262) 38.

<sup>404</sup> *ibid* 37.

<sup>405</sup> *ibid*.

<sup>406</sup> Practice Direction 3E para 5, para 12.

<sup>407</sup> *Lownds* (n 399) [29].

<sup>408</sup> Lord Neuberger, ‘Proportionate Costs: Fifteenth Lecture in the Implementation Programme’, 29 May 2012 3 <<https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Speeches/proportionate-costs-fifteenth-lecture-30052012.pdf>> accessed 3 November 2020.

<sup>409</sup> *ibid*.

<sup>410</sup> *ibid*.

Despite this somewhat troublesome history in the context of costs, the ‘necessity’ facet of proportionality is applicable and useful in a case management context, provided we are clear about its meaning. The term has a general meaning, i.e. something without which a particular aim cannot be achieved. In the context of proportionality as discussed in the previous chapter, however, ‘necessity’ is a term of art: it means that there is no less burdensome or detrimental way to achieve the aim in question. This particular meaning of necessity can be identified in Lord Woolf’s reports. Frequent references are made to the unnecessary complexity, expense and delay inherent in the RSC system. Complexity, expense and delay are burdens imposed on parties and the system in general, and at the heart of Lord Woolf’s reforms was an attempt to find the least burdensome way to provide justice. There are some less clear uses, for example statements that judges must give ‘the necessary directions for the future conduct of the case’<sup>411</sup> and that any additional disclosure must be ‘necessary to do justice’.<sup>412</sup> Applying the ‘least burdensome means’ interpretation would not, however, be inappropriate in either case. If a direction is to be proportionate, it should arguably be the least burdensome way of achieving the aim of that direction. Given that some burden on at least one party is inherent in ordering extra disclosure, the requirement that it is ‘necessary to do justice’ is a justification for that burden. A clear statement that the CPR does indeed embody this ‘least burdensome means’ requirement is that of Lord Woolf himself in *Biguzzi v Rank Leisure Plc* (1999).<sup>413</sup> In the context of strike out, he stated that that ‘[t]he advantage of the CPR over the previous rules is that the court’s powers are much broader than they were. In many cases there will be alternatives which enable a case to be dealt with justly without taking the draconian step of striking out’.<sup>414</sup>

Considering whether a particular decision is ‘necessary’, in other words that there is no less burdensome means to achieve the same objective, is an entirely appropriate part of the case management proportionality analysis. Indeed, it is already carried out in many cases. The burdens imposed on parties to a specific case, the system and its users (who are parties to their own cases) are important factors to be taken into account in case management decisions.<sup>415</sup> The points raised by Lord Neuberger are not problematic if we are clear about the concept of necessity that is being applied and the aim which it serves. Necessity does not have to be tied to the achievement of substantive justice simply because that was the case under the RSC. If

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<sup>411</sup> Woolf, *Final Report* (n 224) ch 2, para 33.

<sup>412</sup> *ibid* ch 12, para 40.

<sup>413</sup> [1999] 1 WLR 1926.

<sup>414</sup> *ibid* 1933.

<sup>415</sup> See ch 4.

we are clear that the aim is implementation of the Overriding Objective, and that the Overriding Objective incorporates substantive and procedural justice in equal measure, then necessity can be tied to that aim and form an integral, although not decisive, part of the case management proportionality analysis.

### **Cost-benefit analysis: proportionality ‘in the strict sense’**

This limb embodies the balancing and cost-benefit analysis which, from a common sense perspective, are most closely associated with the term ‘proportionality’. This is the proportionality that Jackson referred to when he said that the law ‘facilitates the pursuit of lawful objectives, but only to the extent that those objectives warrant the burdens thereby being imposed upon others’.<sup>416</sup> It was noted in Chapter Two that this limb is not always applied in the proportionality analysis.<sup>417</sup> This begs the question as to whether has any value in a case management context.

First, however, we must be clear about what is being balanced, and whether balancing is even appropriate in a case management context. It has been argued that balancing is not appropriate where the proportionality analysis encompasses both rights and interests, as the two cannot properly be balanced against each other.<sup>418</sup> In a case management context, the relevant factors are facets of the ECHR Article 6 right to fair trial, and of the express and implied rights within that Article. One of those implied rights is the right of access to the courts, limitations to which ‘are permitted by implication since the right of access by its very nature calls for regulation by the State’.<sup>419</sup> The CPR regulates that right of access. Other rights within Article 6 come into play in a case management context, for example the rights to a fair hearing, to a hearing within a reasonable time, to equality of arms, and to the fair presentation of evidence. Case management decisions balance factors relevant to those rights. The connection between Article 6 and the CPR was highlighted by Arden LJ in *CIBC Mellon Trust Co v Stolzenberg (Sanctions: Non-compliance)* (2004), in which she stated that proportionality in the context of restrictions on the right of access to court ‘will be satisfied if the Overriding Objective is met’.<sup>420</sup> Various factors are balanced in a case management decision in order to give effect to the right to fair trial, as

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<sup>416</sup> Jackson, *Final Report* (n 262) 36.

<sup>417</sup> See ch 2 at 30.

<sup>418</sup> See ch 2 at 46.

<sup>419</sup> *Ashingdane v United Kingdom* (1985) Series A No 3, para 57.

<sup>420</sup> [2004] EWCA Civ 827 [161].

given permitted structure by the CPR. There is no issue of some factors being more fundamentally important than others, as they are all in service of that ultimate right. On that basis, the language of balancing can be appropriately applied.

Balancing lies at the heart of case management proportionality, on both a conceptual and practical level. At both levels, there is a cost-benefit aspect to the exercise. Conceptually, the type of justice that the courts provide and that is embodied in the Overriding Objective reflects a balance between substantive and procedural justice. The former cannot be achieved at any cost: citizens are entitled 'to seek a remedy from the civil courts',<sup>421</sup> but the 'achievement of the right result needs to be balanced against the expenditure of time and money needed to achieve that result'.<sup>422</sup> The cost and benefit to delivering justice on the merits, which is still a relevant consideration, must be weighed against the cost and benefit to the parties and the system of a reduction in expenditure of time, money and resources. This also incorporates a balance between *inter partes* and systemic procedural justice. The cost and benefit to parties to a given case of any case management decision must be weighed against the cost and benefit to other users of the system. These concepts need to be applied in individual cases and to specific management decisions. The court will conduct those balancing exercises in the practical context of a case provided by, for example, the financial position of the litigants, the importance of the case, the progress of the case to date and the timetable to trial.

One issue with balancing in a case management context, as in other areas, is incommensurability. It is impossible to identify a standard of comparison common to all potentially relevant factors in the proportionality analysis. This will be considered in more detail in Chapter Six, as it impacts on the nature of any guidance that can be given on the application of case management proportionality.<sup>423</sup> For the time being, suffice to say that while it might not be an issue that can be solved, it can be ameliorated through the use of a transparent, consistent approach which takes into account as much information as possible.

#### **DISCRETION AND DEFERENCE**

It is here that case management proportionality diverges more sharply from the general principle considered in Chapter Two. The concepts of the margin of appreciation and judicial

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<sup>421</sup> Woolf, *Interim Report* (n 214) ch 18, para 4.

<sup>422</sup> *ibid* ch 4, para 6.

<sup>423</sup> See ch 6 at 211-212.

deference are not relevant in a case management context. Proportionality in that context is not a means by which the powers of decision-making authorities are kept in check by a court with supervisory jurisdiction, nor is it a feature of the separation of powers between branches of government. It is both part of the CPR's Overriding Objective and a tool for ensuring that cases are dealt with in accordance with that objective. In applying proportionality in that context, the court manages relationships that are internal to the civil justice system, namely those between parties, and between each case and the system as a whole. The court, as primary decision-maker, is not an external party.

This is not, however, to say that discretion and deference as general concepts are irrelevant. Discretion is central to the court's case management powers, as management judges have a broad discretion to make any orders they think appropriate. This is discretion exercised by the court itself, rather than afforded to another party by the court. A management judge is the primary decision-maker, and they conduct the balancing exercise themselves rather than reviewing another body's conduct. There are no limits imposed on the exercise of the discretion by the nature of the court's relationship with any external body. In terms of deference, courts must work co-operatively with parties and take into account the fact that they and their lawyers may be more knowledgeable about many aspects of the case, but there is no question of deference by judges to parties. Indeed, the culture change underlying the CPR requires the opposite: it is the courts that must control the management and progress of cases. The standard of appeal from case management decisions is high, with decisions only being overturned if they are 'plainly wrong'.<sup>424</sup> This does not reflect 'deference' in the manner considered in the previous chapter. It is a standard of internal appellate review that incorporates the importance of the broad discretion afforded to management judges and policy reasons for a robust approach to upholding first instant case management decisions.

These differences do not render inappropriate to case management the entire proportionality framework applied in other areas. The concepts of the margin of appreciation and judicial deference affect how the framework is applied, in particular the intensity of the analysis undertaken, rather than the structure of the framework itself. The core features of that framework can be applied to case management proportionality without either the margin of appreciation or deference aspects.

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<sup>424</sup> *Broughton v Kop Football Cayman Ltd* [2012] EWCA Civ 1743 [51] (Lewison LJ); *HRH Prince Abdulaziz Bin Mishal Bin Abdulaziz Al Saud v Apex Global Management Ltd* [2014] UKSC 64 [13] (Lord Neuberger).

## VI. CONCLUSIONS

Lord Woolf's review and the CPR changed the nature of the justice provided by the civil system. The meaning of procedural justice was broadened, and a new relationship of equality and balance between substantive and procedural justice was introduced. Proportionality lies at the heart of this new concept of justice. It is a central aspect of the Overriding Objective, which is implemented through active judicial case management. Proportionality in that context provides a framework through which factors relevant to a management decision are analysed and balanced. Each must be given no more than appropriate importance, and the final decision must reflect a fair balance of all relevant factors.

This chapter has shown that proportionality in a case management context bears strong similarities to the principle as established and applied in other areas of law. Core aspects of that general principle, namely the need for a legitimate aim, the suitability of the means chosen to achieve that aim, and the requirement that those means impose no greater burden than necessary, can be readily identified in case management proportionality. The cost-benefit analysis is also present. The major differences between case management proportionality and the principle as discussed in the previous chapter lie in the areas of discretion and deference. Those differences stem from the nature of the court's role in making management decisions, the relationship between the court and the parties affected by those decisions, and the institutional context within which the decisions are made. These comparisons have enabled definition and content to be given to an otherwise vague principle. The practical value of this will become clear in Chapter Six. It will be proposed that the four core aspects of the proportionality analysis should be incorporated into guidance aimed at improving consistency of management decision-making. The definition given to that principle through the analysis and comparisons in this and the previous chapter provides crucial detail. The vaguer the guidance, the less use it is likely to have in improving consistency.

That definition alone, however, is insufficient. To fully understand proportionality in a case management context, we must investigate how it is applied on a practical, case-by-case basis. A close analysis of relevant case law allows us to determine the extent to which proportionality is being applied in accordance with its aims and underlying principles. It also enables us to identify specific ways in which proportionality and active judicial management are being used successfully, and to pinpoint precisely where there is scope for improvement. That information

can then be used to ensure that any improvement measures are as detailed and targeted as possible. The next chapter sets out the results of that investigation.

## CHAPTER FOUR

### THE CASE LAW: PROPORTIONALITY AND JUDICIAL MANAGEMENT IN ACTION

The preceding chapters provide the background against which to review the post-Woolf case law. This chapter focuses on the practicalities of case management and party behaviour. A broad range of cases are covered, from general commercial matters to more specialist cases dealing with issues such as patent disputes and defamation. The entire litigation process is covered, from pre-action through to pre-trial reviews and even applications made at the start of trial, reflecting the fact that proportionality and case management are relevant at every stage. It is impossible to draw direct comparisons between, for example, an application for specific disclosure and an application for relief from sanctions where a witness statement has not been filed, or between an application to amend a statement of case and an application for a preliminary issue trial. However, all such decisions are made by balancing relevant factors in order to comply with the Overriding Objective. Identification of those factors can span different types of dispute and decision because, at their heart, issues such as value, complexity, prejudice and expenditure of resources are universal. In their most general sense, they can be relevant to any type of case. There will be divergences in detail and application depending on context, but the aim is to identify those universal factors, rather than to dictate how they should be applied. The cases reviewed do not represent the entirety of case management decisions made under the CPR. Many such decisions will not appear in a case report. However, the reported cases cover a sufficiently broad range of issues and scenarios to provide a representative sample.

Four themes have been identified:

- I. Fundamentals: commentary on and understanding of the Overriding Objective and the role of the court.

Courts have been inconsistent in their understanding of the changes introduced by the CPR, and in their application of those changes. In some cases, Lord Woolf's new conception of justice is applied and judges take the required active role in its implementation. In others, precedence is still given to substantive justice, thus either ignoring or misunderstanding the change in the nature of 'justice' embodied in the Overriding Objective. Some judges have maintained the pre-

CPR approach of leaving the progress of a matter in the parties' hands, rather than taking on a sufficiently active management role.

II. Active case management: application of the case management regime to the facts of a case.

There are many examples of courts taking active control, for example by imposing controlled timetables and tailoring decisions to the needs of a case. There are also examples of courts taking insufficient control. In some cases, problems might have been avoided had the court taken a stronger hold of the case at an earlier stage. There is scope for courts to take a more consistent and controlled approach to case management.

III. Judicial proportionality: incorporation of *inter partes* and systemic proportionality into case management decisions.

Guidance can be drawn from the case law as to factors that judges consider when applying proportionality on an *inter partes* basis. This includes, for example, the relevance and importance of evidence, the centrality of issues and the need to incentivise parties to engage in settlement discussions or mediation. In terms of systemic proportionality, there are three subsets of cases: those that take systemic issues into account, those that do not, and those that fall on a spectrum between the two. There is a lack of consistency in the courts' approach, particularly to systemic proportionality.

IV. Party proportionality: compliance with CPR 1.3.

There are many examples of parties litigating in a disproportionate manner that does not comply with their duty to assist the court in furthering the Overriding Objective. Proportionality can only truly work as a case management tool if both court and parties are fully invested in its application. There are also inconsistencies in the court's attitude and responses to disproportionate party behaviour.

These four themes overlap. The nature of litigation and case management necessitates interplay between court and parties, principles and practicalities. However, considering the cases in this thematic way allows for as precise an identification as possible of both problems and solutions.

## I. FUNDAMENTALS: THE OVERRIDING OBJECTIVE AND THE ROLE OF THE COURT

The case law reveals general points about judges' understanding of the Overriding Objective, the purpose of litigation, and the role of the courts. In many cases, courts have applied the Overriding Objective in accordance with Lord Woolf's new conception of justice. The importance of both substantive and procedural justice, and the *inter partes* and systemic aspects of the latter, have been understood<sup>425</sup> and there are many examples of courts taking the required robust approach to case management.<sup>426</sup> Judges have shown that they understand the compromise at the heart of proportionality. 'Imperfect' solutions can fall within the ambit of a judge's case management discretion.<sup>427</sup> Decisions may involve finding 'the least worst solution'<sup>428</sup> because there is no 'single, perfect, obviously right solution'.<sup>429</sup> Such a decision may be 'uncomfortable',<sup>430</sup> highlighting a persistent difficulty with the concepts underlying the Overriding Objective. Getting as close as possible to 'perfect' substantive justice in a given case may instinctively feel like a more 'correct' approach to justice, but that is not the justice that underpins the CPR. The compromise embodied in the Overriding Objective seeks to achieve 'better justice ... by risking a little bit of injustice'.<sup>431</sup> This might more accurately be phrased as achieving better justice by risking a little bit of substantive injustice.

Courts have not, however, consistently interpreted the Overriding Objective in this way. In making management decisions judges do not always consider systemic issues,<sup>432</sup> nor do they always take a sufficiently active management role.<sup>433</sup> Some judges have made specific pronouncements that run counter to the meaning of the Overriding Objective. The court in *Allen v Jones* (2004), for example, gave undue precedence to substantive justice in saying that the notion of the judge 'getting the right answer' cannot have ceased to be 'a highly important part, if not the most important part, of the overriding objective of a court in a civilised society'.<sup>434</sup> The judge went on to say that it would be 'quite incorrect if the notion were to get about that the CPR had failed to secure the overriding objective whenever a case got to trial on

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<sup>425</sup> See below at 137ff.

<sup>426</sup> See below at 95ff.

<sup>427</sup> *Kranidiotes v Paschali* [2001] EWCA Civ 357 [22] (Aldous LJ) confirming *Tanfern Ltd v Cameron MacDonald* [2000] EWCA Civ 3023 [32]-[33] (Brooke LJ).

<sup>428</sup> *Broughton* (n 424) [51] (Lewison LJ).

<sup>429</sup> *Berezovsky v Abramovich* [2010] EWHC 2044 (Ch) [13].

<sup>430</sup> *ibid.*

<sup>431</sup> *Nichia* (n 275) [51] (Jacob LJ).

<sup>432</sup> See below at 146ff.

<sup>433</sup> See below at 111ff.

<sup>434</sup> [2004] EWHC 1189 (QB) [20].

the merits before a judge'.<sup>435</sup> This is framed as an exaggeration, and it certainly cannot be said that whenever a case gets to trial on the merits, the Overriding Objective has not been complied with. This could happen, however, if for example a low value, low complexity claim with no special importance reached trial by way of expenditure of large amounts of cost, time and resources. In the more recent case of *JW Spear & Sons Ltd v Zynga Inc* (2013), the judge stated that 'the overriding objective is still to provide a just result' and that 'the overriding objective ... requires the Courts to dispose of cases justly'.<sup>436</sup> Such language is not in accordance with the Overriding Objective or its underlying concepts. This merits-based *inter partes* focus persists in subsequent articulations of the Overriding Objective.<sup>437</sup> In *Hicks v Rostas* (2017), for example, the judge noted that he must 'have regard to the overriding objectives in the Civil Procedure Rules, but ultimately seek to do justice between the parties'.<sup>438</sup> This phrasing subordinates the Overriding Objective to *inter partes* substantive justice. The statement in *Otuo v The Watch Tower Bible and Tract Society of Britain* (2019) that '[i]t is often said that ... the Court will ordinarily allow an amendment if the opposite party can be compensated in costs'<sup>439</sup> suggests that the pre-CPR approach that prioritised *inter partes* substantive justice<sup>440</sup> remains prevalent. The centrality of compensation in costs was identified by the Court of Appeal as recently as 2016, in the context of amendments to pleadings.<sup>441</sup> As noted in *Otuo*, this position is a 'misconception'.<sup>442</sup>

The persistence of outdated principles and apparent difficulties in laying them to rest is exemplified by the line of authority commencing with *Cobbold v Greenwich LBC* (1999),<sup>443</sup> a case which dealt with an application to amend a statement of case. Peter Gibson LJ stated that:

amendments in general ought to be allowed so that the real dispute between the parties can be adjudicated upon provided that any prejudice to the other party or

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<sup>435</sup> *ibid.*

<sup>436</sup> [2013] EWHC 1640 (Ch) [68].

<sup>437</sup> *Baxmann v Etok* [2016] EWHC 2075 (QB) [6]; *Hicks v Rostas* [2017] EWHC 1344 (QB) [32]; *Pedriks v Grimaux* [2019] EWHC 2165 (QB) 5; *Delta Kanaris Special Maritime Enterprise v Elemento Ltd* [2019] EWHC 2617 (Comm) [10].

<sup>438</sup> *Hicks* (n 437) [32].

<sup>439</sup> [2019] EWHC 350 (QB) [15].

<sup>440</sup> See ch 3 at 56-57.

<sup>441</sup> *Deutsche Bank AG v Unitech Global Ltd* [2016] EWCA Civ 119 [14] (Longmore LJ).

<sup>442</sup> *Otuo* (n 439) [15].

<sup>443</sup> Unreported, 9 August 1999.

parties caused by the amendment can be compensated for in costs, and the public interest in the efficient administration of justice is not significantly harmed.<sup>444</sup>

This approach was determined in *Swain-Mason v Mills & Reeve* (2011) to have been ‘superseded in favour of one which is a good deal less relaxed about allowing late amendments’.<sup>445</sup> Nevertheless, the *Cobbold* approach persisted. *Cobbold* was cited sufficiently frequently post-*Swain-Mason* as the only authority for amendments<sup>446</sup> that the judge in *Abbas v Shah* (2014) identified two separate strands of authority.<sup>447</sup> The discrepancy persisted as recently as 2019. In *Hewson v Times Newspapers Ltd* (2019), the court noted that the general principles regarding amendment applications were derived from *Cobbold* and were ‘very familiar’.<sup>448</sup> In *Rose v Creativityetc Ltd* (2019) counsel cited *Cobbold* as the starting point for an amendment application,<sup>449</sup> giving the lie to a judicial comment made two years earlier that it was ‘recognised ... by all’ that it was no longer the appropriate starting point.<sup>450</sup> Conversely, in both *Dinglis v Dinglis* (2019)<sup>451</sup> and *Djurberg v Richmond LBC* (2019),<sup>452</sup> the court stated that *Cobbold* was no longer the correct starting point.<sup>453</sup>

Discussions of the Jackson reforms provide useful examples of how the original Overriding Objective had been misunderstood. In *JW Spear*, the judge stated that ‘[f]rom 1<sup>st</sup> April 2013 a proportionality requirement was introduced’ to the Overriding Objective,<sup>454</sup> while in *Co-Operative Group Ltd v Birse Developments Ltd* (2013), in the context of amendments, it was

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<sup>444</sup> *ibid* 5.

<sup>445</sup> [2011] EWCA Civ 14 [78] (Lloyd LJ).

<sup>446</sup> *Berezovsky v Abramovich* [2011] EWHC 1143 (Comm); *The Nottinghamshire and City of Nottingham Fire Authority v Gladman Commercial Properties* [2011] EWHC 1918 (Ch); *Eaton Square Properties Ltd v Shaw* [2011] EWHC 2115 (QB); *Francis v F. Berndes Ltd* [2011] EWHC 3377 (Ch); *Morrison v Buckinghamshire County Council* [2011] EWHC 3444 (QB); *Isis Investments Ltd v Oscatello Investments Ltd* [2012] EWHC 745 (Ch); *Elafonissos Fishing and Shipping Company v Aigaion Insurance Company SA* [2012] EWHC 892 (Comm); *San Vicente v Secretary of State for Communities and Local Government* [2012] EWHC 3585 (Admin); *Phaestos v Ho* [2012] EWHC 1996 (TCC); *Cruddas v Calvert* [2013] EWHC 1096 (QB); *Groarke v Fontaine* [2014] EWHC 1676 (QB); *Gladstar Ltd v Layzells* [2014] EWHC 1449 (Ch); *Philips Pension Trustees Ltd v Aon Hewitt Ltd* [2015] EWHC 1768 (Ch); *Pyrrho Investments Ltd v MWB Property Ltd* [2015] EWHC 3903 (Ch); *Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd* [2018] EWHC 1577 (TCC).

<sup>447</sup> [2014] EWHC 4493 (QB) [34]-[36].

<sup>448</sup> [2019] EWHC 1000 (QB) [15].

<sup>449</sup> [2019] EWHC 1043 (Ch) [36].

<sup>450</sup> *Apache Beryl Ltd v Marathon Oil UK LLC* [2017] EWHC 2462 (Comm) [6].

<sup>451</sup> [2019] EWHC 738 (Ch).

<sup>452</sup> [2019] EWHC 3342 (Ch).

<sup>453</sup> *Dinglis* (n 451) [14]; *Djurberg* (n 452) [37].

<sup>454</sup> *JW Spear* (n 436) [49].

stated that ‘now’ the court must have regard to proportionality.<sup>455</sup> The Overriding Objective incorporated proportionality from its inception, and the post-Jackson amendments simply made explicit what had been implicit.<sup>456</sup> Although not going so far as to say that proportionality was introduced in 2013, other judges noted that the Jackson amendments required them to give more emphasis to proportionality.<sup>457</sup> In *Woolley v UP Global Sourcing UK Ltd* (2014), the judge stated that ‘[t]he landscape against which civil litigation is now conducted changed radically’ on 1<sup>st</sup> April 2013.<sup>458</sup> It is questionable how ‘radical’ the post-Jackson amendments were in that regard, when they took Lord Woolf’s position as their starting point.<sup>459</sup> These judgments were handed down soon after the Jackson reforms came into force, and so could point to a ‘bedding in’ period during which the nature of those reforms was not fully understood. However, a concerted effort was made to educate all involved on the details of the Jackson reforms through a series of lectures.<sup>460</sup> In the context of the misinterpretations identified above, this may instead exemplify a more fundamental inconsistency in understanding the Overriding Objective.

There are also inconsistent views on the proper role of the court. On the one hand, there is widespread recognition of the importance and nature of the court’s management role, both through the act of case management itself<sup>461</sup> and through explicit statements. Parties no longer have ultimate control of the pace and progress of litigation, and cannot by agreement ‘deprive the judge of his overall discretion to conduct the case fairly and to control carefully ... how it should develop.’<sup>462</sup> As stated in *Jameel v Dow Jones & Co Inc* (2005), ‘[i]t is no longer the role of the court simply to provide a level playing field and to referee whatever game the parties choose to play upon it’,<sup>463</sup> an idea that was echoed in similar language in *Guerrero v Monterrico Metals Plc* (2010).<sup>464</sup> On the other hand, there are examples of the court apparently failing to implement the level of management required by this more active role.<sup>465</sup>

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<sup>455</sup> [2013] EWHC 3145 (TCC) [14].

<sup>456</sup> See ch 3 at 61.

<sup>457</sup> *Aherne v Cape Intermediate Holdings Plc* (unreported, 4 June 2013); *Woolley v UP Global Sourcing UK Ltd* [2014] EWHC 388 (Ch); *Admans v Two Saints Ltd* (unreported, 24 June 2016).

<sup>458</sup> *Woolley* (n 457) [5].

<sup>459</sup> See ch 3 at 61.

<sup>460</sup> There were 18 so-called implementation lectures, and several other lectures and speeches. They have all been published on the judiciary website and as such are freely available:

<<https://www.judiciary.uk/publications/review-of-civil-litigation-costs-lectures/>>.

<sup>461</sup> See below at 95ff.

<sup>462</sup> *Parkin v Bromley Hospitals NHS Trust* [2002] EWCA Civ 478 [38].

<sup>463</sup> [2005] EWCA Civ 75 [54] (Phillips LJ).

<sup>464</sup> [2010] EWHC 3228 (QB) [97].

<sup>465</sup> See below at 111ff.

Conceptions of the court's role that tie into misunderstandings of the Overriding Objective persist, in that they focus on the court's primary function being to determine the dispute before it on the merits. An example is another judgment in the *Otu v Watch Tower Bible and Tract Society of Britain* (2019) litigation.<sup>466</sup> In the context of stating that dismissal of a claim on grounds of triviality or disproportionate cost is a serious step which the court should not take lightly, the judge stated that 'the main function of the court is to decide cases, not to refuse to do so and to dismiss them because the process is too costly or burdensome'.<sup>467</sup> He said that the Court of Appeal had 'pointed [this] out'<sup>468</sup> in *Sullivan v Bristol Film Studios Ltd* (2012), in which Lewison LJ said that '[t]he real question ... is whether in any particular case there is a proportionate procedure by which the merits of a claim can be investigated. In my judgment it is only if there is no proportionate procedure by which a claim can be adjudicated that it would be right to strike it out as an abuse of process.'<sup>469</sup> Reference was made to *Jameel*, in which Phillips LJ said that '[t]he court is concerned to ensure that judicial and court resources are appropriately and proportionately used in accordance with the requirements of justice'<sup>470</sup> and '[i]t would be an abuse of process to continue to commit the resources of the English court ... to an action where so little is now seen to be at stake'.<sup>471</sup> The statement in *Otu* about the main function of the court is not in line with the cases which that statement is said to follow. The main function of the court under the CPR is not to decide cases but to deal with them in accordance with the Overriding Objective. This includes management with the aim of ensuring that each case is dealt with by a procedure that is not too costly or burdensome. If there is no such proportionate procedure, then it is open to the court to dismiss the claim. That a court in 2019 prioritised a decision on the merits over procedural proportionality and misunderstood the nature of the court's role makes clear that there is still work to be done in fully incorporating the changes embodied in the CPR.

Courts have made general points about the application of proportionality. It is a difficult subject to pin down, on which there is 'no precise and correct answer. Arguments as to proportionality involve choosing a cut-off point in a range of possibilities and there is no simple right answer as to where a cut-off point should be.'<sup>472</sup> Proportionality has been called an 'elusive objective',<sup>473</sup>

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<sup>466</sup> [2019] EWHC 571 (QB).

<sup>467</sup> *ibid* [12].

<sup>468</sup> *ibid*.

<sup>469</sup> [2012] EWCA Civ 570 [29].

<sup>470</sup> *Jameel* (n 463) [54].

<sup>471</sup> *ibid* [70].

<sup>472</sup> *Digicel (St Lucia) Ltd v Cable & Wireless Plc* [2008] EWHC 2522 (Ch) [82].

<sup>473</sup> *Sharp v Leeds City Council* [2017] EWCA Civ 33 [31] (Briggs LJ).

echoing Lord Neuberger in *Coventry v Lawrence* (2014) where he noted that achieving a proportionate relationship between the costs and benefits of litigation had ‘not merely proved elusive, but ... [was] often missed by a very large margin indeed’.<sup>474</sup> A prominent reason for this elusiveness is that cases are fact specific, indeed they have been described as ‘infinitely variable’.<sup>475</sup> Different judges may come to different but equally legitimate decisions on procedural matters, and what amounts to a ‘good reason’ in one case ‘may prove quite inadequate’ in another.<sup>476</sup> Judicial discretion must be exercised in light of the facts, meaning that ‘there cannot always be one correct answer to the problems posed’.<sup>477</sup> Focusing on the reasoning in other cases, ‘however authoritative’, can be ‘distracting’ where the facts are not truly comparable.<sup>478</sup> Even where facts may appear to be similar, relevant factors may legitimately be balanced in different ways.<sup>479</sup>

Caution must also be exercised as to how previous judgments are treated, and courts must not be too strict in laying down guidelines as to how cases should be managed. Where a rule was deliberately drafted in general terms, they should be reluctant to lay down hard and fast rules on application.<sup>480</sup> Guidelines ‘tend to be treated as something more’,<sup>481</sup> and previous judgments should not be treated ‘as if they were statutes’.<sup>482</sup> Such an approach is contrary to the flexibility inherent in the CPR. The statutory analogy was also used in *Bulic v Harwoods* (2012), where argument had been diverted into a detailed analysis of various ‘tests’ as though some phrases were of statutory significance.<sup>483</sup> The judge thought that Lord Woolf would be ‘surprised’ to find that such a legalistic approach was being adopted to the application of the CPR, as ‘no straitjackets were intended’.<sup>484</sup> The Court of Appeal has ‘on many occasions deplored the use of judge-made checklists to supplement the rules’, meaning that when relevant factors are identified they should not be applied ‘mechanically’ in subsequent cases.<sup>485</sup> When considering earlier authorities, the nature of the particular statement relied on must be identified. Statements of principle or terms of general guidance must be distinguished from their

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<sup>474</sup> [2014] UKSC 46 [36].

<sup>475</sup> *Huscroft v P&O Ferries Ltd* [2010] EWCA Civ 1483 [17] (Moore-Bick LJ).

<sup>476</sup> *Bulic v Harwoods* [2012] EWHC 3657 (QB) [15].

<sup>477</sup> *Groarke* (n 446) [6].

<sup>478</sup> *Bulic* (n 476) [16].

<sup>479</sup> *R (Hussain) v The Secretary of State for Justice* [2016] EWCA Civ 1111 [20] (Sales LJ).

<sup>480</sup> *Huscroft* (n 474) [17] (Moore-Bick LJ).

<sup>481</sup> *Bermuda International Securities Ltd v KPMG* [2001] EWCA Civ 269 8 (Waller LJ).

<sup>482</sup> *Serious Organised Crime Agency v Namli* [2011] EWCA Civ 411 [29] (Stanley Burnton LJ).

<sup>483</sup> *Bulic* (n 476) [15].

<sup>484</sup> *ibid.*

<sup>485</sup> *Seiko Epson Corporation v Dynamic Cassette International Ltd* [2012] EWHC 316 (Pat) [17].

application to the facts.<sup>486</sup> Courts have on more than one occasion limited the usefulness of earlier cases to statements of principle and general guidance.<sup>487</sup> Such statements aside, previous decisions ‘are essentially illustrations of the exercise of the court’s discretion in the particular circumstances of the relevant case.’<sup>488</sup> In one judgment in the *Vilca v Xstrata Ltd* litigation (2016), the judge specifically stated that his conclusions should not be cited in any other case, as ‘they [were] intended to resolve the issues placed before [him] in the context of the particular circumstances of the case as they have presented themselves.’<sup>489</sup>

Related to this fact-specific exercise of flexible discretion is the fact that appeal courts should be slow to interfere with case management decisions. Lord Neuberger in *HRH Prince Abdulaziz Bin Mishal Bin Abdulaziz Al Saud v Apex Global Management Ltd* (2014) stated that it would be ‘inappropriate for an appellate court to reverse or otherwise interfere’ with a case management decision unless it was ‘plainly wrong in the sense of being outside the generous ambit where reasonable decision makers may disagree’.<sup>490</sup> An appeal court should:

only interfere when they consider that the judge of first instance has not merely preferred an imperfect solution which is different from an alternative imperfect solution which the Court of Appeal might or would have adopted, but has exceeded the generous ambit within which a reasonable disagreement is possible....<sup>491</sup>

First instance decisions may be both imperfect and unappealable. Disagreement with the first instance judge is not a sufficient basis on which to allow an appeal: ‘[t]he fact that different judges might give different weight to the various factors does not make the decision one which can be overturned’<sup>492</sup>. Appeal courts play a crucial role in encouraging a consistent culture of active management, and it is ‘vital’ that the Court of Appeal uphold robust first instance case management decisions.<sup>493</sup> The high threshold for overturning case management decisions on appeal means that upholding a first instance decision cannot be taken as an endorsement of

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<sup>486</sup> *Groarke* (n 446) [6].

<sup>487</sup> *Vilca v Xstrata Ltd* [2017] EWHC 2096 (QB) [22]; *Salt Ship Design AS v Prysmian Powerlink Srl* [2019] EWHC 2308 (Comm) [64].

<sup>488</sup> *Salt Ship* (n 487) [64].

<sup>489</sup> [2016] EWHC 389 (QB) [4].

<sup>490</sup> *Abdulaziz* (n 424) [13].

<sup>491</sup> *Tanfern* (n 427) [32] (Brooke LJ).

<sup>492</sup> *Clearway Drainage Systems Ltd v Miles Smith Ltd* [2016] EWCA Civ 1258 [68] (Sir Terence Etherton, MR).

<sup>493</sup> *Mannion v Ginty* [2012] EWCA Civ 1667 [18] (Lewison LJ).

the first instance approach, merely as a determination that it was within the first instance judge's discretion. Courts at the same level should also be slow to depart from previous case management decisions. A court should not too readily 'case manage in a way that is inconsistent with earlier decisions which have been acted upon and which were expected to be the governing decisions'.<sup>494</sup>

The fact-specific and discretionary nature of case management decisions means that citation of a case herein does not mean that the approach in that case will be appropriate in all cases dealing with the same issue. Both proportionality and active judicial management are flexible, and the intention is not to impose any 'straitjackets'. However, fact-specific decisions can be of more general use. They exemplify patterns of thinking and practical solutions which can form the basis of flexible guidance as to how cases may be managed proportionately and consistently.<sup>495</sup>

## **II. ACTIVE CASE MANAGEMENT**

Courts have taken an inconsistent approach to case management. There are many cases in which judges have taken control and applied a robust approach, but there is also a significant number in which this has not been done.

### **MANAGEMENT AND CONTROL OF CASES**

Cases where judges take active control not only exemplify the fact that they have taken on board the importance of case management in a general sense, but can also be used to identify practical details as to how cases are managed.

#### **Controlling the scope of a case**

One of the main ways in which a case can be managed to ensure proportionate use of time, money and resources is by controlling its scope. This is no longer 'just a matter for the parties' choice'.<sup>496</sup> Control can be applied at any stage, but is particularly important when dealing with statements of case and defining the issues in dispute. Judges must identify the issues at an early

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<sup>494</sup> *Gill v Anami Holdings Ltd* [2018] EWHC 1585 (Ch) [6].

<sup>495</sup> See ch 6 at 210-211.

<sup>496</sup> *Lokhova v Longmuir* [2016] EWHC 2579 (QB) [57].

stage,<sup>497</sup> and decide promptly which need full investigation and which can be disposed of summarily.<sup>498</sup> They can decide the order in which issues will be tried<sup>499</sup> and can exclude issues from consideration.<sup>500</sup> A controlled approach at this stage is likely to have a positive knock-on effect in terms of disclosure, evidence and use of court time for hearings and trials. Conversely, lack of precision in pleading can make a case difficult ‘if not impossible’ to manage by, for example, preventing an informed approach to disclosure and making it difficult to identify witnesses and the requirements of expert evidence.<sup>501</sup> Statements of case should sharpen identification of the issues for the court to decide. This will be hampered by vague or superfluous pleading.<sup>502</sup> Issues should be confined to those which are ‘reasonably necessary and proportionate’<sup>503</sup> and ‘essential’ to a party’s case.<sup>504</sup>

To ensure compliance with this purpose, the court can strike out parts of statements of case and refuse or allow amendments. Such actions have both *inter partes* and systemic benefits. Inclusion of unnecessary material may, for no useful purpose, increase disclosure obligations, risk the introduction of satellite issues and increase expenditure of time and costs.<sup>505</sup> Widening the scope of a case may prolong the trial, make management more costly and difficult,<sup>506</sup> and be counterproductive to concentrating on the primary issues.<sup>507</sup> Parties may think that the more issues that are before the court, the greater the likelihood of a ‘just’ outcome, but this will not always be the case. The ‘generation of a host of satellite issues’ may ‘create the risk of an unjust outcome resulting from a lack of focus’.<sup>508</sup> Expanding the scope of a party’s allegations may risk costs consequences that would cancel out any other benefits.<sup>509</sup> Some amendments, on the other hand, may provide greater particularity<sup>510</sup> or reduce the disclosure burden and the risk of the trial being distorted by matters of little or no importance.<sup>511</sup> On a systemic level, controlling the scope of a case enables the court to control the resources devoted to that case.<sup>512</sup>

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<sup>497</sup> CPR 1.4(2)(b).

<sup>498</sup> CPR 1.4(2)(c).

<sup>499</sup> CPR 3.1(2)(j).

<sup>500</sup> CPR 3.1(2)(k).

<sup>501</sup> *Leicester Bakery (Holdings) Ltd v Ridge and Partners LLP* [2020] EWHC 2430 (TCC) [107].

<sup>502</sup> *Tinkler v Ferguson* [2019] EWHC 1501 (QB) [24].

<sup>503</sup> *HRH Duchess of Sussex v Associated Newspapers Ltd* [2020] EWHC 1058 (Ch) [80].

<sup>504</sup> *Gregory v Moore* [2018] EWHC 2343 (Ch) [13].

<sup>505</sup> *Tinkler* (n 502) [24].

<sup>506</sup> *McLaughlin v London Borough of Lambeth* [2010] EWHC 2726 (QB) [106].

<sup>507</sup> *AmTrust Europe Ltd v Trust Risk Group SpA* [2016] EWHC 2334 (Comm) [24].

<sup>508</sup> *Christoforou v Christoforou* [2020] EWHC 1196 (Ch) 19.

<sup>509</sup> *CXS v Chief Constable of Hampshire Police* [2016] EWHC 848 (QB) [9].

<sup>510</sup> *Al Nahda Insulation Contracting LLC v Tremco Illbruck Export Ltd* [2017] EWHC 956 (TCC) [25].

<sup>511</sup> *Bilta (UK) Ltd v SVS Securities Plc* [2017] EWHC 135 (Ch) [27].

<sup>512</sup> *HRH Duchess of Sussex* (n 503) [51]; *Gregory* (n 504) [13].

Decisions to strike out claims or defences relating to proposed amendments of statements of case are not the only techniques available for controlling the scope of a case. Where a party's case cannot be discerned from its statement of case, the court may require re-pleading from scratch.<sup>513</sup> This may increase costs and delay in the instant proceedings, but it may still be appropriate where if the statement of case were struck out, the party in question could commence new proceedings.<sup>514</sup> Permission to amend may be granted subject to conditions, for example that the amended case is set out in more detail, in order to provide certainty and clarity and facilitate the smooth conduct of the trial.<sup>515</sup> In *MSI- Defence Systems Ltd v The Secretary of State for Defence* (2020), the claimant was ordered to serve a separate document with its re-amended Particulars of Claim which complied with the proper principles of pleading, if it was unable to amend to comply with those principles.<sup>516</sup>

Approaches to controlling the scope of a case often acknowledge the importance of timing. This relates to when issues are brought within the scope of a case, and the importance of ensuring that including those issues does not affect the efficient progress of the proceedings. The court may, for example, require some disclosure to take place before amendment.<sup>517</sup> It may order stays to ensure either that additional claims are not brought in unnecessarily early<sup>518</sup> or that the case does not move forward before the claim has been properly pleaded.<sup>519</sup> A short timescale may be set for repleading, to ensure efficient progress despite the need for amendments.<sup>520</sup> If future amendments are anticipated, the court may set a longstop date for applications.<sup>521</sup> The court is not required to take a 'now or never' approach. In *Spin Master Ltd v PMS International Group* (2017),<sup>522</sup> the claimant sought to make amendments which, if allowed, would bring in several complex issues. The issue central to those amendments would only arise if the claimant succeeded in the infringement aspect of its claim. The amendments were not permitted, but neither were they shut out. A further application could be made if and when the infringement claim succeeded, thereby keeping the scope focused while retaining flexibility.<sup>523</sup>

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<sup>513</sup> *Gamatronic (UK) Ltd v Hamilton* [2013] EWHC 3287 (QB); *Kaplan v Super PCS LLP* [2017] EWHC 1165 (Ch).

<sup>514</sup> *Gamatronic* (n 513) [55].

<sup>515</sup> *Jones v Royal Wolverhampton NHS Trust* [2015] EWHC 2154 (QB) [14].

<sup>516</sup> [2020] EWHC 1664 (TCC) [88].

<sup>517</sup> *ibid.*

<sup>518</sup> *Ras Al Khaimah Investment Authority v Azima* (unreported, 8 August 2019) [41].

<sup>519</sup> *Wrightson v Flor Projects Ltd* [2019] EWHC 3036 (QB) [5].

<sup>520</sup> *Kaplan* (n 513) [46].

<sup>521</sup> *BGC Brokers v Tradition (UK) Ltd* [2019] EWHC 3588 (QB) [68].

<sup>522</sup> [2017] EWHC 1477 (Pat).

<sup>523</sup> *ibid* [18].

Courts can take a tailored approach to the content of statements of case, including imposing page limits,<sup>524</sup> specifying the claims and matters that amended versions should contain<sup>525</sup> and identifying parts that cannot stand, down to paragraphs, sentences and words that must be deleted.<sup>526</sup> In *K/S Lincoln v CB Richard Ellis Hotels Ltd* (2009), the claimant applied to strike out an allegation in the defence.<sup>527</sup> It was determined that the allegation could not be struck out while the part of the claim that lay at its heart remained in the claimant's statement of case.<sup>528</sup> The claimant was given a choice whether to retain that part of their claim, with determination of the strike out action dependent on their decision.<sup>529</sup> The judge was sufficiently familiar with the interplay between the parties' respective cases that he was able to make an order tailored to their precise requirements. In both *K/S Lincoln*<sup>530</sup> and *Haydon-Baillie v Bank Julius Baer & Co Ltd* (2007),<sup>531</sup> the approach taken was described as 'slightly unusual', suggesting that this tailored approach was seen as being outside the case management norm. This approach can be applied to any case where appropriate. However, the extent to which a judge is willing to delve into the specifics of how a statement of case should be improved may depend on how badly it is pleaded and the status of the amending party's legal representation. In *Haydon-Baillie*<sup>532</sup> and *Ukoununne v The University of Birmingham* (2020),<sup>533</sup> the amending parties were unrepresented. This may have prompted the court to take a more interventionist approach. Conversely, in *Bruce v TTA Management Ltd* (2018), where the claimant was represented by leading and junior counsel and experienced solicitors, the court determined that it was not its role to 'edit a poor quality, prolix and diffuse statement of case'.<sup>534</sup> It could have suggested minor changes, but the statement of case was so poor that it was impossible to know where to start.<sup>535</sup>

It is particularly important to apply controlled management to statements of case. Control of the issues in dispute will influence the entire litigation. At the disclosure stage, for example, a

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<sup>524</sup> *Lilley v Euromoney Institutional Investor Plc* [2014] EWHC 2364 (Ch) [75].

<sup>525</sup> *Haydon-Baillie v Bank Julius Baer & Co Ltd* [2007] EWHC 3247 (Ch) [23]; *Ukoununne v The University of Birmingham* [2020] EWHC 184 (IPEC) [72] and [79].

<sup>526</sup> *Al Nahda* (n 510); *Nash v 4MA Ltd* [2019] EWHC 3383 (TCC) [28]; *Benyatov v Credit Suisse Securities (Europe) Ltd* [2020] EWHC 85 (QB) [260].

<sup>527</sup> [2009] EWHC 2344 (TCC) [1].

<sup>528</sup> *ibid* [34].

<sup>529</sup> *ibid*.

<sup>530</sup> *K/S Lincoln* (n 527) [38].

<sup>531</sup> *Haydon-Baillie* (n 525) [25].

<sup>532</sup> *ibid*.

<sup>533</sup> *Ukoununne* (n 525).

<sup>534</sup> [2018] EWHC 2718 (Ch) [52].

<sup>535</sup> *ibid*.

‘great advantage in terms of time and cost may be achieved by seeking to narrow down issues’.<sup>536</sup> This in turn can narrow the ‘borders’ for parties’ disclosure searches.<sup>537</sup> Conversely, enlarging allegations may enlarge the scope of disclosure and, as a result, extend or distort the eventual trial.<sup>538</sup> Where issues have been narrowed, future management orders should reflect that confined scope in order to prevent the time and resources of parties and the court from being directed away from the real issues.<sup>539</sup> This highlights the importance of dealing with one stage of litigation with an eye on how it will affect future stages.

Disclosure can be one of the most costly and time-consuming aspects of litigation. Sensible case management at this stage may ‘avoid putting the parties to an expensive application for specific disclosure of other documents, at a later stage of the proceedings.’<sup>540</sup> There are many examples of judges taking a controlled and tailored approach to disclosure. This can require them to go into detail as to what disclosure is appropriate in particular circumstances, for example by giving specific directions about the content of requests to be made to the disclosing party, the information to be provided, and the timescale for the exercise.<sup>541</sup> Where necessary, judges have been as specific as identifying the email addresses that are to be the subject of a search<sup>542</sup> or the words that must be deleted to limit search categories.<sup>543</sup> Judges can make orders of their own formulation, rather than simply allowing or disallowing the order for which a party has applied. They may, for example, order a search to cover a different time period than requested,<sup>544</sup> or reformulate the range and content of categories.<sup>545</sup> In order to progress the action this reformulation can be done in the course of oral argument, although the court must be satisfied that it can be done with sufficient particularity absent written evidence.<sup>546</sup> In *Keith v CPM Field Marketing Ltd* (2001),<sup>547</sup> having criticised the first instance judge for not taking a more active role in disclosure, the Court of Appeal detailed what that role should have looked like. The judge should have ‘enquired into the practicalities’<sup>548</sup> of any outstanding items being

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<sup>536</sup> *Brown v BCA Trading Ltd* [2016] EWHC 1464 (Ch) [6].

<sup>537</sup> *ibid* [7].

<sup>538</sup> *Bilta* (n 511) [29].

<sup>539</sup> *Fox v Boulter* [2013] EWHC 4012 (QB) [53].

<sup>540</sup> *Goodale v The Ministry of Justice* [2009] EWHC B40 (QB) [19].

<sup>541</sup> *Kazakhstan Kagazy Plc v Zhunus* [2019] EWHC 878 (Comm) [11]-[13].

<sup>542</sup> *Aircraft Purchase Fleet Ltd v Campagnia Aerea Italiana* [2017] EWHC 2191 (Comm) [7].

<sup>543</sup> *Vringo Infrastructure, Inc. v ZTE (UK) Ltd* [2015] EWHC 1704 (Pat) [11].

<sup>544</sup> *Manchester Shipping Ltd v Balfour Shipping Ltd* [2020] EWHC 915 (Comm) [9].

<sup>545</sup> *Vodafone Group Services Ltd v Infineon Technologies AG* [2017] EWHC 1383 (Ch) [51]-[52]; *Castle Water Ltd v Thames Water Utilities Ltd* [2020] EWHC 1374 (TCC) [20], [34], [54].

<sup>546</sup> *Hankin v Barrington* [2020] EWHC 1131 (QB) [21]-[22].

<sup>547</sup> [2001] C.P. Rep 35.

<sup>548</sup> *ibid* [59] (Brooke LJ).

produced, then made an order limited to those items as far as he was properly satisfied that they could be produced. The matter could then be ‘restored to him for further directions’<sup>549</sup> if there were any difficulties. The Court of Appeal endorsed an investigative approach by the case management judge and was clear that disclosure orders must be capable of being complied with, and limited to what is necessary. A focused approach will reduce the risk of disclosure orders that result in ‘the opening of a substantial can of worms’, i.e. orders that lack direct relevance to the matters in issue and that risk satellite litigation or argument.<sup>550</sup> However, as with statements of case, timing is important: where there is still work to be done on defining the issues, it may be preferable to frame an initial disclosure order more broadly.<sup>551</sup>

In *Merck Sharp and Dohme Ltd v Wyeth LLC* (2019),<sup>552</sup> a case conducted under the Disclosure Pilot, the judge made an order that not only reflected neither of the parties’ requests, but which embodied a staged approach to disclosure. It required disclosure of specific documents, with the door being left ‘open to a further application for disclosure ... if warranted’.<sup>553</sup> A staged approach was not introduced with the Disclosure Pilot. It can be seen in earlier cases in the context of both pre-action<sup>554</sup> and post-issue disclosure.<sup>555</sup> Searches are to be as limited as reasonably possible, with further searches being carried out only if necessary after the material disclosed has been analysed. The judge in *Goodale v The Ministry of Justice* (2009)<sup>556</sup> made a practical point about staging disclosure in the context of searching for documents in the possession of various individuals. The starting point should be ‘the most important people at the top of the pyramid’ because ‘[v]ery often an opposing party will get everything they want from that without having to go down the pyramid any further, often into duplicate material.’<sup>557</sup> A similar point was made in *SL Claimants v Tesco Plc* (2019), where the judge noted that if no evidential light is thrown by individuals at a certain level of the hierarchy, it is unlikely that those further down would be able to materially assist.<sup>558</sup> This practical point may also be relevant where various storage systems are to be searched. Some may be more important than others, and some may be more likely to turn up less relevant or duplicate documents. A staged

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<sup>549</sup> *ibid.*

<sup>550</sup> *Morley v Royal Bank of Scotland* (unreported, 31 January 2019) [17].

<sup>551</sup> *Barclays Bank Plc v Taberna Europe CDO I Plc* [2016] EWHC 1958 (Ch) [9].

<sup>552</sup> [2019] EWHC 1692 (Pat).

<sup>553</sup> *ibid* [15].

<sup>554</sup> *Ensign Highways Ltd v Portsmouth City Council* [2014] EWHC 3438 (TCC) [19].

<sup>555</sup> *Tip Communications LLC v Motorola Ltd* [2009] EWHC 1486 (Pat) [45]-[46]; *Goodale* (n 540) [13].

<sup>556</sup> *Goodale* (n 540).

<sup>557</sup> *ibid* [22].

<sup>558</sup> [2019] EWHC 3315 (Ch) [13].

approach can also be taken to the type of disclosure orders made, for example initially ordering limited disclosure, then moving to standard disclosure, with enhanced or specific disclosure to be considered if that is unsatisfactory.<sup>559</sup>

The aim of a staged approach is to ensure that costs and resources are not spent on locating and disclosing documents that are of little or no relevance. It allows parties and the court to take stock before deciding whether further disclosure is required. A staged approach must, however, be undertaken in a sensible and logical way. If it is too limited, this may lead to avoidable applications for specific disclosure and thus be counterproductive. Judges may take the initiative and request information from the parties that will enable them to deal fully with disclosure issues. In *Vodafone Group Services Ltd v Infineon Technologies AG* (2017), where the parties had not addressed the scale of the proceedings in their evidence or skeletons for the CMC, the judge thought it ‘legitimate to probe a little further’ and asked them to provide details of costs incurred and estimates to the end of trial prior to the CMC.<sup>560</sup> Similarly, in *BES Commercial Electricity Ltd v Cheshire West and Chester Borough Council* (2020), the judge required the defendant to serve clarification documents and provide a time and cost estimate for applying search terms in order to satisfy himself as to the full range of potential material in dispute and the extent of efforts required to search for it.<sup>561</sup>

Courts have emphasised the relevance of ‘downstream costs’ in the context of disclosure. These are the costs not of the search itself, but of future activities to which it will lead. The downstream costs caused by over-disclosure ‘so often are so substantial and so pointless’.<sup>562</sup> The judge in *Tip Communications LLC v Motorola Ltd* (2009) gave practical content to this point, stating that it is not only a search that is time consuming and expensive, it is what has to be done with the documents once they are identified: ‘someone has to read them, someone has to decide what to do with them and to decide whether they are relevant and then to disclose them’.<sup>563</sup> The concept at the heart of these points, that a decision or action in litigation does not stand alone but has a tangible effect on the expenditure of time, costs and resources going forward, is not limited to disclosure. It can also be seen, for example, in decisions where courts factor in the additional work that an amendment or new evidence might require.<sup>564</sup> These cases

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<sup>559</sup> *Secretary of State for Health v Servier Laboratories* [2016] EWHC 366 (Ch) [43]-[44].

<sup>560</sup> *Vodafone* (n 545) [21].

<sup>561</sup> [2020] EWHC 701 (QB) [73].

<sup>562</sup> *Nichia* (n 275) [47] (Jacob LJ).

<sup>563</sup> *Tip Communications* (n 555) [33].

<sup>564</sup> See below at 131-132.

that focus on disclosure highlight a broader point that each management decision must be seen as an integral part of the case as a whole.

Controlling the scope of proceedings does not stop at disclosure. Evidence can and should, where appropriate, be controlled from the earliest possible stage. The court can direct the issues on which witness evidence is required, the nature of the evidence required and how it is to be placed before the court.<sup>565</sup> The correlation between witness evidence and keeping the scope of a case proportionate is evidenced by the STS which requires the court to consider at the CMC whether to limit witness evidence to specific issues or topics.<sup>566</sup> In *Cathay Pacific Airlines Ltd v Lufthansa Technik AG* (2019), a case within the STS, the parties were ordered to identify in their statements of case which allegations they proposed to prove by means of oral witness evidence and to identify each witness.<sup>567</sup> The order was made pursuant to CPR 3.1(2)(m) with a view to assisting the court in considering witness evidence at the CMC,<sup>568</sup> indicating that this management power is not limited to the STS. Indeed, the court noted that Jackson had endorsed the practice of requiring parties to identify in statements of case the facts that they intended to prove by witness evidence.<sup>569</sup> Implicit in that endorsement was his view that the court already had the power to require parties to do this, the most obvious sources being CPR 3.1(2)(m) and CPR 32.1(1).<sup>570</sup> Controlling witness evidence in this way will assist the court at the CMC in making directions for trial and will provide a helpful structure for any witness statements subsequently served.<sup>571</sup> This is not, however, the only stage at which the court can limit and control witness evidence. It may, for example limit the number of witnesses that a party may call at trial, with a view to ensuring an efficient and fair trial.<sup>572</sup> It is never too late for the court to take control of a matter, although regulation of witness evidence at an early stage, before costs are incurred and when it may be possible for parties to identify matters that might be made the subject of admissions,<sup>573</sup> will often be preferable.

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<sup>565</sup> CPR 32.1(1).

<sup>566</sup> Practice Direction 57AB para 2.45.

<sup>567</sup> [2019] EWHC 484 (Ch) [66].

<sup>568</sup> *ibid*.

<sup>569</sup> *Cathay Pacific Airlines Ltd v Lufthansa Technik AG* [2019] EWHC 715 (Ch) [8].

<sup>570</sup> *ibid* [9].

<sup>571</sup> *ibid* [10].

<sup>572</sup> *MacLennan v Morgan Sindall (Infrastructure) Plc* [2013] EWHC 4044 (QB) [18]-[26].

<sup>573</sup> *ibid* [12].

The court can also restrict expert evidence<sup>574</sup> and no party may call an expert or submit evidence in an expert's report without the court's permission.<sup>575</sup> Parties 'do not have carte blanche to do whatever they like to put before the court potentially relevant evidence'.<sup>576</sup> Courts have found tailored ways of ensuring that expert evidence remains proportionate. In *Kranidiotes v Paschali* (2001),<sup>577</sup> the first instance judge had ordered evidence from a joint expert, with the order including terms of instruction and an upper fee limit. This level of control goes beyond limiting the number of experts or the issues on which they will give evidence. It was approved by the Court of Appeal, as it showed that 'the judge clearly had in view the need to adopt a proportionate attitude to the trial'.<sup>578</sup> In *Teva UK Ltd v Boehringer Ingelheim International GmbH* (2014), the defendant was ordered to serve its expert evidence first.<sup>579</sup> The claimant could then either serve none if it agreed with the defendant's evidence, or it could serve limited evidence focused on specific matters.<sup>580</sup> Sequential exchange will not be relevant in every case, and it may delay the proceedings if there is little likelihood of any substantial agreement prior to all evidence being served. Courts are also able to tailor the expert evidence process to the needs of a case. In *Art & Antiques Ltd v Magwell Solicitors* (2015), for example, relief for late service of expert evidence was granted on very strict terms, with an exceptionally short timetable ordered for completion of the expert process through to service of the joint statement.<sup>581</sup>

### **Joinder and common management frameworks**

Courts will consider whether separate cases should be managed together.<sup>582</sup> This can save parties time, costs and resources by eliminating duplicate or overlapping work. It may also mean that the same court time can be used to deal with multiple cases. Hearing applications on closely related cases which cross-refer to each other together can be 'cost effective' for parties and can mean that all matters 'go more quickly and take less time to prepare' because the court will be familiar with all of them.<sup>583</sup> The solution to dealing with common issues sits on a

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<sup>574</sup> CPR 35.4.

<sup>575</sup> CPR 35.4(1).

<sup>576</sup> *Glaxo Wellcome UK Ltd v Glenmark Pharmaceuticals Europe Ltd* [2019] EWHC 3239 (Ch) [26].

<sup>577</sup> *Kranidiotes* (n 427).

<sup>578</sup> *ibid* [8] (Aldous LJ).

<sup>579</sup> [2014] EWHC 3186 (Pat) [26].

<sup>580</sup> *ibid*.

<sup>581</sup> [2015] EWHC 2143 (Ch) [13].

<sup>582</sup> CPR 3.1(2)(g).

<sup>583</sup> *Lilley* (n 524) [28].

spectrum, with managing and trying everything in all cases together at one end and letting each set of proceedings take its course with no joint management or trial at the other.<sup>584</sup> Sometimes a more nuanced approach is required. The court may order partial joinder, where some issues in multiple cases are sufficiently discrete, important and common that they should only be tried once.<sup>585</sup> In *Walsh v Greystone Financial Services Ltd* (2018),<sup>586</sup> common issues of law arose in three cases within the same factual matrix, involving different claimants but the same defendant. A single trial would therefore be cheaper and quicker for the defendant but longer and more expensive for the claimants, causing them ‘serious and material disadvantages’.<sup>587</sup> The parties in all three cases were ordered to attend the pre-trial review in the first case to go to trial, in order to identify common legal issues to be resolved as preliminary issues alongside the trial of that first case.

This exemplifies the balancing act inherent in all case management decisions. Aligning timetables and managing cases together may instinctively seem a good idea from a proportionality perspective. However, aligning the management of related proceedings will not always be proportionate. If cases are proceeding on different paths, for example if there are more urgent issues in one or aligning timetables would mean unnecessary delay, managing them together will not be appropriate.<sup>588</sup> In any event, however the decision is made, and however strong the proposition for joint management may be, it must be supported by evidence.<sup>589</sup>

### **Split and preliminary issue trials**

In *Walsh*,<sup>590</sup> common legal issues were to be resolved as preliminary issues in two of the three cases. Trying a matter other than at a single trial of all issues, for example ordering a split or preliminary issue trial, is another way in which courts can manage cases.<sup>591</sup> Relevant factors may include the potential cost savings if liability is tried first and not established, meaning that no quantum trial is required,<sup>592</sup> or whether a split would encourage or discourage mediation or

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<sup>584</sup> *Berezovsky* (n 429) [14].

<sup>585</sup> *ibid* [29].

<sup>586</sup> [2018] EWHC 3918 (Ch).

<sup>587</sup> *ibid* [18].

<sup>588</sup> *Sainsbury's Supermarkets Ltd v Mastercard Incorporated* [2014] EWHC 797 (Ch) [8].

<sup>589</sup> *Durrheim v Ministry of Defence* [2014] EWHC 1960 (QB) [111].

<sup>590</sup> *Walsh v Greystone* (n 586).

<sup>591</sup> CPR 3.1(2)(i), (j).

<sup>592</sup> *Electrical Waste Recycling Group Ltd v Philips Electronics UK Ltd* [2012] EWHC 38 (Ch) [5].

settlement.<sup>593</sup> Some issues may be sufficiently discrete for ‘an early decision to be capable of resolution in a form that will have a significant impact on the litigation as a whole’ in terms of saving costs and resources.<sup>594</sup> If there is a satisfactory and fair way of deciding a relatively simple part of a case, without shutting out the possibility of dealing with more complex and detailed matters, then splitting the trial will provide a focused, cost-effective and fair approach, taking into account both *inter partes* and systemic interests.<sup>595</sup> Duplication of work and witnesses must be weighed against the savings that could result from splitting the trial.<sup>596</sup> There may not be a perfect or risk-free solution, but the practical management issue is to arrange resolution of the issues in such a way as to maximise the chances of an orderly and fair resolution and minimise the risk of prejudice to either side or to the administration of justice.<sup>597</sup>

No application is required: the court can order such trials on its own initiative and without the parties’ agreement.<sup>598</sup> In *Stocker v Stocker* (2015), while features of the case appeared to suggest that it would be suitable for a preliminary issue trial, after discussion at the hearing the judge decided that he should not force this on the parties ‘at this stage’.<sup>599</sup> He did, however, emphasise the importance of the parties and the court keeping under review the question of whether a full trial of all issues was avoidable.<sup>600</sup> It seems that the judge would have imposed a preliminary issue trial had he considered it appropriate. Control lies with the court, not the parties. The latter may voice their opinions, but the court can go against their wishes. It is, however, important that such trials are only ordered in appropriate cases. Courts have on occasion taken an over-zealous approach on the basis of an erroneous belief that ordering a split or preliminary issue trial would be proportionate.<sup>601</sup>

## Settlement and ADR

Splitting a trial may encourage mediation or settlement,<sup>602</sup> meaning that the remainder of the case would not need to be tried. Ordering a preliminary issue trial can ‘concentrate the minds

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<sup>593</sup> *ibid* [6].

<sup>594</sup> *Koninklijke Philips NV v Asustek Computer Incorporation* [2016] EWHC 867 (Pat) [46], [49].

<sup>595</sup> *Simpkin v The Berkeley Group Holdings Plc* [2016] EWHC 1619 (QB) [41], [45].

<sup>596</sup> *Humphrey v Aegis Defence Services* [2014] EWHC 2255 (QB) [12].

<sup>597</sup> *Takeda Pharmaceutical Company Ltd v Fougera Sweden Holding 2 AB* [2017] EWHC 1402 (Ch) [15].

<sup>598</sup> *Digicel* (n 472) [2].

<sup>599</sup> [2015] EWHC 1634 (QB) [7].

<sup>600</sup> *ibid*.

<sup>601</sup> See below at 142.

<sup>602</sup> *Hook v Sumner* (unreported, 9 November 2016) [52]; *Gubarev v Orbis Business Intelligence Ltd* [2019] EWHC 162 (QB) [67].

of all wonderfully’ on the real issues and ‘get them talking’.<sup>603</sup> On the other hand, the possibility of settlement may be maximised if all issues are prepared and tried together.<sup>604</sup> This highlights another facet of case management: the role of settlement and ADR and the extent to which they are factored into management decisions. Courts must encourage and facilitate the use of ADR where appropriate and help parties settle all or part of their case.<sup>605</sup>

A case management timetable can be created which allows time for ADR to take place. This was done in *CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd* (2014),<sup>606</sup> where the court commented on the importance of striking a balance between getting the case to trial and allowing time for settlement. Various options were considered, including building in a ‘window’ for ADR and staying the proceedings to allow for ADR or mediation. The former was inappropriate, because the fixing of any lengthy window for purposes unconnected with trial preparation is ‘bad case management’.<sup>607</sup> The latter was ‘even worse’, as it could create ‘uncertainties and the potential for tactical games-playing’.<sup>608</sup> The court referred in that regard to *Roundstone Nurseries Ltd v Stephenson Holdings Ltd* (2009), in which very little progress was made towards mediation during two stays and the parties omitted to extend the stay further, after which the claimant entered judgment in default to which it was technically entitled, but which was ‘contrary to the entire basis’ of the CPR.<sup>609</sup> The appropriate way forward in *CIP Properties* was to allow a reasonable period between each step to trial, so the parties had time to take that step and to consider their position before incurring the next tranche of costs.<sup>610</sup> This was noted to be standard procedure in large TCC cases,<sup>611</sup> however there is no reason why it could not be extended to other appropriate cases. Another TCC case which could have benefited from this approach is *McLennan Architects Ltd v Jones* (2014), in which the trial was put back because over two months had been lost from the timetable due to efforts to mediate through the Court Settlement Process.<sup>612</sup> If the directions had included time to mediate, the trial date may not have been lost.

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<sup>603</sup> *Honda Giken Kogyo Kaisha v Neesam* [2009] EWHC 1213 (Pat) [17].

<sup>604</sup> *Daimler AG v Walleniusrederierna Aktiebolag* [2020] EWHC 525 (Comm) [69].

<sup>605</sup> CPR 1.4(2)(e), (f).

<sup>606</sup> [2014] EWHC 3546 (TCC).

<sup>607</sup> *ibid* [7].

<sup>608</sup> *ibid* [9].

<sup>609</sup> [2009] EWHC 1431 (TCC) [36].

<sup>610</sup> *CIP Properties* (n 606) [5].

<sup>611</sup> *ibid*.

<sup>612</sup> [2014] EWHC 2604 (TCC) [22].

In *Fitzroy Robinson Ltd v Mentmore Towers Ltd* (2009),<sup>613</sup> the court stated that settlement negotiations are not a good reason for failing to comply with orders. Directions are given in the knowledge, or at least expectation, that parties should try to resolve their differences as they prepare for trial.<sup>614</sup> This is in line with the fact that giving serious consideration to ADR falls within CPR 1.3. It is arguable that factoring time for ADR into a timetable is unnecessary, because parties should be taking such steps anyway. The reality, however, is that if ADR is not factored into a timetable, the situation could end up as it did in *McLennan*, with parties coming before the court because the timetable has not been adhered to, thereby expending time, costs and resources that could have been avoided. In some cases, as in *McLennan*, the trial date may be lost. Parties may be required to pursue ADR alongside the timetable to trial, but directions must be practical and realistic. One way to ensure that parties comply with the timetable and pursue ADR is to explicitly deal with ADR at the CMC and to factor it into the timetable as appropriate. In doing so, it is important to bear in mind the court's comments in *CIP Properties* that the requirements of ADR and sensible case management leading up to a prompt trial date can sometimes be at odds. What is appropriate for one process may not be appropriate for the other. Sensible case management must take precedence.<sup>615</sup> The balance will be different in every case, and in some cases factoring ADR into a timetable will not be appropriate. Nevertheless, explicit consideration of this option in every case may lead overall to savings of time, costs and resources.

The court can take a more robust approach to settlement and ADR than simply factoring it into the timetable to trial where appropriate. In *Lomax v Lomax* (2019),<sup>616</sup> the Court of Appeal determined that a court can order Early Neutral Evaluation ('ENE') under CPR 3.1(2)(m) even if both parties do not consent. Limiting the court's power to order ENE to situations where that consent is forthcoming 'would be inconsistent with elements of the overriding objective, in particular the saving of expense and allotting to cases an appropriate share of the court's resources and would, therefore, be contrary to rule 1.2(b)'.<sup>617</sup> A distinction was drawn between ENE, which is part of the court process, and mediation, which is outside that process.<sup>618</sup> In *Halsey v Milton Keynes General NHS Trust* (2004), the Court of Appeal had stated that 'to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable

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<sup>613</sup> [2009] EWHC 3070 (TCC).

<sup>614</sup> *ibid* [10].

<sup>615</sup> *CIP Properties* (n 606) [10].

<sup>616</sup> [2019] EWCA Civ 1467.

<sup>617</sup> *ibid* [32] (Moynan LJ).

<sup>618</sup> *ibid* [25] (Moynan LJ).

obstruction on their right of access to the court.<sup>619</sup> The court's engagement with mediation has 'progressed significantly' since *Halsey*,<sup>620</sup> and it has been noted that *Lomax* 'inevitably' raises the question of whether, despite *Halsey*, the court might require parties to engage in mediation.<sup>621</sup> Several judges have commented, extra-judicially, on *Halsey*, court powers regarding ADR and their relationship to the right of access to justice. Some take the view that, contrary to Dyson LJ's *obiter* comments in *Halsey*, courts already possess the power to require non-consenting parties to refer their dispute to mediation or some other form of ADR.<sup>622</sup> The case law suggests, however, that while courts are willing to make robust orders regarding ADR, they stop short of mandating it.

In *AB v Ministry of Defence* (2009), the judge was referred to a 'standard order' in the Commercial Court requiring parties to take 'such serious steps as they may be advised to resolve their disputes by ADR procedures',<sup>623</sup> although the order was determined to be inappropriate in that case because the parties had 'already received the encouragement' to mediate.<sup>624</sup> In *Honda Giken Kogyo Kaisha v Neesam* (2009), the parties were directed to 'use their best endeavours'<sup>625</sup> to ensure that mediation took place, while in *Uren v Corporate Leisure (UK) Ltd* (2011), they were directed to 'attempt' mediation.<sup>626</sup> In *Garritt-Critchley v Ronnan* (2014), an order stated that 'the court considers the overriding objective would be served by the parties seeking to resolve the claim by mediation',<sup>627</sup> while in *BXB v Watch Tower and Bible Tract Society of Pennsylvania* (2020) a directions order stated that the parties 'must consider' ADR 'at all stages'.<sup>628</sup> In both cases, the orders were given teeth by requiring witness statements to be filed explaining why a party did not engage in ADR, to be relevant when considering costs.<sup>629</sup> A similar order was made in *SM v DAM* (2014), in which the court stated that while it could not impose a mandatory order, it could 'robustly encourage and coerce participation in ADR, specifically by making clear that costs sanctions might await parties who unreasonably refuse to do so'.<sup>630</sup> In neither *Garritt-Critchley* nor *BXB* was the order complied with. On the other

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<sup>619</sup> [2004] EWCA Civ 576 [9] (Dyson LJ).

<sup>620</sup> *Lomax* (n 616) [27] (Moynan LJ).

<sup>621</sup> *McParland & Partners Ltd v Whitehead* [2020] EWHC 298 (Ch) [42].

<sup>622</sup> See ch 6 at 232.

<sup>623</sup> *AB v Ministry of Defence* [2009] EWHC 3516 (Admin) [13].

<sup>624</sup> *ibid* [17].

<sup>625</sup> *Honda* (n 603) [39].

<sup>626</sup> [2011] EWCA Civ 66 [73] (Smith LJ).

<sup>627</sup> [2014] EWHC 1774 (Ch) [6].

<sup>628</sup> [2020] EWHC 656 (QB) [3].

<sup>629</sup> *Garritt-Critchley* (n 627) [6]; *BXB* (n 628) [3].

<sup>630</sup> [2014] EWHC 537 (Fam) [14].

hand, in *Al Hamadani v Al Khafaf* (2015), an order requiring the parties to ‘give consideration to resolving [the] dispute by means of ADR’ by a specified date was successful in respect of three of the defendants.<sup>631</sup> In some cases, encouragement or requirements to consider ADR may be sufficient, while in others they may not. The relationship between ADR and case management is still evolving, as exemplified by the rule relied on in *Lomax* itself, CPR 3.1(2)(m), to which express reference to ENE was added in 2015.

### **How management decisions are expressed**

Management decisions must be expressed in an appropriate way. This in itself is a case management tool. Case management is a means of controlling parties’ future conduct and courts need to be able to tailor the way they do this to the circumstances of each case. The most common method is an order, whether this be a standard order, an order subject to conditions, or an unless order. A standard order states what parties must do and by when they must do it. Although no sanction is specified for non-compliance, parties cannot assume that there will be no consequences if they fail to comply, particularly in light of the post-Jackson emphasis on enforcing compliance. At the same time, a standard order may be more open to amendment, if for example it is the first order made on a particular issue and has not been made against a background of procedural difficulties or non-compliance. Orders subject to conditions allow the court to control future conduct by requiring parties to show tangible commitment to, or take on quantifiable risk in, the ongoing litigation. This can be done by, for example, requiring a party to pay money into court or escrow, or to provide security to their opponent. The court’s power to make orders subject to conditions<sup>632</sup> is wide-ranging. There is no limit placed on either the circumstances in which the power may be invoked or the nature of the conditions that may be imposed.<sup>633</sup> Conditions may, for example, include payment of outstanding costs orders,<sup>634</sup> compliance with further pre-trial directions<sup>635</sup> or limiting claims to those that may be substantiated by specified evidence.<sup>636</sup>

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<sup>631</sup> [2015] EWHC 38 (QB) [9].

<sup>632</sup> CPR 3.1(3)(a).

<sup>633</sup> *Huscroft* (n 475) [17] (Moore-Bick LJ).

<sup>634</sup> *Carlton Advisory Services v Dorchester Holdings Ltd* [2014] EWHC 3341 (Comm) [10]; *BCS Corporate Acceptances Ltd v Terry* [2018] EWHC 2085 (QB) [22].

<sup>635</sup> *Carlton* (n 634) [10].

<sup>636</sup> *Price v Price* [2003] EWCA Civ 888 [46] (Brooke LJ).

A condition alone, however, may not be a sufficient control. Such orders may also contain specified sanctions for non-compliance. Sanctions are also an integral part of an unless order, as without the threat of adverse consequences the order has no more strength than a standard order. If there is a history of non-compliance then a party must be given an added incentive to comply. The most effective incentive is likely to be the risk of a party's case or their ability to pursue it being negatively affected. The court's powers when it comes to sanctions are flexible.<sup>637</sup> However, they should not be too quick to prescribe sanctions: not every breach will require one.<sup>638</sup> The post-Jackson emphasis on rule compliance and a corresponding greater reluctance to grant relief, rather than requiring stronger and more frequent sanctions to incentivise compliance, means that more care should be taken when prescribing sanctions to ensure that this is only done in appropriate cases.<sup>639</sup> Sanctions must also be proportionate to both the breach in the event of non-compliance and to the circumstances of the case. The CPR gives the courts 'the powers and the opportunities to make the sanction fit the breach'.<sup>640</sup> In an application for relief from sanctions under CPR 3.9, the starting point is that the sanction was properly imposed<sup>641</sup> and proportionate.<sup>642</sup> The application of disproportionate sanctions may lead not only to *inter partes* injustice, for example by depriving a party of particular evidence or even of its ability to pursue its claim or defence, but also to systemic injustice by devoting too great a proportion of the court's resources to applications for relief and related appeals.

Courts also manage cases in more subtle ways. Judges may express views on how a case should proceed, or steps parties should take, without going so far as to make an order. A judge may, for example, encourage parties to think about how they wish to proceed by flagging the risks of a certain course.<sup>643</sup> They may warn that the court will not look kindly on an approach that would interfere with the smooth running of the trial<sup>644</sup> or use resources that would be better spent on other aspects of the case.<sup>645</sup> A particular decision may be made to force parties to focus on whether certain future steps are necessary,<sup>646</sup> or on the need to ensure that a trial is completed within a certain timeframe.<sup>647</sup> This is a useful approach where it is not appropriate

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<sup>637</sup> *Asiansky Television Plc v Bayer-Rosin (A Firm)* [2001] EWCA Civ 1792 [49] (Clarke LJ).

<sup>638</sup> *Harrison v Laidlaw* [2014] EWHC 35 (Ch) [43]-[44].

<sup>639</sup> *ibid* [44].

<sup>640</sup> *Aktas v Adepta* [2010] EWCA Civ 1170 [92] (Rix LJ).

<sup>641</sup> *Mitchell* (n 26) [44] (Lord Dyson MR).

<sup>642</sup> *Walsham Chalet Park Ltd v Tallington Lakes Ltd* [2014] EWCA Civ 1607 [32], [50] (Richards LJ).

<sup>643</sup> *K/S Lincoln* (n 527); *Gamatronic* (n 513).

<sup>644</sup> *Art & Antiques* (n 581) [14]-[15].

<sup>645</sup> *R (LXD) v The Chief Constable of Merseyside Police* [2019] EWHC 1264 (Admin) [24].

<sup>646</sup> *Teva* (n 579) [26].

<sup>647</sup> *Homebase Ltd v ATS Rengasamy* [2015] EWHC 618 (QB).

to make a definitive order, but where the judge still wishes to control how parties act going forward. In *R (LXD) v The Chief Constable of Merseyside Police* (2019), for example, the court heard *inter alia* the claimant's application to debar the defendant from adducing further evidence.<sup>648</sup> The defendant was required to make a supported application, because there was not enough information before the court to definitively bar it from adducing the evidence in question.<sup>649</sup> The court encouraged the defendant to formulate its application appropriately by stating that 'the narrower and more focused its evidence, the more likely that it will be admitted'.<sup>650</sup> In *K/S Lincoln*, the claimant applied to strike out part of the defendant's case. The court decided that while strike out was not appropriate or possible at that time, it might be in future, stating in the course of that decision that the defendant should be aware of the associated costs risks of proceeding.<sup>651</sup> In *Spin Master Ltd*, while it was not appropriate to make orders regarding ADR before evidence had been exchanged, the judge noted that once exchange had taken place, if either party refused to mediate, 'it may need to explain why at the end of the trial'.<sup>652</sup> Sometimes, it is not possible or appropriate to make a definitive decision on a particular point, but experienced judges will have a feel for where a matter is and should be going. These types of comments are a more flexible way of controlling the future progress of the case. If parties act contrary to such comments without a good explanation, they may in future face adverse costs consequences or other consequences detrimental to their case as a result, even though no order to that effect has been made.

#### INSUFFICIENT CASE MANAGEMENT

Many judges have accepted the need for active judicial case management, but this is not universally the case. Appeal courts have commented on first instance judges' failure to control and manage cases. The Supreme Court emphasised the need for judges to use their case management powers, in the context of the issue of appropriate forum, in *VTB Capital plc v Nutritek International Corp* (2013).<sup>653</sup> Lord Neuberger stated that 'the judiciary is now encouraged to exercise far greater case management powers than 25 years ago. Accordingly, judges should invoke those powers to ensure that the evidence and argument on service out

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<sup>648</sup> *R (LXD)* (n 645).

<sup>649</sup> *ibid* [26].

<sup>650</sup> *ibid*.

<sup>651</sup> *K/S Lincoln* (n 527) [38].

<sup>652</sup> *Spin Master* (n 522) [22].

<sup>653</sup> [2013] UKSC 5.

and stay applications are kept within proportionate bounds and do not get out of hand.<sup>654</sup> The 25-year reference is to the time since *Spiliada Maritime Corp v Cansulex Ltd (The Spiliada)* (1981), in which Lord Templeman expressed the hope that jurisdiction disputes would in future be dealt with more economically and ‘submissions [would] be measured in hours and not days’.<sup>655</sup> *VTB Capital* was litigated neither economically nor proportionately. That the Supreme Court saw fit to make the above comment in 2013, when the CPR had been in force for 14 years, indicates that Lord Templeman’s comments had little impact, and that courts had not been using their case management powers in a sufficiently robust manner.

The same issues arose in more recent cases. In *Tugushev v Orlov* (2019), a jurisdiction application generated ‘a depressingly vast amount of material’ and costs in the millions,<sup>656</sup> with no apparent attempt by the court to control the scope of the proceedings. The Supreme Court dealt with the issue again in *Vedanta Resources Plc v Lungowe* (2019).<sup>657</sup> The focus in that case was on the parties’ failure to litigate proportionately, rather than lack of court management, however the two do not exist separately from each other. Proportionate litigation requires co-operation and appropriate action from both parties and the court. Nevertheless, as was made clear in *VTB Capital*, the court is to use its case management powers to keep ‘the understandable desire of lawyers to do, and to be seen by their clients to be doing, everything they can to advance their clients’ case’ in check.<sup>658</sup>

Jurisdiction disputes are not the only context in which first instance judges have been criticised for not taking sufficient control. In *DHL Air Ltd v Wells* (2003), the judge did not take into account the proportionality of what was in issue, did not ‘take a proper grip’ of the case, and failed to identify the real issues and ensure the parties concentrated on them.<sup>659</sup> Similar criticisms were made in *Peakman v Linbrooke Services Ltd* (2008), with the focus on trial management, where the trial took 12 months to complete and the judge ‘failed to exercise that degree of control over [the] proceedings which he should have’.<sup>660</sup> The CPR gave him wide powers, which ‘unfortunately’ he did not use.<sup>661</sup> First instance judges have been specifically criticised for not taking control of disclosure. The Court of Appeal in *Keith* not only said that

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<sup>654</sup> *ibid* 31.

<sup>655</sup> [1981] AC 460 465.

<sup>656</sup> [2019] EWHC 645 (Comm) [8].

<sup>657</sup> [2019] UKSC 20.

<sup>658</sup> *VTB Capital* (n 653) [88] (Lord Neuberger).

<sup>659</sup> [2003] EWCA Civ 1743 [29] (Thomas LJ).

<sup>660</sup> [2008] EWCA Civ 1239 [33] (Goldring LJ).

<sup>661</sup> *ibid*.

the first instance judge should have taken a more active role in disclosure requirements and the terms of disclosure orders, it also stated how he should have done it.<sup>662</sup> In *Edwards Lifesciences AG v Cook Biotech Incorporated* (2009),<sup>663</sup> the court and parties were criticised for not taking a sufficiently robust approach to disclosure. The defendant persisted in seeking disclosure of certain documents relating to a particular issue, but this was done in compliance with the judge's directions, indicating that a disproportionate approach by parties can originate from a disproportionate approach by the court. The claimant produced a large number of documents, none of which the defendant deployed at trial. The answer to this issue was a 'much more robust' approach by the court and parties in not engaging in this sort of 'futile exercise' in the first place.<sup>664</sup>

Apparent lack of case management is not confined to cases where there is explicit criticism in that regard by appeal courts. The CPR shifted responsibility for the progress and pace of litigation from the parties to the court,<sup>665</sup> however in some cases courts continue to leave the majority of control in the former's hands. This has manifested as, for example, emphasising that parties must take 'all sensible steps' to limit disclosure but imposing no requirements on the exercise,<sup>666</sup> or stating that it 'may well be' that a claimant 'will need to consider' whether it should amend its case without imposing any deadlines where there is a tight timetable to trial.<sup>667</sup> In *Deutsche Bank AG v Sebastian Holdings Inc* (2020), the court noted that it should not analyse the claimant's evidence, indicate whether it was sufficient and, if necessary, give directions as to further evidence because it was '[c]learly ... not for the court to advise a party on whether its evidence is good enough and, if not, how to plug any deficiency. The Claimant must decide for itself what evidence it wishes to produce.'<sup>668</sup> The court may not be able to 'advise' a party, but CPR 3 and CPR 32.1 allow the court to go further in controlling the issues on which witness evidence is submitted and the form of that evidence than suggested in that case.

In *Group Seven Ltd v Nasir* (2016), in the context of costs management, the judge allowed contingencies in the claimant's budget to reflect the possibility that there might be future

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<sup>662</sup> *Keith* (n 547) [59] (Brooke LJ).

<sup>663</sup> [2009] EWHC 1443 (Pat).

<sup>664</sup> *ibid* [11].

<sup>665</sup> See ch 3 at 66.

<sup>666</sup> *Barclays v Taberna* (n 551) [12].

<sup>667</sup> *Reynold Power Transmission v Holdroyd Precision Ltd* [2014] EWHC 1309 (TCC) [13].

<sup>668</sup> unreported, 5 March 2020 [71].

procedural difficulties attributable to a lack of co-operation from some defendants.<sup>669</sup> The claimant argued that each defendant would raise every conceivable point and objection, and that there had already been procedural difficulties and delays due to a lack of co-operation.<sup>670</sup> On the one hand, this allowance for contingencies may be sensible, because the court cannot entirely control how parties conduct litigation. On the other hand, it suggests an overly relaxed approach, particularly where the defendants had already been unco-operative. No warnings were given to the defendants of the consequences of nonco-operation. Even where a court acknowledges the need for management, too much responsibility can be left with the parties. In *McLaughlin v London Borough of Lambeth* (2010), the judge noted that ‘the action calls for case management’, but ‘neither party ... sought to address their concerns by inviting [the judge] to make limited case management decisions’.<sup>671</sup> He said that he would ‘hear further argument from the parties, if they are so advised, as to the way by which the case should be managed so as to limit the issues to those which are relevant and proportionate’.<sup>672</sup> The manner in which the case was to be managed, and indeed the extent to which it would be managed, was left in the parties’ hands rather than being controlled by the court.

There are cases where time, money and resources may have been saved, or problems avoided, if the court had intervened at an early stage and taken a robust management approach. A fairly extreme example is where weak claims are pursued to trial,<sup>673</sup> sometimes to the extent that pursuit of the claim contributes to an award of indemnity costs.<sup>674</sup> The pursuit of such claims is a waste of both *inter partes* and systemic time and resources. This raises the question of whether the court can and should intervene earlier in order to bring these proceedings to a more proportionate conclusion. There are cases in which it is acknowledged that steps could

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<sup>669</sup> [2016] EWHC 620 (Ch) [26].

<sup>670</sup> *ibid.*

<sup>671</sup> *McLaughlin* (n 506) [106].

<sup>672</sup> *ibid* [115].

<sup>673</sup> *Wates Construction Ltd v HGP Greentree Allchurch Evans Ltd* [2005] EWHC 2174 (TCC) [19]-[21]; *IPC Media Ltd v Highbury Leisure Publishing Ltd* [2005] EWHC 283 (Ch) [24]-[26]; *National Westminster Bank Plc v Rabobank Nederland* [2007] EWHC 1742 (Comm) [66]; *Igloo Regeneration (Gp) Ltd v Powell Williams Partnership* [2013] EWHC 1859 (TCC) [27]-[28]; *Richmond Pharmacology Ltd v Chester Overseas Ltd* [2014] EWHC 3418 (Ch) [28]-[34]; *Consortium Commercial Developments Ltd v Prestigic Holdings Ltd* (unreported, 4 June 2014) [53]; *Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd* [2017] EWHC 2299 (QB) [14]; *Pepe’s Piri Piri v Junaid* [2019] EWHC 2769 (Ch) [39]; *Hamad M Aldrees & Partners v Rotex Europe Ltd* [2019] EWHC 526 (TCC) [40], [43]; *Lejonvarn v Burgess* [2020] EWCA Civ 114 [56]-[65]; *De Sena v Notaro* [2020] EWHC 1366 (Ch) [22].

<sup>674</sup> *Wates* (n 673) [25]-[26]; *IPC Media* (n 673) [24]-[26]; *NatWest v Rabobank* (n 673) [66], [71]; *Consortium* (n 673) [64]; *Imperial Chemical* (n 673) [14]; *Richmond* (n 673) [28]-[34]; *Lejonvarn* (n 673) [67]-[68]; *De Sena* (n 673) [34].

have been taken earlier to narrow the issues and statements of case.<sup>675</sup> The question of narrowing issues and quantum has arisen several times in the context of indemnity costs,<sup>676</sup> with a significant contributing factor being the paying party's persistence in pursuing a claim with the widest possible scope, for example taking every possible point and making unsubstantiated allegations.<sup>677</sup> Through a focused approach and precise questioning at a CMC, based on comprehensive early information-gathering, it may be possible to identify these problems early on and make the orders necessary to narrow or remove issues.

In the context of disclosure, in *Re RBS Rights Issue Litigation* (2015), the court noted that in an 'enormous disclosure process', the defendant had placed too much emphasis on a 'bottom up approach',<sup>678</sup> resulting in it being 'beset and swamped' with problems which might have been attenuated by bringing the disclosure exercise to the court.<sup>679</sup> This case might have benefited from a controlled, top-down approach to disclosure being imposed by the court, rather than leaving application of the process to the parties. These comments were made after the eighth CMC, suggesting that there had been opportunities for the court to monitor and control disclosure, rather than waiting for the defendant to raise any problems. In a case much earlier in its progress, *BMG (Mansfield) Ltd v Galliford Try Construction Ltd* (2013), the court noted after allowing the claimant's application to amend and to call evidence from a fresh expert that 'regrettably' the case had not yet even been set down for its first CMC,<sup>680</sup> yet imposed no requirements that this should be done.

Underlying this approach that leaves control in the parties' hands, there appears to be an acceptance that aggressive litigation is the norm. In *Warner Retail Ltd v National Westminster Bank* (2014) the timetable was ignored, 'as happens all too frequently'.<sup>681</sup> Only a short time before trial, the parties had been distracted by an interlocutory application, 'as also still often happens'.<sup>682</sup> The judge in *Style Research Ltd v Factset Europe Ltd* (2013) accepted that it would

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<sup>675</sup> *Assetco Plc v Grant Thornton UK LLP* [2019] EWHC 592 (Comm) [43]; *Essex County Council v UBB Waste (Essex) Ltd* [2019] EWHC 819 (TCC) [30]; *Hart v Large* [2020] EWHC 1302 (TCC) [56].

<sup>676</sup> *JP Morgan Chase Bank v Springwell Navigation Corporation* [2008] EWHC 2848 (Comm) [12]-[13]; *Digicel (St Lucia) Ltd v Cable & Wireless Plc* [2010] EWHC 888 (Ch) [47], [60]-[63], [68]; *Euroption Strategic Fund Ltd v Skandinaviska Enskilada Banken AB* [2012] EWHC 749 (Comm) [18], [25]; *Richmond* (n 673) [28]-[34].

<sup>677</sup> *JP Morgan* (n 676) [13].

<sup>678</sup> [2015] EWHC 3433 (Ch) [78].

<sup>679</sup> *ibid* [79].

<sup>680</sup> [2013] EWHC 3138 (TCC) [48].

<sup>681</sup> [2014] EWHC 2818 (Ch) [6].

<sup>682</sup> *ibid*.

be impossible for a preliminary issue or list of issues to be agreed, and that the case would last longer than the trial window, due to the ‘bitter and ... wide-ranging’<sup>683</sup> dispute, despite it being ‘not beyond the wit of counsel to clarify the issues’.<sup>684</sup> Comments by the Court of Appeal in the context of parties’ failure to attempt to settle or seriously pursue ADR give the impression that litigation is something of an uncontrollable force. Ward LJ in *Egan v Motor Services (Bath) Ltd* (2007) stated that it is ‘perfectly obvious’ what can happen if a matter that should be mediated is not: ‘[f]eelings are running high, early positions are taken, positions become entrenched, the litigation bandwagon will roll on...’.<sup>685</sup> In *Oliver v Symons* (2012) Ward LJ, again, presented the two options of ‘a fair and sensible compromise’ and ‘an unseemly battle’ that would ‘blight’ the parties’ lives ‘for months and months to come’.<sup>686</sup> In *Assetco* (2019), the parties fought the matter ‘uphill and down dale’ and took ‘every conceivable point that could possibly be taken’.<sup>687</sup> In an endorsement of parties’ entitlement to litigate as hard as they wish, the judge did not criticise this and gave it no ‘real weight’ in assessing costs because there was nothing in that approach that took the case out of the norm.<sup>688</sup> In another recent case, *Abramovich v Hoffmann* (2019), the parties’ ‘tactical considerations’ were simply identified as existing, with no criticism made, because it was ‘not for the court to second-guess’ the parties’ motivations.<sup>689</sup> It seems clear that the culture change underlying the introduction of the CPR has not entirely taken root.

Several cases exemplify the dangers of leaving the progress of litigation to the parties. *Agents’ Mutual Ltd v Gascoigne Halman Ltd* (2019)<sup>690</sup> and *Centenary Homes Ltd v Liddell* (2019)<sup>691</sup> indicate, in the context of disclosure, that parties may be unlikely to do something unless it is required by the court. In the former case, interlocutory applications arose from parties’ failure to engage with each other before implementing a search methodology, because the relevant order required no discussion or agreement in that regard.<sup>692</sup> In the latter, the parties did collaborate to resolve outstanding issues, but only after court intervention. It was ‘unfortunate’ that this intervention was required: ‘the parties could realistically have found their own way to

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<sup>683</sup> [2013] EWHC 4029 (Pat) [16].

<sup>684</sup> *ibid* [37].

<sup>685</sup> [2007] EWCA Civ 1002 [53].

<sup>686</sup> [2012] EWCA Civ 267 [53].

<sup>687</sup> *Assetco* (n 675) [43].

<sup>688</sup> *ibid*.

<sup>689</sup> [2019] EWHC 509 (Ch) [33].

<sup>690</sup> [2019] EWHC 3104 (Ch).

<sup>691</sup> [2019] EWHC 3405 (QB).

<sup>692</sup> *Agents’ Mutual* (n 690) [15].

the position that they are now in'.<sup>693</sup> In *Manchester Shipping Ltd v Balfour Shipping Ltd* (2020), the parties agreed a nineteen-step pre-CMC timetable which did not deal with costs budgets.<sup>694</sup> This resulted in a lack of communication as to whether costs management would take place at the CMC and in the CMC being listed for too short a time.<sup>695</sup> In *Alibrahim v Asturion Fondation* (2020),<sup>696</sup> no order was made regarding agreed directions and no CMC was listed due to an oversight by the court. As a result, neither party was subject to any deadline for taking subsequent steps. The Court of Appeal identified this as a significant factor in the subsequent period of inaction, which was long enough to prompt an application to strike out for 'warehousing'.<sup>697</sup> These cases highlight the risk that, if left to their own devices, parties will take neither the general approach nor specific steps required of them. This connects to the lack of compliance with CPR 1.3, considered below. The overlap between the cases considered in that section and those considered in this one is unlikely to be a coincidence. Lord Woolf recognised that active judicial management was required because party control of litigation caused excess cost, delay and complexity. The case law supports this and indicates that hope or exhortation that parties should co-operate or at least move the case forward efficiently will often be inadequate.

### III. JUDICIAL PROPORTIONALITY

#### *INTER PARTES* PROPORTIONALITY

Dealing with a case justly and at proportionate cost includes, so far as is practicable, dealing with it in ways which are proportionate '(i) to the amount of money involved; (ii) to the importance of the case; (iii) to the complexity of the issues; and (iv) to the financial position of each party'.<sup>698</sup> The case law adds detail to these factors. It also reveals other *inter partes* factors that are taken into account by the courts when making case management decisions.

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<sup>693</sup> *Centenary* (n 691) [10].

<sup>694</sup> [2020] EWHC 164 (Comm) [3].

<sup>695</sup> *ibid* [2]-[3].

<sup>696</sup> [2020] EWCA Civ 32.

<sup>697</sup> *ibid* [11] (Arnold LJ).

<sup>698</sup> CPR 1.1(2)(c).

## Relevant factors: CPR 1.1(2)(c)

The monetary value of a claim<sup>699</sup> is naturally a central factor in case management decision-making. The fact that there are substantial sums at stake has been cited as a point in favour of allowing, for example, amendments to statements of case,<sup>700</sup> evidence from more than one expert in a given field,<sup>701</sup> expert evidence where a first instance court had determined that no such evidence was necessary<sup>702</sup> or where a party had failed to comply with the deadline for service,<sup>703</sup> and additional disclosure a week before trial.<sup>704</sup> At the other end of the scale, low monetary value has been a relevant factor in, for example, refusing an application to vacate trial<sup>705</sup> and refusing permission to amend a statement of case shortly before trial.<sup>706</sup> The limited procedures of the small claims track will be appropriate for a low-value claim unless there is 'something other than value' to justify reallocating it to a different track.<sup>707</sup> Monetary value is identifiable and quantifiable, and as such is a convenient measure by which to assess proportionality, taking as a starting point that high value claims are more deserving of time, costs and resources. However, monetary value is not the only value assigned to disputes and parties do seek other remedies. Defamation claims, for example, are primarily about vindication of reputation and litigation in that context can leave a claimant out of pocket but still be worthwhile.<sup>708</sup> In professional negligence claims, allowance must be made for non-quantifiable, but potentially serious, damage to professional reputation.<sup>709</sup> Parties may also apply for remedies such as injunctions on which it may be difficult to place a monetary value. Even where a potential claim in damages or account is trivial, an action may be justified by the value of an injunction.<sup>710</sup> Where a monetary value can be assigned, 'it will be a rare case where it is not a significant factor',<sup>711</sup> but it is by no means the only relevant one.

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<sup>699</sup> CPR 1.1(2)(c)(i).

<sup>700</sup> *PJSC Tatneft v Bogolyubov* [2020] EWHC 623 (Comm) [44].

<sup>701</sup> *S v Chesterfield and North Derbyshire Royal Hospital NHS Trust* [2003] EWCA Civ 1284 [25] (Brooke LJ).

<sup>702</sup> *British Airways Plc v Spencer* [2015] EWHC 2477 (Ch) [103].

<sup>703</sup> *Roberts v Fresse* [2018] EWHC 3867 (QB) [21].

<sup>704</sup> *PCP Capital Partners LLP v Barclays Bank Plc* [2020] EWHC 1393 (Comm) [118].

<sup>705</sup> *Harrison v Pilkington Group Ltd* [2019] EWHC 2725 (QB) [19].

<sup>706</sup> *Lacuna Edinburgh Ltd v Barclays Bank Plc* (unreported, 10 February 2017) [14]; *Criterion Buildings Ltd v McKinsey & Company, Inc. United Kingdom* [2020] EWHC 2552 (Ch) [41], [44].

<sup>707</sup> *Williams v Santander UK Plc* (unreported, 2015) [5].

<sup>708</sup> *Clarke v Bain* [2008] EWHC 2636 (QB) [54].

<sup>709</sup> *Willis v MRJ Rundell & Associates Ltd* [2013] EWHC 2923 (TCC) [12].

<sup>710</sup> *Lilley v DMG Events Ltd* [2014] EWHC 610 (IPEC) [27].

<sup>711</sup> *Motto v Trafigura Ltd* [2011] EWCA Civ 1150 [42] (Lord Neuberger MR).

The importance of a case<sup>712</sup> is an aspect of value which cannot be quantified in monetary terms. Cases can be important to different people in different ways. Importance to the parties in itself has various aspects. If a party's reputation turns on the result of a case, this may justify the expenditure of more costs and resources or the use of a more complex or time-consuming procedure. The potential for reputational damage may, for example, be a reason in favour of allowing in more expert evidence<sup>713</sup> or a relevant factor in determining issues of timescale and imposition of sanctions relating to service of witness evidence.<sup>714</sup> Where the underlying facts are particularly serious, this can also be relevant. The seriousness of the facts, or related distress to one or more of the parties, has been relevant in, for example, allowing in additional expert evidence,<sup>715</sup> ordering specific disclosure,<sup>716</sup> refusing additional evidence<sup>717</sup> or dismissing an application to vacate trial<sup>718</sup> because resolution must not be delayed. In *Goodale*, any damages awarded to individuals were likely to be small, but the claim involved a very serious allegation against a government department, making standard disclosure appropriate.<sup>719</sup> Where the facts are particularly serious, they may justify a more substantial procedure even if the recoverable damages are 'relatively modest'.<sup>720</sup> This is not, however, always the case. In *CXS v Chief Constable of Hampshire Police* (2016)<sup>721</sup> the underlying facts could hardly have been more serious, in that they related to alleged abuse. Nevertheless, the claimants were refused permission to amend their particulars of claim because by expanding the scope of their allegations, they put themselves at risk of costs consequences that would outweigh any benefit they might obtain.<sup>722</sup> The seriousness of the factual context and the importance of a case to a particular party are simply factors to be weighed in the balance. *CXS* also raises the question as to whether parties are always able to see the most beneficial way forward, particularly where the underlying facts are serious, and whether the court is in such cases better placed to decide what would be in a party's best interests.

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<sup>712</sup> CPR 1.1(2)(c)(ii).

<sup>713</sup> *S v Chesterfield* (n 701) [19].

<sup>714</sup> *Durrant v Chief Constable of Avon & Somerset Constabulary* [2013] EWCA Civ 1624 [44] (Richards LJ); *McTear v Engelhard* [2016] EWCA Civ 487 [43] (Vos LJ); *Razaq v Zafar* [2020] EWHC 1236 (QB) [46].

<sup>715</sup> *S v Chesterfield* (n 701) [19], [25].

<sup>716</sup> *Vilca* (n 489) [25], [41].

<sup>717</sup> *Calden* (n 382) [2], [30] (Brooke LJ).

<sup>718</sup> *Mitchell v Precis 548 Ltd* [2019] EWHC 3314 (QB) [21]; *T v Imperial College Healthcare NHS Trust* [2020] EWHC 1147 (QB) [32].

<sup>719</sup> *Goodale* (n 540) [10].

<sup>720</sup> *Vilca* (n 489) [25]

<sup>721</sup> *CXS* (n 509).

<sup>722</sup> *ibid* [9].

Some cases are important to the public at large or the rule of law in general. The public interest in scrutinising the actions of police officers, for example, has been relevant to determining procedures for service of witness statements and sanctions for non-compliance,<sup>723</sup> and has justified the employment of senior barristers and generally inform the proportionality of costs.<sup>724</sup> In *Komoka v The Security Service* (2019), the importance of the case to the rule of law and holding the government to account was relevant to determining a proportionate resolution to disclosure disputes.<sup>725</sup> Prosecuting claims for contempt of court can have a ‘salutary effect in bringing home ... the importance of honesty in making witness statements and the significance of the statement of truth’.<sup>726</sup> That a claim may have wider ramifications for the substantive law beyond its particular facts can provide a compelling reason for refusing an application or strike out or summary judgment and allowing the claim to proceed to trial.<sup>727</sup> *Benyatov v Credit Suisse Securities (Europe) Ltd* (2020)<sup>728</sup> cited *AC Ward & Sons Ltd v Catlin (Five) Ltd* (2009)<sup>729</sup> on that point. In rejecting a submission that the claim had no prospect of success, the Court of Appeal had upheld a refusal to rule on a short point of construction of the terms of an insurance contract where those terms were standard and widely used in the insurance market.<sup>730</sup> In some cases the lack of public interest will be relevant, for example *Williams v Santander* (2015) in which ‘something other’ than value was required for the case to be taken out of the small claims track.<sup>731</sup> That ‘something’ was not importance: while the case was important to claimant, in that he wanted to get his money back, it had no overriding importance to the world at large.<sup>732</sup>

The financial position of the parties<sup>733</sup> can be closely tied to value and importance. Claims of the same monetary value may be of varying importance depending on how that value compares to a party’s financial resources. A particular result could have serious consequences for a party with relatively few resources. Whether a party may be unable to survive as a going concern<sup>734</sup> or forced into bankruptcy<sup>735</sup> as a result of a particular decision, are factors to weigh in the balance. A relevant consideration in *Priestley v Dunbar & Co* (2015), in which an appeal against

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<sup>723</sup> *Durrant* (n 714) [44] (Richards LJ).

<sup>724</sup> *Hannon v News Group Newspapers* (unreported, 22 July 2014) [3].

<sup>725</sup> [2019] EWHC 2383 (QB) [12].

<sup>726</sup> *KJM Superbikes Ltd v Hinton* [2008] EWCA Civ 1280 [23] (Moore-Bick LJ).

<sup>727</sup> *Benyatov* (n 526).

<sup>728</sup> *ibid.*

<sup>729</sup> [2009] EWCA Civ 1098.

<sup>730</sup> *ibid* [35] (Etherton LJ).

<sup>731</sup> *Williams v Santander* (n 707) [5].

<sup>732</sup> *ibid* [8].

<sup>733</sup> CPR 1.1(2)(c)(iv).

<sup>734</sup> *Versloot Dredging BV v HDI Gerling Industrie Versicherung AG* [2013] EWHC 1667 (Comm) [15].

<sup>735</sup> *Michael v Lillitos* [2019] EWHC 2716 (QB) [55].

dismissal of an application to set aside default judgment on liability was allowed, was that this was a substantial claim against a small company, such that the effect of a judgment on liability would be serious.<sup>736</sup> In contrast, in *Lacuna Edinburgh Ltd v Barclays Bank Plc* (2017), one factor in not allowing the defendant to amend its statement of case to add another defence was that from the defendant's point of view, the sum of money involved was not large.<sup>737</sup>

The difference that a party's financial resources can make was set out in *Harrison v Pilkington* (2019),<sup>738</sup> in the context of the defendant's adjournment application. If the claim had been worth a sum that would have had a significant impact on the defendant, or if the defendant had been of limited means, those points would have weighed in favour of granting an adjournment.<sup>739</sup> As it was, the defendant was a corporate entity and the claimant an individual, factors which weighed in favour of refusing the adjournment.<sup>740</sup> In *Adelson v Associated Newspapers Ltd* (2007),<sup>741</sup> the well-resourced claimant applied for permission to add a claim for aggravated damages. Rich parties are as entitled to compensation as anyone, but the way the claimant had pursued the proceedings suggested that the financial outcome was not his primary consideration.<sup>742</sup> The inference was that if the amendments were refused, any prejudice to the claimant in the form of lower compensation would not be significant to him. This was relevant to whether it would be proportionate to expend additional time and costs on investigating the new claim.<sup>743</sup> Well-resourced parties may also be able to deal with time- and cost-intensive procedural orders which would be unmanageable for parties with more limited resources. In *PCP Capital Partners LLP v Barclays Bank Plc* (2020), the 'extremely large legal resources' on both sides meant that the expense of a disclosure order made a week before trial was not disproportionate.<sup>744</sup> The position might well have been different had there been some resource inequality between the parties.

The final factor listed in CPR 1.1(2)(c) is the complexity of the issues.<sup>745</sup> Complex issues can require the expenditure of more time, costs, and both *inter partes* and systemic resources.

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<sup>736</sup> [2015] EWHC 987 (Ch) [63].

<sup>737</sup> *Lacuna* (n 706) [14].

<sup>738</sup> *Harrison v Pilkington* (n 705)

<sup>739</sup> *ibid* [19].

<sup>740</sup> *ibid*.

<sup>741</sup> [2007] EWHC 997 (QB)

<sup>742</sup> *ibid* [85].

<sup>743</sup> *ibid* [85]-[86].

<sup>744</sup> *PCP Capital* (n 704) [118].

<sup>745</sup> CPR 1.1(2)(c)(iii).

Complexity is not always in lockstep with value: a low value claim can be complex, and vice versa. An increase in value will not inevitably mean an increase in complexity, as exemplified by the court's comments in *CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd* (2015).<sup>746</sup> While it might cost £300,000 or £30million to rectify defects, the expert evidence necessary to prove those defects and the reasonableness of any remedial scheme will be broadly the same.<sup>747</sup> The level of complexity is essentially the same, despite the difference in value. The complexity of the issues may rebut an indication that costs are disproportionate where a budget significantly exceeds half the value of the claim.<sup>748</sup> Conversely, where a matter is straightforward, it will be more difficult to argue that high costs are proportionate.<sup>749</sup>

Looking beyond costs to general case management, complexity can mean that additional evidence or time is required that may not be required in less complex cases. Some types of case may be more likely to have complex elements than others. Professional negligence claims, for example, will almost always require expert evidence, while commercial disputes may not.<sup>750</sup> It is, however, important to consider the actual complexity of the case. Statements of case can be drafted in such a way as to make a simple case seem complex. The claim for negligence in *Williams v Santander* looked complex when 'dressed up', but 'getting to the nitty gritty' the central question was quite simple.<sup>751</sup> The statements of case in *Excel-Eucan Ltd v Source Vagabond System Ltd* (2018) were lengthy, contrary to the requirement of the STS that they be simple and brief.<sup>752</sup> The court had to look beyond that superficial complexity to identify the actual issues and whether they required extensive disclosure and evidence and a longer trial than permitted by the STS.<sup>753</sup> Any eventual trial should be shaped to fit the issues, so that relatively simple issues are not dealt with at long and complex trials. The courts can, and indeed should, take control of this at the case management stage.<sup>754</sup>

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<sup>746</sup> [2015] EWHC 481 (TCC).

<sup>747</sup> *ibid* [43].

<sup>748</sup> *Marks and Spencer plc v Asda Stores Ltd* [2016] EWHC 2081 (Pat) [11].

<sup>749</sup> *K v K* [2016] EWHC 2002 (Fam) [2], [42]; *Price v MGN Ltd* [2018] EWHC 3395 (QB) [34].

<sup>750</sup> *Willis* (n 709) [12].

<sup>751</sup> *Williams v Santander* (n 707) [6].

<sup>752</sup> [2018] EWHC 3864 (Ch) [10].

<sup>753</sup> *ibid*.

<sup>754</sup> *Spin Master* (n 522) [10].

## Other relevant factors

Additional factors relevant to *inter partes* proportionality, other than those listed in CPR 1.1(2)(c), can also be identified. These can be divided into two categories: those related to the case and those related to the parties.

### *Case-related factors*

The court will consider whether the subject of a decision is relevant to the issues in dispute and the extent to which it will contribute to the resolution of the case. Amendments to statements of case may be allowed where they are closely related to the original pleaded case and do not materially extend the scope of the action or the issues to be investigated at trial.<sup>755</sup> Conversely, lack of relevance may be a reason for refusing amendments. The inclusion of unnecessary material in a statement of case, which would increase disclosure obligations, risk the introduction of satellite issues and increase the expenditure of *inter partes* and systemic time and costs, to no useful purpose, is to be avoided.<sup>756</sup> The same approach is taken to requests for further information.<sup>757</sup> They can be refused where the information requested would neither affect the outcome of the case nor save time or narrow the issues in dispute.<sup>758</sup> Relevance is not, however, a decisive factor. It may be that matters are relevant but that their inclusion is still disproportionate. In *McLaughlin*, the judge struck out parts of the claimant's statements of case partly on the grounds of relevance.<sup>759</sup> He stated that even assuming some of the matters pleaded were relevant, their inclusion would be disproportionate because the claim to which they related was not so large as to be proportionate to the likely cost of preparing and trying those issues.<sup>760</sup>

Lack of relevance to pleaded issues can contribute to the court's refusal to allow disclosure.<sup>761</sup> Irrelevant documents will not help the court resolve a dispute. Where standard disclosure has been given, and there is no basis for holding that there was any failure in that regard, this will support a determination that documents requested are not relevant because all relevant and

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<sup>755</sup> *Rothschild v Associated Newspapers Ltd* [2011] EWHC 3462 (QB) [61].

<sup>756</sup> *Tinkler* (n 502).

<sup>757</sup> CPR 18.

<sup>758</sup> *Heggin v Person(s) Unknown* [2014] EWHC 3973 (QB) [10].

<sup>759</sup> *McLaughlin* (n 506) [108].

<sup>760</sup> *ibid* [110].

<sup>761</sup> *Heggin* (n 758) [11]; *Akebia Therapeutic Inc v Fibrogen Inc* [2019] EWHC 1943 (Pat) [21].

non-privileged documents should already have been disclosed.<sup>762</sup> Disclosure can be a time-consuming and costly exercise. The fact that a search is unlikely to reveal anything of relevance can contribute to determining that the expenditure of time and costs is disproportionate.<sup>763</sup> On the other hand, the potential for discovering something of relevance can justify a complex, lengthy and expensive disclosure exercise. Even if that exercise involves looking for a needle in a haystack, it may be ‘a potentially very valuable needle’.<sup>764</sup> Failure to comply with an unless order requiring disclosure of ‘probative’ documents that are ‘material to an important issue in the case’ can result in a party being debarred from defending the claim against it.<sup>765</sup> The court must consider not only relevance, but to what a particular item of disclosure is relevant. In *Tesco*, it was noted that the central objective of the disclosure exercise was the disclosure of documents which went to the ‘real stuff of the case’.<sup>766</sup> The additional disclosure requested was not necessary for the ‘fair disposal of the real issues’.<sup>767</sup> Relevance will not, however, be considered in isolation. Even on the assumption that documents requested are relevant, specific disclosure may be refused where the circumstances of the case do not justify wide-ranging disclosure nor the time and work that it would require. and where there can be an ‘adequate’ investigation with the materials already available.<sup>768</sup>

Relevance is a spectrum. There will be cases where particular disclosure is relevant to the issues in dispute, but, on balance, it would be inappropriate to commit time, costs and resources to its production and inspection. The court may consider whether documents sought will provide a significant amount of additional information beyond that which is already available.<sup>769</sup> It may be disproportionate to order disclosure and inspection of documents which, in so far as they are relevant at all, largely duplicate what is already available.<sup>770</sup> Documents may be relevant, and they may not entirely duplicate those already provided, but their relevance and originality may be insufficient to make disclosure proportionate. It may be unnecessary to search for documents of ‘marginal’<sup>771</sup> and ‘peripheral’ relevance, particularly if the request is made late.<sup>772</sup> Where disclosure is provided, rather than requested, so close to trial that the receiving party

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<sup>762</sup> *Heggin* (n 758) [11].

<sup>763</sup> *Monde Petroleum SA v Westernzagros Ltd* [2016] EWHC 755 (QB) [5].

<sup>764</sup> *JSC BTA Bank v Ablyazov* [2014] EWHC 2788 (Comm) [130].

<sup>765</sup> *Pharmagona Ltd v Taheri* [2020] EWHC 66 (Ch) [17].

<sup>766</sup> *Tesco* (n 558) [6].

<sup>767</sup> *ibid* [13].

<sup>768</sup> *Baillie v Bromhead & Co* [2014] EWHC 844 (Ch) [29].

<sup>769</sup> *Simba-Tola v Trustees of Elizabeth Fry Hostel* [2001] EWCA Civ 1371 [22] (Keene LJ).

<sup>770</sup> *ibid*.

<sup>771</sup> *Amaryllis Ltd v HM Treasury* [2009] EWHC 1666 (TCC) [20].

<sup>772</sup> *ibid* [25].

will not have a proper opportunity to investigate or respond, relevance needs to be of a ‘compelling nature’ to justify admitting the new documents.<sup>773</sup> When deciding whether a particular request or item is relevant, it is important to consider the purpose that the disclosure in issue will serve. Identifying illustrative evidence, for example, may require less data than estimating quantum.<sup>774</sup> Even then, it may not always be worthwhile or proportionate to improve the accuracy of an estimate. Spending £30million to improve the accuracy of an estimate by plus or minus £5million is unlikely to be a ‘rational exercise’.<sup>775</sup>

Relevance also comes into play when dealing with witness and expert evidence. A two-stage test for the admissibility of witness evidence was set down in *JP Morgan Chase Bank v Springwell Navigation Corporation* (2005),<sup>776</sup> applying Lord Bingham’s principles in *O’Brien v Chief Constable of South Wales Police* (2005).<sup>777</sup> The first stage requires consideration of whether the evidence is ‘potentially probative’ of one or more issues.<sup>778</sup> If so, it is legally admissible, but can be refused under the second stage, in exercise of the court’s case management powers, if there are ‘good grounds’ to do so.<sup>779</sup> Lord Bingham suggested three matters might affect this exercise of discretion, again summarised in *JP Morgan v Springwell*. The first is whether the new evidence will distort the trial and divert attention to collateral issues, the second the need to weigh potential probative value against the potential for causing unfair prejudice, and the third the need to consider the burden that admission would lay on the resisting party.<sup>780</sup> Late witness evidence may be rejected where the court would not be ‘much if anything the wiser’ if it was allowed in, but it would require extra time and cost to be incurred.<sup>781</sup> The court can allow in parts of witness statements relevant to specific issues while refusing others.<sup>782</sup> It will consider whether the evidence in question will provide assistance in resolving the case which no other existing evidence can provide.<sup>783</sup> If it is the only evidence on a particular point, the trial may be unfair if it is excluded.<sup>784</sup> Duplication may mean that evidence is less likely to be allowed in,

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<sup>773</sup> *Obaid v Al-Hezaimi* [2019] EWHC 1953 (Ch) [38].

<sup>774</sup> *Vodafone* (n 545) [29]-[30].

<sup>775</sup> *ibid* [31].

<sup>776</sup> [2005] EWCA Civ 1602.

<sup>777</sup> [2005] UKHL 26.

<sup>778</sup> *JP Morgan v Springwell* (n 776) [67].

<sup>779</sup> *ibid*.

<sup>780</sup> *ibid*.

<sup>781</sup> *Papa Johns (GB) Ltd v Doyley* [2011] EWHC 2621 (QB) [125].

<sup>782</sup> *ibid*.; *Depp v News Group Newspapers Ltd* [2020] EWHC 1237 (QB) [27].

<sup>783</sup> *Papa Johns* (n 781) [129].

<sup>784</sup> *McTear* (n 714) [43] (Vos LJ).

however in some circumstances duplication may add ‘weight and gravity’ to a proposition, with the sum of duplicative evidence ‘exceeding the probative weight of the individual parts’.<sup>785</sup>

Once again, relevance involves a spectrum. Evidence may not be allowed in where its relevance is ‘so limited and tangential’<sup>786</sup> or ‘so marginal’<sup>787</sup> that the benefit of admission would not outweigh the burden. Evidence may also be excluded where it raises issues different from those to be determined and, as a result, would distort rather than assist the court’s focus.<sup>788</sup> As is clear from Lord Bingham’s suggestions, however, relevance is only one factor to be weighed in the balance. In *Karbhari v Ahmed* (2013), the defendant was refused permission to adduce a supplementary witness statement, despite the fact that the case could not continue without it and it would have been ‘pointless and absurd’ for him to present a case based only on his original statement.<sup>789</sup> Other factors outweighed the importance of the supplementary statement, notably the defendant’s improper motives and the scale of his non-compliance regarding service of evidence. The proportionate response, rather than allowing in the evidence, was to strike out the defence, despite the seriousness of the allegations and the high value of the claim.<sup>790</sup>

*British Airways Plc v Spencer* (2015)<sup>791</sup> sets out a three stage test for the restriction of expert evidence to that which is ‘reasonably required to resolve the proceedings’.<sup>792</sup> There is a sliding scale implicit in the assessment of what is ‘reasonably required’, from the essential to the useful.<sup>793</sup> The court must first look at each issue and determine whether expert evidence is necessary, rather than merely helpful, for its resolution: if so, then it must be admitted.<sup>794</sup> If the evidence is not necessary, but would be of assistance, then the court would be able to determine the issue without it.<sup>795</sup> The third question is whether, in the context of the proceedings as a whole, expert evidence on the issue is reasonably required to resolve the proceedings.<sup>796</sup> This third stage, as the court acknowledged, is a proportionality analysis which requires the court

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<sup>785</sup> *MacLennan* (n 572) [5].

<sup>786</sup> *Barkhuysen v Hamilton* [2016] EWHC 2858 (QB) [51].

<sup>787</sup> *Depp* (n 782) [20].

<sup>788</sup> *BGC Brokers* (n 521) [64].

<sup>789</sup> [2013] EWHC 4042 (QB) [33].

<sup>790</sup> *ibid* [36].

<sup>791</sup> *British Airways* (n 702) [68].

<sup>792</sup> CPR 35.1.

<sup>793</sup> *RBS Rights Issue* (n 678) [19].

<sup>794</sup> *British Airways* (n 702) [68].

<sup>795</sup> *ibid*.

<sup>796</sup> *ibid*.

to take into account factors such as the value of the claim, the effect of any eventual judgment on the parties and any delay that producing the evidence would entail.<sup>797</sup> At this third stage, the court must consider not only relevance to a particular issue, but the importance of that issue to the case as a whole.<sup>798</sup> Some issues may be central whereas others may be more peripheral. Some evidence may be admitted to resolve an issue if that issue stands alone, but it may not be reasonably required for the court to resolve *all* of the issues in the case.<sup>799</sup> In *Mitchell v News Group Newspapers Ltd* (2014), expert evidence was admitted that was helpful rather than necessary, but that evidence went to a central issue and might have been conclusive on that issue.<sup>800</sup> A similar issue could arise in another case, but the issue could be peripheral rather than central,<sup>801</sup> meaning that expert evidence was not reasonably required.

Similar issues arose in *Bulic*,<sup>802</sup> in which the claimant was permitted to adduce its own expert evidence rather than being compelled to accept the opinion of a single joint expert. The issue to which the expert evidence went was fundamental to the resolution of the main issue in dispute, and the saving of time and money inherent in using single joint experts is likely to assume greater significance in inverse proportion to the centrality of the issues.<sup>803</sup> Where relatively peripheral issues are concerned, it is likely to be ‘only in unusual circumstances that the services of a single joint expert will be dispensed with’.<sup>804</sup> In the context of survey evidence, the Court of Appeal stated in *Interflora v Marks & Spencer* (2012),<sup>805</sup> and reiterated ‘more loudly’ in another judgment in the same action,<sup>806</sup> that evidence of that kind should not be allowed unless it is likely to be of ‘real value’ and the likely value justifies the cost.<sup>807</sup> In *TJX UK v SportsDirect.com Retail Ltd* (2019), after citing the *Interflora* cases, the court noted that the question of proportionality in this regard is not simply an arithmetic assessment of survey costs as a proportion of total costs: more important is the value to the court of the evidence in question.<sup>808</sup> In both general and specific contexts, the main point is to determine whether the

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<sup>797</sup> *ibid* [63], [68].

<sup>798</sup> *ibid* [64].

<sup>799</sup> *ibid*.

<sup>800</sup> [2014] EWHC 3590 (QB) [24].

<sup>801</sup> *British Airways* (n 702) [65].

<sup>802</sup> *Bulic* (n 476).

<sup>803</sup> *ibid* [16].

<sup>804</sup> *ibid*.

<sup>805</sup> [2012] EWCA Civ 1501.

<sup>806</sup> *Interflora Inc v Marks & Spencer Plc* [2013] EWCA Civ 319 [26] (Lewison LJ).

<sup>807</sup> *Interflora* (n 805) [150] (Lewison LJ); *ibid*.

<sup>808</sup> [2019] EWHC 3246 (Ch) [100].

evidence will be of sufficient value to the court to justify the burdens imposed by its production and admission.

Case management decisions are procedural, but this does not mean that the substantive merits of a case are irrelevant. However, they are simply one more factor to weigh in the balance, rather than the primary consideration to which procedural factors are secondary. As highlighted by the Court of Appeal in *Mann v Chetty & Patel* (2000) in the context of an appeal against the refusal of permission to adduce expert evidence, it is not always easy to consider procedural issues without giving some thought to substance:

It is no easy matter for a judge to assess proportionality without prejudging the claimant's prospects of success. If the requirement in the Civil Procedure Rules is to have any effect at all, however, it seems to me that he cannot always take the claimant's claim at face value and simply ask how the proposed costs relate to the claimant's best case. The judge is entitled to take into account the broad ambit of the claimant's likely recovery in the event that the claimant succeeds in his factual allegations. This is particularly so in a case such as this, where the trial judge will have to ask himself what the appellant would have been likely to achieve had his case been properly prepared and presented.<sup>809</sup>

Where a party wishes to amend or add a new claim to its statement of case, that claim must have some prospect of success and not be based on 'invention or mere speculation'.<sup>810</sup> To allow in a claim that does not cross the arguability threshold would be 'wasteful of the parties' and the Court's time and resources'.<sup>811</sup> The attention paid to the strength and merits of the proposed amended case changes the later a party seeks permission to amend,<sup>812</sup> in that the later permission is sought, the stronger the prospect of success must be. In the context of setting aside default judgments, the Court of Appeal has noted that the merits of a defence are 'a factor which can be taken into account'.<sup>813</sup> The more serious the length and character of any delay, the stronger the defence and the more convincing the supporting evidence must be to justify setting aside.<sup>814</sup> In the context of security for costs, courts will have regard to a party's prospects

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<sup>809</sup> Unreported, 26 October 2000 [24].

<sup>810</sup> *Djurberg* (n 452) [37].

<sup>811</sup> *Suremime Ltd v Barclays Bank Plc* [2015] EWHC 2277 (QB) [8].

<sup>812</sup> *Rose* (n 449) [45]-[46].

<sup>813</sup> *Regione Piemonte v Dexia Crediop SpA* [2014] EWCA Civ 1298 [33] (Clarke LJ).

<sup>814</sup> *ibid* [126] (Clarke LJ).

of success, but should not go into the merits in detail unless it can clearly be demonstrated that there is a high degree of probability of success or failure.<sup>815</sup>

The relevance of the merits to procedural decisions is not, however, something on which there is total agreement. In *Abdulaziz*, members of the Supreme Court disagreed on the extent to which the merits were relevant to whether the defence should be struck out due to non-compliance with an unless order. Lord Neuberger, expressing the views of the majority, stated that:

the strength of a party's case on the ultimate merits of the proceedings is generally irrelevant when it comes to case management of the issues of the sort which were the subject matter of the decisions ... in these proceedings. The only possible exception could be where a party has a case whose strength would entitle him to summary judgment.<sup>816</sup>

Lord Clarke, on the other hand, said that 'each case depends on its own facts and ... it is almost always wrong in principle to disregard the underlying merits altogether as irrelevant'.<sup>817</sup> He agreed with Lord Neuberger that the court should not conduct a trial of the issues when making case management decisions, but did not think that the relevance of the merits should be limited to cases where a party would be entitled to summary judgment.<sup>818</sup>

In order to determine whether a party would be entitled to summary judgment, or whether they have a high possibility of success or failure, the court must spend some time considering the merits. Time and resources must be expended before the extent to which the merits are relevant can be determined. This may be a quicker process where a party has a particularly strong or weak case, in that the strength or weakness may be more obvious on the face of the statements of case or evidence. A more detailed investigation may be necessary where the relative strengths of the parties' cases are more finely balanced. It could be argued that the more serious the consequence of a decision, the more relevant the merits should be. In *Abdulaziz*, for example, the consequence was a lost opportunity to defend a claim for

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<sup>815</sup> *McLennan* (n 612).

<sup>816</sup> *Abdulaziz* (n 424) [29].

<sup>817</sup> *ibid* [75].

<sup>818</sup> *ibid*.

US\$6million. Such a serious consequence could be said to be more disproportionate the greater the likelihood of the defence being successful.

### *Party-related factors*

These factors relate to features of the parties themselves and how a particular management decision will affect them. At the heart of many of them lies equality of arms, one of the core principles underlying the CPR. The need to ensure that parties are on an equal footing comes to the fore in various ways, with one of the most obvious being creating a level playing field where parties have different financial resources. As noted in *Papa Johns (GB) Ltd v Doyley* (2011), there ‘is not one law for the rich and another for the poor’.<sup>819</sup> The context was the claimant’s application to rely on further witness evidence which, if allowed in, would require further disclosure and an extra day’s hearing. The claimant argued that any such consequences could be met by an appropriate costs order, to which the court replied that costs and who is to pay them ‘may be a relevant factor but cannot be conclusive’.<sup>820</sup> This concept of costs being a ‘universal panacea’ was left behind with the RSC.<sup>821</sup> Litigation between two similarly resourced parties may proceed and need to be managed differently to litigation between parties with unequal levels of resources. Inequality of arms may, for example, weigh in favour of there being a trial of a potentially decisive preliminary issue on the basis that this would reduce costs, whereas on the same facts there would be no preliminary issue trial were the parties similarly resourced.<sup>822</sup>

Another form of *inter partes* inequality is asymmetry of information. In respect of disclosure, for example, the nature of the parties’ businesses or activities may mean that a direct comparison cannot be drawn between the searches they have carried out. The fact that one has done more work does not of itself mean that the other’s efforts were inadequate.<sup>823</sup> The disclosure exercise may carry particular importance for one party, for example in *Vilca* in which it was through disclosure that the claimants would secure sufficient evidence to be able to proceed with the case.<sup>824</sup> This was the reason for the exercise being ‘time- and cost-

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<sup>819</sup> *Papa Johns* (n 781) [102].

<sup>820</sup> *ibid.*

<sup>821</sup> See ch 3 at 58.

<sup>822</sup> *Binstead v Zytronic Displays Ltd* [2018] EWHC 2182 (Ch) [31].

<sup>823</sup> *Digicel* (n 472) [26].

<sup>824</sup> *Vilca* (n 489) [27].

consuming.<sup>825</sup> In some cases, much of the relevant material will be exclusively within the control of one party,<sup>826</sup> meaning that the disclosure obligation will be weighted more towards that party.<sup>827</sup> The court must ensure that an overly-strict limitation of the scope of disclosure does not result in a party being kept in ignorance of important material.<sup>828</sup> On the other hand, the fact that one party has a large amount of material is not a reason for adopting a procedure that could jeopardise the fairness of the proceedings: disclosure orders must still be proportionate, for example requiring specific disclosure upon request.<sup>829</sup> This asymmetry can extend beyond disclosure, for example to expert evidence. The nature of the case and the witnesses required may mean that additional steps need to be taken to ensure the parties are on an equal footing. In *S v Chesterfield* (2003),<sup>830</sup> for example, the claimant appealed an order directing that expert evidence be limited to a report from not more than one expert in the field of obstetrics on each side. If that order stood, there would be one obstetrician giving evidence for the claimant and three for the defendant. Although two of the latter would strictly be witnesses of fact rather than expert witnesses, they would in the course of their evidence be bound to refer to the practice of other obstetricians.<sup>831</sup> This inequality, together with the importance, high value and complexity of the case, meant that it was appropriate for additional expert evidence to be allowed.

Failing to deal with these inequalities would result in prejudice. The need to ensure that a party is not disproportionately prejudiced, or subjected to disproportionate burdens, is a major factor in case management decisions. Prejudice can take various forms. Amendments to statements of case may require the non-amending party to revisit significant steps already taken<sup>832</sup> or undertake additional work,<sup>833</sup> sometimes to the extent of preparing a whole new case at the same time as preparing their existing case for trial.<sup>834</sup> This will require the expenditure of additional time and costs and may weigh against allowing the amendment. Conversely, if allowing an amendment or extension of time will not make a significant difference to the work

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<sup>825</sup> *ibid.*

<sup>826</sup> *Ventra Investments Ltd v Bank of Scotland Plc* [2019] EWHC 2058 (Comm) [38].

<sup>827</sup> *Kings Security Systems Ltd v King* [2019] EWHC 3620 (Ch) [29].

<sup>828</sup> *Ventra* (n 826) [69].

<sup>829</sup> *National Crime Agency v Leahy* [2020] EWHC 1242 (QB) [28].

<sup>830</sup> *S v Chesterfield* (n 701).

<sup>831</sup> *ibid* [37].

<sup>832</sup> *Donovan v Grainmarket Asset Management LLP* [2019] EWHC 1023 (QB) [27].

<sup>833</sup> *Versloot* (n 734) [14]; *Hague Plant Ltd v Hague* [2014] EWCA Civ 1609 [32]-[33], [42] (Briggs LJ); *Wani LLP v Royal Bank of Scotland* [2015] EWHC 1181 (Ch) [64]; *Morley v Royal Bank of Scotland* [2019] EWHC 270 (Ch) [73].

<sup>834</sup> *Bourke v Favre* [2015] EWHC 277 (Ch) [19]; *Birch v Beccanor Ltd* [2016] EWHC 265 (Ch) [31].

to be undertaken and costs incurred, or any such difference is not unreasonable, this will weigh in favour of allowing it.<sup>835</sup> In *CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd* (2015), the court noted that prejudice to parties as a result of amendments will fall on a spectrum, ranging from being ‘mucked around’ at one end to the disruption of and additional pressure on lawyers in the run up to trial, and the duplication of cost and effort, at the other.<sup>836</sup>

It is not simply a case of there being prejudice or no prejudice: the seriousness of the prejudice in context must be considered. Part of that context is the amount of work to which a party is already committed, including likely timescale and resource implications,<sup>837</sup> and the work that a party should already have done.<sup>838</sup> Taking this into account allows any additional burdens to be identified as accurately as possible. Determining how much additional work might be needed inevitably involves an element of conjecture, however it is ‘conjecture of the kind which is inevitably involved in all case management’.<sup>839</sup> The amount of prejudice required to justify management decisions will vary. In the context of late applications to amend statements of case, where the explanation for lateness is weak, the amount of prejudice to the non-amending party that may justify refusal of the application will be less than if the explanation has greater merit.<sup>840</sup> The court may need to balance prejudice accruing to both parties, as it did in *Brown v Innovatorone* (2011).<sup>841</sup> The burden imposed on the defendant by allowing the claimant to introduce new allegations was balanced against the detriment to the claimant in being unable to pursue an important part of their case if the allegations were shut out.<sup>842</sup> A fair balance was struck by allowing the claimant to introduce a limited number of new allegations.<sup>843</sup>

Delay is a common cause of prejudice. The seriousness of the underlying facts may mean that delay in resolution is ‘intolerable’ for one party,<sup>844</sup> or a party’s mental health condition may mean that greater weight is given to the prospect of having a claim hanging over them for a longer time, for reasons which are not their fault.<sup>845</sup> A defendant’s worsening financial situation

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<sup>835</sup> *Groarke* (n 446) [25], [32]; *Jones v Royal Wolverhampton* (n 515) [10]; *Hale v NHS Blood & Transplant* [2016] EWHC 1200 (QB) [36].

<sup>836</sup> [2015] EWHC 1345 (TCC) [19].

<sup>837</sup> *Komoka* (n 725) [12].

<sup>838</sup> *Morley v Royal Bank of Scotland plc* [2019] EWHC 2865 (Ch) [70].

<sup>839</sup> *Christoforou* (n 508) 12.

<sup>840</sup> *Donovan* (n 832) [29].

<sup>841</sup> [2011] EWHC 3221 (Comm).

<sup>842</sup> *ibid* [50]-[51].

<sup>843</sup> *ibid* [61].

<sup>844</sup> *Calden* (n 382) [30] (Brooke LJ).

<sup>845</sup> *Eaglesham v Ministry of Defence* [2016] EWHC 3011 (QB) [44].

may mean that the longer a trial is delayed, the lower a claimant's chances of recovering anything even with judgment in their favour,<sup>846</sup> or there may be real urgency to a party's commercial position that justifies an expedited trial.<sup>847</sup> Where a party has prosecuted an action quickly and proactively, the loss of a trial date on the ground of delay alone will cause that party to suffer 'real and meaningful prejudice'.<sup>848</sup> Delay may prejudice all parties in different ways, in which case those different types of prejudice need to be weighed against each other. In *Gubarev v Orbis Business Intelligence Ltd* (2019),<sup>849</sup> for example, the claimant's application for a split trial in a defamation case was refused. The claimants would potentially suffer prejudice if there was a single trial, because the need for further evidence would mean a delay in listing, which in turn would delay their achievement of vindication.<sup>850</sup> However, the matter had already been delayed, in which context the additional delay was unlikely to be so substantial as to unfairly prejudice their wish for vindication.<sup>851</sup> The potential prejudice to the defendant was that the claims against them would not be fully tested in court for a longer period of time.<sup>852</sup> This outweighed the potential prejudice to the claimants.<sup>853</sup>

Attempts to amend statements of case or submit evidence outside the prescribed timetable or close to a hearing date can cause delay. They may require the timetable to be amended or the hearing adjourned. Courts should be, and often are, slow to adjourn listed dates. This means that another aspect of potential prejudice is a party's inability to sufficiently deal with new information as part of its trial preparation. It may not be possible for the necessary work to be undertaken in the time available,<sup>854</sup> or imposing that additional work may disrupt the orderly preparation for trial.<sup>855</sup> Where one party provides new disclosure on the eve of trial, procedural unfairness will result if the other party does not have a proper opportunity to respond or to investigate how to deal with the new documents in cross-examination.<sup>856</sup> Where a party can

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<sup>846</sup> *Fitzroy* (n 613) [25].

<sup>847</sup> *Nicoventures Trading Ltd v Philip Morris Produces, SA* [2020] EWHC 1594 (Pat) [41].

<sup>848</sup> *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 (Comm) [90].

<sup>849</sup> *Gubarev* (n 602).

<sup>850</sup> *ibid* [61].

<sup>851</sup> *ibid* [74].

<sup>852</sup> *ibid* [63].

<sup>853</sup> *ibid* [71].

<sup>854</sup> *Cleveland Bridge (UK) Ltd v Sarens (UK) Ltd* [2018] EWHC 460 (TCC) [25]; *KMG International NV v Chen* [2020] EWHC 1203 (Comm) [68].

<sup>855</sup> *GBM Minerals Engineering Consultants Ltd v GB Minerals Holdings Ltd* [2015] EWHC 2954 (TCC) [22]; *Davidson v Seelig* [2016] EWHC 549 (Ch) [48]; *Al Nahda* (n 510) [22]; *Lacuna* (n 706) [13]; *Cleveland* (n 854) [25]; *ADVA Optical Networking Ltd v Optron Holding Ltd* [2018] EWHC 852 (TCC) [42], [47]; *Donovan* (n 832) [27].

<sup>856</sup> *Obaid* (n 773) [35].

satisfactorily deal with new information before trial, this will be a factor in favour of allowing its admittance. This has occurred, for example, where the evidence in question is limited,<sup>857</sup> of relatively low importance,<sup>858</sup> or broadly similar to information already advanced such that little further evidence is required.<sup>859</sup> In the specific context of expert evidence, this factor has been relevant where the receiving party's expert had already opined or adduced evidence on the relevant question,<sup>860</sup> and where they would not need to do much work to digest the new information.<sup>861</sup>

The converse of this aspect of prejudice is the unfairness that could be suffered by a party by not being able to present relevant evidence. This may outweigh prejudice to the party on whom evidence is served. The procedural unfairness caused by late admission of evidence may be justified if the relevance of that evidence is of a 'compelling nature'.<sup>862</sup> The absence of some evidence may have such a serious effect on one of the parties that it will outweigh prejudice caused to the other party by late admission, such as in *Gordon v Fraser (No.1)* (2014) where the absence of certain evidence would have risked reaching the incorrect decision that the defendant was a thief.<sup>863</sup> Similarly, in *Razaq v Zafar* (2020), where the fundamental issue related to a determination of dishonesty, it was important for the court to have a full picture rather than refuse admission of evidence that would leave the claimant 'significantly hamstrung' in the conduct of his case.<sup>864</sup> The importance of being able to present all relevant evidence can also be important in other contexts. Where a split trial is ordered, the court will not be dealing with all of the issues and evidence at the same time. This may cause prejudice to one or both of the parties. In *Gubarev*,<sup>865</sup> there was a risk that splitting the trial and deferring quantum issues may pressurise the defendant into settlement. They may not have wanted to risk the costs of a second trial without knowing the full extent of the damages claimed, and would have been unable to take an informed view as to whether the claimants would be likely to establish their losses.<sup>866</sup>

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<sup>857</sup> *Bank of Ireland v Donaldsons LLP* [2014] EWHC 1957 (Ch) [15].

<sup>858</sup> *McTear* (n 714) [49] (Vos LJ).

<sup>859</sup> *UPL Europe v AgChemAccess Ltd* [2017] EWHC 944 (Ch) [18].

<sup>860</sup> *Bank of Ireland* (n 857) [15]; *PJSC Tatneft* (n 700) [40].

<sup>861</sup> *McTear* (n 714) [49] (Vos LJ).

<sup>862</sup> *Obaid* (n 773) [38].

<sup>863</sup> Unreported, 16 June 2014 [23].

<sup>864</sup> *Razaq* (n 714) [46].

<sup>865</sup> *Gubarev* (n 602).

<sup>866</sup> *ibid* [62].

In some cases, a party may be prejudiced by being deprived of the opportunity to pursue all or part of their case. Sometimes, this will be too serious a consequence. Witness evidence may be allowed in,<sup>867</sup> or amendments to statements of case allowed,<sup>868</sup> because refusal would mean the effective termination of a party's case. In *GBM Minerals Engineering Consultants Ltd v GB Minerals Holdings Ltd* (2015), amendments to the defence were allowed because, although the defendant would still have been able to defend the claim, the allegations in the amendments were so serious that without them there would be 'extraordinary prejudice' to the defendant and a risk of a 'wholly unjust result'.<sup>869</sup> The striking out of a claim, with the associated denial of an opportunity to have arguable claims determined by the court, has been held to be disproportionate where a claimant was not on notice that a sanction of that seriousness was available and had no opportunity to protest it.<sup>870</sup> A similar determination has been made where the struck out claims would otherwise be statute-barred and the defendant had suffered limited prejudice.<sup>871</sup> In *Newland Shipping & Forwarding Ltd v Toba Trading FZC and Others* (2017), refusing relief from sanctions in respect of an acknowledgement of service served over two years late would have had an 'unusually disproportionate' result, because it would have deprived the defendant of the opportunity to challenge a baseless assertion of jurisdiction against him.<sup>872</sup> The consequence of bringing a defaulter's case to an effective end may be only one consideration in determining whether to grant relief, but it is a 'consideration of real importance'.<sup>873</sup> A party deprived of a cause of action may be able to obtain a remedy from its legal advisers. The court should consider this,<sup>874</sup> but it should not necessarily be given much weight. To 'relegate a litigant to a claim against its advisers involves leaving the litigant to a claim based on loss of a chance', which may be an unsatisfactory result.<sup>875</sup>

Nevertheless, despite the 'grave consequence' of depriving a party of its cause of action, this is not necessarily a determinative factor.<sup>876</sup> A party may have other avenues or defences that it is able to pursue.<sup>877</sup> In some cases, grave consequences aside, it is a proportionate response. As

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<sup>867</sup> *Chartwell Estate Agents v Fergies Properties SA* [2014] EWCA Civ 506 [58] (Davis LJ); *Devon & Cornwall Autistic Community Trust v Cornwall Council* [2015] EWHC 129 (QB) [41].

<sup>868</sup> *UPL Europe* (n 859) [18]; *Scipion Active Trading Fund v Vallis Group Ltd* [2020] EWHC 795 (Comm) [80], [93].

<sup>869</sup> *GBM Minerals* (n 855) [27].

<sup>870</sup> *Tamalt v Google UK Ltd* [2015] EWHC 4246 (QB) [21]-[22].

<sup>871</sup> *Lewis v Ward Hadaway* [2015] EWHC 3503 (Ch) [72]-[73].

<sup>872</sup> [2017] EWHC 1416 (Comm) [94].

<sup>873</sup> *Syed v Shah* [2020] EWHC 319 (Ch) [51].

<sup>874</sup> *Welsh v Parnianzadeh* [2004] EWCA Civ 1832 [32] (Mance LJ); *Devon* (n 867) [34].

<sup>875</sup> *Devon* (n 867) [24].

<sup>876</sup> *Chartwell* (n 867) [52] (Davis LJ).

<sup>877</sup> *Lacuna* (n 706) [14].

the Supreme Court stated in *Abdulaziz*, there is ‘undoubtedly attraction’ in the contention that preventing a party from challenging liability is a disproportionate sanction where that party appears to have a substantive defence.<sup>878</sup> However, the importance of litigants obeying court orders is ‘self-evident’, and if persistence in disobedience would lead to an unfair trial, it seems hard to quarrel with a sanction that prevents the party in breach from presenting or resisting the claim.<sup>879</sup> In situations such as that in *Abdulaziz*, where a party’s own failures or persistence in non-compliance underlie or contribute to the decision, the loss of the opportunity to pursue a claim or defence, or indeed the accrual of some less fatal prejudice, will be given less weight in the balancing exercise.<sup>880</sup>

A final party-related factor is the parties’ legitimate expectations. All parties, and indeed the court, have a legitimate expectation that trial windows and dates will be kept.<sup>881</sup> Parties are entitled to assume that they must meet and investigate their opponent’s case as pleaded<sup>882</sup> and on the basis of evidence properly admitted in the proceedings, and to prepare their own case on that basis. This entitlement may weigh against, for example, allowing amendments<sup>883</sup> or the admission of late evidence.<sup>884</sup> The court will be particularly reluctant to allow a party to change its position in terms of how its case is pleaded or pursued where that change of position runs counter to previous assertions or actions on which its opponent was entitled to rely. In *Benyatov*,<sup>885</sup> for example, a factor weighing against granting summary judgment was that the defendant’s actions prior to the application would have led ‘any reasonable observer’ to believe that a trial would take place.<sup>886</sup> They were inconsistent with a firmly held belief that there was no part of the claim that should go to trial. In *Rose*, one reason for not allowing a late amendment was that the claimant sought to put forward an entirely different basis of claim

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<sup>878</sup> *Abdulaziz* (n 424) [22] (Lord Neuberger).

<sup>879</sup> *ibid* [23] (Lord Neuberger).

<sup>880</sup> *Archlane Ltd v Johnson Controls Ltd* (unreported, 10 May 2012) [25]; *Phaestos* (n 446) [38]; *Clarke v Barclays Bank Plc* [2014] EWHC 505 (Ch) [30]; *Quah Su-Ling* (n 848) [95]; *CIP Properties v Galliford Try* (n 836) [44]; *Avanesov v Shymkentpivo* [2015] EWHC 394 (Comm) [68]; *Wani v RBS* (n 833) [65]; *The Council of the Borough of Milton Keynes v Viridor (Community Recycling MK) Ltd* [2016] EWHC 2764 (TCC) [24]; *ADVA Optical* (n 855) [52]; *Donovan* (n 832) [34]; *Harrison v Pilkington* (n 705) [20]; *Glaxo v Glenmark* (n 576) [28]; *Mitchell v Preci* (n 718) [20]; *Buckingham Homes Ltd v Rutter* [2019] EWHC 1760 (Ch) [39]; *Benkel v East-West German Real Estate Holding* [2020] EWHC 1489 (Ch) [66]; *Pearce v East and North Hertfordshire NHS Trust* [2020] EWHC 1504 (QB) [23].

<sup>881</sup> *Brown v Innovatorone* (n 841) [7]; *Quah Su-Ling* (n 848) [38]; *Poulton Plaiz Ltd v Barclays Bank Plc* [2015] EWHC 3667 (QB) [12]; *Mishcon de Reya v Leeds United Football Club Ltd* [2017] EWHC 1039 (QB) [23]; *Mitchell v Preci* (n 718) [21]; *T v Imperial* (n 718) [23].

<sup>882</sup> *ADVA Optical* (n 855) [41].

<sup>883</sup> *Versloot* (n 734) [14]; *Bourke* (n 834) [21]; *ADVA Optical* (n 855) [41].

<sup>884</sup> *Durrant* (n 714) [49] (Richards LJ).

<sup>885</sup> *Benyatov* (n 526).

<sup>886</sup> *ibid* [87].

which they had deliberately chosen not to assert when proceedings commenced.<sup>887</sup> They sought to do so after having repeatedly told the court and the defendant that they would not seek to take the action that lay at the heart of their new basis of claim.<sup>888</sup>

A relevant factor in the decision-making process is that one party has acted in reliance on their opponent's statement of case, evidence or assertions. As a result of that reliance, it would be unfair to allow the other party to change its position. Legitimate expectations pervade all aspects of litigation in that all parties expect their opponents, for example, to comply with rules and orders, to provide proper disclosure, to be truthful in pleadings and witness statements. Parties are entitled to conduct themselves accordingly. The court has similar legitimate expectations. Such expectations may therefore already be an implicit part of many case management decisions, particularly where the court considers questions of prejudice. In many cases, if a party suffers prejudice it will be because it conducted litigation in a certain way, on the basis of legitimate expectations, but those expectations were then thwarted by their opponent's behaviour.

#### **SYSTEMIC PROPORTIONALITY**

*Inter partes* proportionality is arguably the easier aspect of proportionality to incorporate into case management decisions. It involves only the parties and instant case, in respect of which judges have, or can obtain, all the information needed to conduct the balancing exercise. A judge does not, however, have comprehensive information on the progress and resource requirements of other cases, which makes systemic proportionality more difficult to apply.

#### **Cases in which systemic proportionality is applied**

In various contexts, courts have acknowledged the balance that must be struck when considering systemic proportionality. The systemic effect of a decision has been weighed against, for example, the prejudice to a party in being deprived of certain witnesses,<sup>889</sup> the court's 'instinct' to have the fullest evidence available,<sup>890</sup> the claimant's right to a full trial of its

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<sup>887</sup> *Rose* (n 449) [109].

<sup>888</sup> *ibid.*

<sup>889</sup> *Lorenzo v The Chief Constable of the West Midlands* [2012] EWCA Civ 1863 [21] (Moses LJ).

<sup>890</sup> *Lindsay v Debenhams Retail Plc* [2014] EWCA Civ 630 [27] (Davis LJ).

claim<sup>891</sup> and the potential benefit to a claimant of a successful claim.<sup>892</sup> This balance has been referred to in terms of a cost-benefit analysis.<sup>893</sup> In *Quah Su-Ling v Goldman Sachs International* (2015), in the context of a very late application to amend, Carr J referred to the court striking a balance ‘between injustice to the applicant if the amendment is refused and injustice to the opposing party and other litigants in general, if the amendment is permitted’.<sup>894</sup> This language highlights the fact that proportionality involves compromise, in that the achievement of perfection for some is rejected in favour of satisfaction for all.

A central principle identified in *Quah Su-Ling* was that, where a late application to amend is made, the risk to a trial date may mean that lateness will of itself cause the balance to be ‘loaded heavily’ against granting permission.<sup>895</sup> One of the main contexts in which systemic proportionality is factored into management decisions is where a hearing or trial date is at risk. Case management decisions have been made so as to maintain a listed date, with one of the reasons being that adjourning would negatively impact the use of court resources and other litigants, in a diverse range of circumstances. These have included applications for permission to amend statements of case,<sup>896</sup> to adduce additional evidence<sup>897</sup> or to limit the evidence that an opponent can adduce;<sup>898</sup> applications for security for costs;<sup>899</sup> strike out;<sup>900</sup> and, unsurprisingly, specific applications to adjourn.<sup>901</sup> There are also cases where the fact that there will be minimal disruption to the court system and no adverse impact on other court users is expressly relevant to the analysis.<sup>902</sup>

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<sup>891</sup> *Admans* (n 457) [51].

<sup>892</sup> *Al-Hasani v Nettle* [2019] EWHC 640 (Ch) [100].

<sup>893</sup> *Kimathi v The Foreign & Commonwealth Office* [2016] EWHC 3004 (QB) [52]; *Al-Hasani* (n 892) [162].

<sup>894</sup> *Quah Su Ling* (n 848) [38].

<sup>895</sup> *ibid.*

<sup>896</sup> *Mandrake Holdings Ltd v Countrywide Assured Group Plc* [2005] EWHC 311 (Ch) [21]; *CIP Properties v Galliford Try* (n 836) [13]; *Quah Su-Ling* (n 848) [90]; *Secker v Fairhill Property Services Ltd* [2016] EWHC 3789 (QB) [24]; *Henderson v Dorset Healthcare University Foundation NHS Trust* [2016] EWHC 3032 (QB) [48]; *Davidson* (n 855) [43]; *Gatto v Allianz SpA* [2017] EWHC 955 (Comm) [18]; *Al Nahda* (n 510); *Pearce* (n 880) [10], [14], [22].

<sup>897</sup> *Lindsay* (n 890) [26]-[27] (Davis LJ); *Warner* (n 681) [30].

<sup>898</sup> *Lorenzo* (n 889) [18]-[20] (Moses LJ).

<sup>899</sup> *Banwait v Dewji* [2013] EWCA Civ 1669 [22] (Patten LJ).

<sup>900</sup> *Ali v CIS General Insurance* (unreported, 29 July 2015) [39]-[40].

<sup>901</sup> *Fitzroy* (n 613) [8]; *WM Morrison Supermarkets Plc v Mastercard Incorporated* [2014] EWHC 3956 (Comm) [22]-[23]; *Brahilika v Allianz Insurance Plc* (unreported, 30 July 2015) 5; *Rai v Bholowasia* [2015] EWHC 430 (QB) [29]-[30]; *JSC Mezhdunarodniy Promyshlenny Bank v Pugachev* [2017] EWHC 1761 (Ch) [21]; *The Financial Conduct Authority v Avacade Ltd* [2020] EWHC 26 (Ch) [83].

<sup>902</sup> *Groarke* (n 446) [32]; *Singh v The Charity Commission* [2017] EWHC 2183 (Ch) [34]; *Re One Blackfriars Ltd* [2019] EWHC 2493 (Ch) [54]; *Salt Ship* (n 487) [156].

The imminence of a trial date, and the associated systemic consequences of losing that date, can be a decisive factor, as exemplified by *Murray v Devenish* (2017) and *Groarke v Fontaine* (2014). In the former case, the first instance judge’s refusal of permission to rely on new expert evidence had to be understood in the context of concerns about lateness and the forthcoming trial. By the time the appeal was heard, that balance had changed, because the trial date had ‘long gone’ and a new date had not been fixed.<sup>903</sup> The Court of Appeal dismissed the appeal because the first instance decision was within the judge’s discretion in the context in which it was made, but also determined that the claimant should now be entitled to introduce and rely on the new evidence.<sup>904</sup> The evidence was relevant but refusing to admit it had been an appropriate result of the case management balancing exercise in the context of the imminent trial date. In *Groarke*, the court noted that if allowing the defendant to amend its defence had necessitated an adjournment, this would have made a ‘significant difference’ to the analysis.<sup>905</sup>

Consideration of systemic issues is often confined to general comments, such as statements that there would be an ‘obvious effect on court resources’,<sup>906</sup> an ‘impact on other court users’<sup>907</sup> or ‘disruption to the court and other court users’<sup>908</sup> if a particular action were taken. Conversely, a judge might simply state that the impact on other court users would be ‘minimal’<sup>909</sup> or that they would suffer ‘little or no prejudice’.<sup>910</sup> Occasionally, however, judges have commented on specific listing issues. In *Mandrake Holdings Ltd v Countrywide Assured Group Plc* (2005), the court noted that the Chancery Division list at the relevant time was ‘already very full’ and there was ‘accordingly no leeway’,<sup>911</sup> while in *Fitzroy* the judge went into some detail on his diary and how adjourning the trial would affect other litigants by leaving ‘a hole ... of two weeks’.<sup>912</sup> In the majority of cases, it will be difficult to pinpoint precisely how the adjournment of a trial will affect court resources and other litigants. Judges do not have an overarching view of how those resources can be most efficiently assigned or a case-specific view of the requirements of all other cases before the court. Undertaking this sort of detailed analysis could itself be disproportionate. It is sensible to assume that vacating a listed date at the last minute will

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<sup>903</sup> [2017] EWCA Civ 1016 [19] (Gross LJ).

<sup>904</sup> *ibid* [20] (Gross LJ).

<sup>905</sup> *Groarke* (n 446) [15].

<sup>906</sup> *Banwaitt* (n 899) [22].

<sup>907</sup> *Lindsay* (n 890) [26] (Davis LJ).

<sup>908</sup> *Quah Su-Ling* (n 848) [90].

<sup>909</sup> *Morley* (n 833) [72].

<sup>910</sup> *Janakarajah v Oxford University Hospitals* [2020] EWHC 2802 (QB) [51].

<sup>911</sup> *Mandrake Holdings* (n 896) [21].

<sup>912</sup> *Fitzroy* (n 613) [28].

usually have some deleterious effect on resources and other litigants. As noted in *Gregor Fiskens Ltd v Carl* (2019), where the judge did not know what the state of the lists would be at the time fixed for trial and whether other useful work could be brought in, the very fact of having to relist a new trial and duplicate elements of the case to prepare for that trial would have an adverse effect on the administration of justice and the interests of other court users.<sup>913</sup> Approaching this assumption with a judge's experience of how the lists are managed<sup>914</sup> enables systemic considerations to be weighed in the balance without going into a detailed analysis.

Most cases that consider systemic issues in the context of adjournment focus on the waste of court resources caused by removing a case from the list at the last moment and the inability to fill the resulting gap with another case. This is not, however, the only consideration. The court in *Joint Liquidators of WR Refrigeration Ltd v WR Refrigeration Ltd* (2017) noted that it might have been possible to bring in another case if an adjournment was allowed, but it was also important to bear in mind the fact that other court users had not had trials listed because of this case.<sup>915</sup> In *Warner*, the court considered not only removal from the list but also the need to relist in the future.<sup>916</sup> A late adjournment may have a broader systemic impact than the direct effect of removing a case from the lists.

Concern about systemic considerations will not always result in refusal to adjourn or vacate a hearing. Judges may ameliorate their concerns by stating that any gap in the listings can be filled,<sup>917</sup> although this may be expressed more as hope than certainty.<sup>918</sup> Sometimes no such comments will be made but the hearing will, however reluctantly,<sup>919</sup> be vacated. *Inter partes* factors can be weighed against systemic factors in situations where the balance comes out in favour of the former. Those factors have included, for example, the need to avoid a 'highly unsatisfactory' break between lay and expert evidence,<sup>920</sup> the scale of outstanding disclosure issues meaning that the case would not be fit to be tried as listed,<sup>921</sup> the 'extraordinary prejudice' to a party if they are not permitted to amend their pleadings to include very serious

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<sup>913</sup> [2019] EWHC 3360 (Comm) [53].

<sup>914</sup> *Lindsay* (n 890) [26] (Davis LJ).

<sup>915</sup> [2017] EWHC 3608 (Ch) 11.

<sup>916</sup> *Warner* (n 681) [30].

<sup>917</sup> *Brown v Mujibal* (unreported, 4 April 2017) 4.

<sup>918</sup> *Addison v Royal Bank of Scotland plc* [2016] EWHC 180 (Ch) [21].

<sup>919</sup> *Vilca* (n 489) [106]; *Smith v Wellington Court (St. John's Wood) Residents Management Ltd* [2020] EWHC 940 (Ch) [28].

<sup>920</sup> *Brown v Mujibal* (n 917) [11].

<sup>921</sup> *Vilca* (n 489) [106].

allegations,<sup>922</sup> and the risk that a damages claim may fail if an amendment is not allowed, where it is common ground that loss was caused by the defendant's breach.<sup>923</sup> These cases highlight an important point: systemic proportionality is no more important than *inter partes* proportionality. Systemic considerations are 'only one factor relevant to the furtherance of the overriding objective'<sup>924</sup> and there is no rule that where court resources and other litigants will be negatively affected those interests must prevail.

In other cases, adjourning a hearing or trial may on balance be the systemically proportionate approach. In *London & Henley (Middle Brook Street) Ltd v Secretary of State for Communities and Local Government* (2013), adjourning to allow settlement of a complex case, where the process was close to completion, would avoid the use of further court time in future.<sup>925</sup> The court did, however, note the immediate detrimental systemic effect as the time could not be allocated to other cases, and stated that the circumstances were 'truly exceptional'.<sup>926</sup> In other cases, the court has factored in the resources that would be used should a claimant start a fresh action if amendments<sup>927</sup> or the joinder of an additional defendant<sup>928</sup> are refused. Systemic proportionality is a factor to be weighed in the balance and there will be cases where the balance comes out in favour of *inter partes* considerations. The crucial point is that it is weighed in the balance in the first place.

Systemic considerations also become pertinent when courts are considering whether to order preliminary issue or expedited trials. In *Steele v Steele* (2001), Neuberger J set out ten points to take into account when considering whether to order a preliminary issue trial, the tenth being whether it was 'just' to order a preliminary issue.<sup>929</sup> There is no explicit reference to systemic considerations in *Steele*. However, the court in *Binstead v Zytronic Displays Ltd* (2018) stated that when considering that tenth point, it is necessary to step back and consider the matter in the round, taking into account the Overriding Objective, including *inter partes* and systemic considerations.<sup>930</sup> The earlier case of *Lexi Holdings Plc v Pannone & Partners* (2009) did not refer to *Steele*, but did highlight the importance of considering the use of the parties'

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<sup>922</sup> *GBM Minerals* (n 855) [27].

<sup>923</sup> *Scipion* (n 868) [80], [93].

<sup>924</sup> *Addison* (n 918) [21].

<sup>925</sup> [2013] EWHC 4207 (Admin) [11].

<sup>926</sup> *ibid* [16].

<sup>927</sup> *Georgiev v Kings College Hospital NHS Foundation Trust Appeal* [2016] EWHC 104 (QB) [27].

<sup>928</sup> *CPL Ltd v CPL OPCO (Trinidad) Ltd* [2016] EWHC 1452 (Ch) [51].

<sup>929</sup> [2001] CP Rep 106 13.

<sup>930</sup> *Binstead* (n 822) [30].

and the court's resources in deciding whether to order a preliminary issue.<sup>931</sup> Ordering preliminary issue trials requires caution. They can seem like a way to save time, costs and resources for parties and the court. The preliminary issue trial will likely be shorter and require less work than a trial of all the issues. However, many preliminary issue trials have not been a success.<sup>932</sup> The Supreme Court criticised the use of a preliminary issue trial in *Woodland v Essex County Council* (2013), noting that without it the matter 'would almost certainly have been decided by now'.<sup>933</sup> There is no explicit reference to systemic issues in the judgment, but it is clear that the case had used more resources than it should have done. In *Bond v Dunster Properties Ltd* (2011), the Court of Appeal noted that '[w]hile they have their value, it is notorious that preliminary issues often turn out to be misconceived, in that, while they are intended to short-circuit the proceedings, they actually increase the time and cost of resolving the underlying dispute'.<sup>934</sup> In both that case and a subsequent one, *Rossetti Marketing v Diamond Sofa* (2012),<sup>935</sup> the Court of Appeal stated that preliminary issue hearings will not be appropriate in the majority of cases. In *Rossetti*, the ordering of preliminary issues over-complicated the matter, increasing expenditure of time, costs and resources.<sup>936</sup> Considering these authorities, the judge in *Binstead* noted that he should 'not be overly enthusiastic in assuming that the best outcome will occur should a preliminary issue trial take place'.<sup>937</sup>

It is important to look beyond the immediate effect of a particular case management decision and consider how that decision will affect the case overall, and how in turn that will affect allocation of court resources. Ordering a preliminary issue or expedited trial will sometimes be appropriate from a systemic perspective. Resolving certain issues before others may mean that a case uses fewer court resources overall, for example if a claim will either end or potentially settle after resolution of a preliminary issue,<sup>938</sup> or where early resolution of a discrete issue will narrow the scope and cost of the litigation.<sup>939</sup> In some cases, however, this approach may lead to a case taking longer, costing more, and using more of the court's resources.<sup>940</sup> Where there is no significant difference between the timings for listing a preliminary issue trial and a full

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<sup>931</sup> [2009] EWHC 3507 (Ch) [4].

<sup>932</sup> *ibid* [9].

<sup>933</sup> [2013] UKSC 66 [2] (Lord Sumption).

<sup>934</sup> [2011] EWCA Civ 455 [107] (Arden LJ).

<sup>935</sup> [2012] EWCA Civ 1021.

<sup>936</sup> *ibid* [74]-[75] (Lord Neuberger MR).

<sup>937</sup> *Binstead* (n 822) [16].

<sup>938</sup> *Simpkin* (n 595) [45].

<sup>939</sup> *Koninklijke Philips* (n 594) [46]-[49].

<sup>940</sup> *Dahlan v Middle East Eye Ltd* [2019] EWHC 2261 (QB) [11].

trial, and a claim is ‘already ... stale’, the systemic aspects of the Overriding Objective lend weight to bringing that claim on in its entirety as soon as possible.<sup>941</sup> The court will need to balance *inter partes* concerns, such as having a particular issue resolved as soon as possible, with the disruption to the lists and other litigants that having one action ‘jump the queue’ may cause.<sup>942</sup> As with many aspects of proportionality, this is not an ‘either or’ question. If preliminary issues are identified early, it may be appropriate to deal with them separately, where it is inappropriate to do so when those same issues are identified at a late stage.<sup>943</sup>

In *WL Gore & Associate GmbH v Geox SpA* (2008),<sup>944</sup> Lord Neuberger set down four points to be considered when deciding whether to order an expedited trial. The court must consider whether there is a good reason for expedition, whether it would interfere with the good administration of justice, any prejudice to the party not requesting an expedited trial, and any ‘special factors’.<sup>945</sup> The second factor includes the interests of ‘parties to other cases’.<sup>946</sup> Subsequent cases have referred to interference with the administration of justice where a trial is expedited as ‘inevitable’<sup>947</sup> because such a decision will always involve ‘a degree of queue jumping’<sup>948</sup> and queue jumping is assumed to be prejudicial, absent good reason.<sup>949</sup> There is likely to be a large number of litigants who want their cases to be tried as early as possible, so there must be a good reason for expedition.<sup>950</sup> Even if the court would have availability to bring a trial on swiftly, and there is no need to move other cases, the question must be considered as a matter of principle.<sup>951</sup> Not all expedition is equal, as different degrees will cause different amounts of disruption. There should be no greater disruption than necessary to accommodate the degree of expedition sought.<sup>952</sup>

Systemic issues have been considered and expedition has nonetheless been ordered where a party’s commercial position imports real urgency to the need for an early trial<sup>953</sup> and where

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<sup>941</sup> *Gorton v McDermott Will & Emery UK LLP* [2018] EWHC 2045 (Comm) [44].

<sup>942</sup> *Takeda* (n 597) [23].

<sup>943</sup> *Dahlan* (n 940) [9].

<sup>944</sup> [2008] EWCA Civ 622.

<sup>945</sup> *ibid* [25].

<sup>946</sup> *ibid* [30].

<sup>947</sup> *Takeda* (n 597) [14].

<sup>948</sup> *IPCom GmbH & Co KG v Vodafone Group Plc* [2019] EWHC 1255 (Pat) [15].

<sup>949</sup> *Eli Lilly and Company v Human Genome Sciences, Inc.* [2012] EWHC 2857 (Pat) [56].

<sup>950</sup> *Petter v EMC Europe Ltd* [2015] EWCA Civ 480 [16] (Vos LJ).

<sup>951</sup> *Middlesbrough Football & Athletic Co (1986) Ltd v Flahavan* [2018] EWHC 4051 (QB) [18]; *Eli Lilly* (n 948) [56].

<sup>952</sup> *Nicoventures* (n 847) [27].

<sup>953</sup> *WL Gore* (n 944) [26]-[27]; *ibid* [11].

there is a need to hear an application for injunctive relief before restrictive covenants come to an end, in order to avoid losing any benefit those covenants may have conferred.<sup>954</sup> On the other hand, expedition has been refused where the requesting party has been slow to date in pursuing the litigation<sup>955</sup> and where the parties were in the middle of a tender process in which the claimant might still be successful.<sup>956</sup> In the latter case, the court thought that other court users might be ‘surprised’ to find that the claimant’s case had been given priority.<sup>957</sup> In *Law Debenture Trust Corporation Plc v Elektrim SA* (2008), the court raised an important practical point: ordering an expedited trial may impose impossible working conditions and directions that may not work in practice and so would not be complied with, all of which would culminate in an application to adjourn the trial.<sup>958</sup> This, of course, would not be a proportionate use of the court’s resources.

Systemic considerations are not limited to decisions affecting trial listings. Use of court resources must be proportionate in the progress of a claim to trial, as well as the trial itself.<sup>959</sup> This means that courts will consider the disproportionate use of resources in the context of case management and interlocutory matters. Avoidable adjournment of CMCs wastes the court’s time, which is a factor to be taken into account when considering whether to grant relief from sanctions to a party whose behaviour contributes to such an adjournment.<sup>960</sup> Concerns about future management being an inappropriate and inefficient use of court resources have supported decisions to refuse<sup>961</sup> and allow<sup>962</sup> permission to amend statements of case and to bring proceedings to an end.<sup>963</sup> That a case has to date made ‘very significant calls on the court’s resources’, even if no hearings have been ‘imperilled’, can justify transferring the onus to a defendant to make out his case by applying to set aside a default judgment.<sup>964</sup> The time and resources expended ‘behind the scenes’ to ensure that court business runs smoothly are also relevant, as exemplified by *Richardson v Glencore Energy UK Ltd* (2014). The parties wrote to the court the day before the first CMC to say that agreement had been reached on directions and to ask whether attendance was still required. Late requests such as this disrupt the ‘orderly

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<sup>954</sup> *Middlesbrough* (n 951) [14].

<sup>955</sup> *Law Debenture Trust Corporation Plc v Elektrim SA* [2008] EWHC 2187 (Ch) [7], [9].

<sup>956</sup> *Joseph Gleave & Son Ltd v Secretary of State for Defence* [2017] EWHC 238 (TCC) [47]-[51].

<sup>957</sup> *ibid* [50].

<sup>958</sup> *Law Debenture Trust Corp* (n 955) [10].

<sup>959</sup> *Kings Security* (n 827) [57].

<sup>960</sup> *Dass* (n 381) [18]-[22].

<sup>961</sup> *Hague* (n 833) [25]-[27].

<sup>962</sup> *Coral Reef Ltd v Silverbond Enterprises Ltd* [2019] EWHC 887 (Ch) [32].

<sup>963</sup> *Bank of New York Mellon v Sterling Biotech Ltd* [2014] EWHC 1889 (Comm) [13].

<sup>964</sup> *Hanson v Carlino* [2019] EWHC 1940 (Ch) [21]-[23].

conduct of the court's business', because each request must be put before a judge for consideration, meaning the listing section has to divert attention from other matters.<sup>965</sup>

Disproportionate use of court resources can amount to an abuse of process. The Court of Appeal in *Jameel*, a defamation case, stated that '[a]n abuse of process is of concern not merely to the parties but to the court. ... The court is concerned to ensure that judicial and court resources are appropriately and proportionately used in accordance with the requirements of justice.'<sup>966</sup> The question is whether the commitment of resources is proportionate to what is at stake, or whether 'the game is worth the candle'.<sup>967</sup> In *Jameel*, it would have been an abuse of process to continue to commit the court's resources to an action where so little was at stake.<sup>968</sup> The applicability of *Jameel* is 'not confined to defamation'.<sup>969</sup> It has been cited as authority for the general principle that a statement of case can be struck out pursuant to CPR 3.4(2)(b) if it is 'pointless and wasteful including when the costs of the litigation will be out of all proportion to the benefit to be achieved'.<sup>970</sup> More succinctly, it is authority for the court having jurisdiction to strike out 'on proportionality grounds'.<sup>971</sup> In cases applying this principle, a clear interplay can be seen between *inter partes* and systemic considerations. The court balances the *inter partes* benefit of taking the matter to trial against the benefit to the system and all court users if the time that would be used for this case is made available to others. The principle should only, however, be applied in 'clear' cases,<sup>972</sup> highlighting the draconian nature of the strike out sanction.

Several of the cases cited above involve unsatisfactory conduct by one or more parties, for example the making of very late applications to amend or failure to adhere to case management timetables. Where a party's behaviour has systemic effects, those effects can increase the seriousness and consequences of that behaviour. This point was made in *Denton*.<sup>973</sup> The Court of Appeal stated that in considering the seriousness or significance of a breach, it is relevant to take into account the effect on litigation generally.<sup>974</sup> At the third stage of the *Denton* analysis,

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<sup>965</sup> [2014] EWHC 3990 (Comm) [11].

<sup>966</sup> *Jameel* (n 463) [54].

<sup>967</sup> *Schellenberg v British Broadcasting Corporation* [2000] EMLR 296 [55].

<sup>968</sup> *Jameel* (n 463) [70].

<sup>969</sup> *Higinbotham v Teekhungam* [2018] EWHC 1880 (QB) [39].

<sup>970</sup> *Magdeev v Tsvetkov* [2019] EWHC 1557 (Comm) [28].

<sup>971</sup> *Lloyd v Google LLC* [2018] EWHC 2599 (QB) [104].

<sup>972</sup> *Liberty Fashion Wears Ltd v Primark Stores Ltd* [2015] EWHC 415 (QB) [53]; *Bayerische Motoren Werke Aktiengesellschaft v Kellmatt Ltd* [2018] EWHC 2420 (IPEC) [6].

<sup>973</sup> *Denton* (n 27) (Lord Dyson MR).

<sup>974</sup> *ibid* [26].

if the breach has prevented other litigation from being conducted efficiently and at proportionate cost, that will weigh in favour of refusing relief from sanctions.<sup>975</sup> In *Altomart Ltd v Salford Estates (No.2) Ltd* (2014), for example, a delay of around 5 weeks in filing a respondent's notice of appeal was not regarded as serious or significant because it did not disrupt the progress of the litigation or the business of the court more generally.<sup>976</sup> In *LBI HF v Stanford* (2014), an application was made on the seventh day of trial for permission to call a witness and rely on a witness statement, which was refused. A relevant factor at both the first and third stages of the *Denton* analysis in that case was the effect that allowing the evidence would have in extending the length of the trial, and the inevitable knock-on effect on other litigation.<sup>977</sup> In *Lakhani v Mahmud* (2017), the court was concerned with disproportionate use of case management time where the defendant served its costs budget a day late. It stated that the extent to which the impact of a breach on the parties and the court is minimised can affect the level of seriousness and significance assigned to that breach.<sup>978</sup> A breach is not assigned one level of seriousness as soon as it occurs, which then remains static. If a party in breach takes steps to ameliorate the effect of that breach, they must consider the proportionate use of court resources and the interests of other litigants as well as their opponent. There are other cases in which the waste of court resources, in terms of other cases and litigants waiting their turn, have weighed against granting relief from sanctions.<sup>979</sup> The sanctions regime lies at the heart of the CPR. It is essential that systemic proportionality form an integral part of that regime if it is to truly embed itself into the application and operation of the rules.

### **Cases in which systemic proportionality is not applied**

There are instances where systemic concerns are relevant and yet they are not considered. Courts have adjourned or vacated trial dates without any explicit reference to systemic considerations, sometimes in response to adjournment applications made very close to the listed date.<sup>980</sup> In *Jumani v Mortgage Express* (2012), it was stated on appeal that the first instance judge had not grappled with the question 'at the centre of the application' to adjourn, which was whether a fair trial could be had on the listed date in the absence of the defendant's

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<sup>975</sup> *ibid* [34].

<sup>976</sup> [2014] EWCA Civ 1408 [22] (Moore-Bick LJ).

<sup>977</sup> [2014] EWHC 3385 (Comm) [33].

<sup>978</sup> [2017] EWHC 1713 (Ch) [45].

<sup>979</sup> *Swinden v Grima* [2014] EWHC 3387 (QB) [29]; *Morgan v Arriva North West* (unreported, 24 April 2015) [39], [43].

<sup>980</sup> *Collins v Gordon* [2008] EWCA Civ 110; *Jumani v Mortgage Express* [2012] EWCA Civ 1455; *R (Twin Training International Ltd) v Secretary of State for the Home Department* [2014] EWHC 1545 (Admin).

witnesses.<sup>981</sup> This was not balanced against any adverse effects of adjournment on the court system and other litigants. The Court of Appeal also said that the first instance judge might have sustained a refusal to vacate had he ‘reasoned the matter properly’.<sup>982</sup> There is no reference to whether such proper reasoning would include systemic considerations, and those considerations did not feature in the Court of Appeal’s analysis. Similarly, systemic considerations did not explicitly feature in the Court of Appeal’s analysis in *National Westminster Bank Plc v Rabobank Nederland* (2006), in which an appeal regarding amendments to statements of case was allowed where the first instance judge had been concerned with disturbance of the trial programme.<sup>983</sup>

The Court of Appeal again failed to refer to systemic considerations in *Collins v Gordon* (2008),<sup>984</sup> in which dismissal of an application to vacate was overturned. The first instance judge had noted the relevance of the Overriding Objective, including its systemic requirements. He took guidance from Practice Direction 29, specifically the statement that postponing a trial is an order of last resort.<sup>985</sup> The Court of Appeal determined that he was ‘wholly wrong’ and ordered the trial dates to be re-fixed. Sir Paul Kennedy stated that because Practice Direction 29 deals with a failure to comply with case management directions, the comment that postponement should be a last resort ‘does not really assist’<sup>986</sup> where the application to vacate was based on availability of counsel and experts. Despite explicit reference by the first instance judge to the systemic aspects of the Overriding Objective, the Court of Appeal does not refer to them at all. The Court of Appeal again overturned a first instance decision that had considered systemic issues in *Unadkat v West Bromwich Commercial Ltd* (2017)<sup>987</sup> and made no explicit reference to those issues in its re-exercise of discretion. Emphasis was given to the ‘overall leisurely approach’ taken by the parties prior to the application and the court considered detriment to the claimant of a short adjournment against that background.<sup>988</sup> This is an *inter partes*-focused approach that gives no explicit weight to systemic interests. There are other cases where trials or hearings are adjourned with no explicit reference made to systemic

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<sup>981</sup> *Jumani* (n 980) [15] (Laws LJ).

<sup>982</sup> *ibid.*

<sup>983</sup> [2006] EWCA Civ 1578 [30], [39] (Auld LJ).

<sup>984</sup> *Collins* (n 980).

<sup>985</sup> *Collins v Gordon* [2007] EWHC 2952 QB 3.

<sup>986</sup> *Collins* (n 980) [9].

<sup>987</sup> [2017] EWCA Civ 411.

<sup>988</sup> *ibid* [20]-[21] (Davis LJ).

considerations in the underlying analysis.<sup>989</sup> The lack of explicit reference is emphasised because it is not possible to tell whether systemic issues were factored in where, for example, the court simply states that ‘the overriding objective does require’<sup>990</sup> that a matter be adjourned. Considering the inconsistencies in understanding of the Overriding Objective highlighted earlier,<sup>991</sup> no assumptions can be made.

Another context in which adjournment has been ordered without consideration of systemic issues is where a late application is made to adduce witness or expert evidence. Weight may be given to the importance of the trial judge having all relevant evidence before them,<sup>992</sup> without prejudice to the parties if the evidence is refused and the trial date maintained being weighed against prejudice to the court system and its users if the trial is adjourned. In *Sandisk IL Ltd v Kingston Digital Europe Ltd* (2012), the judge stated that he did ‘not see how the overriding objective [could] be accomplished’ without allowing the evidence in question to be adduced,<sup>993</sup> but the lack of reference to systemic considerations suggests that the Overriding Objective was being considered in a solely *inter partes* context. This is supported by an earlier comment noting the parties’ views on keeping the trial date, with neither saying that ‘it is so important that it should be kept without regard to whether the case can be justly tried’.<sup>994</sup> In *Loanline (UK) Ltd v McIntosh* (2017), in the context of a late disclosure application, the trial was vacated because ‘[t]he court should not have to come to a determination on the merits of the rival cases without having before it the fullest possible picture of the relationship’ between the parties and their financial standing.<sup>995</sup> With no mention being made of the systemic consequences of this decision, this appears to be yet another case where *inter partes* considerations and the ability of the court to resolve the matter on the merits are given precedence.

There are also instances where the effects of potential future adjournments are considered on a solely *inter partes* basis. Additional disclosure searches were ordered in *Digicel (St Lucia) Ltd v Cable & Wireless Plc* (2008), with the judge noting that while it did not appear necessary to

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<sup>989</sup> *Fulton v Guys & St Thomas NHS Foundation Trust* [2015] EWHC 3637 (QB); *R (Kalah) v Secretary of State for the Home Department* [2017] EWHC 2373 (Admin); *Delta* (n 437); *Buckley v Guy’s & St Thomas’ NHS Foundation Trust* [2019] EWHC 1493 (QB); *Musst Holdings Ltd v Astra Asset Management UK Ltd* [2020] EWHC 22 (Ch).

<sup>990</sup> *Fulton* (n 989) [11].

<sup>991</sup> See above at 88ff.

<sup>992</sup> *Roberts v Williams* [2005] EWCA Civ 1086 [27] (Clarke LJ).

<sup>993</sup> [2012] EWHC 2170 (Ch) [6].

<sup>994</sup> *ibid* [2].

<sup>995</sup> [2017] EWHC 2341 (QB) [35].

re-fix the trial, if it did become necessary the claimants would have no complaint and the defendants would have to bear that consequence of their failure to carry out a reasonable search.<sup>996</sup> The comments suggest that the court would be amenable to re-fixing but there is no indication of whether or how it was determined that this would be a proportionate use of court resources. In *ARC Capital Partners Ltd v ARC Capital Holdings Ltd* (2015),<sup>997</sup> a stay pending challenge to and enforcement of an arbitration award was refused. The judge raised with the parties the possibility of vacating the trial date and ‘simply pushing the timetable back by six months’.<sup>998</sup> This was concluded to be unsatisfactory, but depending on how matters progressed it would ‘of course always be open to the parties to come to the court’ and say that the trial was not necessary or could be reduced in scope.<sup>999</sup> There is no acknowledgement of any potential systemic difficulties in fixing a new trial date and timetable, and the language suggests that if the parties wanted to vacate in future then the court would accommodate their wishes. This is not to say, however, that in these cases it would be inappropriate or disproportionate to adjourn the trials. The same is true in respect of all cases where trials or hearings have been adjourned or vacated. A court can consider systemic proportionality and determine that the balance falls in favour of adjournment or vacation. The point is that systemic proportionality must be considered, and in these cases it was not.

Systemic issues form an express part of the guidance for decisions regarding preliminary issue and expedited trials.<sup>1000</sup> This is not the case with split trials. Several cases<sup>1001</sup> cite *Electrical Waste Recycling Group Ltd v Philips Electronics UK Ltd* (2012)<sup>1002</sup> as setting down guidance on how the court should approach an application for a split trial. That guidance makes no reference to systemic considerations. The final ‘catch all’ point is that the court must consider ‘generally, what is perceived to offer the best course to ensure that the whole matter is adjudicated as fairly, quickly and efficiently as possible’.<sup>1003</sup> This can be contrasted with the position regarding preliminary trials.<sup>1004</sup> The absence of systemic considerations continues in the cases applying the *Electrical Waste* guidance. In *Gubarev*, the judge did consider the increase

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<sup>996</sup> *Digicel* (n 472) [96].

<sup>997</sup> [2015] EWHC 2170 (QB).

<sup>998</sup> *ibid* [28].

<sup>999</sup> *ibid*.

<sup>1000</sup> See above at 141-144.

<sup>1001</sup> *Roadchef Ltd v Ingram-Hill* [2013] EWHC 939 (Ch) [25]; *Celltrion Inc v Biogen Idec Inc* [2016] EWHC 188 (Pat) [14]; *Signia Wealth Ltd v Marlborough Trust Company Ltd* [2016] EWHC 2141 (Ch) [24]; *Hook* (n 602) [49]; *Gubarev* (n 602) [49].

<sup>1002</sup> *Electrical Waste* (n 592).

<sup>1003</sup> *ibid* [5].

<sup>1004</sup> See above at 141.

in court management time that two trials might entail,<sup>1005</sup> but no consideration was given to whether it was a proportionate use of court resources. *Hook v Sumner* (2016) proceeded on the basis of an *inter partes*-focused interpretation of the Overriding Objective, with the judge stating that the court's management powers 'must be exercised in accordance with the overriding objective of deciding the case expeditiously and economically and in a manner that is proportionate to the matters truly in issue.'<sup>1006</sup> These cases provide no indication as to why split trials should be dealt with differently to preliminary issue trials. Indeed, the two types of trial may sometimes be indistinguishable. A preliminary issue trial may serve a specific function in determining an issue the resolution of which is required before a matter can proceed any further, but that will not always be the case. The court in *Gubarev* used the terms interchangeably. Reference was made to the authorities warning against inappropriate preliminary issue trials,<sup>1007</sup> but the guidance applied is that from *Electrical Waste* on split trials as opposed to *Steele* on preliminary issue trials.<sup>1008</sup> *Daimler AG v Walleniusrederierna Aktiebolag* (2020), however, cites the *Electrical Waste* guidance as a 'non-exhaustive list' of relevant factors,<sup>1009</sup> before noting that the court's power under CPR 3.12(i) to direct a split trial must be exercised in accordance with the Overriding Objective, which includes considering systemic issues.<sup>1010</sup> There is no reason why systemic considerations would be relevant to ordering preliminary issue trials but not split trials. Any discrepancies in approach are another example of inconsistency in the courts' application of systemic proportionality.

Failure to consider systemic issues can also be identified in a wider case management context. Hearing actions together, for example, could free up court resources for use by other litigants, but in *Schutz (UK) Ltd v Werit UK* (2009),<sup>1011</sup> the court only considered the effect of this course on the parties. Inequality of arms in terms of financial resources meant that the just and convenient course was for the claims to be heard sequentially.<sup>1012</sup> The fact that a case has already used a significant amount of court resources can be factored into how it is managed going forward. However, no such analysis was undertaken in *A Khan Design Ltd v Horsley* (2014), in which the claimant tried to pursue questions of costs and enquiries as to damages

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<sup>1005</sup> *Gubarev* (n 602) [54].

<sup>1006</sup> *Hook* (n 602) [31].

<sup>1007</sup> *Gubarev* (n 602) [15].

<sup>1008</sup> *ibid* [49].

<sup>1009</sup> *Daimler* (n 604) [27].

<sup>1010</sup> *ibid* [31].

<sup>1011</sup> [2009] EWHC 131 (Pat).

<sup>1012</sup> *ibid* [14].

two years after the conclusion of trial.<sup>1013</sup> Nor was this done in *BES Commercial*, in which the matter had already been before the court for case management and in dealing with a disclosure dispute, the court ordered a further CMC to be listed.<sup>1014</sup> A solely *inter partes* analysis can also be seen in cases where the court considers bifurcating the determination of jurisdiction issues,<sup>1015</sup> the joinder of a new defendant,<sup>1016</sup> strike out of a defence three months before trial<sup>1017</sup> and whether a claim for fundamental dishonesty after discontinuance merited a hearing.<sup>1018</sup> It was noted above that one situation in which systemic issues may be relevant is where a particular decision would cause a party to commence fresh proceedings (with the concomitant use of court resources). There are also cases where it is noted that new proceedings may be commenced, but the resulting systemic effects are not considered.<sup>1019</sup> This is not to say that the systemic considerations inherent in commencing separate proceedings would have changed the outcome of the analysis in those cases, simply that this was a relevant factor that did not form part of that analysis.

Just as negative systemic consequences can affect the seriousness of a defaulting party's behaviour, there are also cases where this is not considered. In *Re Bankside Hotels Ltd* (2014),<sup>1020</sup> relief from sanctions was granted where, absent such relief, the defence would have stood struck out. The court went through the three-stage *Denton* analysis, but at no stage of that analysis were systemic issues considered. This is despite the evidence falling 'not far short' of establishing a clear course of conduct on the part of the defendant deliberately designed to delay the hearing.<sup>1021</sup> Such conduct clearly has a systemic impact. The judge noted that he must consider the Overriding Objective but only specifically cited *inter partes* aspects. He went on to say that:

An insistence on enforcing compliance with court orders in circumstances where there is no evidence of any substantial effect on the litigation and where it could not be said that as a result of non-compliance a trial has been put in jeopardy is in

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<sup>1013</sup> [2014] EWHC 3019 (IPEC) [27].

<sup>1014</sup> *BES Commercial* (n 561) [2], [80].

<sup>1015</sup> *Dynasty Company for Oil & Gas Trading Ltd v The Kurdistan Regional Government of Iraq* [2020] EWHC 890 (Comm) [18].

<sup>1016</sup> *Benkel* (n 880) [68]-[73].

<sup>1017</sup> *Orexim Trading Ltd v Mahavir Port and Terminal Private Ltd* [2019] EWHC 2299 (Comm) [23].

<sup>1018</sup> *Rouse v Aviva Insurance Ltd* (unreported, 15 January 2016) [5], [9].

<sup>1019</sup> *Bourke* (n 834) [25]; *Poulton* (n 881) [22]; *The Manchester Ship Canal Company v United Utilities Water Ltd* [2016] EWHC 259 (Ch) [35], [46], [49], [51].

<sup>1020</sup> [2014] EWHC 4440 (Ch).

<sup>1021</sup> *ibid* [48].

my view not the right approach. It is expressly not so in the light of the Court of Appeal's judgment in *Denton*. To do so would be to ignore the need to deal with a case justly bearing in mind that the effect of refusing relief would be to prevent the respondents from defending these petitions. In my view it would not be just, fair or proportionate to refuse relief.<sup>1022</sup>

Emphasis is placed on the trial being in jeopardy. *Denton*, however, goes beyond this. Lord Dyson MR made clear that the effect of a party's breach on other litigation is an important factor at the first and third stages of the relief from sanctions analysis.<sup>1023</sup> This did not feature in the analysis in *Re Bankside Hotels* or some subsequent cases. In *Talos Capital Ltd v JCS Investment Holdings XIV Ltd* (2014), the defendant deliberately caused delay which led to an urgent full day hearing,<sup>1024</sup> but this waste of court resources was not factored into the relief from sanctions analysis. In *Process and Industrial Developments Ltd v The Federal Republic of Nigeria* (2018), the focus was on whether any prejudice to the claimant could be remedied in costs where late service of the acknowledgement of service late lead to additional hearings.<sup>1025</sup> In *R (Plant) v Somerset County Council* (2016), the defendant had not engaged 'in any meaningful way' with the claim for two years<sup>1026</sup> and was unable to satisfy the first two stages of the *Denton* test, meaning the third stage was critical.<sup>1027</sup> The judge noted that this was:

precisely the sort of case in which the judge must consider all of the circumstances of the case so as to deal justly with the application including the need for litigation to be conducted efficiently and at proportionate cost and the need to enforce compliance with rules, practice directions and court orders.<sup>1028</sup>

In doing this, however, he only considered *inter partes* factors, notably negative effects on how the claimant would have to deal with his case.<sup>1029</sup> Allowing the defendant's applications would extend the length of the hearing,<sup>1030</sup> but there was no comment on whether this would be a proportionate use of the court's resources.

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<sup>1022</sup> *ibid* [62].

<sup>1023</sup> *Denton* (n 27) [34] (Lord Dyson MR).

<sup>1024</sup> [2014] EWHC 3977 (Comm) [35], [40].

<sup>1025</sup> [2018] EWHC 3714 (Comm) [76]-[83].

<sup>1026</sup> [2016] EWHC 1245 (Admin) [9].

<sup>1027</sup> *ibid* [15].

<sup>1028</sup> *ibid* [16].

<sup>1029</sup> *ibid* [18].

<sup>1030</sup> *ibid*.

In some cases where systemic proportionality is not considered, the result of an *inter partes* analysis may be the most ‘systemically proportionate’ result. *Inter partes* factors that have contributed to a refusal to adjourn include cost consequences for the parties,<sup>1031</sup> a lack of explanation for the change in circumstances underlying the application to adjourn,<sup>1032</sup> a party’s failure to either instruct an expert promptly or obtain the information that the expert required,<sup>1033</sup> the fact that there is sufficient time for parties to prepare for the hearing,<sup>1034</sup> and that delay would prejudice one or more parties.<sup>1035</sup> In these situations, the refusal to adjourn will mean that the court’s resources are not wasted and time that might have been assigned to an adjourned hearing can be assigned to other cases. This is a consequence of the court’s decision whether or not it is explicitly factored into the analysis. The absence of a systemic analysis here could mean one of two things: either the judge would never have considered systemic proportionality and it is by pure chance that the result is systemically proportionate, or it was determined that there was no need for an explicit systemic analysis because the result was systemically proportionate. In the latter case, there was a systemic analysis, it was merely implicit. If the latter were correct, this would raise a question as to why and how courts are using systemic proportionality, and whether it is sometimes used to reach a result that the court instinctively feels is right, but which cannot be reached on an *inter partes* analysis alone. This would mean that systemic concerns are still being treated as subordinate to *inter partes* concerns, because the former is being used as a means of reaching a desired *inter partes* result. It is not possible to determine conclusively whether this is actually the case, however the possibility lends further support to the need for more consistency in consideration of systemic issues.

### **Assumptions and insufficient consideration of systemic proportionality**

The cases cited above reflect opposite ends of a spectrum: at one end, systemic issues are considered and at the other, they are not. There are also cases that fall between those two extremes. In some cases, the court will refer to the importance of maintaining a trial date or

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<sup>1031</sup> *Borealis AB v Stargas Ltd (The Berge Sisar)* [2002] EWCA Civ 757 [56]-[57] (Rix LJ); *Financial Services Authority v Asset L.I. Inc* [2012] EWHC 2775 (Ch) [13].

<sup>1032</sup> *Subotic v Knezevic* [2013] EWHC 3011 (QB) [52].

<sup>1033</sup> *TST Millbank v Resolution Real Estate Ltd* [2018] EWHC 678 (Ch) [14]-[15].

<sup>1034</sup> *Pius v Fearnley* [2013] EWHC 2216 (Ch) [4]; *Hope Not Hate Ltd v Farage* [2017] EWHC 3275 (QB) [37].

<sup>1035</sup> *Plantation Holdings (FZ) LLC v Dubai Islamic Bank PJSC* [2013] EWCA Civ 1229 [49] (Gloster LJ); *Birch* (n 834) [31]; *Mahfouz v Rashid* [2016] EWHC 2173 (Comm) [18]; *Mitchell v Precis* (n 718) [21].

avoiding delay, but will give no detail as to why this is important.<sup>1036</sup> General comments are made, such as it being ‘in the public interest and in the interest of the parties that the fixed trial date be held’,<sup>1037</sup> that losing the trial date would be the ‘worst case scenario’<sup>1038</sup> or that a judge is ‘mindful of the need to preserve [the] trial window’<sup>1039</sup> or ‘reluctant as a matter of case management to do anything that would cause the adjournment of the trial’.<sup>1040</sup> The maintenance of trial dates has both *inter partes* and systemic importance, so reference to maintaining the trial date cannot be taken as evidence that systemic proportionality has been factored into the decision. References to the public interest or ‘the interests of justice’<sup>1041</sup> widen the scope beyond the parties to a particular case, but these are general phrases which do not necessarily refer to systemic procedural justice. Maintenance of a trial date can be in the public interest because it is important for the public to know that if they bring a case to court, there will be certainty in terms of a set timetable and trial date. The phrase ‘in the interests of justice’ begs the question: ‘justice to whom?’. Without more detail, it cannot definitively be said that the reference is to justice to all users of the court system.

In some cases, judges acknowledge that they must take systemic considerations into account, but do not factor them into the analysis when it comes to applying principles to the facts of the case. In *Nottinghamshire and City of Nottingham Fire Authority*, permission was given to admit evidence in response to an application made when the trial had been running for ten days and which resulted in an adjournment. The judge noted that ‘[c]ourt time which is wasted is lost to others who could have used it. Once a trial starts it is incumbent on the court to finish it as quickly as possible within the confines of the CPR.’<sup>1042</sup> The analysis underlying the decision, however, refers only to whether an adjournment will cause an injustice that would affect the judge’s ability ‘properly to recall all the evidence and deal with it fairly as between the parties’.<sup>1043</sup> In other adjournment cases courts have set out the need to consider ‘effective

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<sup>1036</sup> *Roberts v Williams* (n 992) [27] (Clarke LJ); *Sovereign Marine & General Insurance Company Ltd v Opposing Creditors* [2007] EWHC 1781 (Ch) [17]; *Multiplex Construction (UK) Ltd v Cleveland Bridge UK Ltd* [2008] EWHC 231 (TCC) [5]; *Gilmovitch v Bourne Leisure Ltd* [2016] EWHC 3228 (QB) [20]; *Tuke v Hood* [2017] EWHC 3598 (Comm) [10]; *Simou v Salliss* [2017] EWCA Civ 312 [73]; *ADVA Optical* (n 855) [38]; *Cleveland* (n 854) [17], [25]; *T v Imperial* (n 718) [23];

<sup>1037</sup> *Multiplex* (n 1036) [5].

<sup>1038</sup> *Sovereign Marine* (n 1036) [17].

<sup>1039</sup> *Gilmovitch* (n 1036) [20].

<sup>1040</sup> *Tuke* (n 1036) [10].

<sup>1041</sup> *Johnson v Berkshire Healthcare NHS Foundation Trust* [2013] EWHC 2439 (QB) [18]

<sup>1042</sup> *Nottinghamshire and City of Nottingham Fire Authority* (n 446) [27].

<sup>1043</sup> *ibid* [21].

management of the court's case load<sup>1044</sup> and the benefits and disadvantages 'for the court',<sup>1045</sup> but then conduct the actual analysis on an *inter partes* basis only. In *Bank St Petersburg v Arkhangelsky* (2014), the court recognised the importance of the interests of other court users, noting that 'nothing could be worse' for either them or the parties to a particular case than a trial 'which simply meanders and disintegrates'.<sup>1046</sup> In the analysis underlying the adjournment, however, there is no consideration of the effects of removing the trial from the list or of re-listing, and no balancing of these systemic effects against those that might result from a 'meandering' trial. In several cases involving applications to amend statements of case, judges quote from the relevant authorities setting out the principles to be applied, which include systemic considerations where late amendment might affect the trial date, but then conduct the case-specific analysis on a solely *inter partes* basis.<sup>1047</sup> The majority of these cases fall into the situation identified above, where an *inter partes* analysis has yielded a systemically proportionate result. In *GBM Minerals*, however, the trial was vacated with no systemic considerations having been expressly factored into the analysis.<sup>1048</sup>

Adjournment is not the only situation where this issue arises. In *Howard v Chelsea Yacht and Boat Company Ltd* (2018),<sup>1049</sup> the court considered whether there should be a preliminary issue trial. The judge referred<sup>1050</sup> to *Lexi Holdings*, which references the importance of systemic considerations.<sup>1051</sup> In conducting its analysis, however, the court focused on *inter partes* issues only, notably cost, delay, duplication of time and effort<sup>1052</sup> and the defendant's legitimate interests in having matters determined within a reasonable timescale.<sup>1053</sup> A comparison was made between the amount of court time that would be used for a single trial on the one hand and a preliminary issue trial on the other, but there was no reference to what would be a proportionate amount of court time to allot to this case.<sup>1054</sup> In *Orange Personal Communications Services Ltd v Hoare Lea* (2008), the court considered whether there should be a joint trial of

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<sup>1044</sup> *The Three Mile Inn Ltd v Daley* [2012] EWHC Civ 970 [15].

<sup>1045</sup> *Malhotra v Malhotra* [2014] EWHC 4340 (QB) [4].

<sup>1046</sup> [2014] EWHC 695 (Ch) [44].

<sup>1047</sup> *GBM Minerals* (n 855); *Mishcon de Reya* (n 881); *Cleveland* (n 854); *ADVA Optical* (n 855); *Montvale Invest Ltd v Terra Raf Trans Trading Ltd* [2018] EWHC 1507 (Ch); *Keadby Generation Ltd v Promanex (Total FM & Environment Services) Ltd* [2020] EWHC 2444 (TCC)

<sup>1048</sup> *GBM Minerals* (n 855).

<sup>1049</sup> *Howard v Chelsea Yacht & Boat Co Ltd* [2018] EWHC 1118 (Ch).

<sup>1050</sup> *ibid* [21].

<sup>1051</sup> See above at 141-142.

<sup>1052</sup> *Howard* (n 1049) [45].

<sup>1053</sup> *ibid* [56].

<sup>1054</sup> *ibid* [46].

two ‘intimately connected’ claims to allow for one to go through the relevant PAP process.<sup>1055</sup> It was noted that ‘the Court’s resources are a factor’<sup>1056</sup> in considering the application of PAP requirements, but when deciding that it would be ‘unfortunate’ if the claims were tried separately, only the *inter partes* factors of additional cost, delay and the risk of inconsistent findings were considered.<sup>1057</sup> The role of systemic considerations within the Overriding Objective was also identified in *Simmons v City Hospitals Sunderland NHS Foundation Trust*,<sup>1058</sup> but those considerations were not factored into the case-specific analysis of the claimant’s amendment application. These ‘spectrum points’ muddy the waters yet further in circumstances where the application of systemic proportionality is clearly inconsistent.

#### IV. PARTY PROPORTIONALITY

CPR 1.3 requires parties to ‘help the court to further the overriding objective’.<sup>1059</sup> The Overriding Objective has a two-sided nature, with full implementation requiring engagement from parties and the court. In *Price v Price* (2003), the claimant’s failure to comply with CPR 1.3 meant that the court was ‘deprived of the opportunity of managing the case actively in pursuance of the overriding objective’.<sup>1060</sup> As stated in *Phaestos v Ho* (2012), ‘[i]t is important that all parties to litigation are aware that they are bound by the overriding objective ... because the Court is seriously hindered in dealing with cases justly unless the parties and their legal advisers act in a way to enable them to do so.’<sup>1061</sup> Despite this, there are numerous instances of parties failing to comply with CPR 1.3. Non-compliance begins before proceedings are issued. Parties fail to comply with pre-action processes, for example by not sending<sup>1062</sup> or responding to letters before action,<sup>1063</sup> holding back documents either by falsely asserting that they have

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<sup>1055</sup> [2008] EWHC 223 (TCC) [32].

<sup>1056</sup> *ibid* [31].

<sup>1057</sup> *ibid* [32].

<sup>1058</sup> [2018] EWHC 3931 (QB) [32].

<sup>1059</sup> See ch 3 at 73.

<sup>1060</sup> *Price v Price* (n 636) [42].

<sup>1061</sup> *Phaestos* (n 446) [5].

<sup>1062</sup> *Phoenix Finance Ltd v Federation Internationale D’Automobile* [2002] EWHC 1242 (Ch) 3; *Daejan Investments Limited v The Park West Club Limited* [2003] EWHC 2872 [14]; *Sinclair v Dorsey & Whitney* [2015] EWHC 3888 (Comm) [5].

<sup>1063</sup> *Aegis Group Plc v Commissioners of Inland Revenue* [2005] EWHC 1468 (Ch) [35]-[36]; *Riniker v Employment Tribunals and Regional Chairmen* [2009] EWCA Civ 1450 [19], [20], [33] (Smith LJ); *Pepe’s Piri Piri* (n 673) [38].

none to disclose<sup>1064</sup> or failing to respond to reasonable requests,<sup>1065</sup> and failing to engage in negotiations<sup>1066</sup> or arrange a pre-action meeting.<sup>1067</sup>

Non-compliance extends beyond the letter of the PAPs to the spirit of pre-action conduct. In *Prior v Silverline International Ltd* (2015), it was held that a party cannot automatically be said to have acted reasonably if it issues a claim when technically entitled to under a PAP.<sup>1068</sup> The pre-2013 Road Traffic Accidents Protocol entitled a claimant to issue if the defendant did not reply to a letter of claim within 21 days. The defendant in *Prior* did not reply within that time and the claimant issued, but was not automatically entitled to its costs. Even though issue was legitimate, all the circumstances had to be taken into account, including significant pre-issue co-operation between the parties. Issuing the claim form in that context, even though technically permitted, was not within the spirit of the PAP.<sup>1069</sup> That compliance must embody both the letter and spirit of a PAP is also exemplified by *Pepe's Piri Piri v Junaid* (2019).<sup>1070</sup> The court did not distinguish between a defendant who provided no response to a letter before action and one who sent the 'barest of denials'.<sup>1071</sup> In *Thornhill v Nationwide Metal Recycling Ltd* (2011), the claimant failed so completely to comply with the Pre-Action Conduct Practice Direction that the Court of Appeal noted that its provisions 'appear to have been unfamiliar to the representative of the claimants' solicitors who conducted this litigation' and that 'it is essential that all parties to any prospective litigation and their solicitors should take this Practice Direction seriously'.<sup>1072</sup>

Courts have criticised parties for failing to co-operate with opponents after issue, including a lack of engagement with correspondence. Parties do not engage 'properly with the logic of the other's position',<sup>1073</sup> take a 'consciously unhelpful attitude',<sup>1074</sup> do not respond to disclosure proposals<sup>1075</sup> and fail to copy opponents into correspondence with the court regarding

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<sup>1064</sup> *Chapman v Tameside Hospital NHS Foundation Trust* (unreported, 15 June 2016) [12]-[13].

<sup>1065</sup> *Webb Resolutions Ltd v Waller Needham & Green* [2012] EWHC 3529 (Ch) [21]; *Harrath v Stand for Peace* [2016] EWHC 665 (QB) [62].

<sup>1066</sup> *Straker v Tudor Rose* [2007] EWCA Civ 368 [31] (Waller LJ).

<sup>1067</sup> *Higginson Securities (Developments) Ltd v Hodson* [2012] EWHC 1052 (TCC) [26]; *Frontier Agriculture Ltd v Wilkinson* [2014] EWHC 2548 (TCC) [3], [19].

<sup>1068</sup> unreported, 8 July 2015 [24]-[25].

<sup>1069</sup> *ibid* [23].

<sup>1070</sup> *Pepe's Piri Piri* (n 673).

<sup>1071</sup> *ibid* [38].

<sup>1072</sup> [2011] EWCA Civ 919 [44] (Sir Henry Brooke).

<sup>1073</sup> *Ventra* (n 826) [242].

<sup>1074</sup> *Brit Inns Ltd v BDW Trading Ltd* [2012] EWHC 2489 (TCC) [59].

<sup>1075</sup> *Phaestos* (n 446) [7].

progression of the action.<sup>1076</sup> These failures will cause problems for opponents and the court. Unco-operative attitudes increase expenditure of time and money and mean that a case takes up more of the court's time and resources than it should. This is exemplified by *Keith*,<sup>1077</sup> in which proper engagement by the claimant's solicitors in correspondence regarding disclosure could have avoided later difficulties when the matter had to come before the court because the defendant allegedly failed to comply with an unless order.<sup>1078</sup> Lack of co-operation extends further to failure to agree on issues and practicalities for disclosure,<sup>1079</sup> failure and refusals to engage in ADR,<sup>1080</sup> repeated failures to serve documents on time<sup>1081</sup> and failure to agree a sensible timetable.<sup>1082</sup> Engagement must be meaningful, a point made particularly clear in the context of failures to properly consider ADR and settlement. Courts have stated that 'going through the motions will not be good enough',<sup>1083</sup> that 'some attempt in correspondence between solicitors to settle' may be insufficient,<sup>1084</sup> and that 'best endeavours ... does not mean second best endeavours'.<sup>1085</sup> Failure to co-operate also manifests as an insistence on maintaining a weak claim or an untenable position through to trial.<sup>1086</sup> This would be far less likely to happen if parties fully engaged with each other with the genuine aim of bringing the dispute to a satisfactory close. These are all examples of the continuing prevalence of aggressive attitudes.

As recently as 2019, a case generated 'a dispiriting volume of mistrust' and 'unfortunate hostility', with the court reminding the parties that '[c]ourt proceedings are not a stage for a grudge match'.<sup>1087</sup> They 'ruin winners and losers alike'.<sup>1088</sup> A similar situation emerged in

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<sup>1076</sup> *Artibell Shipping Company Ltd v Markel International Insurance Company Ltd* [2008] EWHC 811 (Comm) [70].

<sup>1077</sup> *Keith* (n 547).

<sup>1078</sup> *ibid* [23].

<sup>1079</sup> *Centenary* (n 691) [9]-[10]; *Agents' Mutual* (n 690) [15].

<sup>1080</sup> *Burchell v Bullard* [2005] EWCA Civ 358 [40]-[41] (Ward LJ); *Painting v Oxford University* [2005] EWCA Civ 161 [22] (Maurice Kay LJ); *Faidi v Elliot Corporation* [2012] EWCA Civ 287 [36]-[37] (Jackson LJ); *Ghaith v Indesit Company UK Ltd* [2012] EWCA Civ 642 [26], [29] (Longmore LJ); *Garritt-Critchley* (n 627) [3]-[9]; *NJ Rickard Ltd v Holloway* [2015] EWCA Civ 1631 (Vos LJ); *BXB* (n 627) [8].

<sup>1081</sup> *First National Trustco (UK) Ltd v Page* [2018] EWHC 899 (Ch) [41].

<sup>1082</sup> *Buchanan v Metamorphosis Management Ltd* [2016] EWHC 3386 (Ch) [36].

<sup>1083</sup> *AB v Ministry of Defence* (n 623) [11].

<sup>1084</sup> *Ghaith* (n 1080) [29].

<sup>1085</sup> *Honda* (n 603) [39].

<sup>1086</sup> *Wates* (n 673) [19]-[21]; *IPC Media* (n 673) [24]-[26]; *NatWest v Rabobank* (n 673) [66]; *Igloo* (n 673) [27]-[28]; *Richmond* (n 673) [28]-[34]; *Consortium* (n 673) [53]; *Imperial Chemical* (n 673) [14]; *Pepe's Piri Piri* (n 673) [39]; *Hamad M Aldrees* (n 673) [40], [43]; *Lejonvarn* (n 673) [56]-[65]; *De Sena* (n 673) [22].

<sup>1087</sup> *UTB v Sheffield* (n 295) [6] (Vos C).

<sup>1088</sup> *Gamatronic* (n 513) [57].

*McTear v Engelhard* (2016), in which there was ‘heated email correspondence between solicitors’, each accusing the other of inappropriate behaviour in the conduct of litigation.<sup>1089</sup> A bad relationship between legal advisers was also an issue in *MacLennan v Morgan Sindall (Infrastructure) Plc* (2013), where it was no justification for a failure to agree sensible directions: the court was ‘entitled to expect legal advisers to co-operate in a pragmatic and sensible manner’.<sup>1090</sup> There is little difference between these cases and the earlier case of *King v Telegraph Group Ltd* (2004), in which conduct of the litigation was ‘illustrative of what always tended to happen in the pre-CPR regime when litigation solicitors took up unnecessary time and incurred disproportionate expense in litigating aggressively in correspondence instead of conducting themselves within the structured framework provided by the rules.’<sup>1091</sup> One might expect old attitudes to remain a few years after the CPR came into force, however they have persisted as the rules became more established. Indeed, as noted, judicial comments suggest that these aggressive attitudes are not only prevalent but accepted as the norm.<sup>1092</sup> The judge in *Lexi Holdings (In Administration) v Pannone and Partners* stated that CPR 1.3 requires parties and lawyers to ‘put on one side their understandable feelings of mutual outrage and hostility, and to co-operate with each other in a process of preparation for trial which incurs only proportionate costs and uses no more than an appropriate share of the court’s resources’.<sup>1093</sup> The court does not expect there to be no hostility between parties, but it should not filter through into how they and their lawyers conduct litigation.

Parties often try to gain tactical advantages over their opponents. In *Petter v EMC Europe Ltd* (2015), the Court of Appeal noted that there was ‘nothing particularly unusual’ about both sides using litigation to try to gain a tactical advantage.<sup>1094</sup> This is not only an overly indulgent reaction to tactical litigation, but it also suggests that such an approach was still common. This too can begin before proceedings are issued. In *Jet 2 Holidays Ltd v Hughes* (2019), the claimant provided a dishonest witness statement pre-action aimed at eliciting an admission from the potential defendant that could be deployed in any subsequent proceedings.<sup>1095</sup> Parties may conduct matters pre-action in such a way as to increase costs pressure on opponents<sup>1096</sup> and have tried to obtain an order in respect of pre-action costs as a way of putting themselves in an

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<sup>1089</sup> *McTear* (n 714) [11] (Vos LJ).

<sup>1090</sup> *MacLennan* (n 572) [12].

<sup>1091</sup> [2004] EWCA Civ 613 [66] (Brooke LJ).

<sup>1092</sup> See above at 115.

<sup>1093</sup> [2010] EWHC 1416 (Ch) [7].

<sup>1094</sup> *Petter* (n 950) [21].

<sup>1095</sup> [2019] EWCA Civ 1858 [40].

<sup>1096</sup> *Chapman* (n 1064) [15].

advantageous position going into a mediation.<sup>1097</sup> This is despite the statement in the Pre-Action Conduct Practice Direction that neither it nor any PAP should be used ‘as a tactical device to secure an unfair advantage over another party’.<sup>1098</sup>

Once proceedings are commenced, attempts to gain a tactical advantage have taken the form of applying to adjourn in order to improve a party’s negotiating position,<sup>1099</sup> making applications designed to obstruct an opponent in obtaining and enforcing judgment,<sup>1100</sup> unnecessarily opposing applications,<sup>1101</sup> dragging litigation out through repeated non-compliance to increase pressure on an opponent of limited means,<sup>1102</sup> applying for a split trial to delay consideration of the sanction that should attach to a serious breaches of disclosure orders,<sup>1103</sup> seeking to increase pressure on an opponent by repeated failure to particularise a case<sup>1104</sup> and trying to impose significant additional work very close to trial.<sup>1105</sup> In more than one case, a claimant has attempted to use its reply as a ‘Trojan horse’, essentially as a way to insert new claims into the proceedings by arguing that because they are included in the reply, then they must arise out of matters already in issue. This is an approach that ‘smacks of tactical manoeuvring’<sup>1106</sup> and may lead to the court refusing permission to amend even if the threshold test is satisfied.<sup>1107</sup>

One notable tactical approach is attempting to take advantage of minor procedural errors by opponents. In *Raayan Al Iraq Co Ltd v Trans Victory Marine Inc* (2013), the defendant attempted to exploit the claimant’s error in serving particulars of claim two days late by resisting their application to regulate the position, which the court described as ‘regrettable’.<sup>1108</sup> Defendants also attempted to take advantage of a short delay in *Summit Navigation Ltd v Generali Romania Asiguarare Reasigurare SA* (2014).<sup>1109</sup> The claimants were ready to provide security for costs

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<sup>1097</sup> *TJ Brent Ltd v Black & Veatch Consulting Ltd* [2008] EWHC 1497 (TCC) [4].

<sup>1098</sup> Practice Direction – Pre-Action Conduct and Protocols, para 4.

<sup>1099</sup> *Fitzroy* (n 613) [11], [32].

<sup>1100</sup> *Talos* (n 1024) [40].

<sup>1101</sup> *GBM Minerals Engineering Consultants Ltd v GB Minerals Holdings Ltd* [2015] EWHC 3091 (TCC) [16].

<sup>1102</sup> *Hayden v Charlton* [2010] EWHC 3144 (QB) [76]-[77].

<sup>1103</sup> *Byers v SAMBA Financial Group* [2020] EWHC 853 (Ch) [114]-[115].

<sup>1104</sup> *Foley v Lord Ashcroft* [2012] EWCA Civ 423 [42]-[43] (Pill LJ and Sharp J).

<sup>1105</sup> *Abramovich* (n 689) [34].

<sup>1106</sup> *Lokhova* (n 496) [58].

<sup>1107</sup> *Compagnie Noga D’Importation et D’Exportation SA v Australia & New Zealand Banking Group Ltd* [2005] EWHC 225 (Comm) [41].

<sup>1108</sup> [2013] EWHC 2696 (Comm) [18].

<sup>1109</sup> [2014] EWHC 398 (Comm).

the day after the specified deadline, but the defendants refused to accept it and refused to lift the stay that had been imposed pending provision of security. The claimant's default had no material impact on the efficient conduct of the litigation, but the defendant's response had a substantial effect on the timetable and orderly management of the case.<sup>1110</sup> Judgment in both of these cases was given prior to the Court of Appeal's warning in *Denton* that litigants should not take advantage of opponents' mistakes in order to gain 'litigation advantage',<sup>1111</sup> however that approach continued thereafter. It can be seen, for example, in opposition to an application for relief as an attempt to have evidence shut out,<sup>1112</sup> in a strike out application made after mistakes led to late service of particulars of claim in a breach deemed neither serious nor significant by the court,<sup>1113</sup> and in an attempt to seek the benefit of a sanction for late provision of security for costs where the applying party had suffered no prejudice and was fully protected by that late provision.<sup>1114</sup> The judge in *GBM Minerals v GB Minerals* highlighted the relevance of the warning in *Denton* beyond its immediate context of relief from sanctions and avoiding satellite litigation, stating that 'it makes clear that seeking opportunistic advantage will not achieve the aim of efficient conduct of litigation'.<sup>1115</sup>

Parties (or, more likely, their lawyers) can find ways to use new rules in a tactical manner. The rules on costs budgeting, for example, were introduced with the aim of enhancing the court's ability to keep costs at a proportionate level. At the same time, an express reference to proportionate cost was added to the Overriding Objective. It could not have been clearer that the CPR 1.3 duty included compliance with the rules on costs budgeting. However, the court's comments in *Findcharm Ltd v Churchill Group Ltd* (2017) suggest that parties still found ways to try to turn the rules to their tactical advantage:

... even now, some parties seem to treat cost budgeting as a form of game, in which they can seek to exploit the cost budgeting rules in the hope of obtaining a tactical advantage over the other side. In extreme cases, this can lead one side to offer very low figures in their Precedent R, in the hope that the court may be tempted to

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<sup>1110</sup> *ibid* [53].

<sup>1111</sup> *Denton* (n 27) [41] (Lord Dyson MR).

<sup>1112</sup> *McTear* (n 714) [38]-[41] (Vos LJ).

<sup>1113</sup> *Viridor Waste Management v Veolia Environmental Services* [2015] EWHC 2321 (Comm) [22], [39].

<sup>1114</sup> *Everwarm Ltd v BN Rendering Ltd* [2019] EWHC 2078 (TCC) [46].

<sup>1115</sup> *GBM Minerals v GB Minerals* (n 1101) [18].

calculate its own amount, somewhere between the wildly different sets of figures put forward by the parties.<sup>1116</sup>

In *Findcharm*, the defendant's Precedent R did precisely that, and was determined to be 'of no utility'.<sup>1117</sup> More recently, the Disclosure Pilot<sup>1118</sup> aimed to further embed a culture change driven by concepts of reasonableness and proportionality, with emphasis on disclosure being focused on the issues in dispute. A party could seek so-called Extended Disclosure, an order for which had to be reasonable and proportionate.<sup>1119</sup> In *UTB v Sheffield*, however, the defendant made a wide application for Extended Disclosure, after thousands of documents had already been disclosed, prompting the court to state that '[e]xtended disclosure is not ... something that should be used as a tactic, let alone a weapon, in hard fought litigation. It is all about the just and proportionate resolution of the real issues in dispute.'<sup>1120</sup> The defendant's application was 'outside the spirit' of the Pilot.<sup>1121</sup> It was noted in *McParland & Partners Ltd v Whitehead* (2020)<sup>1122</sup> that some parties sought to use the Pilot 'as a stick with which to beat their opponents', an approach that was 'entirely unacceptable'.<sup>1123</sup> The inescapable conclusion is that if parties can find a way to use a new rule tactically then they will try to do so.

The Supreme Court commented on parties' tendency to conduct litigation in a disproportionate manner in *Vedanta* in the context of a jurisdiction dispute,<sup>1124</sup> referring to cases in which warnings had been given about the need to litigate those issues proportionately and which had been ignored.<sup>1125</sup> The written case in *Vedanta* ran to 294 pages, electronic bundles included 8,945 pages, and there were 13 bundles of authorities. Lord Briggs, giving the judgment of the court, stated that:

[t]he fact that it has been necessary, despite frequent judicial pronouncements to the same effect, yet again to emphasise the requirements of proportionality in relation to jurisdiction appeals, suggests that, unless condign costs consequences

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<sup>1116</sup> [2017] EWHC 1108 (TCC) [3].

<sup>1117</sup> *ibid* [9]

<sup>1118</sup> Practice Direction 51U.

<sup>1119</sup> *ibid* para 6.4.

<sup>1120</sup> *UTB v Sheffield* (n 294) [79] (Vos C).

<sup>1121</sup> *ibid* [97].

<sup>1122</sup> *McParland* (n 621).

<sup>1123</sup> *ibid* [54].

<sup>1124</sup> See above at 112.

<sup>1125</sup> *Vedanta* (n 657) [6]-[10].

are made to fall upon litigants, and even their professional advisors, who ignore these requirements, this court will find itself in the unenviable position of beating its head against a brick wall.<sup>1126</sup>

Jurisdiction disputes are not the only area in which matters are routinely litigated disproportionately. Parties often present cases to the court in an inappropriate and disproportionate way, providing huge numbers of documents together with long and complex skeleton arguments.<sup>1127</sup> *Vedanta* is not the only case in which this sort of conduct has run counter to a clear judicial exhortation to litigate proportionately. In *R (Network Rail Infrastructure Ltd) v The Secretary of State for the Environment, Food and Rural Affairs* (2017),<sup>1128</sup> the claim was accompanied by six volumes of documents, comprising over 2,000 pages of irrelevant material. At the hearing, only a court-ordered 250-page core bundle and five or six extra pages were required. The claimant's skeleton argument was long, diffuse and often confused, lacked proper cross-referencing to the bundles, and buried the one 'rather obvious' point on which the claimant succeeded in two paragraphs within the discussion of an argument to which it did not belong.<sup>1129</sup> The claim was presented in this 'inappropriate manner' despite the 'clear statement'<sup>1130</sup> in *R (Newsmith Stainless Ltd) v Secretary of State for the Environment, Transport and the Regions* (2001) on the need to limit the evidence in judicial review cases challenging decisions of planning inspectors.<sup>1131</sup>

Parties must ensure that the material they present to the court is proportionate to the issue to be determined. Applications on case management decisions, for example, are not the place for an 'extraordinary volume of paper ... extravagantly long skeleton arguments ... and ... inordinate citation of authority'.<sup>1132</sup> Looking beyond the materials presented to the court, courts have criticised parties for litigating too widely by making no attempt to narrow issues, quantum,<sup>1133</sup> or the scope of procedural disputes.<sup>1134</sup> In *Vodafone*, the parties failed to even

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<sup>1126</sup> *ibid* 7.

<sup>1127</sup> *Brudenell-Bruce v Moore* [2013] EWHC 4408 (Ch) [5]; *Tesco* (n 558) [3]; *Vneshprombank LLC v Bedzhamov* [2019] EWHC 3616 (Ch) [5]-[6].

<sup>1128</sup> *R (Network Rail)* (n 384).

<sup>1129</sup> *ibid* [8]-[9].

<sup>1130</sup> *ibid* 3.

<sup>1131</sup> [2001] EWHC Admin 74 [6]-[10].

<sup>1132</sup> *Broughton* (n 424) [2] (Lewison LJ).

<sup>1133</sup> *JP Morgan* (n 676) [13]; *Digicel* (n 676) [47], [60]-[63]; *Euroption* (n 676) [18]; *Excalibur Ventures LLC v Texas Keystone Inc* [2013] EWHC 4278 (Comm) [6]-[9]; *Courtwell Properties Ltd v Greencore PF (UK) Ltd* [2014] EWHC 184 (TCC) [42]; *Hart* (n 675) [56]-[57].

<sup>1134</sup> *Lexi Holdings (In Administration) v Pannone & Partners* [2010] EWHC 1416 (Ch) [6].

address the scale of the proceedings in terms of both quantum and costs at the management stage.<sup>1135</sup> Even if parties commence a case with a wide scope and numerous allegations, they must be willing to adapt this approach during the course of the litigation, for example if it becomes clear after disclosure and inspection that the scope must be narrowed.<sup>1136</sup>

Another way in which parties fail to comply with CPR 1.3 is through delay, which can take many forms and occur at different stages. A party may, for example, deliberately fail to comply with agreed directions meaning that a trial date is lost,<sup>1137</sup> repeatedly fail to provide the security for costs required for the action to progress,<sup>1138</sup> fail to act with expedition in order to get the case to trial despite being aware that expedition is required,<sup>1139</sup> or fail to provide particulars of core elements of its claim for so long that a fair trial is no longer possible.<sup>1140</sup> In *Multiplex Construction (UK) Ltd v Cleveland Bridge UK Ltd* (2008), the litigation ‘dragged on for years’ after the parties ignored the court’s suggestion that they might seek a commercial resolution of quantum issues.<sup>1141</sup> Delay can also be relevant in terms of trial time itself, for example in *Peakman*,<sup>1142</sup> in which the trial took around a year to complete, with the advocates having ‘lost all sense of proportion in their conduct of it’.<sup>1143</sup> ‘Unacceptably slow’ progress in pursuing a case is contrary to the underlying principles of the CPR,<sup>1144</sup> one of the reasons being that delay has both *inter partes* and systemic consequences. Delays not only affect opponents, they prevent the court from managing the case and its resources effectively. Long delays inevitably generate applications that would not have been made had the litigation progressed efficiently and such applications cause the court’s resources to be expended unnecessarily.<sup>1145</sup> Similarly, a party’s failure to grapple with its obligations in a timely manner may lead to both delay and unnecessary applications.<sup>1146</sup> Many failures to comply with deadlines will ultimately lead to delay, but every delay will have consequences that are unique to the circumstances in which it occurs.

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<sup>1135</sup> *Vodafone* (n 545) [19].

<sup>1136</sup> *Richmond* (n 673) [28]-[30].

<sup>1137</sup> *Pantano v Super Nova Racing* [2003] EWHC 255 (QB) [10], [28]; *Smith v Wellington Court* (n 919) [19], [28].

<sup>1138</sup> *Sinclair* (n 1062) [40].

<sup>1139</sup> *Powell v Pallisers of Hereford Ltd* [2002] EWCA Civ 959 [4], [6] (Potter LJ); *EDO Technology Ltd v Campaign to Smash EDO* [2006] EWHC 598 (QB) [68].

<sup>1140</sup> *Djurberg* (n 452).

<sup>1141</sup> *Multiplex* (n 1036) [7].

<sup>1142</sup> *Peakman* (n 660).

<sup>1143</sup> *ibid* [33]

<sup>1144</sup> *Dass* (n 381) [8]

<sup>1145</sup> *Wearn v HNH International Holdings Ltd* [2014] EWHC 3542 (Ch) [111].

<sup>1146</sup> *Serco Ltd v Secretary of State for Defence* [2019] EWHC 515 (TCC) [8].

Delay is not the only way in which parties' behaviour can have adverse systemic consequences. Failure to co-operate on disclosure<sup>1147</sup> or on agreeing a timetable,<sup>1148</sup> for example, may mean that disproportionate court time is devoted to interlocutory disputes. The taking of every possible point is likely to consume more of the court's limited resources than is appropriate.<sup>1149</sup> The greater the volume of material produced by the parties and the less organised it is, the more of the court's time is required to deal with it, all of which is time that cannot be allocated to other cases. In *Adoko v Jemal* (1999), the case came before the Court of Appeal in 'complete disarray' and the only way the appeal could proceed was through a 'wholesale restructuring of the notice of appeal'.<sup>1150</sup> This was not a proper use of the court's time, and it was 'neither appropriate nor just that any further share of the court's resources should be allocated to a case conducted in this way'.<sup>1151</sup> Without the restructuring, there were no grounds on which the appeal could proceed, so the notice of appeal was struck out. Laws LJ stated that it was 'disgraceful that [the Court of Appeal] should have been treated as it has been. The proper and proportionate use of court resources is now to be considered part of substantive justice itself'.<sup>1152</sup> *Adoko* came before the Court of Appeal only a few months after the CPR came into force. One might assume, or hope, that matters subsequently improved. However, that was not always the case, and there are more recent examples of cases in which an explicit connection has been made between parties' behaviour and a disproportionate use of court resources.<sup>1153</sup> As noted in *Secker v Fairhill Property Services Ltd* (2016), 'the achievement of justice means something new now'. Parties can no longer 'expect indulgence' if they fail to comply with their procedural obligations, because those obligations serve the wider purpose of ensuring that other litigants can obtain efficient and proportionate justice.<sup>1154</sup>

## THE COURTS' RESPONSE

Judicial responses to this non-compliant and disproportionate behaviour by parties vary. To an extent this is understandable, because any response must be appropriate to the facts of a case.

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<sup>1147</sup> *Centenary* (n 691) [10]; *Canary Riverside Estate Management Ltd v Circus Apartments Ltd* [2019] EWHC 154 (Ch) [6].

<sup>1148</sup> *Buchanan* (n 1082).

<sup>1149</sup> *Kings Security* (n 827) [14]; *Brake v The Chedington Court Estate Ltd* [2020] EWHC 694 (Ch) [3].

<sup>1150</sup> (1999) *The Times*, July 8, 1999; 1999 WL 477353 5 (May LJ).

<sup>1151</sup> *ibid* 4 (Buxton LJ).

<sup>1152</sup> *ibid* 5.

<sup>1153</sup> *Foley* (n 1104) [43]; *Excalibur* (n 1133) [63]; *Bank of New York v Sterling Biotech Ltd* (n 963) [12]; *Richardson* (n 965) [9]-[10]; *Secker* (n 896) [30]; *R (Network Rail)* (n 384) [11], [25].

<sup>1154</sup> *Secker* (n 896) [30]; *Avanesov* (n 880) [66].

However, there is inconsistency on a more general level as to whether parties face any consequence at all for their behaviour. In some cases, the nature of the application means that a party's behaviour can contribute to the striking out of its claim<sup>1155</sup> or defence,<sup>1156</sup> a refusal to grant an extension of time to allow a jurisdiction challenge,<sup>1157</sup> a refusal to allow amendments and the addition of new causes of action,<sup>1158</sup> a refusal to provide disclosure leading to judgment on liability,<sup>1159</sup> or the loss of the benefit of certain evidence<sup>1160</sup> or an interim remedy.<sup>1161</sup> In many cases, the court's disapproval sounds in costs, either in the form of an order against the non-compliant party or a reduction in that party's recoverable costs. This may result from failure to comply with a pre-action protocol,<sup>1162</sup> failure to co-operate in providing information,<sup>1163</sup> taking an unhelpful attitude in correspondence,<sup>1164</sup> attempting to take tactical advantage of an opponent's short delay,<sup>1165</sup> failure to act with expedition,<sup>1166</sup> substantial and conscious failure to comply with directions<sup>1167</sup> or acting unreasonably in pursuing parts of a case,<sup>1168</sup> including pursuing a claim with no evidential basis, thereby having the case allocated to the multi-track instead of the small claims track, with the attendant increase in expenditure.<sup>1169</sup>

A party's disproportionate conduct will sometimes contribute to all or a proportion of costs being awarded to their opponent on the indemnity basis. Such contributions have been made, for example, by failure to engage in ADR<sup>1170</sup> or accept a settlement offer,<sup>1171</sup> repeated failure to

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<sup>1155</sup> *Pantano* (n 1137) [28]; *Hayden* (n 1102) [75]-[80]; *Wearn* (n 1145) [133]; *Sinclair* (n 1062) [45]; *Djurberg* (n 452); *WTA Global Holdings Ltd v Lombard North Central Plc* [2019] EWHC 277 (Comm) [41].

<sup>1156</sup> *Foley* (n 1104).

<sup>1157</sup> *Talos* (n 1023) [39]-[44].

<sup>1158</sup> *Lokhova* (n 496).

<sup>1159</sup> *Eaglesham* (n 845) [46].

<sup>1160</sup> *Dass* (n 381) [1]-[2]; *Glaxo v Glenmark* (n 576) [28]; *Harrison v Pilkington* (n 705) [20].

<sup>1161</sup> *EDO Technology* (n 1139) [68].

<sup>1162</sup> *Daejan* (n 1062) [20]-[21]; *Aegis Group* (n 1063) [45]; *Charles Church Developments Ltd v Stent Foundations Ltd* [2007] EWHC 855 [46]-[49]; *Straker* (n 1066) [42]-[43] (Waller LJ); *Orange* (n 1055) [33]-[36]; *Riniker* (n 1063) [34] (Smith LJ); *Thornhill* (n 1072) [45]-[49] (Sir Henry Brooke); *Higginson* (n 1067) [29]; *Webb Resolutions* (n 1065) [23], [28]; *Prior* (n 1068) [25]; *Chapman* (n 1064) [18]-[19]; *Hart* (n 675) [56]-[57].

<sup>1163</sup> *Price v Price* (n 636) [42].

<sup>1164</sup> *Brit Inns* (n 1074) [59], [62].

<sup>1165</sup> *Summit Navigation* (n 1109) [63].

<sup>1166</sup> *Powell* (n 1139) [19] (Potter LJ); *Hart* (n 675) [56]-[57].

<sup>1167</sup> *Smith v Wellington Court* (n 919) [19]. [30].

<sup>1168</sup> *Pepe's Piri Piri* (n 673) [42].

<sup>1169</sup> *Peakman* (n 660) [29]-[32].

<sup>1170</sup> *Garritt-Critchley* (n 627) [10]; *DSN v Blackpool Football Club Ltd* [2020] EWHC 670 (QB); *BXB* (n 628) [8], [11], [13].

<sup>1171</sup> *De Sena* (n 673) [26]-[30].

deal with disclosure issues,<sup>1172</sup> delay in quantifying a claim,<sup>1173</sup> unnecessary applications or adjournment caused by a party's delayed approach,<sup>1174</sup> or persisting in the pursuit of an overly broad claim that could have been narrowed<sup>1175</sup> or a weak claim when the weaknesses should have been readily apparent.<sup>1176</sup> In *Excalibur Ventures LLC v Texas Keystone Inc* (2013), a particularly extreme example, indemnity costs were awarded due to the claimant's pursuit of a speculative and opportunistic claim that was 'gargantuan' in scope<sup>1177</sup> and pursued as if it was 'an act of war'.<sup>1178</sup> Solicitors sent 'interminable and heavy-handed correspondence'<sup>1179</sup> and provided unworkable trial bundles,<sup>1180</sup> and the case proved an 'enormous drain' on court resources.<sup>1181</sup> Where a party shows no regard for proportionality in its conduct of a case, it is appropriate to deprive that party of the benefit of a costs assessment that is subject to the limitation of proportionality.<sup>1182</sup> While the award of litigation costs is intended to be compensatory rather than penal, it is in practice difficult to separate the compensation awarded to the receiving party from the censure of the paying party's behaviour, and an award of indemnity costs may be viewed by the latter as punishment. The court has a wide discretion as to costs,<sup>1183</sup> and may factor the conduct of the parties into any order.<sup>1184</sup> As noted in *Summit*, costs orders can reflect a party's 'unreasonable conduct' and can be used to 'discourage' inappropriate litigation behaviour.<sup>1185</sup>

In some cases, however, there are no immediate, tangible consequences to parties' disproportionate behaviour. The relevance of parties' approach to litigation may stop at brief criticism, or simply identification, by the court.<sup>1186</sup> In *McTear*, for example, the Court of Appeal

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<sup>1172</sup> *Phaestos* (n 446) [45].

<sup>1173</sup> *ibid.*

<sup>1174</sup> *R (Kalah)* (n 989) [16]; *Serco* (n 1146) [11].

<sup>1175</sup> *JP Morgan* (n 676) [12]-[13]; *Digicel* (n 676) [47], [60]-[63], [68].

<sup>1176</sup> *IPC Media* (n 673) [24]-[26]; *Wates* (n 673) [25]-[26]; *NatWest v Rabobank* (n 673) [66], [71]; *Consortium* (n 673) [64]; *Richmond* (n 673) [28]-[34]; *Imperial Chemical* (n 673) [14]; *Lejonvarn* (n 673) [67]-[68]; *De Sena* (n 673) [34].

<sup>1177</sup> *Excalibur* (n 1133) 9.

<sup>1178</sup> *ibid* 12.

<sup>1179</sup> *ibid* 48.

<sup>1180</sup> *ibid* 60.

<sup>1181</sup> *ibid* 63.

<sup>1182</sup> *Digicel* (n 676) [68]; *Euroption* (n 676) [25].

<sup>1183</sup> CPR 44.

<sup>1184</sup> CPR 44.2(4)(a).

<sup>1185</sup> *Summit* (n 1109) [63].

<sup>1186</sup> *King v Telegraph* (n 1091) [35], [66] (Brooke LJ); *Broughton* (n 424) [2] (Lewison LJ); *MacLennan* (n 572) [12]; *McTear* (n 714) [38]-[39] (Vos LJ); *Joseph Gleave* (n 956) [2]; *Ventra* (n 826) [242]-[243]; *UTB v Sheffield* (n 295) [6], [112] (Vos C); *Brudenell-Bruce* (n 1127) [5].

identified ‘aggressive and unco-operative correspondence’ and ‘mutual suspicion’<sup>1187</sup> between solicitors in circumstances where they should have co-operated regarding disclosure issues. This behaviour had no immediate consequence, and there was neither warning nor incentive given to steer the parties towards a more co-operative attitude once the matter was remitted for retrial. In *Joseph Gleave & Son Ltd v Secretary of State for Defence* (2017) and *Brudenell-Bruce v Moore* (2013) the parties were criticised for underestimating the length of the hearing due to tactical applications<sup>1188</sup> and ‘voluminous’ papers and issues<sup>1189</sup> respectively, but in neither case did they face any consequences for this inappropriate use of court time. On occasion the court will highlight that parties must change their approach, for example stating that ‘both sides will need to demonstrate a much higher level of co-operation and realism’<sup>1190</sup> if the case is to be ready for trial, that the parties ‘will need to keep proportionality in the forefront of their minds as matters proceed’,<sup>1191</sup> or that they are asked to ‘reflect before raising yet further interlocutory matters, and to satisfy themselves that they are really necessary’.<sup>1192</sup> These statements are not, however, accompanied by any concrete incentive to encourage that change. These cases generally involve disproportionate behaviour by both parties. Identifying effective consequences and incentives in such circumstances may not be easy, as it is not simply a case of penalising one party and compensating another in costs. A starting point might be a strong, specific warning about the potential costs consequences, even for ultimately successful parties, of future disproportionate behaviour.

There is some overlap between cases cited in this section and those cited in support of the assertion that courts do not always take on the active management role required of them.<sup>1193</sup> Active case management was introduced because Lord Woolf determined that litigation could not be conducted proportionately if the parties were in control. It is unsurprising, therefore, that in cases where there is insufficient management an aggressive, adversarial approach wins out. Parties want to ‘win’ and will generally do everything they can to ensure this, whether it is expending large amounts of time, cost and resources where available, or taking every opportunity to obtain a tactical advantage. The court can step back and take an objective view of the case, something which parties and to an extent their legal advisers cannot do. Three

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<sup>1187</sup> *McTear* (n 714) [39] (Vos LJ).

<sup>1188</sup> *Joseph Gleave* (n 956) [2].

<sup>1189</sup> *Brudenell-Bruce* (n 1127) [5].

<sup>1190</sup> *Ventra* (n 826) [243].

<sup>1191</sup> *UTB v Sheffield* (n 295) [6] (Vos C).

<sup>1192</sup> *Brake* (n 1149) [3].

<sup>1193</sup> See above at 111-117.

points can be drawn from this. The first is the importance of the combination of active judicial case management and proportionate litigating by parties. Judicial case management can only go so far, and there are some aspects of litigation that the court cannot control. The court cannot, for example, actually conduct disclosure exercises or prepare witness statements. Parties have the knowledge and information on which a case is based, and the court acts on the basis of that information. Secondly, there is a conflict at the heart of the CPR between the court's and parties' conceptions of proportionality. Finally, parties are likely to require incentives to police their own behaviour. These points must be acknowledged and understood if concrete improvements are to be made to the application of case management proportionality.

## V. CONCLUSIONS

It is suggested that three main insights emerge from the detailed analysis set out in this chapter. First, this analysis has revealed that over two decades after the CPR came into force, neither proportionality nor active judicial case management are fully integrated into the civil justice system. There are inconsistencies in judicial understanding of the nature of justice underlying the Overriding Objective, and in application of the active management role required by the CPR. The former manifests itself in the persistence of the primacy of substantive justice and the view that the court's role is to do justice on the merits between the parties to the case before it. The latter manifests itself in an approach that leaves control and progress of litigation largely in the parties' hands.

Beyond these general points, the practical content of those inconsistencies has been identified. Application of the Overriding Objective's concept of proportionate justice has been seen, for example, in the weighing of *inter partes* and systemic interests and in the balancing of different types of prejudice. The factors which the court considers when applying proportionality have been identified. It has been determined that they are not limited to those specified in CPR 1.1(2)(c). On the other hand, an inappropriate *inter partes* focus has been found, for example, in late adjournment of hearings and in determining whether to order split trials. Where the court has taken on the active role required of it, it has been possible to see how cases are managed, for example by controlling the scope of a case and by appropriate encouragement of settlement and ADR. Practical tools for applying those management techniques have also been

identified. Conversely, it has been revealed that a failure to take on this active role is linked to acceptance that aggressive litigation remains the norm.

The second main insight concerns the crucial role of the parties, and by extension their legal representatives, in ensuring that the court fulfils its management role and that litigation proceeds proportionately. Many parties do not comply with the duty imposed on them by CPR 1.3. An aggressive approach to litigation is commonplace. This is despite clear judicial statements that parties must litigate in a proportionate manner, co-operate with their opponents, and assist the court in managing the case. Once again, the analysis has allowed us to go beyond general points and identify precisely how parties litigate disproportionately, for example by failing to engage in correspondence, refusing or failing to provide requested information, and providing too much material to opponents and the court. Another inconsistency has also been identified in the form of courts' responses to disproportionate party behaviour, which range from simple factual identification to the imposition of indemnity costs. Identifying these inconsistencies and practical details is valuable in and of itself. It enables us to better understand the role and application of proportionality. However, that value is limited if problems are defined but then allowed to continue.

The third insight is that the study has yielded a body of information that can be used to develop focused, realistic ways of dealing with the inconsistencies identified. It enables us, for example, to compile practical guidance on management techniques, and to target improvement measures at specific problems such as parties' persistent pursuit of weak claims and judges' failure to explicitly consider systemic proportionality. In Chapter Six proposals will be made, based on the results of this investigation, for combatting the problems and inconsistencies identified in the present chapter.

## CHAPTER FIVE

### COMPARATIVE PERSPECTIVES

England is not the only jurisdiction to have faced issues of cost, complexity and delay in civil litigation, nor is it alone in looking to proportionality and judicial case management as solutions to those issues. Three other jurisdictions which have faced the same problems and identified similar solutions are the United States, Canada and Australia. These are common law jurisdictions<sup>1194</sup> that were identified by both Lord Woolf and Sir Rupert Jackson as potential sources of inspiration for the reform of civil procedure. This chapter reviews how those jurisdictions have integrated those solutions into their respective procedural rules.

Several points emerge that may assist with the issues identified in Chapter Four. They cover, broadly, case management powers and requirements, the obligations imposed on parties and lawyers, and the publication of guidance. The first of these can be broken down into three areas: docketing, compulsory case management language, and the role of settlement and ADR. Docketing was considered by both Lord Woolf and Jackson. Lord Woolf took the view that the lack of flexibility in judicial deployment inherent in docketing, combined with the structure of the English civil justice system, would make it difficult to introduce.<sup>1195</sup> Jackson noted that consultations had been favourable to its introduction<sup>1196</sup> and that from his own experience a docket system makes it ‘easier for the court to deliver a cost effective service to users’.<sup>1197</sup> He recommended docketing of multi-track cases, so far as possible.<sup>1198</sup> At that time docketing was, to an extent, already established in England,<sup>1199</sup> notably in the Business and Property Court<sup>1200</sup> and the Technology and Construction Court.<sup>1201</sup> When the Jackson reforms were implemented, it was thought that docketing would ‘play an important part in the future development of case

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<sup>1194</sup> The exception is Quebec in Canada, which follows civil law principles. This will be considered where appropriate, as there are some aspects of the procedural rules in Quebec that fall within a broader pattern across the Canadian jurisdictions.

<sup>1195</sup> Woolf, *Interim Report* (n 214) ch 6, para 28; ch 11, para 3; Woolf, *Final Report* (n 224) ch 8, para 13.

<sup>1196</sup> Jackson *Preliminary Report Vol 1* (n 262) 118; Jackson, *Final Report* (n 262) 218, 232, 290, 294, 388, 389.

<sup>1197</sup> Jackson, *Preliminary Report Vol 2* (n 262) 434.

<sup>1198</sup> Jackson, *Final Report* (n 262) 392.

<sup>1199</sup> Neuberger, ‘Docketing’ (n 315) 14.

<sup>1200</sup> Jackson, *Supplemental Report* (n 290) 134.

<sup>1201</sup> Jackson, *Final Report* (n 262) 294-5.

management'.<sup>1202</sup> As docketing has already been given significant consideration as part of the ongoing reform of English civil procedure, and its benefits recognised, the intention here is not to re-tread old ground. Attention will be given to other measures that may improve the application of case management proportionality.

Some jurisdictions prescribe judicial management actions,<sup>1203</sup> for example by mandating issues to be considered at management conferences.<sup>1204</sup> Although some parts of the CPR do impose prescriptive requirements on the court, consideration will be given in the next chapter to whether they should be extended.<sup>1205</sup> Another area in which rules can be prescriptive is that of settlement and ADR, and several jurisdictions take a stronger approach than England to forms of resolution other than trial. This includes requiring the court to consider options for ADR,<sup>1206</sup> and empowering the court to refer a matter to ADR without the parties' consent.<sup>1207</sup> Many jurisdictions also impose obligations on parties to consider ADR and settlement,<sup>1208</sup> as well as how any such process must be conducted.<sup>1209</sup> Similar powers and requirements could usefully be incorporated into the CPR.<sup>1210</sup> Some jurisdictions also go further than the CPR in terms of the obligations imposed on parties and lawyers more generally, for example by detailing the content of litigation duties<sup>1211</sup> and imposing certification requirements.<sup>1212</sup> The CPR would benefit from a similar approach.<sup>1213</sup> Finally, case management guidance has been published in the United States and Australia,<sup>1214</sup> covering matters such as issues that judges may take into account when making management decisions, questions they may ask parties and lawyers, and practical management techniques. Similar guidance, the content of which will be considered in the next chapter, would be a valuable addition to the resources available in England.<sup>1215</sup>

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<sup>1202</sup> Neuberger, 'Docketing' (n 315) 18.

<sup>1203</sup> See below at 174-175, 184-185, 191.

<sup>1204</sup> See below at 182, 188, 196.

<sup>1205</sup> See ch 6 at 229-232.

<sup>1206</sup> See below at 178, 188, 196.

<sup>1207</sup> See below at 178, 188, 195.

<sup>1208</sup> See below at 178, 187, 196.

<sup>1209</sup> See below at 196.

<sup>1210</sup> See ch 6 at 223, 225, 231.

<sup>1211</sup> See below at 185, 193.

<sup>1212</sup> See below at 176, 193.

<sup>1213</sup> See ch 6 at 223-224.

<sup>1214</sup> See below at 178-180, 197-198.

<sup>1215</sup> See ch 6 at 210ff.

## I. THE UNITED STATES

The United States ('U.S.') federal court system is governed by the Federal Rules of Civil Procedure 1938 (as amended) ('FRCP'), the life of which has been characterised by complaints about cost and delay.<sup>1216</sup> They are the issues that the FRCP aims to combat and one of the main bases on which it has been reformed. The 'scope and purpose' of the FRCP are that it 'should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding'.<sup>1217</sup> The word 'administered' highlights the duty of judges and lawyers to ensure that civil litigation is resolved not only fairly, but without undue cost and delay.<sup>1218</sup> The wording '... and employed by the court and the parties...' was added in 2015 to provide an 'aspirational goal to all participants in the legal system'.<sup>1219</sup> In contrast to the CPR's Overriding Objective, FRCP 1 does not identify expedition and cost-efficiency as being part of an overarching concept of 'justice', rather they are separate aims to be balanced with the aim of determining a matter according to justice. The reference to 'every action and proceeding' reflects an *inter partes* focus and there is no explicit reference to systemic concerns.

Proportionality is central to discovery (i.e. disclosure) under the FRCP, which has long been a focal point for reform. Its role as a forum for abuse and the cause of high costs and delay is 'a constant theme emerging from analysis of the civil justice system'.<sup>1220</sup> Parties may only obtain discovery that is:

proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefits.<sup>1221</sup>

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<sup>1216</sup> Robert G. Bone, 'Improving Rule 1: A Master Rule for the Federal Rules', (2010) 87(2) Denver University Law Review 287.

<sup>1217</sup> FRCP 1.

<sup>1218</sup> Patrick Johnston, 'Problems in Raising Prayers to the Level of Rule: The Example of Federal Rule of Civil Procedure 1', (1995) 75(5) B.U.L. Rev. 1325, 1328.

<sup>1219</sup> John J. Jablonksi, Alexander R. Dahl, 'The 2015 Amendments to the Federal Rules of Civil Procedure: Guide to Proportionality in Discovery and Implementing a Safe Harbor for Preservation', 2015 82 Def. Counsel J. 411, 432.

<sup>1220</sup> John L. Carroll, 'Proportionality in Discovery: A Cautionary Tale', (2010) 32 Campbell L. Rev. 455, 455.

<sup>1221</sup> FRCP 26(b)(1).

These factors are identical to some of those relevant to the proportionality analysis under the CPR. The most recent amendment to FRCP 26, in 2015, saw the above wording moved from FRCP 26(b)(2)(C)(iii) to FRCP 26(b)(1). There was no substantive change to the scope of discovery and no material change to the court's or the parties' obligations.<sup>1222</sup> The problem was not with the text of the rule but with its implementation. The emphasis of the rule changed, the aim being to force parties and the court to confront discovery cost containment at the outset, and to balance utility against cost.<sup>1223</sup> This highlights the fact that reforms do not have to be aimed at the substance of the rules. Changing in drafting and expression, for example amending the order in which obligations are set out or making explicit something that was implicit (as with the amendments to CPR 1.1 post-Jackson), is an alternative way to try to influence the conduct of parties and the court.

Judicial management is a fundamental aspect of U.S. federal civil justice, with perhaps its most prominent aspect being the docketing system. This is a crucial lens through which to view U.S. case management, as a judge who knows that they will be dealing with all pre-trial aspects of a matter may take a different approach to one whose involvement is limited to a single interlocutory application. The FRCP gives judges wide management powers, but many are discretionary. Under FRCP 16, for example, the court 'may'<sup>1224</sup> order parties to appear for one or more pre-trial conferences, 'for such purposes as'<sup>1225</sup> expediting disposition,<sup>1226</sup> establishing early control of the case so that it will not be protracted for lack of management,<sup>1227</sup> discouraging wasteful pre-trial activities,<sup>1228</sup> improving the quality of trial through more preparation<sup>1229</sup> and facilitating settlement.<sup>1230</sup> A conference is not compulsory, nor is consideration of these issues at any conference that does take place. This does not, however, mean that the court is disengaged at the start of an action. In all cases, a scheduling order 'must'<sup>1231</sup> be issued with certain required contents, namely deadlines for joinder, amendment of pleadings, completion of discovery and filing of motions.<sup>1232</sup> These can be described as bare

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<sup>1222</sup> Craig B. Shaffer, Ryan T. Shaffer, 'Looking Past the Debate: Proposed Revisions to the Federal Rules of Civil Procedure', (2014) 7(1) Federal Courts Law Review 175, 192.

<sup>1223</sup> Jablonksi and Dahl (n 1219) 414.

<sup>1224</sup> FRCP 16(a).

<sup>1225</sup> *ibid.*

<sup>1226</sup> FRCP 16(a)(1).

<sup>1227</sup> FRCP 16(a)(2).

<sup>1228</sup> FRCP 16(a)(3).

<sup>1229</sup> FRCP 16(a)(4).

<sup>1230</sup> FRCP 16(a)(5).

<sup>1231</sup> FRCP 16(b)(1).

<sup>1232</sup> FRCP 16(b)(3)(A).

minimum case management requirements. Other matters ‘may’ be included,<sup>1233</sup> for example modification of the extent of discovery<sup>1234</sup> and setting dates for further conferences and trial itself.<sup>1235</sup> These broad, discretionary powers mean that the effectiveness of case management will depend on the individual judge. The court’s management powers are, however, stricter and more prescriptive in the context of discovery. The court ‘must’<sup>1236</sup> limit the frequency or extent of discovery if it is, *inter alia*, unreasonably cumulative or duplicative,<sup>1237</sup> available from a more convenient, less burdensome or less expensive source,<sup>1238</sup> or is outside the proportionality limits specified in FRCP 26(b)(1).<sup>1239</sup> Such steps can be taken on motion or on the court’s own initiative.<sup>1240</sup> One of the few compulsory items in the scheduling order required by FRCP 16 is a time limit for the completion of discovery, although there is no requirement to include limitations on the scope or extent of discovery. Practically speaking, however, because the court must limit discovery, any limits applied may well be included in the scheduling order.

Complementing the court’s management obligations are duties placed on parties and legal representatives. Once again, a particular focus is discovery, in respect of which parties must cooperate. They must meet and confer ‘as soon as is practicable’ to develop a discovery plan, to be submitted to the court before the scheduling conference takes place or the scheduling order is made.<sup>1241</sup> The plan ‘must’<sup>1242</sup> state their views and proposals on, for example, the subjects on which discovery may be needed, whether it should focus on particular issues, and whether a phased approach would be appropriate.<sup>1243</sup> This obligation on parties to work actively to ensure that the discovery process is proportionate is also reflected in a prohibition on ‘boilerplate’ objections to discovery requests. Objections must be specific and reasoned.<sup>1244</sup> Lawyers, and all unrepresented parties, must attempt ‘in good faith’ to agree the discovery plan.<sup>1245</sup> Express requirements of co-operation and good faith are not limited to discovery. The court may

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<sup>1233</sup> FRCP 16(b)(3)(B).

<sup>1234</sup> FRCP 16(b)(3)(B)(ii).

<sup>1235</sup> FRCP 16(b)(3)(B)(vi).

<sup>1236</sup> FRCP 26(b)(2)(C).

<sup>1237</sup> FRCP 26(b)(2)(C)(i).

<sup>1238</sup> FRCP 26(b)(2)(C)(ii).

<sup>1239</sup> FRCP 26(b)(2)(C)(iii).

<sup>1240</sup> FRCP 26(b)(2)(C).

<sup>1241</sup> FRCP 26(f).

<sup>1242</sup> FRCP 26(f)(3).

<sup>1243</sup> FRCP 26(f)(3)(B).

<sup>1244</sup> FRCP 34(b)(2)(B).

<sup>1245</sup> FRCP 26(f)(2).

sanction a party or lawyer if they *inter alia* are ‘substantially unprepared to participate’ in a scheduling or pre-trial conference or do not ‘participate in good faith’.<sup>1246</sup>

The FRCP also imposes certification requirements. By presenting a pleading, motion or ‘other paper’ to the court, a lawyer or unrepresented party ‘certifies that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances’<sup>1247</sup> the item presented is not presented for ‘any improper purpose’,<sup>1248</sup> legal contentions are warranted<sup>1249</sup> and factual contentions have or will likely have evidentiary support,<sup>1250</sup> and denials of factual contention are warranted on the evidence or reasonably based on belief or a lack of information.<sup>1251</sup> Once again, discovery is singled out for additional measures. FRCP 26(g) requires discovery requests, responses and objections to be signed, certifying that they are consistent with the rules and the certification requirements in FRCP 11, and that they are ‘neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action’.<sup>1252</sup> This is a certification of *inter partes* proportionality. These requirements mean that lawyers must think carefully about how they approach litigation and may help keep tactical litigation to a minimum.

Unlike the CPR, the FRCP imposes no explicit pre-action obligations. However, the rules cited above mean that some pre-action work will be required. In order to comply with the certification requirements, the factual and legal basis for a claim must be investigated. Once a claim has been issued, it is likely to move forward quickly. A scheduling order ‘must’ be issued within the earlier of 90 days after any defendant has been served with the complaint or 60 days after any defendant has appeared.<sup>1253</sup> Both the discovery conference and any scheduling conference must take place before that order is issued.<sup>1254</sup> Being unprepared for the latter is an explicit basis for the imposition of sanctions.<sup>1255</sup> Pre-action work will be required to determine

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<sup>1246</sup> FRCP 16(f)(1)(B).

<sup>1247</sup> FRCP 11(b).

<sup>1248</sup> FRCP 11(b)(1).

<sup>1249</sup> FRCP 11(b)(2).

<sup>1250</sup> FRCP 11(b)(3).

<sup>1251</sup> FRCP 11(b)(4).

<sup>1252</sup> FRCP 26(g)(1)(B)(3).

<sup>1253</sup> FRCP 16(b)(2).

<sup>1254</sup> FRCP 16(b)(1).

<sup>1255</sup> FRCP 16(f).

the nature of the case and the potential scope of discovery and evidence in order that these milestones may be met.

Judges have broad jurisdiction to sanction parties and legal representatives for non-compliance, either on motion or on their own initiative.<sup>1256</sup> There is generally no requirement to impose sanctions, although a notable exception is where discovery has been improperly certified.<sup>1257</sup> The mandatory nature of this sanction is, however, tempered by the fact that the violation must have been ‘without substantial justification’.<sup>1258</sup> The nature of any sanction is at the court’s discretion. Sanctions for breach of certification requirements, for example, ‘may include’ an order to pay legal costs resulting from the violation or ‘nonmonetary directives’,<sup>1259</sup> ranging from admonitions to merits penalties.<sup>1260</sup> If a party or lawyer fails to obey a scheduling or pre-trial order, the court may issue ‘any just orders’.<sup>1261</sup> Failures to make disclosures, co-operate in discovery and obey disclosure orders may result in a range of sanctions, including payment of expenses, prohibitions on introducing designated matters into evidence and strike out or dismissal.<sup>1262</sup> Sanctions must, however, be proportionate to the seriousness of the violation. This is reflected in references to ‘just orders’<sup>1263</sup> and ‘appropriate sanctions’,<sup>1264</sup> and the statement that sanctions under FRCP 11 ‘must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated’.<sup>1265</sup> Imposition of sanctions is reviewable for abuse of discretion,<sup>1266</sup> as are other case management decisions such as refusals to extend deadlines or to allow late filings.<sup>1267</sup> This is a difficult standard to meet. U.S. appeal courts take a similar approach to those in England and are ‘especially reluctant’ to interfere with first instance courts’ decisions ‘regarding their own day-to-day operations’.<sup>1268</sup>

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<sup>1256</sup> *ibid.*

<sup>1257</sup> FRCP 26(g).

<sup>1258</sup> FRCP 26(g)(3); Steven S. Gensler and Lumen N. Mulligan, *Federal Rules of Civil Procedure, Rules and Commentary*, Rule 26.

<sup>1259</sup> FRCP 11(c)(4).

<sup>1260</sup> FRCP Commentary n.63 Rule 11.

<sup>1261</sup> FRCP 16(f)(1).

<sup>1262</sup> FRCP 37(b)(2); FRCP 37(c)(1).

<sup>1263</sup> FRCP 16(f)(1); FRCP 37(b)(2)(A).

<sup>1264</sup> FRCP 26(g)(3); FRCP 37(c)(1)(C).

<sup>1265</sup> FRCP 11(c)(4).

<sup>1266</sup> FRCP Commentary n.63 Rule 11, Rule 16.

<sup>1267</sup> FRCP Commentary n.63 Rule 16.

<sup>1268</sup> *Hussain v Nicholson*, 435 F.3d 359, 365; Gensler and Mulligan (n 1258) Rule 16.

Federal civil cases are ‘virtually never’ resolved through trial.<sup>1269</sup> ADR and settlement have been prominent in U.S. procedural law for some time. The Alternative Dispute Resolution Act 1998 (the ‘ADR Act’) requires every district court to provide parties in civil cases with ‘at least one’ ADR process.<sup>1270</sup> One express purpose of the scheduling conference is ‘facilitating settlement’.<sup>1271</sup> The court may, at that conference, take appropriate action in ‘settling the case and using special procedures to assist in resolving the dispute when authorised by statute or local rule’.<sup>1272</sup> Party consent is not required, and the court may compel attendance at a conference to consider possible settlement.<sup>1273</sup> The ADR Act requires parties to consider an ADR process ‘at an appropriate stage in the litigation’.<sup>1274</sup> At the discovery conference, they must also ‘consider the nature and basis of their claims and defenses and the possibilities of promptly settling or resolving the case’.<sup>1275</sup> There is no requirement for parties to inform the court that such discussions have taken place, but it seems likely that an active management judge might ask them to confirm this at the scheduling conference.

Guidance on practical management techniques has been published in the U.S.<sup>1276</sup> Matters for consideration at the scheduling conference are listed.<sup>1277</sup> Actions are suggested for narrowing or defining issues,<sup>1278</sup> such as requiring counsel to list the essential elements of the cause of action, requiring parties to present statements of contentions with supporting facts and evidence,<sup>1279</sup> and asking direct and leading questions at the conference.<sup>1280</sup> Examples of limits on discovery are provided, such as phased, sequenced or targeted approaches,<sup>1281</sup> prioritising by subject matter<sup>1282</sup> and sequencing by parties.<sup>1283</sup> Means of encouraging settlement are

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<sup>1269</sup> J. Maria Glover, ‘The Federal Rules of Civil Settlement’, (2012) 87(6) NYU L. Rev. 1713, 1716.

<sup>1270</sup> Alternative Dispute Resolution Act 1998 §652(a).

<sup>1271</sup> FRCP 16(a)(5).

<sup>1272</sup> FRCP 16(c)(2)(I).

<sup>1273</sup> FRCP 16(c)(1).

<sup>1274</sup> ADR Act 1998 (n 1270).

<sup>1275</sup> FRCP 26(f)(2).

<sup>1276</sup> Robert J. Niemic, Donna Stienstra, Randall E. Ravitz, *Guide to Judicial Management of Cases in ADR* (Federal Judicial Center 2001); *Manual for Complex Litigation* (Federal Judicial Center 2004); *Civil Litigation Management Manual* (The Judicial Conference of the United States Committee on Court Administration and Case Management 2010); *Benchbook for U.S. District Judges* (Federal Judicial Center 2013).

<sup>1277</sup> *Manual for Complex Litigation* (n 1276) 33.

<sup>1278</sup> *ibid* 45.

<sup>1279</sup> *ibid* 46.

<sup>1280</sup> *Civil Litigation Management Manual* (n 1276) 27.

<sup>1281</sup> *Manual for Complex Litigation* (n 1276) 54; *Benchbook* (n 1276) 195.

<sup>1282</sup> *ibid*.

<sup>1283</sup> *Manual for Complex Litigation* (n 1276) 55.

suggested, such as targeting discovery at information needed for settlement<sup>1284</sup> and asking counsel for reports on negotiations and how settlement might be facilitated.<sup>1285</sup> Similar themes run through these publications. The first is that judges should take active control as early as possible, because early investment of judicial time ‘will lead to earlier dispositions, less wasteful activity, shorter trials and, in the long run, economies of judicial time and fewer judicial burdens’.<sup>1286</sup> This may include becoming familiar with the substantive issues at an early stage,<sup>1287</sup> holding the scheduling conference as soon as is practicable,<sup>1288</sup> providing an initial scheduling order setting out important dates and structuring parties’ initial activities,<sup>1289</sup> and providing specific and early notice of required pre-conference preparation.<sup>1290</sup> Counsel should be prompted to give early attention to the case, for example by requiring them to prepare specified work products.<sup>1291</sup> Early involvement extends to setting the tone for the proceedings and expectations as to behaviour. Counsel should be informed at the start of a case of the court’s expectations regarding co-operation and professionalism.<sup>1292</sup> After this initial early control, management should be continuing and ‘firm, but fair’.<sup>1293</sup> Progress should be monitored periodically, and interim reports may be ordered.<sup>1294</sup> Additional conferences can help to monitor progress and address problems as they arise: some judges schedule these as the need arises, some at regular intervals.<sup>1295</sup>

These publications highlight the importance of co-operation between opposing legal representatives and between parties and the court. They also recognise the court’s role in fostering co-operation. The controlling issues in a case can almost always be identified by thorough and candid discussion with counsel at the scheduling conference.<sup>1296</sup> Conference preparation should require opposing counsel to talk to each other, as the ‘desirability of having counsel talk, not write, to each other about the case at the earliest moment cannot be overstated’.<sup>1297</sup> The question of settlement should be raised at the first conference, and parties

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<sup>1284</sup> *ibid* 168; *Civil Litigation Management Manual* (n 1276) 91.

<sup>1285</sup> *Civil Litigation Management Manual* (n 1276) 91.

<sup>1286</sup> *Manual for Complex Litigation* (n 1276) 8.

<sup>1287</sup> *ibid* 12.

<sup>1288</sup> *ibid* 11.

<sup>1289</sup> *Civil Litigation Management Manual* (n 1276) 6-8; *Benchbook* (n 1276) 191.

<sup>1290</sup> *Civil Litigation Management Manual* (n 1276) 8.

<sup>1291</sup> *ibid* 11.

<sup>1292</sup> *Manual for Complex Litigation* (n 1276) 15.

<sup>1293</sup> *ibid* 12.

<sup>1294</sup> *ibid*.

<sup>1295</sup> *ibid* 40.

<sup>1296</sup> *ibid* 43.

<sup>1297</sup> *Civil Litigation Management Manual* (n 1276) 22.

should be encouraged to re-examine their positions as the case progresses.<sup>1298</sup> The importance of ADR is highlighted by the fact that there is a separate management handbook for cases in ADR.<sup>1299</sup> This gives advice on issues such as when ADR should be considered,<sup>1300</sup> points to consider when determining whether a case is suitable for ADR,<sup>1301</sup> considerations relating to mandatory and voluntary referrals and the role of party consent.<sup>1302</sup> The guide also covers managing cases in the ADR process,<sup>1303</sup> dealing with how they can be kept on track<sup>1304</sup> and whether and when sanctions should be imposed.<sup>1305</sup>

Research has been undertaken by the Institute for the Advancement of the American Legal System and the American College of Trial Lawyers (the 'ACTL') into how judges manage cases,<sup>1306</sup> consisting of interviews with judges 'identified as being outstanding case managers and whose civil case management experience can serve as a model for others'.<sup>1307</sup> The report highlights how individual judges tailor management in a given case. Some suggest that a key part of balancing limited resources and active management is 'as simple as being available and accessible to lawyers when certain aspects of the case begin to fall off the tracks'.<sup>1308</sup> Setting a trial date early is a common practice, as it forces all involved to be more disciplined.<sup>1309</sup> Several judges are firm in their practice of not moving the date, because when parties know that a judge is firm about trial dates they will adjust their behaviour accordingly.<sup>1310</sup> Many interviewees highlight the importance of setting out expectations about civility and professionalism at the outset,<sup>1311</sup> and one judge includes expectations concerning behaviour in a standard pre-trial order.<sup>1312</sup> One judge requires parties to make written settlement demands before the initial conference in a specified order, the idea being to remove the pressure of being the first party to make a settlement move.<sup>1313</sup>

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<sup>1298</sup> *Manual for Complex Litigation* (n 1276) 167.

<sup>1299</sup> Niemic, Stienstra and Ravitz (n 1276).

<sup>1300</sup> *ibid* 13.

<sup>1301</sup> *ibid* 21-30.

<sup>1302</sup> *ibid* 48-53.

<sup>1303</sup> *ibid* 111.

<sup>1304</sup> *ibid* 114.

<sup>1305</sup> *ibid* 115.

<sup>1306</sup> *Working Smarter Not Harder: How Excellent Judges Manage Cases* (Institute for the Advancement of the American Legal System and American College of Trial Lawyers 2014).

<sup>1307</sup> *ibid* 1.

<sup>1308</sup> *ibid* 9.

<sup>1309</sup> *ibid* 16.

<sup>1310</sup> *ibid* 17.

<sup>1311</sup> *ibid* 27.

<sup>1312</sup> *ibid*.

<sup>1313</sup> *ibid* 30.

## II. CANADA

The Canadian legal system comprises various jurisdictions, each of which has its own rules of civil procedure. The analysis here will consider the Federal Court Rules ('CFCR')<sup>1314</sup> and the rules applicable in the Canadian provinces.<sup>1315</sup> There is a general commitment to proportionality in all of these rules. The majority of Canadian procedural rules have a general principles or purpose clause referring to justice, cost-efficiency and expedition. In Alberta, claims are to be 'fairly and justly resolved in or by a court process in a timely and cost-effective way'.<sup>1316</sup> The objective of the Alberta rules has been summed up in the words 'settlement', 'cooperation', 'simplicity', 'expediency' and 'economy'.<sup>1317</sup> The Nova Scotia rules echo the U.S. FRCP with their object of the 'just, speedy and inexpensive determination of every proceeding'.<sup>1318</sup> Some rules, within this just, expeditious and cost-efficient context, include a specific reference to determining a given case 'on its merits'.<sup>1319</sup> Ontario takes matters further in this regard, occasionally echoing the position as it stood in England under the RSC. The court may grant amendments to pleadings 'on such terms as are just, to secure the just determination of the real matters in dispute'<sup>1320</sup> and 'shall' grant leave to amend 'on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment'.<sup>1321</sup> Some rules mention proportionality as being relevant to the application of the rules, however this is sometimes limited to consideration of the amount in dispute and the importance and complexity of the proceedings.<sup>1322</sup> In Alberta, remedies or sanctions must be 'proportional to the reason for granting or imposing' them,<sup>1323</sup> requiring a balance to be struck between the

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<sup>1314</sup> Federal Court Rules, SOR/9-106.

<sup>1315</sup> Alberta Rules of Court, AR 124/2010; British Columbia Supreme Court Civil Rules, B.C. Reg. 168/2009; Manitoba Court of Queen's Bench Rules, Manitoba Regulation 553/88; New Brunswick Rules of Court; Newfoundland and Labrador Rules of the Supreme Court 1986, SNL1986 C42 Schedule D; Nova Scotia Civil Procedure Rules; Ontario Rules of Civil Procedure, R.R.O. 1990, Regulation 194; Prince Edward Island Rules of Civil Procedure; Quebec Code of Civil Procedure C-25.01; Saskatchewan Queen's Bench Rules.

<sup>1316</sup> Alberta (n 1315) r.1.2(1).

<sup>1317</sup> Darren J. Reed and Glen H. Poleman, *Civil Procedure and Practice in Alberta* (LexisNexis Canada Inc, 2019) 10; *Kwok v Canada (Natural Sciences and Engineering Research Council)* [2013] AJ No. 752, [24].

<sup>1318</sup> Nova Scotia (n 1315) r.1.01.

<sup>1319</sup> Ontario (n 1315) r.1.04(1); British Columbia (n 1315) r.1-3; Manitoba (n 1315) r.1.04(1); Prince Edward Island (n 1315) r.1.04(1).

<sup>1320</sup> Ontario (n 1315) r.2.01(1)(a).

<sup>1321</sup> *ibid* r.26.01.

<sup>1322</sup> *ibid* r.1.04(1.1); British Columbia (n 1315) r.1-3(2); New Brunswick (n 1315) r.1.02.1; Prince Edward Island, (n 1315) r.1.04(2).

<sup>1323</sup> Alberta (n 1315) r.1.2(4).

objectives of resolving a claim ‘fairly and justly’ and in a ‘timely and cost-effective way’.<sup>1324</sup> As in the U.S., there is no explicit incorporation of systemic concerns.

The Canadian Supreme Court in *Hryniak v Mauldin* (2014)<sup>1325</sup> highlighted issues that are reflected in several of these general purpose clauses, namely that trials are expensive and protracted and costs are too high, both of which affect access to justice:

Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. The balance between procedure and access struck by our justice system must come to reflect modern reality and recognise that new models of adjudication can be fair and just.<sup>1326</sup>

The ACTL, in a companion report to that produced in the U.S., saw this as a call to arms that should be responded to with a more active and unified approach to case management.<sup>1327</sup> Case management is not unknown in the Canadian jurisdictions, however it is more limited than in the U.S., Australia and England. Some jurisdictions allow for post-issue, pre-trial conferences in all cases, although these are not always compulsory. In the federal jurisdiction a party ‘may’<sup>1328</sup> apply for a pre-trial conference and there are no mandatory orders to be made at any conference.<sup>1329</sup> In Ontario, parties must schedule the pre-trial conference,<sup>1330</sup> although a judge ‘may’ direct an initial<sup>1331</sup> or subsequent<sup>1332</sup> conference at any time. Certain matters ‘shall’ be considered at the conference,<sup>1333</sup> although there is no requirement for specific orders to be made. In other jurisdictions, a conference may be scheduled but there is no obligation on parties or the court to do so.<sup>1334</sup> Courts have a broad discretion at these conferences to, for example,

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<sup>1324</sup> Reed and Poleman (n 1317) 10; *Donaldson v Farrell* [2011] AJ No.18 [14].

<sup>1325</sup> 2014 SCC 7.

<sup>1326</sup> *ibid* [2]

<sup>1327</sup> *Working Smarter Not Harder in Canada: The Development of a Unified Approach to Case Management in Civil Litigation* (American College of Trial Lawyers 2016) 2.

<sup>1328</sup> CFCR (n 1314) Art.258.

<sup>1329</sup> *ibid* Art.265.

<sup>1330</sup> Ontario (n 1315) r.50.02(1).

<sup>1331</sup> *ibid* r.50.02(3).

<sup>1332</sup> *ibid* r.50.13(1).

<sup>1333</sup> *ibid* r.50.06.

<sup>1334</sup> British Columbia (n 1315) r.1-5(1) and (2); Manitoba (n 1315) r.50.02(1); Prince Edward Island (n 1315) r.50.01(1).

establish timetables,<sup>1335</sup> give procedural orders and directions,<sup>1336</sup> identify and simplify issues<sup>1337</sup> and make any order ‘respecting the conduct of the action’<sup>1338</sup> or that will further the object of the rules.<sup>1339</sup> Conferences have few compulsory outcomes. Under the CFCR, a trial date ‘shall’ be fixed by the judge who conducts the conference,<sup>1340</sup> while in British Columbia the court ‘must’ make a case plan order where a conference takes place,<sup>1341</sup> but there are no prescribed contents for that order.<sup>1342</sup>

In other jurisdictions there is no judicial management unless specifically ordered, the rationale being that court intervention should be targeted at cases that truly need it. Rules refer to providing management for ‘selected proceedings’,<sup>1343</sup> ‘selected actions’<sup>1344</sup> and ‘only ... those proceedings for which a need for the court’s intervention is demonstrated’.<sup>1345</sup> Ontario and the Federal Court take a two-tiered approach, with parties and the court being able to apply for and order case conferences in all cases, and with the court able to order stricter judicial management where appropriate. Links are drawn to the limited nature of judicial resources. In Ontario, the nature and extent of judicial management is to be informed by *inter alia* ‘judicial resources issues’.<sup>1346</sup> Recent changes to case management assignment procedures in Alberta highlight ‘the current need to deploy ... judicial resources in ways that reduce unacceptably long lead times to trial’.<sup>1347</sup> The issues that universal case management may cause are exemplified by the introduction of such a system in Toronto in 2001. That system proved to be unworkable, largely due to the volume of cases and relative lack of resources.<sup>1348</sup> Case management had to be reworked to apply resources only to cases that needed management.<sup>1349</sup>

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<sup>1335</sup> Ontario (n 1315) r.50.13(5)(d); Manitoba (n 1315) r.50.01(2); British Columbia (n 1315), r.5-3(1)(a).

<sup>1336</sup> Ontario (n 1315) r.50.13(6); Manitoba (n 1315) r.50.01(2).

<sup>1337</sup> Manitoba (n 1315) r.50.01(2); Ontario (n 1315) 50.06, r.50.13(5).

<sup>1338</sup> CFCR (n 1314) Art.265(1)(a).

<sup>1339</sup> British Columbia (n 1315) r.5-3(1)(v).

<sup>1340</sup> CFCR (n 1315) Art.264.

<sup>1341</sup> British Columbia (n 1315) r.5-3(3).

<sup>1342</sup> *ibid* r.5-3(4).

<sup>1343</sup> Newfoundland and Labrador (n 1315) r.18A.01.

<sup>1344</sup> Nova Scotia (n 1315) r.26B.01(1).

<sup>1345</sup> Ontario (n 1315) r.77.01(1).

<sup>1346</sup> *ibid* r.77.01(2).

<sup>1347</sup> Notice NPP#2019-7.

<sup>1348</sup> Warren K. Winkler, ‘The Warren Winkler Lectures on Civil Justice Reform (2007) 39(1) Ottawa Law Review 99, 106.

<sup>1349</sup> *ibid* 107.

Criteria for assigning a matter to case management may include the complexity of the issues, the importance of the issues to the public, the time required for discovery, trial preparation and trial itself, and whether there has been any substantial delay in conduct of the action.<sup>1350</sup> In Alberta, a management judge may be appointed for one or more of four specified reasons: to encourage parties to participate in ADR, to promote and ensure fair and efficient conduct and resolution of the action, to keep parties on schedule, and to facilitate trial preparation and scheduling of the trial date.<sup>1351</sup> In the Federal Court, while the Chief Justice has a general discretion to assign a case to be managed where appropriate,<sup>1352</sup> delay is a particular concern. The court is required to either issue a notice of status review or to assign a matter to continue as a ‘specially managed proceeding’ if parties have not taken steps to set the matter down for trial within a specified time.<sup>1353</sup> Some jurisdictions appoint a single management judge to deal with the entirety of a matter, either automatically or as directed.<sup>1354</sup> An express ground for application for a case management order in Newfoundland and Labrador is whether the case would ‘benefit from management, supervision and direction by a single judge’.<sup>1355</sup> This approach is a halfway house between full docketing for all cases and having all cases being managed by a succession of judges. Whether the management judge can also preside at trial differs between jurisdictions. This is not permitted under the CFCR<sup>1356</sup> or in Ontario,<sup>1357</sup> whereas in Newfoundland and Labrador<sup>1358</sup> and Nova Scotia,<sup>1359</sup> one judge can be appointed as both management and trial judge.

Case management judges, when appointed, have broad, discretionary powers. A judge in the Federal Court ‘may’ give any directions or orders that are ‘necessary for the just, most expeditious and least expensive determination of the proceeding on its merits’.<sup>1360</sup> Judges in Ontario have similarly wide powers,<sup>1361</sup> while in Alberta a judge may make ‘any procedural order ... necessary’.<sup>1362</sup> Some imperatives are imposed. In Newfoundland and Labrador, once

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<sup>1350</sup> Ontario (n 1315) r.77.05(4); Manitoba (n 1315) r.50.1.

<sup>1351</sup> Alberta (n 1315) r.4.12.

<sup>1352</sup> CFCR (n 1314) Art.381, Art.384.

<sup>1353</sup> *ibid* Art.380.

<sup>1354</sup> *ibid* Art.385; Ontario (n 1315) r.77.06(1); Newfoundland and Labrador (n 1315) r.18A.07(1); Nova Scotia (n 1315) r.26B.02; Quebec (n 1315) r.157; Saskatchewan (n 1315) r.4-7(2).

<sup>1355</sup> Newfoundland and Labrador (n 1315) r.18A.03.

<sup>1356</sup> CFCR (n 1314) Art.266.

<sup>1357</sup> Ontario (n 1315) r.77.06(2).

<sup>1358</sup> Newfoundland and Labrador (n 1315) r.18A.09.

<sup>1359</sup> Nova Scotia (n 1315) r.26B.02(2).

<sup>1360</sup> CFCR (n 1314) Art.385(1)(a).

<sup>1361</sup> Ontario (n 1315) r.77.04.

<sup>1362</sup> Alberta (n 1315) r.4.14(1)(f).

notified of appointment, a management judge ‘shall’ convene a case management meeting to discuss pre-trial procedural matters.<sup>1363</sup> Similarly, in Nova Scotia, the judge appointed as case manager ‘must’ convene a conference as soon as is convenient to consider ‘all subjects pertinent to management’,<sup>1364</sup> and ‘must’ monitor progress of the action by holding further conferences, hearing motions, exchanging correspondence ‘or by other means’.<sup>1365</sup> Even where a management judge is appointed, however, an underlying principle across the Canadian jurisdictions is that the parties, rather than the court, bear responsibility for progressing cases. In Ontario, even where case management is applied, ‘the greater share of the responsibility for managing the proceeding and moving it expeditiously to a trial, hearing or other resolution remains with the parties’<sup>1366</sup>. In Alberta and Saskatchewan, the ‘parties are responsible for managing their dispute and for planning its resolution in a timely and cost-effective way’.<sup>1367</sup> They must monitor the progress of the case and adjust dates as necessary.<sup>1368</sup> Rather than court management, the rules refer to ‘court assistance in managing litigation’.<sup>1369</sup> In Nova Scotia, the application of judicial management in selected actions ‘departs from a general principle of procedure that an action is managed by the parties until trial dates are requested’.<sup>1370</sup>

In some jurisdictions, parties’ obligations go beyond management responsibility. In Alberta and Saskatchewan, those obligations are set out in the ‘purpose and intention’ provision. They include identifying the real issues in dispute, facilitating the quickest means of resolving the claim at the least expense, periodically evaluating ADR, refraining from applications that do not further the purpose of the rules, and using publicly funded court resources effectively.<sup>1371</sup> In Quebec, parties ‘must be careful to confine the case to what is necessary to resolve the dispute, and must refrain from acting with the intent to cause prejudice to another person or behaving in an excessive or unreasonable manner, contrary to the requirements of good faith’.<sup>1372</sup> They are ‘duty-bound to co-operate and, in particular, to keep one another informed at all times of the facts and particulars conducive to a fair debate...’.<sup>1373</sup> In other rules, while there are no express obligations imposed, expectations as to parties’ behaviour are apparent in

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<sup>1363</sup> Newfoundland and Labrador (n 1315) r.18A.06.

<sup>1364</sup> Nova Scotia (n 1315) r.26B.03(1).

<sup>1365</sup> *ibid* r.26B.04.

<sup>1366</sup> Ontario (n 1315) r.77.01(2).

<sup>1367</sup> Alberta (n 1315) r.4.1; Saskatchewan (n 1315) r.4-1.

<sup>1368</sup> Alberta (n 1315) r.4.7(1).

<sup>1369</sup> *ibid* Part 4, Division 2; Saskatchewan (n 1315) Part 4, Division 2.

<sup>1370</sup> Nova Scotia (n 1315) r.26B.01(1).

<sup>1371</sup> Alberta (n 1315) r.1.2(3); Saskatchewan (n 1315) r.1-3(3).

<sup>1372</sup> Quebec (n 1315) r.19.

<sup>1373</sup> *ibid* r.20.

the rules on costs assessment. Under the CFCR and in Ontario, for example, in assessing costs the court may take into account *inter alia* ‘the conduct of any party that tended to shorten or lengthen unnecessarily the duration of the proceeding’,<sup>1374</sup> whether any step was ‘improper, vexatious or unnecessary’<sup>1375</sup> and whether a party failed to admit something that should have been admitted.<sup>1376</sup> Parties’ obligations do not extend to the pre-action phase, with the exception of Quebec where parties ‘must consider private prevention and resolution processes before referring their dispute to the courts’.<sup>1377</sup> Unlike in the U.S., there are no certification requirements which by practical extension would require parties and lawyers to take some pre-action steps. Pre-action requirements have been considered by some Canadian reform projects,<sup>1378</sup> but no measures have been implemented as a result.

The general position that responsibility for progressing litigation lies with the parties is reflected in some jurisdictions’ approach to sanctions for non-compliance. Sanctions have a central position in Alberta, where the ‘purpose and intention’ provision states that the rules are intended to be used *inter alia* to ‘provide an effective, efficient and credible system of remedies and sanctions to enforce these rules and orders and judgments’.<sup>1379</sup> This is one of several jurisdictions where sanctions and remedies for non-compliance are available on application by a party, rather than on the court’s own initiative.<sup>1380</sup> This is not the case across the board, however, as in Ontario a judge or case management master may on their own initiative require parties to appear before them to deal with any case management matter, ‘including a failure to comply with an order or the rules’.<sup>1381</sup> Once an issue of non-compliance is before the court, there is generally a broad discretion as to how to deal with it, with courts able to respond to non-compliance with any orders that will carry out or further the purpose of the rules<sup>1382</sup> or such orders as may be ‘just’.<sup>1383</sup> Some rules are more prescriptive than others. In Manitoba,

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<sup>1374</sup> Ontario (n 1315) r.57.01(1)(e); CFCR (n 1314) Art.400(3)(i).

<sup>1375</sup> Ontario (n 1315) r.57(1)(f)(i); CFCR (n 1314) Art.400(3)(k).

<sup>1376</sup> Ontario (n 1315) r.57(1)(g); CFCR (n 1314) Art.400(3)(j).

<sup>1377</sup> Quebec (n 1315) r.1.

<sup>1378</sup> The British Columbia Civil Justice Reform Working Group, *Effective and Affordable Civil Justice: Report of the Civil Justice Reform Working Group to the Justice Review Task Force*, November 2006, viii; The Alberta Rules of Court Project, *Management of Litigation: Consultation Memorandum No.12.5*, March 2003 52-3; The Alberta Rules of Court Project, *Promoting Early Resolution of Disputes by Settlement: Consultation Memorandum No.12.6*, July 2003 26-32.

<sup>1379</sup> Alberta (n 1315) r.1.2(2).

<sup>1380</sup> Alberta (n 1315) r.1.5(1); British Columbia (n 1315) r.5-3(6); Ontario (n 1315) r.3.04(4); Saskatchewan (n 1315) r.1-6.

<sup>1381</sup> Ontario (n 1315) r.77.04(2).

<sup>1382</sup> British Columbia (n 1315) r.22-7(2); Ontario (n 1315) r.77.04(1).

<sup>1383</sup> Manitoba (n 1315) r.30.08(1)(b), r.60.11(c); New Brunswick (n 1315) r.31.08; Ontario (n 1315) r.3.04(4), r.60.12.

where a party does not comply with a pre-trial order or direction, is unprepared for the pre-trial conference or does not participate in good faith, the judge ‘must’ make an order from the list provided, which includes adverse costs and strike out orders. The final item in that list, ‘any order that the pre-trial judge considers appropriate’,<sup>1384</sup> indicates that the judge’s discretion remains broad. Alberta and Saskatchewan provide the most detail on situations in which the court may cure non-compliance. Four criteria must be met, namely that curing the non-compliance will cause no irreparable harm to any party, terms will be imposed that eliminate or ameliorate reparable harm or prevent reoccurrence, a suitable sanction is issued, if any, and it is in the overall interests of justice.<sup>1385</sup>

Further obligations are often imposed on parties and legal representatives in terms of resolving proceedings by means other than trial. The FCR require solicitors to discuss settlement within 60 days of close of pleadings,<sup>1386</sup> and parties ‘must’ be prepared to discuss settlement at a pre-trial conference.<sup>1387</sup> In Quebec, after proceedings have been commenced, parties are ‘required to co-operate to either arrive at a settlement or establish a case protocol’, which must indicate the consideration given to resolving the dispute other than through the courts.<sup>1388</sup> Parties in Alberta must participate in ADR in ‘good faith’<sup>1389</sup> and throughout the litigation must ‘periodically evaluate dispute resolution process alternatives to a full trial, with or without assistance from the Court’.<sup>1390</sup> In Saskatchewan, parties ‘make a genuine attempt to settle an action before a pre-trial conference’.<sup>1391</sup>

These obligations are part of a robust approach taken in the Canadian jurisdictions to ADR and settlement. It is clear from several of the rules that settlement is one of their main purposes. In Alberta, encouraging parties to resolve the claim themselves, as early as is practicable, is an explicit aim of the rules.<sup>1392</sup> In Ontario, the purpose of case conferences is to provide ‘an opportunity for any or all of the issues ... to be settled without a hearing and, with respect to any issues that are not settled, to obtain’<sup>1393</sup> orders or directions. The priority is settlement, with

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<sup>1384</sup> Manitoba (n 1315) r.50.09(1).

<sup>1385</sup> Alberta (n 1315) r.1.5; Saskatchewan (n 1315) r.1-6.

<sup>1386</sup> CFCR (n 1314) Art.257.

<sup>1387</sup> *ibid* Art.258.

<sup>1388</sup> Quebec (n 1315) r.148.

<sup>1389</sup> Alberta (n 1315) r.4.16(1).

<sup>1390</sup> Alberta (n 1315) r.1.2(3).

<sup>1391</sup> Saskatchewan (n 1315) r.4-12(1).

<sup>1392</sup> Alberta (n 1315) r.1.2(2).

<sup>1393</sup> Ontario (n 1315) r.50

proceeding to trial being secondary. Similarly, in Saskatchewan, the pre-trial conference ‘must’ be for the purpose of attempting to settle, and if that is not possible to consider *inter alia* identifying and simplifying the issues, amendments to pleadings and trial preparation.<sup>1394</sup> In some jurisdictions, courts can compel parties to participate in ADR or settlement discussions.<sup>1395</sup> The value of mandatory mediation was explained by the Civil Justice Review Task Force in its 1995 report on civil justice in Ontario. Even if settlement was not reached at an early stage, the use of mandatory mediation would force parties to evaluate their case and lawyers to focus on relevant settlement issues early in the life of the case.<sup>1396</sup>

Although case management in the Canadian jurisdictions is in some senses limited, the ACTL suggests that, in light of *Hryniak*,<sup>1397</sup> judges and lawyers should adopt a more expansive and flexible use of case management. This may result in substantially reducing expense and delay while allowing justice to be dispensed fairly and regularly.<sup>1398</sup> The ACTL report, like its U.S. counterpart, provides useful insight into the practicalities of case management. The facts, evidentiary problems or legal issues on which the case will turn must be identified early.<sup>1399</sup> Decisions should be timely.<sup>1400</sup> Trial dates should be fixed early in the process.<sup>1401</sup> Judges should encourage an atmosphere of collegiality and co-operation,<sup>1402</sup> and should utilise informal procedures where appropriate.<sup>1403</sup> Finally, it should be remembered that case management is not ‘one size fits all’, but must be tailored to each case.<sup>1404</sup> Proportionality was repeatedly cited by interviewees as a key principle that should be used in devising and implementing management procedures, and as ‘the lens through which virtually all pre-trial procedures should be viewed’.<sup>1405</sup> A number of interviewees noted that there is still some reluctance and misunderstanding on the part of Canadian judges regarding case management, despite the recognised benefits,<sup>1406</sup> a point that was absent from the equivalent U.S. report. The report

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<sup>1394</sup> Saskatchewan (n 1315) r.4-12(4).

<sup>1395</sup> CFCR (n 1314) Art.386(1); Alberta (n 1315) r.4.16(4); British Columbia (n 1315) r.5-3(1); Newfoundland and Labrador (n 1315) r.37A.03; Saskatchewan (n 1315) r.4-10; Ontario (n 1315) r.24.1.

<sup>1396</sup> The Ontario Civil Justice Review, *Supplemental and Final Report*, November 1996, Chapter 5, section 5.2a.

<sup>1397</sup> *Hryniak* (n 1325).

<sup>1398</sup> *Working Smarter Not Harder* (n 1327) 3.

<sup>1399</sup> *ibid* 11.

<sup>1400</sup> *ibid*.

<sup>1401</sup> *ibid* 12.

<sup>1402</sup> *ibid* 13.

<sup>1403</sup> *ibid* 14.

<sup>1404</sup> *ibid* 16.

<sup>1405</sup> *ibid*.

<sup>1406</sup> *ibid*.

suggests that this may in part be due to the varying approaches to case management across Canada.<sup>1407</sup> It does, however, note that a shift may be taking hold in this regard.<sup>1408</sup>

### III. AUSTRALIA

Australian civil procedure comprises a federal jurisdiction<sup>1409</sup> and state-specific rules.<sup>1410</sup> They all have an overarching purpose or objective provision, implicit in which is ‘an understanding that the rights of the parties to justice on the merits are subject to the goal of promoting efficiency in the administration of justice’.<sup>1411</sup> The clauses vary between jurisdictions, but share the common feature of ‘promoting efficiency, minimising costs and delays and facilitating the just determination of disputes’.<sup>1412</sup> Australia has close ties to England in this regard, in that these provisions were introduced after Lord Woolf’s review prompted a ‘fundamental rethink of rules of court [in Australia], commencing with first principles’.<sup>1413</sup> It is clearer in Australia than in either the U.S. or Canada that these overarching provisions include both *inter partes* and systemic considerations. In Victoria, for example, the court must have regard to *inter alia* the just determination of proceedings, the importance and complexity of the dispute, the efficient conduct of court business and the efficient use of judicial and administrative resources.<sup>1414</sup> Similar factors apply in the Federal Court and in New South Wales, where those factors are linked to a requirement that courts must ‘follow the dictates of justice’.<sup>1415</sup> Some rules draw a link between their overarching purpose and the role of court management in its implementation.<sup>1416</sup> This link was made clear by the High Court of Australia in *Aon Risk Services Ltd v Australian National University* (2009),<sup>1417</sup> which has been said to embody ‘the triumph of case management’.<sup>1418</sup> The court in that case also determined that case management required

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<sup>1407</sup> *ibid* 17.

<sup>1408</sup> *ibid* 26.

<sup>1409</sup> Federal Court of Australia Act 1976 (‘FCAA 1976’); Federal Court Rules 2011 (‘FCR 2011’).

<sup>1410</sup> Australian Capital Territory Court Procedures Rules 2006; New South Wales Uniform Civil Procedure Rules 2005; Northern Territory Supreme Court Rules; Queensland Uniform Civil Procedure Rules 1999; South Australia Uniform Civil Rules 2020; Victoria Supreme Court (General Civil Procedure) Rules 2015; Western Australia Rules of the Supreme Court 1971.c

<sup>1411</sup> Andrew Hemming and Tania Penovic, *Civil Procedure in Australia* (LexisNexis Butterworths 2015) 46.

<sup>1412</sup> *ibid*.

<sup>1413</sup> Stephen Colbran, Peta Spender, Roger Douglas, Sheryl Jackson, *Civil Procedure Commentary and Materials* (7th edn, LexisNexis Butterworths 2019) 60.

<sup>1414</sup> Victoria (n 1410) r.9.

<sup>1415</sup> FCAA 1976, s.37M(2); New South Wales (n 1410) r.57, r.58.

<sup>1416</sup> New South Wales (n 1410) r.56-58; Western Australia (n 1410) r.4B.

<sup>1417</sup> [2009] HCA 27.

<sup>1418</sup> Jeremy Sher, ‘Aon Risk Services Australia Ltd v Australian National University: the triumph of case management’, (2010) 29(1) CJQ 13.

consideration of systemic as well as *inter partes* issues.<sup>1419</sup> *Aon Risk* has since been applied with ‘great vigour’ and cited ‘thousands’ of times.<sup>1420</sup> Across the Australian jurisdictions, the meaning of ‘justice’ has been broadened by the procedural rules and case law to include systemic as well as *inter partes* considerations.<sup>1421</sup>

As in England, judicial case management was introduced in Australia in conjunction with the overriding purpose provisions to deal with similar flaws in the civil justice system<sup>1422</sup> such as high costs, delay, party control of litigation and a lax approach to compliance driven by the primacy of substantive justice.<sup>1423</sup> Some form of case management is provided for by all Australian procedural rules, although approaches differ between jurisdictions. Only the Federal Court runs a docketing system. This ‘Individual Docketing System’ survived the recent introduction of the National Court Framework (‘NCF’), described as a fundamental reform of the court and the way it operates, intended to ‘reinvigorate the Court’s approach to case management’.<sup>1424</sup> There are no other court-wide docketing systems, although some jurisdictions do allow cases to be managed and heard by the same judge.<sup>1425</sup> Courts are generally given broad, discretionary management powers. The Federal Court Rules 2011 (‘FCR 2011’) set out actions that the court ‘may’ take and orders that it ‘may’ make. These include any order considered appropriate ‘in the interests of justice’<sup>1426</sup> and directions at any hearing.<sup>1427</sup> A non-exhaustive list of thirty-four possible directions is included.<sup>1428</sup> The Australian Capital Territory rules include twenty orders that the court ‘may’ make ‘at any time’.<sup>1429</sup> In New South Wales, a court may make ‘such directions as it thinks fit’.<sup>1430</sup>

Language is also often discretionary in referring to the balance the court must strike when making these decisions. Under the FCR 2011, a court ‘may’ deal with a proceeding in a manner proportionate to its nature and complexity.<sup>1431</sup> In Queensland, the court ‘may’ have regard to

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<sup>1419</sup> *Aon Risk* (n 1417) [5], [23]-[24].

<sup>1420</sup> Colbran, Spender, Douglas and Jackson (n 1413) 75.

<sup>1421</sup> Michael Legg, ‘Reconciling the goals of minimising cost and delay with the principle of a fair trial in the Australian civil justice system’ (2014) 33(2) CJQ 157, 166.

<sup>1422</sup> Colbran, Spender, Douglas and Jackson (n 1413) 22.

<sup>1423</sup> *ibid* 37.

<sup>1424</sup> <<https://www.fedcourt.gov.au/about/national-court-framework>> last accessed 25 May 2020.

<sup>1425</sup> Australian Capital Territory (n 1410) r.1402; Queensland (n 1410) r.386.

<sup>1426</sup> FCR 2011 r.1.32.

<sup>1427</sup> *ibid* r.5.04(1).

<sup>1428</sup> *ibid* r.5.04(3).

<sup>1429</sup> Australian Capital Territory (n 1410) r.1401(4).

<sup>1430</sup> New South Wales (n 1410) r.61(1).

<sup>1431</sup> FCR 2011 r.1.31(2).

factors such as the reasonableness of any time allowed, issues of complexity and importance, the volume and character of evidence and the state of the court lists.<sup>1432</sup> The Australian Capital Territory rules include a list of similar matters that the court ‘may’ have regard to in making orders.<sup>1433</sup> The Northern Territory rules, on the other hand, are more prescriptive. After a matter is filed, a Master ‘must’ fix an initial directions hearing within a specified time,<sup>1434</sup> at which the case must be designated to one of five categories,<sup>1435</sup> based on for example required hearing time, complexity and urgency, which will determine how the case proceeds. There are imperatives on the Master to make orders regarding the next stage of the proceedings. The South Australia rules, on the other hand, allow the court ‘in its discretion’ to order at any stage that a proceeding may be managed, or cease to be managed, as appropriate.<sup>1436</sup>

In Western Australia, the rules recognise the potential for tension between judicial management and limited court resources. Actions will be managed ‘to the extent that the resources of the Court permit’ in accordance with ‘a system of positive case flow management’.<sup>1437</sup> The Western Australia system also incorporates an Inactive Cases List (‘ICL’).<sup>1438</sup> If no procedural step is taken for 12 months, a case is taken to be inactive<sup>1439</sup> and the case manager may require the parties to show why it should not be put on the ICL.<sup>1440</sup> If a case is on the ICL, only certain documents may be filed<sup>1441</sup> and a case is taken to be dismissed for want of prosecution if it remains on the ICL for six continuous months after the date of notice to the parties.<sup>1442</sup> The same is true if the case is taken off the list and no procedural step is taken for six months.<sup>1443</sup> This is a clear and systematic way of ensuring that parties get on with a case and that court time is not wasted on cases that are either making their way to trial too slowly, or in which parties have no intention of getting to trial at all. A balance does need to be struck, however, between the resources saved by the existence of such a list and the administrative resources required to run it.

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<sup>1432</sup> Queensland (n 1410) r.367(1).

<sup>1433</sup> Australian Capital Territory (n 1410) r.1401(5).

<sup>1434</sup> Northern Territory (n 1410) r.48.04.

<sup>1435</sup> *ibid* r.48.06.

<sup>1436</sup> South Australia (n 1410) r.311.3.

<sup>1437</sup> Western Australia (n 1410) r.4B.

<sup>1438</sup> *ibid* Division 5.

<sup>1439</sup> *ibid* r.24.

<sup>1440</sup> *ibid* r.22.

<sup>1441</sup> *ibid* r.26.

<sup>1442</sup> *ibid* r.28(1).

<sup>1443</sup> *ibid* r.28(2).

Some Australian courts have issued practice notes and directions dealing with the management of specific types of case. The Central Practice Note of the Federal Court of Australia ('CPN-1') sets out the principles of case management under the NCF. These include allocation to a specialist judge<sup>1444</sup> and several options for parties to seek expedited or streamlined procedures.<sup>1445</sup> Parties can also opt to use procedures from specific national practice areas. The Commercial and Corporations Practice Note ('C&C-1'), for example, sets out a discovery procedure which requires parties to collaborate on the production of a schedule, with only focused disagreements being dealt with by the court.<sup>1446</sup> Queensland introduced a case flow management system in the Brisbane registry by way of Practice Direction 4 of 2020, aimed at monitoring the progress of proceedings and intervening when that progress is unsatisfactory. All cases in which a request for a trial date has not been filed within a specified time are placed on a case flow management list. Directions are given in cases on the list at monthly case flow reviews. Queensland also runs a 'supervised case list' (Practice Direction 11 of 2012), for matters where the hearing will take more than five days or which impose 'a greater than normal demand on resources because of considerations such as length of time, complexity of issues, or multiplicity of parties'.<sup>1447</sup>

These case management systems still place significant responsibility on the parties for management and progress of the case. CPN-1 states that while the court:

will manage the issues in dispute, the proceeding is always the parties' proceeding. In everything they do, the parties should approach their role as the primary actors responsible for identifying the issues in dispute and in ascertaining the most efficient, including cost-efficient, method of its resolution.<sup>1448</sup>

The Queensland supervised case list requires parties to attempt to reach agreement on matters such as the adequacy of pleadings, expert evidence, and whether and when ADR should be attempted. Matters on the list will not be allocated trial dates unless a request is filed or a judge

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<sup>1444</sup> CPN-1, r.3.1.

<sup>1445</sup> *ibid* r.6.5.

<sup>1446</sup> C&C-1, r.8.4.

<sup>1447</sup> Practice Direction 11 of 2012, para 7.

<sup>1448</sup> CPN-1, r.7.4.

‘otherwise orders’,<sup>1449</sup> and before a request for trial date is filed parties ‘should seek directions’ on certain matters.<sup>1450</sup>

Several Australian rules impose obligations on parties and their lawyers. In the Federal Court, parties must conduct proceedings, including settlement negotiations, consistently with the overarching purpose.<sup>1451</sup> Lawyers must take account of that duty and assist their client to comply.<sup>1452</sup> A lawyer who fails to do so may be ordered to personally bear resultant costs, which they are unable to recover from their client.<sup>1453</sup> Parties are expected to be prepared and to cooperate. CPN-1 includes a list of ‘case management imperatives’ that ‘should’ be considered by parties in preparation for the first case conference.<sup>1454</sup> Parties and practitioners must communicate in a ‘meaningful way’ about matters to be raised at any case management hearing.<sup>1455</sup> New South Wales imposes a duty not unlike CPR 1.3, in that a party is ‘under a duty to assist the court to further the overriding purpose and, to that effect, to participate in the processes of the court and to comply with directions and orders of the court’.<sup>1456</sup>

Victoria and South Australia impose detailed and prescriptive ‘overarching obligations’. The obligations imposed in Victoria include acting honestly,<sup>1457</sup> only taking steps that a party ‘reasonably believes ... is necessary to facilitate resolution or determination of the proceeding’,<sup>1458</sup> co-operation between parties and lawyers and with the court,<sup>1459</sup> and using ‘reasonable endeavours’ to narrow issues in dispute<sup>1460</sup> and minimise delay.<sup>1461</sup> Each party must certify that they have read and understood these obligations.<sup>1462</sup> The certification must be filed at court, together with a ‘proper basis’ certification confirming that the claim or response has a proper factual and legal basis.<sup>1463</sup> The court can take contravention of these requirements<sup>1464</sup> into account when making any order, including as to costs. The South Australia rules impose

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<sup>1449</sup> Practice Direction 11 of 2012, para 31.

<sup>1450</sup> *ibid* para 33.

<sup>1451</sup> FCAA 1976, s.37N(1).

<sup>1452</sup> *ibid* s.37N(2).

<sup>1453</sup> *ibid* s.37N(5).

<sup>1454</sup> CPN-1, r.8.5

<sup>1455</sup> CPN-1, r.8.9

<sup>1456</sup> New South Wales (n 1410) r.56(2).

<sup>1457</sup> Civil Procedure Act 2010 (Victoria) s.17.

<sup>1458</sup> *ibid* s.19.

<sup>1459</sup> *ibid* s.20.

<sup>1460</sup> *ibid* s.22.

<sup>1461</sup> *ibid* s.23.

<sup>1462</sup> *ibid* s.41.

<sup>1463</sup> *ibid* s.42.

<sup>1464</sup> *ibid* s.28, s.46.

similar obligations,<sup>1465</sup> although without an analogous certification requirement. Some jurisdictions also impose a duty on lawyers to facilitate the overarching purpose, in addition to their general duties to the court and their clients.<sup>1466</sup>

The pre-action provisions in Australian jurisdictions are closer to the CPR than either the U.S. or Canada, although the position differs between jurisdictions within Australia. Several allow a party to apply for pre-action disclosure.<sup>1467</sup> The jurisdictions that go furthest in terms of pre-action requirements are the Commonwealth, Victoria and South Australia. The Commonwealth requires parties to take ‘genuine steps’ to resolve a dispute before proceedings are commenced and to file a statement confirming that this was done if and when proceedings are indeed commenced.<sup>1468</sup> In Victoria, not only must the factual and legal basis of a claim be investigated prior to filing, but the various overarching obligations must be explained to potential litigants.<sup>1469</sup> The pre-action requirements in South Australia are the most detailed. They aim to, *inter alia*, encourage resolution before litigation is commenced and ensure that any litigation is conducted expeditiously, efficiently, at proportionate cost and on focused issues.<sup>1470</sup> Parties must file a pre-action claim<sup>1471</sup> and response<sup>1472</sup> respectively, the contents of which are prescribed by the rules, as are the information and evidence that must accompany them. A pre-action meeting must be held ‘to attempt to resolve the dispute’.<sup>1473</sup> If a claim is issued, the issuing party must certify whether these pre-action steps were taken.<sup>1474</sup> If they should have been but were not, the court will list the matter for a special directions hearing to determine whether orders should be made for pre-action steps or steps in lieu to be taken.<sup>1475</sup>

All Australian jurisdictions give the courts broad discretion to deal with non-compliance. Several allow the court to set aside the proceeding or any document, judgment or order, in

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<sup>1465</sup> South Australia (n 1410) r.3.1

<sup>1466</sup> FCAA 1976 s.37N(2); Civil Procedure Act 2005 (New South Wales), s.56(3); CPA 2010 (n 1456), ss.13-15; Colbran, Spender, Douglas and Jackson (n 1413) 66.

<sup>1467</sup> FCR 2011 r.7.23; New South Wales (n 1410) reg.5.3; Northern Territory (n 1410) r.32.01-32.11; Western Australia (n 1410) Order 26A.

<sup>1468</sup> Civil Dispute Resolution Act 2011, ss.6 and 7.

<sup>1469</sup> CPA 2010 (n 1457) Part 2.3, s.42.

<sup>1470</sup> South Australia (n 1410) r.61.1.

<sup>1471</sup> *ibid* r.61.7.

<sup>1472</sup> *ibid* r.61.9

<sup>1473</sup> *ibid* r.61.12.

<sup>1474</sup> *ibid* r.61.13.

<sup>1475</sup> *ibid* r.61.14.

whole or in part, to allow amendments, or to make such orders as it deems appropriate.<sup>1476</sup> Some go further in detailing how courts may act in specific situations. In Queensland, the party entitled to the benefit of an order that has not been complied with may apply to require the non-compliant party to show cause, on which application the court may give judgment, extend time for compliance, give directions or ‘make another order’.<sup>1477</sup> In South Australia, a party can apply for judgment in default of compliance where its opponent has committed serious or persistent breaches which ‘seriously prejudice the proper and expeditious conduct of an action’ or where the opponent ‘manifests an inability or unwillingness to prosecute or defend an action with due diligence’.<sup>1478</sup> The court has a wide discretion in dealing with such an application. It may, for example, stay the action until the non-compliance is rectified, grant judgment, list the matter for an early trial, or ‘make any other or further order as it thinks fit’.<sup>1479</sup> The Australian rules are less clear than the CPR in stating that the courts can take any steps relating to non-compliance of their own initiative, although in Victoria the court has an inherent power to strike out where a party has failed to take any step required of it under the rules or has failed to comply with an order.<sup>1480</sup>

Settlement and ADR have a prominent place in Australian procedural rules. The range of mechanisms introduced to facilitate early resolution has been identified as a dominant feature of Australian civil procedure.<sup>1481</sup> In South Australia, the object of the rules refers to ‘resolution or determination of the issues’, giving resolution other than at trial a prominent place.<sup>1482</sup> In Victoria, the overarching purpose of the rules may expressly be achieved by agreement between parties or any dispute resolution process agreed to by parties or ordered by the court.<sup>1483</sup> The court may order parties to use ADR in Victoria,<sup>1484</sup> and the same is true in many other Australian jurisdictions. The Federal Court can require parties to submit to mediation,<sup>1485</sup> and can make an order at any hearing referring a matter to mediation, arbitration or another ADR process.<sup>1486</sup> In contrast to the discretionary management powers considered above, the court ‘will’ consider

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<sup>1476</sup> Northern Territory (n 1410) r.2.01; Queensland (n 1410) r.371(2); Victoria (n 1410) r.2.01(2); Western Australia (n 1410) Ord.2, r.1(2).

<sup>1477</sup> Queensland (n 1410) r.374

<sup>1478</sup> South Australia (n 1410) r.146.1

<sup>1479</sup> *ibid* r.146.1(3).

<sup>1480</sup> Victoria (n 1410) r.24.05.

<sup>1481</sup> Hemming and Penovic (n 1411) 29.

<sup>1482</sup> South Australia (n 1410) r.1.5

<sup>1483</sup> Victoria (n 1410) r.7(2).

<sup>1484</sup> *ibid* r.48(d).

<sup>1485</sup> FCAA 1976 (n 1409) s.53A.

<sup>1486</sup> FCR 2011, r.5.04(3).

options for ADR as early as is reasonably practicable.<sup>1487</sup> The Northern Territory rules are similarly prescriptive. At the initial directions hearing, the Master ‘must’ consider whether it is appropriate to refer the matter to mediation or a settlement conference, and order accordingly.<sup>1488</sup> Several other rules do not require the court to consider ADR or settlement, but they do allow it to refer a matter to ADR without the parties’ consent.<sup>1489</sup> The introduction of these powers allowing the court to mandate ADR has been described as one of the ‘most striking developments in ADR’ in Australia in the past 15 to 20 years.<sup>1490</sup>

Some rules impose imperatives on parties to consider ADR or to otherwise try to resolve the dispute. Under the FCR 2011, while the court ‘will’ consider ADR options, parties ‘must’ do so as early as is reasonably practicable.<sup>1491</sup> The court ‘expects’ parties to ‘always’ consider or seek early resolution using ADR.<sup>1492</sup> As noted, the Commonwealth Civil Dispute Resolution Act 2011 requires parties to take ‘genuine steps’ to resolve a dispute before proceedings are commenced.<sup>1493</sup> ‘Genuine steps’ include notification of and an offer to discuss issues, responding appropriately, providing relevant information and documents, considering ADR processes, considering a different process if one is carried out and fails, and attempting to negotiate.<sup>1494</sup> In Victoria, parties must use reasonable endeavours to resolve a dispute by agreement, including ADR, unless it is not in the interests of justice to do so or the dispute is of such a nature that only judicial determination is appropriate.<sup>1495</sup> The Federal jurisdiction and New South Wales both require parties to participate in mediation in good faith.<sup>1496</sup> Queensland requires parties to ‘act reasonably and genuinely’ in mediation.<sup>1497</sup> There are also some Australian legislative provisions that require parties with certain types of claims, for example some native title claims and proceedings relating to children, to attend some form of ADR as a pre-condition to litigation.<sup>1498</sup>

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<sup>1487</sup> *ibid* r.28.01.

<sup>1488</sup> Northern Territory (n 1410) r.48.06(4).

<sup>1489</sup> New South Wales (n 1410) r.26; South Australia (n 1410) r.131.2-3; Western Australia (n 1410) Order 4A(2), r.8(1); Queensland (n 1410) r.319, r.320; CPA 2010 (n 1456) s.66.

<sup>1490</sup> *Hemming and Panovic* (n 1411) 102.

<sup>1491</sup> FCR 2011 r.28.01.

<sup>1492</sup> CPN-1 r.9.1.

<sup>1493</sup> CDRA 2011 (n 1468) ss.6 and 7.

<sup>1494</sup> *ibid* s.4.

<sup>1495</sup> Victoria (n 1410) r.22.

<sup>1496</sup> CPN-1, r.9.5; New South Wales (n 1410) r.27.

<sup>1497</sup> Queensland (n 1410) r.325

<sup>1498</sup> *Colbran, Spender, Douglas and Jackson* (n 1413) 92.

In order to assist with the practicalities of case management, the Law Council of Australia and the Federal Court of Australia have published a case management handbook.<sup>1499</sup> This highlights tools and techniques available to the court and practitioners, and ‘more importantly’ gathers and distils experience as to the merits or perils of specific techniques in different contexts.<sup>1500</sup> Important points are made about the relationship between the work carried out by lawyers, litigation costs and judges’ role in that relationship. It cannot be ‘too plainly stated’ that the only effective means of reducing litigation costs are those which result in less work being done by lawyers over the course of a proceeding.<sup>1501</sup> There is a tendency for this to be overlooked, and for case management to be seen as a series of timetabling events with the court focusing its role on ‘keeping the case on the rails’. This may increase speed, but it may also increase costs.<sup>1502</sup> This means that efficiency cannot be left to parties<sup>1503</sup> or lawyers.<sup>1504</sup> Judges play a crucial role, and perhaps their most important power is ‘the power to question’, to require practitioners and parties to account for the positions they have taken. This takes the form of, for example, asking whether a claim adds materially to prospects of success and if not, why it is being pressed, or asking why facts not seriously in dispute have not been admitted.<sup>1505</sup>

The handbook covers all aspects of case management, including directions hearings, communications between parties and the court, the identification and narrowing of issues, ADR, discovery, evidence, and interlocutory applications. As with the U.S. and Canadian guidance, it is recommended that judges identify and narrow issues as early as possible.<sup>1506</sup> The court can make a discovery order at any stage, and early production of documents may assist in identifying and narrowing issues in some cases.<sup>1507</sup> The importance of tailoring management to the individual case is highlighted. Requiring parties to agree on a list of issues, for example, may seem like a time-saving decision, but it might not always be appropriate. Depending on the nature of the case, it may simply result in additional disputation and costs.<sup>1508</sup> The handbook lists practical matters for judges to consider at different stages of the proceedings. It includes questions to ask concerning consent and timing in the context of ADR.<sup>1509</sup> Matters to

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<sup>1499</sup> *Case Management Handbook* (Law Council of Australia and Federal Court of Australia 2014).

<sup>1500</sup> *ibid* 11.

<sup>1501</sup> *ibid* 15.

<sup>1502</sup> *ibid*.

<sup>1503</sup> *ibid*.

<sup>1504</sup> *ibid* 16.

<sup>1505</sup> *ibid*.

<sup>1506</sup> *ibid* 21.

<sup>1507</sup> *ibid* 30.

<sup>1508</sup> *ibid*.

<sup>1509</sup> *ibid* 36.

be considered early, prior to the formulation of a request or order for discovery, are set out, for example whether discovery can be staged, limited to issues or defined by categories, or whether the intended purpose can be achieved by less expensive means.<sup>1510</sup> There are suggested orders that can be made where parties are not co-operating regarding discovery, for example requiring them to file evidence to more clearly define the matters in dispute, to produce specific or summary documents or provide further particulars, or remove inadequately particularised allegations in pleadings. In some cases, it may be appropriate to direct parties to file and serve regular progress reports.<sup>1511</sup> Specific objectives are set out which can be addressed at the first directions hearing to avoid the ‘blizzard of documents’ that can build up through the witness evidence process.<sup>1512</sup> It is recommended that the court direct the manner and form in which evidence is to be adduced.<sup>1513</sup> Bundles can be created as the matters proceeds, for example, with documents being added or removed where necessary.<sup>1514</sup> The court can urge parties to consider whether and why it is necessary to file witness statements which simply annex or refer to documents without comment,<sup>1515</sup> and can also make the point that there is usually no good reason to exhibit a document to a statement, as it should be in discovery.<sup>1516</sup>

#### IV. CONCLUSIONS

The management of civil litigation in the U.S., Canadian and Australian jurisdictions has much in common with the equivalent process in England. All incorporate notions of proportionality and judicial control of proceedings. On a more specific level, however, there are points from each jurisdiction which might usefully be applied in England to improve the operation of case management proportionality.

In the U.S., the FRCP uses prescriptive language in respect of party behaviour and actions to be taken by the court. Incorporation of this kind of language into the CPR might steer cases more forcefully towards proportionate litigation and active management. The certification requirements imposed by FRCP 11, and the associated power of the court to sanction legal representatives, would assist in targeting the tactical pursuit of weak claims. They should also

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<sup>1510</sup> *ibid* 45-6.

<sup>1511</sup> *ibid* 47.

<sup>1512</sup> *ibid* 75.

<sup>1513</sup> *ibid* 76.

<sup>1514</sup> *ibid*.

<sup>1515</sup> *ibid*.

<sup>1516</sup> *ibid* 75.

increase the quality of pre-action work, with a resulting positive effect on efficiency and proportionate use of resources post-issue. Codification within the rules of robust powers to compel parties to consider settlement would provide judges with a useful management tool, particularly in the context of a system that is intended to see trial as a last resort. The publication of detailed, and crucially practical, guidance on how to manage cases is a final aspect of the U.S. approach to civil litigation management that could be transposed to the English system.

The aspects of Australian civil procedure that might most usefully be applied in England fall within similar categories. The obligations imposed on parties and lawyers in some jurisdictions are much more detailed than those imposed by the CPR. The most extreme example is Victoria, which also imposes a certification requirement in respect of those obligations. England is also once again less robust when it comes to settlement and ADR, with some Australian jurisdictions imposing prescriptive requirements to consider settlement or ADR, and some allowing the court to refer a matter to ADR without the parties' consent. As in the U.S., guidance has been published in Australia on the practicalities of case management. This is a resource that would have real value in England.

The Canadian jurisdictions are arguably the least useful. Judicial management is more limited in Canada, and responsibility for progress of litigation lies more prominently with the parties than it does in England. That is not to say, however, that they are unhelpful. The rules in some jurisdictions give more detail to the parties' obligations than the CPR, an approach which might better serve to keep that behaviour in line with the aims of the rules. This is particularly true of express obligations regarding the consideration of ADR and settlement. Despite the more limited approach to judicial management in Canada, in some jurisdictions the court may require parties to participate in ADR without their consent, further highlighting the importance of resolution other than by trial.

There is a notable consistency in these points across all three jurisdictions. This suggests that they are not unusual or inappropriate, rather that they are logical tools to consider in adapting and improving civil procedure. Each of those tools was developed within the context of the system in which they operate. It would be at best unhelpful, and at worst counterproductive, to simply transplant a procedural tool from one jurisdiction to another without considering whether and how it would fit within the system to which it is being transplanted. The next

chapter will consider, as part of proposals for dealing with the problems and inconsistencies identified in Chapter Four, how the points identified here might fit within the system as governed by the CPR.

## CHAPTER SIX

### ANALYSIS AND REFORM PROPOSALS

The preceding chapters have explored various facets of proportionality, both as a general principle of law and in a procedural case management context. From the meaning and application of proportionality in areas of law other than civil procedure, the focus narrowed to the civil justice system as governed by the CPR. Starting with Lord Woolf's review of the civil justice system, the introduction and development of proportionality and active judicial case management were traced. Procedural proportionality was then defined by comparing it to the more established general principle of law. The heart of this work, an analysis of CPR case management case law, identified inconsistencies in the application of both proportionality and active case management, as well as practical detail on how courts apply proportionality and manage cases. A step was then taken away from England, to consider how cases are managed in three other common law jurisdictions.

In the present chapter, it is intended to bring everything together. The aim of this work is not only to increase understanding of proportionality in a case management context, but to provide practical suggestions as to how its application may be improved. This chapter sets out those suggestions. First, however, it will be necessary to collate the main points from the previous chapters and analyse preliminary issues of meaning and objective. This will provide the platform upon which proposals for improvement can be considered.

#### I. THE PRINCIPLE OF PROPORTIONALITY

Proportionality as a general principle is not unique to civil procedure. It has been a central aspect of various areas of law for some time.<sup>1517</sup> Nevertheless, it is difficult to attach a precise meaning to the concept, and Lord Neuberger's observation that it is 'elusive' has broader application than the costs context in which the comment was made.<sup>1518</sup> Even the 'tests' for proportionality developed in some areas<sup>1519</sup> do not take us very far in that regard. They use

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<sup>1517</sup> See ch 2.

<sup>1518</sup> See ch 4 at 92-93.

<sup>1519</sup> See ch 2 at 29-34.

general terminology, leaving details to be filled in as required. In all contexts, the proportionality analysis is fact-specific, and being too prescriptive about meaning may reduce the flexibility that allows the concept to be applied to any given factual scenario. Proportionality provides an analytical framework, into which relevant facts can be inserted, rather than a rule. Over-prescriptiveness in terms of meaning misconceives the nature of the inquiry.

Nevertheless, the proportionality analysis can be given some meaning and structure. Proportionality describes the relationship between two or more factors. In the contexts considered in Chapter Two, it describes the relationship between means and ends. Taking the most structured form of analysis identified in that chapter, proportionality requires that the ends be legitimate, that the means be suitable and necessary for achieving them, and that the means satisfy a cost-benefit analysis. The heart of the analysis in any context is balancing the rights and interests of relevant parties. If those rights and interests cannot be met to each party's entire satisfaction in a given factual scenario, any limitation must go no further than is necessary to achieve the specified aim. Means that limit rights or interests must not be chosen if less burdensome means are available. The costs of pursuing those means must not outweigh the benefit that achievement of the aim in question will confer. Although proportionality was not structured in this way when it was made a central part of the CPR's Overriding Objective, these aspects can be identified within proportionality in that context.<sup>1520</sup>

## **II. CASE MANAGEMENT PROPORTIONALITY UNDER THE CPR: THE CURRENT POSITION**

Three general points can be drawn from the case law review in Chapter Four. The first is that inconsistency is a persistent problem in the integration and application of proportionality and in the adoption of a robust approach to case management. Secondly, the relationship between parties and the court lies at the heart of proportionate litigation and of giving full effect to the Overriding Objective. Finally, the application of case management proportionality is a fact-specific exercise. These points form the foundation on which improvements to the application of case management proportionality must be built.

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<sup>1520</sup> See ch 3 at 77-82.

## INCONSISTENCY

In Chapter Four, four main areas of inconsistency were identified. They covered judicial interpretation of the Overriding Objective, the application of *inter partes* and systemic proportionality, the extent to which courts take active and robust control of cases, the extent to which parties comply with CPR 1.3, and how courts respond to breaches of that duty. These inconsistencies cannot be explained by the fact-specific nature of case management decisions. They are points of principle in respect of which consistency of approach should be achievable. It should, for example, be possible to state that whenever a hearing has been vacated, *inter partes* and systemic considerations were taken into account. Instead, there are instances where hearings have been vacated without any explicit consideration of systemic issues.<sup>1521</sup> The pre-CPR approach that compensating for prejudice by way of a costs order is sufficient should not persist; however, this was articulated relatively recently by the Court of Appeal.<sup>1522</sup> Courts should consistently criticise and, where appropriate, sanction parties for breach of CPR 1.3, but there is a tendency at times to accept that aggressive, unco-operative litigation is the norm.<sup>1523</sup> Each type of inconsistency undermines the Overriding Objective by preventing both it and its underlying concepts of justice from becoming fully embedded within the civil justice system. Inconsistency in and of itself is also a problem. A consistent approach allows judges to identify more easily how they might deal with a particular issue. It allows parties and lawyers to plan with confidence and efficiency, as it will be easier to take a view on how a case management question might be decided. This may mean that parties are less likely to take a high risk or tactical approach, as the detrimental consequences of such an approach will be more predictable. One of the main aims of the proposals that follow is to remove, or at least to reduce, these inconsistencies.

## THE RELATIONSHIP BETWEEN PARTIES AND THE COURT

Inconsistencies in judicial interpretation of the Overriding Objective and the application of proportionality are within the court's control. The court also controls the extent to which a robust approach is taken to case management, however it is the parties that provide the information on the basis of which management decisions are made. They must also comply with those decisions. Parties' behaviour may also increase the need for judicial intervention.

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<sup>1521</sup> See ch 4 at 146-149.

<sup>1522</sup> See ch 4 at 89.

<sup>1523</sup> See ch 4 at 115-116.

This creates a link to the final inconsistency, parties' compliance with CPR 1.3. Just as the parties are not irrelevant to case management, neither is the court irrelevant to party compliance. Parties and lawyers are autonomous entities that cannot be completely controlled, but the court can direct their behaviour through its approach to management and non-compliance, for example through appropriate use and enforcement of orders and sanctions. Full engagement is required from both sides if litigation is to proceed proportionately. This relationship must be borne in mind when considering how to improve case management proportionality. It is not enough, for example, to provide guidance on or even supplement the rules in respect of matters to be dealt with at a CMC, if no consideration is given to how parties might best be required to provide the comprehensive information that must form the basis of a useful CMC. As judges are encouraged to take early and robust control of cases, parties and lawyers must be steered towards a co-operative approach that supports judicial control.

There is the potential for conflict within the relationship between parties and the court. They have different aims, meaning that the court's determination as to whether a decision is proportionate may be different to, and indeed conflict with, a party's view on the same issue. The court's aim is, or should be, that set out in the Overriding Objective. In an ideal world, parties' aims would chime with the court's, in that they would prioritise proportionate litigation and compliance with the rules, in particular the Overriding Objective and CPR 1.3. In reality, their aims are more personal. A party will want to succeed on the merits at trial or to otherwise bring litigation to as advantageous a conclusion as possible. Their conception of proportionality will support those aims. It will minimise cost and prejudice to themselves while shifting any disadvantages to their opponents. This is an intensely *inter partes* approach, yet one that will differ to that taken by the court, which can take an objective approach to balancing *inter partes* interests that parties are unable or unwilling to take. Parties are unlikely to give much unprompted thought to the interests of their opponent. The same is true of systemic issues, unless there is a tactical advantage in doing so, and a party may overestimate the proportion of court resources that should be allocated to their case. The court should in any event be better informed as to systemic consequences. This tension will prevent the full implementation of the Overriding Objective unless one player steers the other in that direction. That steering must be done by the court. In taking control it must be aware that it will have to divert parties clearly and specifically from their instinctive course.

## FACT-SPECIFIC ANALYSIS

Courts have emphasised that management decisions are limited to the facts of a case, and that caution must be exercised in how they are treated in subsequent cases.<sup>1524</sup> This is in line with the discussion in Chapter Two, which highlighted that the proportionality analysis is tied to the facts of the case at hand.<sup>1525</sup> This fact-specific characteristic applies at the *inter partes* and systemic levels. On an *inter partes* level, every case has its own unique set of facts and circumstances within which proportionate management decisions must sit. On a systemic level, those facts and circumstances mean that each case interacts with the system as a whole in a unique way. The underlying facts may be sufficiently serious to justify the allocation of more court resources than might be allocated to a less serious case of commensurate monetary value. Alternatively, the parties' resources may be sufficiently plentiful that they should have been able to keep to an ordered timetable and as such there is no justification for adjourning a hearing, with the resulting increase in use of court resources. This aspect of proportionality means that care must be taken in using existing case law as a basis for improvement. This will be considered further below, in the context of proposals on the publication of guidance.

### III. IMPROVING CASE MANAGEMENT PROPORTIONALITY

#### SHOULD PROPORTIONALITY BE REPLACED?

Assy has recently proposed that proportionality should be replaced with tests for affordability and expedition.<sup>1526</sup> His contention is that the considerations relevant to proportionality, such as value, importance, complexity, and the financial positions of the parties, are 'open-ended and potentially conflicting, rendering the proportionality test all but meaningless'.<sup>1527</sup> The current definition of proportionality, Assy argues, does not rule out a scenario in which 'the resources allocated to a case are beyond the reach of either or both parties, because their financial means are just one consideration among many'.<sup>1528</sup> Replacing proportionality with tests for affordability and expedition would ensure that cost and time as dimensions of justice

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<sup>1524</sup> See ch 4 at 93-94.

<sup>1525</sup> See ch 2 at 45.

<sup>1526</sup> Rabeea Assy, 'Taking Seriously Affordability, Expedition, and Integrity in Adjudication' in *Principles, Procedure, and Justice: Essays in Honour of Adrian Zuckerman*, ed. Rabeea Assy and Andrew Higgins (OUP 2020) 183.

<sup>1527</sup> *ibid.*

<sup>1528</sup> *ibid.*

mean something ‘more than merely eliminating waste’.<sup>1529</sup> He suggests that if cost and time are dimensions of justice, then the costs and time spent on any given proceeding become criteria for measuring the quality of the process.<sup>1530</sup> There ‘can be no doubt that expensive and lengthy litigations are bad in and of themselves and should be avoided; no intangible [sic] value lies in them’.<sup>1531</sup> Assy’s proposal assumes that it is possible in the abstract to identify a costs figure that is ‘too expensive’ or an amount of time from issue to judgment that is ‘too long’. It suggests that there is a point at which, regardless of the features of an individual case and of the parties’ interests in fighting it, expenditure of more time and money in pursuit of an accurate judgment is inappropriate.

Against Assy, it might be argued that if proportionality is used correctly, it is a more useful tool than narrower tests for affordability and expedition. ‘Inappropriate’ values for cost and time cannot be identified with any precision without weighing cost and time against other features of the parties and the case. Simply saying that £100,000 of costs or a two-year timetable to trial is ‘too expensive’ or ‘too long’ means little on its own. We are better able to understand why £100,000 is too expensive if that expenditure is compared to, for example, the value of a case, or its importance to either the parties or the public at large. Similarly, we can better understand why a two-year timetable to trial is too long if that timeframe is considered against the context of lengthy delay posing an insolvency risk for one party, or where a party has already had to endure significant delays. The meaning of ‘expensive’ and ‘lengthy’ cannot be judged, at least in a non-arbitrary way, without comparison to other factors. Ignoring those factors would itself increase the risk of injustice. Requiring comparisons to those other factors then brings us back in any event to the proportionality analysis. Assy’s comment that the open-ended factors underlying that analysis render ‘the proportionality test all but meaningless’ fails to appreciate the nature of proportionality and the advantages that lie in its flexibility. Proportionality is not a ‘test’, it is a malleable analytical framework to which the circumstances of any case can be added. If all relevant factors are added and balanced, the outcome should be proportionate. The scenario identified by Assy, whereby a ‘proportionate’ allocation of resources is beyond the reach of either or both parties would be unlikely to arise. This mere fact would render the decision disproportionate on an *inter partes* basis.

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<sup>1529</sup> *ibid.*

<sup>1530</sup> *ibid* 186.

<sup>1531</sup> *ibid.*

Proportionality is by no means a perfect tool. This can be seen in the issues of incommensurability and in the difficulty of developing consistent bodies of decisions from a fact-sensitive analysis. However, its advantages in terms of flexibility and the fact that it can be applied to the broadest possible range of factual scenarios outweigh any disadvantages. If properly applied, and if all relevant factors are weighed in the balance, proportionality is a useful management principle that deserves its place at the heart of the CPR.

## **OBJECTIVES**

Having decided that proportionality will be retained, the next preliminary step is to identify the objectives of any improvement measures. There is no one perfect way to manage a case or to apply proportionality. A consequence of the fact-specific nature of the exercise is that what works in one case may not work in others. The broad judicial management discretion means that within the context of a single case or decision, there may be more than one proportionate solution. Improvement measures cannot, therefore, dictate a 'correct' way of applying proportionality that will apply in every case. In line with the interplay between the role of the court and that of parties and lawyers, the aims must be approached from two directions. From the court's perspective, the aim is to ensure that proportionality is applied consistently and in accordance with the principles of justice underlying the Overriding Objective. This is not a case of requiring or even encouraging identical application across different cases, but instead ensuring that all relevant factors are taken into account in every case. Parties and lawyers, on the other hand, need to be aware of the nature of their duties to the court and to each other, of what amounts to non-compliance, and of its potential consequences. They also need to be able to predict, at least generally, how the court will manage a case or will respond to a particular action by one of the parties. Conduct of the litigation can then be planned accordingly.

The targets of improvement actions must also be identified. This comes down to the nature and purpose of case management. In managing a case, the court controls its progress through the litigation process. Ultimately, however, the court is controlling the actions of parties and lawyers: cases are not autonomous and cannot progress of their own accord. Once again, the question must be approached from two directions. From the court's perspective, improvement measures should aim to encourage and enable courts to exercise more effective control, while from the perspective of parties and lawyers they should aim to incentivise compliance. One

crucial target is the so-called ‘culture change’ that lies at the heart of Lord Woolf’s reports and subsequent amendments to the CPR. This is not just a pithy phrase: it is the practical context within which civil litigation is conducted, and which underpins decisions made by parties, lawyers and judges. ‘Culture’ in this context denotes the attitudes and aims that all players in the process bring to the conduct of civil litigation. The litigation culture that the CPR was intended to embody is one of a co-operative approach within a managed system where the court, rather than the parties, controls the progress of cases in a manner that balances *inter partes* and systemic interests. The extent to which this culture is embedded within the civil litigation system remains inconsistent.

Without a true culture change, attempts at improvement will simply patch up expensive or time-consuming issues, with superficial effects that are limited in scope and longevity. Improvement measures will have a more enduring impact if they aim to strengthen the litigation culture recommended by Lord Woolf. Sorabji has noted that an essential element of ensuring a true culture change is a clear line of Court of Appeal authorities that reflect the new culture.<sup>1532</sup> Zuckerman has identified the Court of Appeal’s failure to ‘speak with one voice’ in articulating how the CPR are to be applied.<sup>1533</sup> The role of the Court of Appeal is certainly important; however, even clear statements by appeal courts on the requirements of proportionate litigation are not always followed.<sup>1534</sup> When they are adopted by lower courts it may be too late. Citing requirements that parties should litigate proportionately after they have already spent time litigating disproportionately is of limited use. Practical, day to day management decisions, consistent with the intended culture, will assist in embedding that culture within the system. They will build up into a body of case law from which judges can draw appropriate guidance, and which will inform how lawyers approach litigation, how they advise their clients, and in turn shape clients’ expectations and attitudes. Improvement measures aimed at bolstering that body of consistent management decisions should have a significant impact on litigation culture as a whole.

Care must also be taken to ensure that so-called ‘improvements’ are not in fact counterproductive in that they increase expenditure of time, costs and resources. If, for example, an attempt to ensure a more consistent application of case management

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<sup>1532</sup> Sorabji, *English Civil Justice* (n 7) 239.

<sup>1533</sup> Adrian Zuckerman, ‘The continuing management deficit in the administration of civil justice’ (2015) 34(1) CJK 1, 2.

<sup>1534</sup> See ch 4 at 162-163.

proportionality requires the court to spend too much time on a complex decision-making process, this is arguably in itself disproportionate. It is important, however, to look at each individual case as a whole, and within the context of the civil litigation system. A case cannot proceed without expenditure of some time, costs and resources, and viewing any such expenditure negatively is inappropriate and unhelpful. Where expenditure exists, it must be proportionate. Spending some additional time and resources on case management, where that will result in savings in the broader context of both the case and the system as a whole, can be a positive investment. As is often the case where proportionality is concerned, the solution is balance, and improvement measures must strike that balance. There are various options available, each with their own advantages and disadvantages. Just as there is no one perfect way to apply case management proportionality, there is unlikely to be one perfect way to achieve the identified aims.

#### **A PROPORTIONALITY TEST?**

The main limbs of the proportionality tests established in other areas of law<sup>1535</sup> are applicable in a case management context.<sup>1536</sup> This raises the question as to whether it would be appropriate to introduce a test for case management proportionality. A test gives predictable structure to the analysis and promotes consistency in decision-making. It also promotes transparency, in that more of the underlying reasoning may be visible in the judgment, although the fact that the tests themselves use general terminology limits this particular advantage. A formal test is also useful for practitioners and parties. They can more easily plan their litigation strategy and focus procedural applications if they are aware of the structure that the court will use to consider case management issues.

There are, however, disadvantages to introducing a formal test. This is arguably too prescriptive an approach to a flexible principle, although there is limited weight in this particular argument given that any test could be drafted in broad terms and applied flexibly. Other disadvantages carry more weight. The provision of more detailed reasoning would provide more ammunition to parties wanting to appeal case management decisions, something that judges are likely to be anxious to avoid. This is not to say that rules should be drafted so as to deter legitimate appeals, and the standard of appeal for case management decisions would remain high, but an

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<sup>1535</sup> See ch 2 at 29-34.

<sup>1536</sup> See ch 3 at 77-82.

increase in interlocutory appeals would not further the Overriding Objective. Introduction of a test also has the potential to overcomplicate the decision-making process. Following a multi-stage structured test for every case management decision would be time-consuming. As a result, expenditure of costs and resources would likely increase. One major difference between case management proportionality and the areas of law considered in Chapter Two is the frequency with which case management decisions are made. They are much more frequent than, for example, the judicial review of public authority decisions. Every litigation case will incorporate many such decisions, some of which will be easier to make than others. This requires a practical approach, and one that does not make the decision-making process too rigid or time-consuming. The disadvantages of a proportionality test outweigh the advantages, and its introduction would be likely to cause more problems than it solves. However, aspects of existing proportionality tests can be incorporated into case management guidance.

## **GUIDANCE**

### **Case law as a Source of Guidance**

Details can be drawn from the case law as to factors that judges consider when applying proportionality and managing cases. The former can be seen, for example, in the forms of prejudice identified and the aspects of a litigant's financial position that are considered, while the latter can be seen in measures such as staged disclosure and forensic approaches to the amendment of statements of case. When considering whether and how to translate this information into practical guidance, two issues arise: first, that case management does not immediately appear to lend itself to the lifting of considerations or techniques from one case to another, and secondly that there is an incommensurability at the heart of proportionality that may resist the development of concrete guidance.

The fact-specific and discretionary nature of case management decisions means that the application of principles to facts can rarely be used as a direct authority in subsequent cases. It is unlikely that any two cases will feature the same combination of facts. This specificity will also limit the reach of appellate oversight. However, this does not mean that previous decisions have no value. First, principles must be separated from their application to the facts. Cases with different facts can reinforce the same point of principle, for example that evidence must be sufficiently relevant to an issue in dispute if it is to be admitted. In considering a case's value

as authority, there is no need to go beyond this to whether and how a particular piece of evidence was relevant. Cases are useful in identifying in the first place the principles and factors that may need to be considered. The CPR is not comprehensive in this regard and case law can supplement the rules. Cases are also a useful means of identifying practical management tools, such as forms of order or ways to approach and control issues. It is unlikely that a particular order or technique can be lifted from one case and applied without adjustment to another, but awareness of a wide range of techniques allows judges to adapt a technique to the case before them, and perhaps to discover new management methods. A full awareness of factors considered and approaches taken in other cases, such as could be provided by comprehensive guidance, should result in better informed and more consistent decision-making.

It is here that the issue of incommensurability arises. This is a criticism of proportionality as a general principle,<sup>1537</sup> and is as much an issue in the procedural context. It is difficult to assign concrete values to relevant factors to aid in the balancing exercise, and to identify a standard of comparison common to all potentially relevant factors in the proportionality analysis. Each factor is relevant to one or more of the core concepts of justice (i.e. *inter partes* substantive justice, *inter partes* procedural justice and systemic procedural justice), but those concepts may conflict. Taking the example of an application to allow in witness evidence close to trial: how does one balance relevance, additional work that the evidence would impose on the respondent, and the potential lengthening or even adjournment of the trial that allowing in the evidence may require? There is no central standard against which these questions can be measured, other than ‘compliance with the Overriding Objective’, which is not helpful as it simply brings the analysis back to balancing the core concepts of justice. Ultimately, the final balance will come down to an individual judge’s intuition, albeit based on knowledge and experience, as to the justice of the situation. This raises the question as to whether it is even possible to provide guidance on how the relevant factors might be balanced in a logical and consistent way.

Situations can be identified in which it might be possible to be prescriptive. Take, for example, two cases in which the facts are the same, including factors such as complexity, party resources, importance, length of trial and amount of evidence required, but the monetary value of one case is higher than the other. In that situation, it can be said confidently that the higher value alone of one case does not justify the expenditure of any additional time, costs or resources,

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<sup>1537</sup> See ch 2 at 46-48.

because that case could be resolved with the same expenditure as the lower value case. Any additional expenditure is disproportionate. The same logic could be applied to a single case where the value increases, but all other factors remain the same. That value increase in and of itself will not justify an increase in time, costs and resources, which again would be disproportionate. This was the point made, in the context of expert evidence, in *CIP Properties*.<sup>1538</sup> The problem is that these scenarios are artificial. Rarely, if ever, will two cases or litigants be exactly the same, meaning that no two combinations of proportionality factors will be the same. Where value increases, other factors may also change, such as the complexity of the issues or the amount of evidence required, which may then bring in other factors such as relevance. Even if two cases were to increase in financial value by identical amounts, those other factors may change to different degrees. Hypotheticals may be useful in testing how proportionality might be applied, but imposing rules as to how certain factors should be balanced in particular circumstances would introduce the impossible task of identifying all possible combinations of facts and factors. It would also impose unwarranted rigidity onto the flexible case management discretion. This does not, however, mean that there is no scope for guidance. If it were to take the form of a guide to the potentially relevant factors, how they might be balanced, and practical suggestions as to orders and other case management actions, judges could be assisted in achieving a more consistent application of proportionality whilst maintaining flexibility.

### **Guidance for Judges**

Judges' broad case management discretion is central to ensuring that management can be tailored to the needs of each case, but it also risks inconsistency. Supplementing the CPR with practical guidance, such as that produced in the U.S. and Australia,<sup>1539</sup> would reduce this risk, while retaining crucial flexibility. Flexibility would also be maintained by ensuring that guidance does not remain static, rather that it is regularly updated and amended to reflect the most recent case law and management techniques. This guidance would have advantages over the White Book<sup>1540</sup> and the Green Book.<sup>1541</sup> Both texts comment on the entire CPR. Specific focus on case management would allow inclusion of more detail on factors relevant to management decisions. That detail would inform suggestions as to management techniques

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<sup>1538</sup> See ch 4 at 122.

<sup>1539</sup> See ch 5 at 178-180, 197-198.

<sup>1540</sup> *Civil Procedure* (Sweet & Maxwell 2021).

<sup>1541</sup> *The Civil Court Practice* (LexisNexis 2021).

and how judges might approach different management issues. The guidance would therefore incorporate a level of practical detail which goes beyond that in either the White or Green Book.

#### *The meaning of the Overriding Objective*

The meaning of the Overriding Objective, specifically the need to balance substantive and procedural justice, and *inter partes* and systemic considerations, would feature prominently in this guidance. Judges could be encouraged to refer explicitly to each of these factors when giving reasons for a case management decision. Consideration was given to making this a requirement within the CPR, however a prescriptive approach might be counterproductive. It is important that judges retain maximum flexibility as to the content of their judgments. There is also the risk that a prescriptive requirement would turn the inclusion of these issues into little more than a tick-box exercise. On the other hand, their inclusion in non-prescriptive guidance first reminds judges of their relevance, and secondly allows them to incorporate them into their judgment in the most appropriate way. The guidance would, however, need to make clear the benefits of expressly including references to these points in a judgment. This would contribute to more consistent application in future cases. It would also make clear to parties and lawyers that the court will always consider the provision of procedural as well as substantive justice, and will take into account rights and interests beyond those of the case at hand. This should prompt parties and lawyers to take those considerations into account when progressing a case and making interlocutory applications.

#### *Case management*

Judges would be encouraged to take early, active control of cases. The guidance would suggest various ways in which this might be done. This could include general advice, such as noting that judges can take an active approach to management without being bound by or waiting for a party's proposal or application. It could also include more specific advice. A variety of case management techniques were identified in Chapter Four, for example imposing limits on the length and content of pleadings, ordering a staged approach to disclosure, requiring parties to identify witnesses of fact in their statements of case and ordering sequential exchange of expert evidence. The guidance would not prescribe certain techniques or suggest that some are more appropriate or effective than others. It would highlight that case management is a fact-specific exercise, and that it is crucial to its success that management orders are tailored to the needs

of a case rather than transposed from one to another. By collating information on different management techniques, the guidance would allow judges to consider a broader range of options than they might otherwise have done.

A useful addition to this section would be a list of issues to be considered and questions to be asked at a CMC, similar to those included in the U.S. guidance.<sup>1542</sup> This would enable judges to take control of the CMC by asking pertinent questions and ensuring, so far as possible, that potential problems are discovered and either dealt with on the spot or factored into the management going forward. Parties and lawyers could also use this list to fully prepare for a CMC. Matters on the list would include discussion of settlement and ADR and of steps taken to date, consideration of statements of case and identification of the main issues in dispute, and consideration of witness and expert evidence and the scope of disclosure, including relevant issues and practicalities. Judges should be encouraged to ask questions on these matters of their own initiative, rather than waiting for counsel to raise, for example, disagreements over issues in dispute or potential practical issues with providing disclosure. The guidance could also encourage judges to make clear to parties and lawyers, at the earliest opportunity, the court's expectations in terms of behaviour, co-operation and compliance as well as the potential consequences of non-compliance. This is an approach often taken by U.S. management judges.<sup>1543</sup> It might be argued that it is for lawyers to explain these points to their clients, however lawyers may be as culpable as parties themselves in taking an aggressive and non-compliant approach. A clear and early on-the-record expression of the court's expectations, and the risks of flouting them, would not only set the tone for the proceedings, but might bolster lawyers in advising clients to take a more co-operative approach.

#### *Proportionality: meaning and application*

Although there will be no structured proportionality test, the four limbs and some explanation as to their meaning would be a useful addition to case management guidance. This would give clarity and definition to the meaning of proportionality, and would provide starting points from which to commence the analysis. That could then be undertaken with the aid of a checklist.<sup>1544</sup> The aim of the checklist is not to set a rigid structure for the analysis, rather to serve as an aide-mémoire as to factors that may be relevant. It is unlikely that all matters will be relevant in all

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<sup>1542</sup> See ch 5 at 178-180.

<sup>1543</sup> See ch 5 at 179.

<sup>1544</sup> See Appendix One.

cases, but it would be better to consider and immediately dismiss a particular factor than to fail to consider it at all. Giving the checklist the status of guidance, rather than formalising it in a rule or Practice Direction, retains flexibility. The incorporation of a checklist into the rules might risk ossification, rather than allowing it to remain as a tool that can be used as appropriate and can be easily supplemented and amended. This would also avoid the problem highlighted by the Court of Appeal, that judge-made checklists can lead to a ‘mechanical’ application of relevant factors.<sup>1545</sup>

The checklist does not contain any information on how the various factors should be balanced against each other. Consideration was given to creating a matrix to be populated by scores given to each relevant factor, with the score dependent on the importance of that factor in the analysis at hand. The problem with this approach is that while the balance can be determined easily once scores have been added to the matrix, questions of weight and incommensurability are just shifted back a stage. It would be artificial to give any factor a score without considering its place in the overall scheme of the matter. This approach would not remove or make any easier the issue of how relevant factors should be balanced; indeed, it would add an unnecessary layer of complexity. It is preferable to identify the potentially relevant factors, and to leave the weight to be given to those factors to the decision-maker’s discretion. Where appropriate, items on the checklist would cross-refer to more detailed commentary.

The checklist distils the factors identified in Chapter Four. These can be divided into factors relating to the case, to the parties and to wider systemic interests, although there is inevitably some overlap between them. The main case-related factors are value, complexity, relevance and the substantive merits. Value reflects not only monetary value, but also the importance of non-monetary considerations, such as reputation, and remedies such as injunctions. The greater the value, the more likely it is that a higher expenditure of costs, time and resources will be proportionate. An important aspect of this factor is value to the parties, which includes characteristics such as their financial positions, and the effect that the proceedings may have on their reputation. Failure to consider that aspect risks placing inappropriate weight on the decision-maker’s own preconceptions as to value, although it must be borne in mind that a party might place an exaggerated value on its claim. Value and importance to the wider public and the administration of justice in general must also be considered. Cases involving public bodies may have greater value in this regard than disputes between private individuals or

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<sup>1545</sup> See ch 4 at 93.

entities, as may cases which deal with a point of substantive law that is widely applicable, for example in a consumer context. On a broader level, all cases have an inherent value in this regard as it is in the interests of the public and the administration of justice for matters to be dealt with, and to be seen to be dealt with, in accordance with the Overriding Objective. Turning to complexity, the more complex the issues, the easier it will be to justify expenditure of time, costs and resources on the basis of proportionality. It is important, however, to identify the true nature of the issues. Simple issues can be drafted so as to make them appear complex, and the court must determine complexity for itself. It is also important to separate value and complexity: a high value claim is not necessarily a complex one, and vice versa.

The more relevant the subject of a decision is to one or more of the issues in dispute, the more likely it is that a higher expenditure of time, costs and resources will be proportionate. There are shades of nuance within this point. A proper consideration of relevance requires the issues to be identified and situated within the matrix of the case as a whole. Some issues will be central and determinative, while others will be more peripheral. The former are likely to merit more attention than the latter. Relevance must also be viewed as a spectrum. There will be an interplay between relevance and the centrality of issues, in that the subject of a decision could be essential to determining a peripheral issue, or merely useful in determining a centrally important issue. Where the balance lies will be a fact-specific decision.

As to the substantive merits, once again the position is not black and white: the extent to which the merits are relevant will depend on both the nature of the decision being made and the stage of the proceedings at which that decision is made. There are two important points to remember in this context. The first is that the court should not conduct any kind of trial process at an interlocutory stage. Striking a balance between this and the need to take a robust approach to matters such as narrowing the issues in dispute may prove to be a delicate operation. Secondly, the merits are only one factor to be weighed in the balance and do not have any inherently greater weight than any other factor. This point is explicitly made on the checklist, to avoid a reversion to the RSC approach of prioritising substantive justice.

The party-related factors on the checklist are *inter partes* prejudice, asymmetry, legitimate expectations and conduct. Several questions can help identify prejudice to a party. A judge can consider, for example, whether additional work will be required because of a decision, including whether any of that work will be duplicative and whether the burden of carrying it

out will fall more heavily on one party than others. They can ask whether there will be any delay and, if so, what effect it might have on the parties. In some cases, delay will have little practical effect. In others, prolonging litigation might adversely affect a party's financial situation or reduce their chances of recovering on any eventual judgment if their opponent is in a financially precarious position. Prejudice may also take the form of an inability to pursue all or part of a case, or to put certain evidence before the court. This ties into relevance, in that not all cases and evidence are equal. A party is likely to suffer greater prejudice if it cannot present evidence that is essential to determining a central issue, than if the evidence is merely useful or the issue peripheral. Prejudice is also relevant to the question of party asymmetry. Asymmetry between parties can take various forms, for example asymmetry of information, where one party has most of the evidence required in its possession, or asymmetry of resources, where one party is able to engage more manpower in exercises such as disclosure or is able by the nature of its business to field more witnesses with expertise on a particular subject. Compensating for such asymmetry may render proportionate expenditure of time, costs and resources that might not be justified if the parties were on an equal footing. The extent to which prejudice can be compensated in costs cannot be disregarded, but it is also not decisive: the mere existence of prejudice must itself be weighed in the balance.

Parties have legitimate expectations as to how cases will progress. They are, for example, entitled to assume that deadlines will be met and trial windows kept, and that they must meet and investigate their opponent's case as pleaded.<sup>1546</sup> It was noted in Chapter Four that while only a few cases expressly refer to the relevance to case management decisions of those expectations, their importance implicitly underlies many more such decisions.<sup>1547</sup> As such, this factor is a part of some of those already considered. It also provides a useful additional angle, particularly where a party has made assurances from which they later seek to resile. Legitimate expectations are also linked to the final party-related factor on the checklist, namely conduct. Parties often conduct litigation in a manner that does not comply with CPR 1.3. Non-compliant conduct will not inevitably lead to the disproportionate expenditure of time, costs and resources, but it may well do so. There are different ways in which party conduct can be factored into management decisions. It is important first to consider the extent to which conduct has affected the progress of the case to date. If party conduct has already caused delay or the unnecessary expenditure of costs or resources, this may weigh against an indulgence

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<sup>1546</sup> See ch 4 at 136.

<sup>1547</sup> See ch 4 at 136-137.

that might otherwise be granted. Secondly, if parties have taken a non-compliant approach to date, they may continue to do so, and this should be factored in to how the court manages a case going forward. Judicial control of party behaviour is a central aspect of case management. The fact that aggressive, disproportionate behaviour is so prevalent highlights the importance of including consideration of such behaviour in the checklist.

The checklist then turns to systemic considerations. These are central to the Overriding Objective and case management, yet there is inconsistency in their application. Systemic issues can arise in a variety of ways. A matter may take up court time due to a large number of interlocutory applications, or late adjournment of trial may create a gap in the lists that cannot be filled at short notice. Removal and re-listing will both affect the court's diary. Time used by one case cannot be used by another. The checklist recognises that there is a limit to the extent to which a court can fully assess the systemic consequences of an action or decision. In some instances, it may be possible to analyse the lists and determine these issues, but in many it will not. This potential lack of precision is not, however, a reason to ignore systemic considerations. The fact that an action or decision will have systemic consequences of any kind must be factored in. The inconsistency identified in Chapter Four makes this a particularly important item on the checklist. Judges should be encouraged to refer to systemic issues even if the result of the decision is such that consideration of those issues would not change the outcome.

Sorabji has set out a proposed two-stage approach to applying proportionality in a relief from sanctions context.<sup>1548</sup> This makes satisfying a requirement of systemic proportionality both determinative<sup>1549</sup> and a condition precedent of moving on to an *inter partes* analysis.<sup>1550</sup> A defaulting party would have to show that their default was 'minimal in respect of the case management timetable set for its case'.<sup>1551</sup> In Sorabji's view, this would avoid the court lapsing into finding that because a trial on the merits was still possible, relief should be granted.<sup>1552</sup> In other words, it would prevent the court from continuing to prioritise *inter partes* substantive justice. Anything more flexible, such as making the first stage of the test 'merely indicative' of how the court should exercise its discretion, would mean that the systemic aspect of proportionality would 'be given no more than lip service'.<sup>1553</sup> Sorabji goes on to say that this

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<sup>1548</sup> See ch 1 at 21.

<sup>1549</sup> Sorabji, *English Civil Justice* (n 7) 246. Sorabji uses the term 'collective proportionality'.

<sup>1550</sup> *ibid* 248.

<sup>1551</sup> *ibid*.

<sup>1552</sup> *ibid*.

<sup>1553</sup> *ibid* 246.

approach emphasises ‘the paramountcy of distributive justice over individual justice, and that the latter is only achieved through the former’.<sup>1554</sup> This distributive justice is Lord Woolf’s conception of justice, which balances substantive justice, economy, efficiency, equality and proportionality, supporting the public policy aim of ensuring a fair distribution of limited resources.<sup>1555</sup>

Sorabji’s proposal is based on concerns that courts were too often and quickly granting relief from sanctions decisions on a substantive *inter partes* basis and were not giving sufficient weight to systemic considerations. In making systemic considerations determinative, however, it risks leaning too far in the opposite direction. Systemic proportionality is only one factor to weigh in the balance. In some cases, the court will balance *inter partes* and systemic factors and determine that compliance with the Overriding Objective does require vacation of a hearing or amendment of a timetable.<sup>1556</sup> Management decisions that comply with the Overriding Objective require analysis of the interplay between *inter partes* and systemic issues that a strict two stage approach does not allow. Imposing too rigid a structure on decisions that rest on an exercise of discretion may be counterproductive. It is impossible to identify every possible scenario, which means that imposing such a structure removes crucial flexibility. It is not, therefore, appropriate to incorporate this kind of structured approach into any case management guidance. If the guidance is clear on the equal weight to be given to substantive and procedural justice, and *inter partes* and systemic interests, this should be sufficient to steer judicial decision-making towards the correct approach.

#### *Controlling party behaviour*

The final point to be considered is party behaviour. This would cover the importance of controlling that behaviour, how it might be done, and how to respond when behaviour is disproportionate. The concern here is behaviour that does not comply with CPR 1.3, rather than non-compliance with court orders, as the latter will often have a built-in structure of consequences and sanctions. The court has two general categories of tools: those that relate to managing the progress and scope of the litigation, and those that relate to the costs of the litigation. The former ties into the need for early, active management. It must be made clear that an aim of that management is to control parties’ future behaviour, and decisions should

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<sup>1554</sup> *ibid* 250.

<sup>1555</sup> *ibid* 3.

<sup>1556</sup> See ch 4 at 140-141.

be made with that aim in mind. Where, for example, interactions to date indicate a combative relationship between parties, the court may consider including specific co-operation requirements, perhaps with related progress reports, in its orders. In terms of costs, the court manages costs *ex ante* and makes costs orders *ex post*, with the latter being made at both interlocutory and final stages. Costs measures alone may be insufficient to control party behaviour. Costs management controls recoverable costs, but there is nothing to stop a party deciding to spend more than an agreed budget. The number of cases cited in Chapter Four where indemnity costs were awarded because a weak claim was pursued beyond the point where parties and lawyers should have known that it was hopeless suggests that the threat of a costs order is simply not enough. The intensely case-specific approach likely to be taken by parties and lawyers may incorporate a view that while other cases may have been subject to adverse costs orders, their own can be distinguished in some way. Costs measures must be combined with other management techniques in a multi-directional approach to controlling and directing parties' behaviour.

A consistently robust response to non-compliance with CPR 1.3 is crucial to controlling party behaviour in specific cases and across the system more generally. In individual cases, if parties do not see immediate, concrete consequences to disproportionate behaviour which affects either their pocket or their ability to present or progress their case, there is little incentive for them to adapt that behaviour. In more general terms, parties and particularly lawyers will look to other cases for indications as to how a certain approach or specific actions might be treated by the court. The more inconsistent and less robust the court's response to disproportionate behaviour, the greater the likelihood that a risk might be taken. In addition, as parties and the court are likely to have different definitions of proportionate behaviour,<sup>1557</sup> the court needs to be clear and consistent in imposing consequences on behaviour that falls outside its definition. The guidance might propose, for example, that courts consider imposing immediate interlocutory costs consequences, combined with specific requirements in management directions and orders going forward aimed at preventing similar behaviour. Where a court sees fit to criticise parties, consideration should be given to whether any immediate, tangible consequences can stem from that criticism. A generally stricter approach should be recommended, reflecting the support given by the case law to Lord Woolf's determination that parties are unlikely to regulate their own behaviour to the required standard.

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<sup>1557</sup> See above at 204.

## Guidance for Practitioners

Guidance for judges would also be useful for practitioners. It is impossible to predict precisely how a judge will approach an issue. However, if guidance is published, and importantly followed, this will provide a clearer idea of how a case is likely to be managed. Guidance on issues to be dealt with at a CMC, for example, would enable lawyers to prepare appropriately. The proportionality checklist would provide insight into the reasoning behind management decisions and would enable applications and submissions to the court to be more accurately focused. There is, however, a case for guidance specifically aimed at practitioners, the central pillar of which would be the CPR 1.3 duty. The broad shape of this duty can be identified, even if precise boundaries are more difficult to pin down.<sup>1558</sup> Guidance can be given on the importance of co-operation, with opponents and the court, and what this entails. Correspondence must be engaged with, for example, and in a helpful rather than aggressive manner. Tactical moves and game playing must be avoided. Settlement must be considered where appropriate. Parties must factor in systemic considerations when making decisions as to how they want a case to progress. These requirements may be antithetical to the way in which many parties want their cases to be run. A useful addition to guidance for practitioners would be pointers on matters to explain to clients at the start of a litigation matter. This could include the meaning and aims of the Overriding Objective and the co-operation requirements inherent in CPR 1.3. The potential consequences of non-compliance should also be explained. These matters could easily be included in a letter of engagement or other early communication with a client. A clear explanation at the start of a matter should mean that lawyers are better able to manage both the file and their client's expectations in a way that is consistent with the Overriding Objective.

This guidance would differ from existing handbooks, such as the Commercial Court Guide<sup>1559</sup> ('CCG') and the Technology and Construction Court Guide<sup>1560</sup> ('TCCG'). The CCG makes no reference to CPR 1.3 other than setting out the text of the rule in an appendix, although it is stated that the court expects 'a high level of co-operation and realism from the legal representatives of the parties' which applies 'to dealings (including correspondence) between

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<sup>1558</sup> See ch 3 at 74-75.

<sup>1559</sup> *The Commercial Court Guide*, HM Courts and Tribunals Service (10th edn, 2017).

<sup>1560</sup> *The Technology and Construction Court Guide*, HM Courts and Tribunals Service (2nd edn, 5th revision, 2015).

legal representatives as well as to dealings with the Court'.<sup>1561</sup> The TCCG does refer to CPR 1.3, but only in the context of a general statement that in order to 'assist the judge in the exercise of his costs and case management functions, the parties will be expected to co-operate with one another at all times. ... Costs sanctions may be applied, if the judge concludes that one party is not reasonably co-operating with the other parties'.<sup>1562</sup> There are points missing from these guides that could usefully be dealt with in supplementary guidance, for example the importance of factors extending beyond the case at hand that must be taken into account when applying for extensions and adjournments. The aim would be to focus less on the steps to be taken in progressing a case and more on how to take those steps in accordance with the principles underpinning the CPR.

Guidance alone, however, may be insufficient. Zuckerman has argued that lawyers' financial incentives are an obstacle to the reduction of litigation costs.<sup>1563</sup> Lawyers', particularly solicitors', business models are certainly not conducive to reducing the time, cost and resources spent on litigation. Financial incentives, such as bonuses, are tied to billable hours, so there is a constant incentive to increase the number of hours recorded. An aggressive approach to litigation can be a marketable asset for lawyers, given that the very fact that a dispute has reached the litigation stage means that there is likely to be at least some animosity between the parties. Many clients will prefer a lawyer who takes an aggressive approach and leaves no stone unturned in the quest for victory, rather than one who recommends settlement from the outset. Lawyers may see an approach to litigation management that emphasises co-operation as one that will lose them business. Measures aimed at embedding a culture change which do not properly target these issues may have limited effect.

Some amendments to the CPR proposed below would assist in resolving this issue, but there are other avenues to explore. Disconnecting financial bonuses from billable hours targets would remove the incentive to maximise time spent on a litigation matter. There has been some movement in this regard,<sup>1564</sup> although it is an approach that is likely to be unpopular with the legal profession. Another avenue for reform is amending the professional rules that govern

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<sup>1561</sup> CCG (n 1559) 8.

<sup>1562</sup> TCCG (n 1560) 19.

<sup>1563</sup> *Zuckerman on Civil Procedure* (n 11) ch 28 para 28.5.

<sup>1564</sup> Max Walters, 'Clifford Chance drops billable hours for new bonus assessment' (The Law Society Gazette, 2 May 2019) <<https://www.lawgazette.co.uk/practice/clifford-chance-drops-billable-hours-for-new-bonus-assessment/5070158.article>> last accessed 11 March 2021.

lawyers' practices. The SRA's new Code of Conduct<sup>1565</sup> is broadly drafted and in the context of litigation does not require solicitors to inform clients of the nature or even the existence of their duty as litigants under the CPR. More detailed requirements in this regard might assist in dealing with concerns about loss of business. If all litigation solicitors are required to inform clients of their duties to co-operate and litigate proportionately, there may be less scope for those clients to shop around for an aggressive litigator. Amendments to the CPR and professional conduct rules aside, however, guidance would certainly be useful.

## **AMENDMENTS TO THE CPR**

The preceding section proposed guidance on the application of the CPR as they currently stand. There is also scope for formal amendments to the CPR. The amendments suggested here fall into four categories: litigants' duties, pre-action steps, requirements on filing a claim, and case management. They have two interlinked aims: first, to enhance the court's ability to manage cases, and secondly to encourage party compliance, particularly with CPR 1.3. None reflect sweeping or fundamental changes, rather they are intended to sharpen the focus of the current rules.

### **Litigants' Duties**

CPR 1.3 is short and broadly drafted: it simply states that parties are 'required to help the court to further the overriding objective'. This duty can be sufficiently defined that more detail could be added to the text of the rule. It is clear, for example, that co-operation is required and that parties must give appropriate consideration to resolution by settlement or ADR. The overarching obligations in the Victorian CPA 2010 provide a useful model here.<sup>1566</sup> They go into significantly more detail than CPR 1.3 as to what is required of parties and lawyers, and many of the obligations are in line with the case law that gives shape to CPR 1.3. Those obligations include, for example, co-operation, minimising delay, narrowing issues in dispute, using reasonable endeavours to resolve the dispute by agreement and only taking steps reasonably believed to be necessary to facilitate resolution or determination of the proceeding.<sup>1567</sup> Another potentially useful addition from the CPA 2010 is the requirement that all parties must certify

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<sup>1565</sup> <<https://www.sra.org.uk/solicitors/standards-regulations/code-conduct-solicitors/>> last accessed 11 March 2021.

<sup>1566</sup> See ch 5 at 193.

<sup>1567</sup> *ibid.*

that they have read and understood the overarching obligations.<sup>1568</sup> The CPR's fast and multi-track Directions Questionnaire requires legal representatives to confirm that they have explained to their client the need to consider settlement, the options available, and the possibility of cost sanctions if they refuse to try to settle. This could be amended to include confirmation that legal representatives have explained to their client the meaning of the Overriding Objective and their duty under CPR 1.3.

One issue here is that the more detailed the rules, the more likely it is that an alleged breach might be used in an attempt to gain a tactical advantage. An explicit reference to co-operation, for example, may encourage parties to accuse their opponents of failing to co-operate as much as it would encourage them to actively co-operate. This would lead to an increase in interlocutory activity, with a resulting disproportionate increase in expenditure of time, costs and resources. A specific prohibition on the use of the rule for tactical purposes might assist. This is not without precedent in the CPR: the Practice Direction on Pre-Action Conduct and Protocols includes a similar provision.<sup>1569</sup> While it should be obvious that attempts to gain a tactical advantage would be in clear contravention of CPR 1.3, as expanded or otherwise, it must be accepted that some parties will try to obtain such advantages where they can. This ties into the need for consistent, robust sanctions for failure to comply with CPR 1.3. This risk is not, however, on its own a reason to dismiss incorporating more detail into CPR 1.3. Doing so would make clear to parties and lawyers what is required of them and would also provide the court with a more substantial basis on which to impose consequences for disproportionate behaviour.

### **Pre-Action Requirements**

The pre-action provisions in the CPR use permissive language. The Practice Direction on Pre-Action Conduct, for example, states that steps to be taken before issue 'will usually include' exchange of correspondence and key documents.<sup>1570</sup> Cases where parties are unable to at least exchange some correspondence pre-action are likely to be rare. Minimal prejudice would be caused by stating that parties must exchange pre-action correspondence, and disclosure where it is available, with a provision for exceptions, for example where there is insufficient time to comply before a limitation period expires. These more prescriptive pre-action requirements can

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<sup>1568</sup> *ibid.*

<sup>1569</sup> Practice Direction - Pre-Action Conduct and Protocols, para 4.

<sup>1570</sup> *ibid* para 6.

be broadened to include consideration of settlement. At present, parties ‘should consider whether negotiation or some other form of ADR might enable them to settle their dispute without commencing proceedings’,<sup>1571</sup> and ‘should review their respective positions’ once the necessary pre-action steps have been taken to ‘see if proceedings can be avoided’.<sup>1572</sup> There is scope for more prescriptive language. Replacing the word ‘should’ with ‘must’ immediately gives the rule a more compulsory tone. It is recommended below that parties be required to inform the court on issue of pre-action settlement efforts. Reference to this in the pre-action rules, and to the fact that there may be adverse costs consequences where settlement is not considered, would highlight the importance of this provision. Another useful addition might be a compulsory pre-action meeting as, for example, is required by South Australia’s Uniform Civil Procedure Rules.<sup>1573</sup> Parties must use that meeting to attempt to resolve the dispute. A face-to-face meeting, or even one that takes place over the telephone, may be more likely to lead to a consensual resolution, or at least move the parties closer to one, than written correspondence, which is a standard forum for posturing and aggressive tactics.

A counterargument to these proposals is that they may result in disproportionate front-loading of costs. There is also a risk that parties will treat pre-action requirements as formalities and do the bare minimum possible to comply. Such actions have no real value. That risk can be dealt with fairly easily, as the courts have made clear that compliance with pre-action requirements involves complying with the spirit as well as the letter of the rules.<sup>1574</sup> An addition to PAPs along these lines would make clear that bare compliance is not enough. In terms of the front-loading of work and costs, while this may be the case to a certain extent, a comprehensive and co-operative pre-action approach may be just as likely to save costs. Time and costs will be expended on a pre-action meeting, for example, but that meeting may mean that parties are better able either to settle or to proceed with litigation based on shared knowledge about the case and each other’s positions. This will save time and costs in the longer term. As with many aspects of litigation and case management, pre-action steps must be seen in the context of a dispute as a whole. It cannot simply be assumed that increased costs at the initial stages are a bad thing, when that increase may result in a reduction later or overall.

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<sup>1571</sup> *ibid* para 8.

<sup>1572</sup> *ibid* para 12.

<sup>1573</sup> See ch 5 at 194.

<sup>1574</sup> See ch 4 at 157.

## Obligations when a Claim is Issued

It would be useful for the rules to require provision of more information on pre-action steps when a claim is issued. Currently, the first information the court receives in that regard is in the Directions Questionnaire (on the fast and multi tracks). Earlier provision could mean that failure to comply is caught, and rectified, as soon as possible. It would also seem sensible for parties to include information as to what attempts, if any, were made to settle pre-action. The Practice Direction on Pre-Action Conduct currently states that, if proceedings are issued, parties ‘may be required by the court to provide evidence that ADR has been considered’.<sup>1575</sup> The Directions Questionnaire includes a section on settlement, but this does not require information to be provided about pre-action settlement attempts. Not only would receipt of this information inform early management decisions as to whether a stay for ADR or settlement would be appropriate, but it would also give an insight into the relationship between the parties. Stricter management might be required if parties have failed to co-operate pre-action in making a reasonable attempt to resolve the dispute.

Introduction of a certification requirement, similar to that in Rule 11 of the U.S. FRCP,<sup>1576</sup> may reduce the regularity with which parties aggressively pursue weak claims. In short, that rule requires lawyers (as opposed to parties) to certify that a claim has a proper factual and legal foundation, determined after reasonable investigation. This obliges lawyers to manage clients’ expectations in terms of whether their claims are realistic. It also ties into pre-action work, as an accurate certification will require some pre-action investigation, which should mean that the issuing party is better prepared to take the case forward efficiently. This certification would go beyond the statement of truth currently required by the CPR.<sup>1577</sup> Even if that statement of truth is signed by a legal representative, they are by their signature confirming their clients’ belief in the truth of the relevant matters and their understanding of the consequences of a lack of honest belief.<sup>1578</sup> Imposing a certification obligation on lawyers would provide an incentive not to pursue a claim simply because their client is insisting on doing so, and is willing to pay for it.

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<sup>1575</sup> Practice Direction – Pre-Action Conduct and Protocols, para 11.

<sup>1576</sup> See ch 5 at 176.

<sup>1577</sup> CPR 22; Practice Direction 22.

<sup>1578</sup> Practice Direction 22, para 3.8.

There would need to be sanctions for non-compliance, and it is notable that the FRCP confers broader powers on the court to sanction legal representatives than the CPR. At present under the CPR, the court can require legal representatives to pay costs, but this requires ‘unreasonable or improper conduct’.<sup>1579</sup> Given that it is often lawyers that tend to drive or at least encourage tactical and aggressive litigation, there may be a case for broadening the court’s power in this regard, at least as a corollary to the introduction of a certification requirement.

## **Case Management**

The recommendations in this section deal with fast-track and multi-track case management. Disproportionality will be less problematic where there is a clear, imposed, proportionate structure, as there is on the small claims track, and more likely to be an issue where the procedure to be applied is at the court’s discretion. Compulsory CMCs are not recommended. This would shift matters too far from the intended flexibility of case management under the CPR and give yet more prominence to the issues of front-loaded costs that became a concern once Lord Woolf’s recommendations were implemented. Not every case requires a CMC, and to use court resources for CMCs in cases that do not require them would be inconsistent with the Overriding Objective. It is preferable to enable the court to make an informed decision whether a CMC is required, and to ensure that each CMC is as comprehensive as possible.

The case management rules focus on the court giving or approving directions. A fixed CMC on the multi-track will be vacated if directions are issued by the court or agreed between the parties and approved by the court,<sup>1580</sup> suggesting that there is likely to be insufficient value in a CMC if directions are already in place. Achievable directions require a foundation of comprehensive information about the case and the parties’ circumstances. An understanding of, for example, the scope of any disagreement and the nature of any resourcing issues will allow creation of a timetable that is less likely to require amendment. In many cases there will be matters that efficient progress requires to be dealt with sooner rather than later. These may include narrowing the issues in dispute, identifying potential problems with obtaining evidence, considering the practicalities of disclosure, or preventing a hostile relationship between parties from worsening. It may be easy to treat directions as something of a formality and to put off these issues at the start of a case. They may not be identified at all if there is no

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<sup>1579</sup> CPR 44.11.

<sup>1580</sup> CPR 29.4.

requirement or incentive to fully analyse a case as early as possible. Either situation may lead to urgent applications, adjourned hearings and the need to balance issues of prejudice that would not have arisen had the issue been dealt with earlier. The management provisions in the CPR do not ignore this entirely. At the initial directions stage on the fast and multi-tracks, ‘the court’s first concern will be to ensure that the issues between the parties be identified and that the necessary evidence is prepared and disclosed’.<sup>1581</sup> However, there is scope for improving the nature and quality of the information that parties are required to provide to the court. That information underpins decisions as to what directions should be given and whether a CMC should be held.

Those initial decisions are based on parties’ statements of case and Directions Questionnaires. The required contents of statements of case are set out in CPR 16. They include details of quantum, the facts on which a claimant relies, and information on denial, admission and any alternative version of events from a defendant. The fast and multi-track Directions Questionnaire requires parties to *inter alia* provide information on whether they want to try to settle, and if not why not; to confirm whether pre-action requirements have been complied with and if they have not, to provide details; to provide details on applications that have been or will be made; to identify e-disclosure issues that the court may need to address and to propose directions for disclosure; to identify lay and expert witnesses and the nature of their evidence; and to provide ‘any other information’ that may help with management. The form itself gives no details as to what this ‘other information’ may include, although some detail is provided in Practice Direction 26. It may include ‘any particular facts that may affect the timetable the court will set’<sup>1582</sup> and any facts which ‘may make it desirable for the court to fix an allocation hearing or a hearing at which case management directions will be given’.<sup>1583</sup> There is no indication on the Directions Questionnaire that this additional guidance exists nor where it may be found. One way to improve the quality of the information provided to the court at this early stage would be to expand the content of the Directions Questionnaire. Parties should be required to provide details of pre-action steps that were taken, including whether attempts were made to settle. The ‘other information’ section could include specific examples of the sort of information that is expected, or at least reference to where in the CPR guidance can be found.

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<sup>1581</sup> Practice Direction 28, para 3.3; Practice Direction 29, para 4.3.

<sup>1582</sup> Practice Direction 26, para 2.2(3)(e).

<sup>1583</sup> *ibid* para 2.2(3)(f).

The Directions Questionnaire could also be supplemented with items from the Commercial Court Case Management Information Sheet (the 'CMIS'). The CMIS elicits useful information which the Directions Questionnaire does not, such as whether amendments are required to any statement of case and views on whether the case is appropriate for a preliminary issue or split trial. The CMIS itself could be expanded to include practical matters such as the nature and location of potential disclosure and whether any issues are envisaged in contacting potential witnesses. Another aspect of Commercial Court procedure which could usefully be applied more widely is the list of issues that parties must file and serve prior to a CMC.<sup>1584</sup> This would assist the court in identifying whether face-to-face discussion at a CMC would be helpful. The aim is to introduce more comprehensive post-pleading requirements which will result in parties providing to the court as thorough a picture as possible of the state and possible development of the case. This should prompt parties and lawyers to identify and consider the shape of the whole case as soon as possible, and ensure that the court receives all available information in that regard at the earliest opportunity. An obvious counterargument to this approach is, again, that it will increase and front-load costs. However, full engagement from parties and lawyers at an early stage, together with fully tailored case management, may result in savings overall. It will reduce the risk of costs being incurred in dealing with matters such as late amendments, admission of new evidence and other interlocutory applications. In addition, true engagement with a matter by parties and lawyers will be encouraged more by requirements to take practical steps than by general exhortations.

If a CMC does take place, the presiding judge has a broad discretion as to matters that will be covered. The fast track rules make no provision as regards matters that may or must be dealt with at a CMC, whereas the multi-track rules go into more detail. There are three items that the court 'will' deal with at any CMC, namely: reviewing the steps parties have taken in preparing the case, in particular compliance with directions; deciding on and giving directions about steps to be taken to secure progress in accordance with the Overriding Objective; and ensuring as far as it can that all agreements that can be reached about the matters in issue and the conduct of the claim are made and recorded.<sup>1585</sup> These are broad, general matters. There is also a non-exhaustive list of topics that the court is 'likely' to consider at a CMC, including the clarity of the claim, whether any amendments are required, what disclosure is necessary, the obtaining and disclosure of factual and expert evidence, arrangements required to provide any

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<sup>1584</sup> Practice Direction 58, para 10.8.

<sup>1585</sup> Practice Direction 29, para 5.1.

clarification or further information and the putting of questions to experts, and whether it will be 'just' and 'save costs' to order a split or preliminary issue trial.<sup>1586</sup> There are only seven items on the list and although more specific than the compulsory considerations that precede them, none of the items are comprehensive. Item three, for example, provides that the court is likely to consider 'what disclosure of documents, if any, is necessary'. There is no reference to identifying practical difficulties that either party may face in locating documents (although such additional considerations are covered by the non-exhaustive nature of the list).

It has been proposed in this chapter that guidance might assist judges in ensuring that all relevant matters are considered, and questions asked, at a CMC. A more formal step would be to amend the CPR to increase the number of matters that judges are required to consider at a CMC. In respect of the multi-track, for example, paragraph 5.3 of Practice Direction 29 could be re-drafted in compulsory terms. There may also be scope for including a longer and more detailed compulsory list, or at least broadening the existing list. This list could include discussions on the clarity of parties' cases and the issues in dispute, the extent to which those issues are agreed, whether any amendments are required to any statement of case, the requirements and practicalities of disclosure, factual and expert evidence requirements, and whether a split or preliminary issue trial would further the Overriding Objective. The same provisions could apply to the fast track in cases where a CMC is ordered (which, given the emphasis on giving directions without a hearing, may be a minority of cases).

There are arguments both for and against this compulsory approach. It would ensure that a CMC is comprehensive, particularly when coupled with the provision of more detailed information, thus ensuring that truly appropriate directions are given. Where parties have compiled, and the court has received, detailed information about a case, it should be possible to identify which of the factors for consideration require the most attention. The incorporation of a compulsory list into the CPR would mean not only that the court does not omit anything from its management decisions, but also that parties and lawyers arrive at a CMC knowing that they will need to discuss certain issues. This should encourage thorough preparation, which may result in a more efficient CMC. On the other hand, it would limit the flexibility currently available to judges to tailor a CMC to the needs of a case. Although such limitation may be minimal in many cases, in that focus and time can still be weighted towards the most important items, it would still restrict judges' ability to determine the level of management required. It is

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<sup>1586</sup> *ibid* para 5.3.

essential that procedures remain proportionate. Having the court deal with a compulsory list of items at every CMC would run counter to this imperative, as it may mean that CMCs are longer and that each one absorbs more time and resources. In some cases, for example, it may be obvious that a CMC only needs to deal with one issue, in which case a compulsory list of matters to consider simply over-complicates matters and wastes time. Requirements for provision of additional post-issue information, together with guidance on case management, including questions to ask and issues to deal with at a CMC, should be sufficient to ensure a comprehensive CMC and appropriate directions.

One exception is settlement and ADR. Other common law jurisdictions require the appropriateness of settlement negotiations and participation in ADR to be considered at management hearings.<sup>1587</sup> Although the CPR does refer to the importance of judges encouraging and facilitating settlement,<sup>1588</sup> a compulsory requirement would have real value. It would prompt judges, parties and lawyers to give early consideration to means of resolution other than trial. This may particularly be the case for parties and lawyers, if they know that they will have to discuss these questions at a CMC, and that they are likely to be pressed to provide a good reason for any reluctance. That may feed into a greater shift to a co-operative culture, as early consideration of settlement and ADR will become the norm.

The next logical question is whether the rules should allow judges to order mediation or another form of ADR absent the parties' consent, which again is a management power granted in other jurisdictions.<sup>1589</sup> This issue, and the Court of Appeal's comments in *Halsey* regarding the relationship between mandating ADR and the right of access to justice,<sup>1590</sup> have prompted some extra-judicial commentary. Lord Dyson, in 2013, thought that *Halsey* struck the right balance in terms of supporting mediation.<sup>1591</sup> Sir Gavin Lightman criticised *Halsey*, stating that the proposition that requiring a party to mediate against his will would breach ECHR Article 6

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<sup>1587</sup> This requirement can be found in the procedural rules of the United States (Federal jurisdiction), Ontario, Saskatchewan, Australia (Federal jurisdiction) and the Northern Territory).

<sup>1588</sup> CPR 1.4(2)(e), (f).

<sup>1589</sup> This power is granted by the procedural rules of United States (Federal jurisdiction), Canada (Federal jurisdiction), Alberta, British Columbia, Newfoundland and Labrador, Saskatchewan, Ontario, Australia (Federal jurisdiction), Northern Territory, New South Wales, South Australia, Western Australia and Queensland.

<sup>1590</sup> See ch 4 at 107-108.

<sup>1591</sup> Lord Dyson MR, 'Compensation Culture: Fact or Fantasy?', Holdsworth Club Lecture, 15 March 2013, 13 <<https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Speeches/mr-speech-compensation-culture.pdf>> accessed 5 February 2021.

was ‘unfortunate’ and ‘clearly wrong and unreasonable’.<sup>1592</sup> Lord Clarke<sup>1593</sup> considered that, despite *Halsey*, it is ‘at least strongly arguable’<sup>1594</sup> that courts do have the jurisdiction to require parties to mediate under a combination of CPR 1.4(2)(e) and 3.1(2)(m).<sup>1595</sup> Nevertheless, the position at present is that judges cannot mandate the use of ADR procedures (other than ENE) absent the consent of all parties.

Matters are moving towards an express expansion of the court’s powers in this regard, notably with the decision in *Lomax*, although at the time of writing there has been no fundamental reconsideration of *Halsey*.<sup>1596</sup> The Judicial ADR Liaison Committee, set up on the recommendation of the Civil Justice Council ADR Working Group,<sup>1597</sup> has been considering practical examples of ADR schemes that incorporate some compulsion, and how it works.<sup>1598</sup> This would be a useful discretionary power for the court to have, as there will be cases that are suited to ADR but in which parties’ recalcitrance prevents even an attempt at any form of resolution other than trial. The continued prevalence of aggressive, unco-operative attitudes suggests that if settlement and ADR are to take the place within the civil litigation system that has been envisaged for them under the CPR, judges may need to step in and require parties to at least try to reach an agreement. This could feed into the ongoing culture change, in that parties may be more likely to give unprompted consideration to a mediation or settlement meeting if they know that the court may order one anyway, with the attendant cost consequences of any lack of co-operation. If, however, there is any reluctance to introduce this power, initial steps such as requiring consideration of ADR at a CMC and encouraging judges to in turn be more robust in encouraging parties to settle should be taken first, and the results considered before stronger powers are introduced.

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<sup>1592</sup> Gavin Lightman, ‘Mediation: An Approximation to Justice’ (2007) 73(4) *Arbitration: the International Journal of Arbitration, Mediation and Dispute Management* 400, 401.

<sup>1593</sup> Sir Anthony Clarke, ‘The Future of Civil Mediation’, *The Second Civil Mediation Council National Conference*, 8 May 2008 6; Lord Clarke, ‘Mediation – An Integral Part of Our Litigation Culture’, *Littleton Chambers Annual Mediation Evening*, 8 June 2009 2.

<sup>1594</sup> Clarke, ‘The Future of Civil Mediation’ (n 1593) 6.

<sup>1595</sup> *ibid* 7.

<sup>1596</sup> See ch 4 at 107-108.

<sup>1597</sup> ‘ADR and Civil Justice’, Civil Justice Council ADR Working Group, Final Report, November 2018, para 9.1 <<https://www.judiciary.uk/wp-content/uploads/2018/12/CJC-ADR-Report-FINAL-Dec-2018.pdf>> accessed 30 March 2021.

<sup>1598</sup> Minutes of the Judicial ADR Liaison Committee, 20 January 2020, 2 <<https://www.judiciary.uk/wp-content/uploads/2020/07/2-SUMMARY-MINUTES-Jan-2020-Judicial-ADR-Liaison-Committee.pdf>> accessed 30 March 2021.

#### IV. CONCLUSIONS

Proportionality is a useful case management tool. Its flexibility allows it to be adapted to the facts of any case. However, the results of the case law review make clear that there is room for improvement in its application. Care must be taken in deciding precisely how any such improvement is effected. Three points drawn from the case law analysis form the foundation of any improvement efforts: the inconsistency with which proportionality is applied, the centrality of the relationship between the parties and the court, and the fact-specific nature of the proportionality analysis. It is also important to consider the precise aims of any improvement measures. A realistic approach is needed, which recognises that there is no single perfect way to apply proportionality. Measures must target the parties and the court, aiming to incentivise compliance in respect of the former and to encourage and enable more effective control in respect of the latter. Another crucial target is the ‘culture change’ that Lord Woolf and subsequent reform efforts sought to embed into the civil litigation system. Improvement measures also cannot be counterproductive. Significantly increasing time and costs may itself be disproportionate, although it must be remembered that proportionality is not simply synonymous with reduction in expenditure of time and costs.

As to how case management proportionality might be improved, it has been suggested that a structured test would reduce flexibility and risk an increase in *inter partes* and systemic costs and resources that could itself be disproportionate. One approach taken here has been to propose ways to improve the quality and consistency of the information available to management judges, while retaining the broad discretion that is central to case management. This has taken the form of comprehensive guidance, including a proportionality checklist, and amendments to the CPR requiring additional information from parties at the pre-CMC stage. Guidance has also been proposed for legal practitioners, aimed at improving compliance with CPR 1.3 by providing detail as to what that rule requires, what lawyers must explain to their clients, and how litigation should be progressed in a compliant manner. Proposed rule changes give more detail to the CPR 1.3 duty and include certification requirements aimed at deterring weak or under-investigated claims.

Practical proposals have been made that are precisely targeted at the problems revealed by the case law review. The discretionary nature of case management, as well as the broad and flexible nature of the proportionality analysis, mean that perfection in its application is not attainable.

Striving for that perfection is a fool's errand. It is better to work with those features to ensure that cases are managed and conducted not only proportionately but as consistently and predictably as possible.

## CONCLUSION

The application of proportionality in specific cases requires the balancing of different, sometimes conflicting, interests. A connection is drawn between means and ends, in that any cost and prejudice incurred as a result of the former must be justified by the latter. Proportionality provides a decision-making framework into which the facts and circumstances necessitating a particular decision may be placed, in order to determine how that decision may be made in a proportionate way (or whether a decision was made in such a way, if the analysis is conducted *ex post*). In the context of English civil procedure, proportionality is tied to the objectives of the system governed by the CPR and the nature of the justice provided by that system. To deal with cases ‘justly and at proportionate cost’ is to balance the features of a given case, the interests of the parties to that case and the need for a fair allocation of finite court resources. The outcome of that balancing exercise, if it is conducted in accordance with the principles underlying the Overriding Objective, is proportionate justice. All principles require implementation. Proportionality, in the context of civil procedure, is implemented through active judicial case management. The shift of responsibility for the progress of a case from parties to the court embodied in case management reflects an adjustment to the traditional adversarial system. Nevertheless, parties and their legal advisers retain a crucial role through the CPR 1.3 duty to assist the court in furthering the Overriding Objective.

There is a significant gap between the ideals at the heart of proportionality and active case management and the reality of their application. Inconsistencies have been identified in judicial understanding as to the precise nature of the principles that underpin the CPR, notably the importance of balancing substantive and procedural justice and the need to consider both *inter partes* and systemic interests. Judges do not consistently take on the robust, active role that is required of them, and parties and lawyers do not consistently comply with their duty to assist the court in furthering the Overriding Objective. This prevents the full implementation of the Overriding Objective and limits the civil justice system’s ability to provide proportionate justice. That in turn has a negative effect on access to justice. It means that the court’s limited resources are not allocated as effectively as they might be, and that individual parties are having to spend disproportionate amounts of time, money and resources on litigating their disputes. This may prevent some from continuing with a legitimate case and may dissuade others from commencing litigation altogether.

It would be wrong, however, to give a purely negative impression of the current position regarding proportionality and case management. In many cases, judges do take an active approach to managing cases and conduct that management in accordance with the CPR's underlying principles. They are often sensitive to both the specific needs of the parties before them and of the system in general. Robust management techniques are used, and parties are ordered to bear the consequences of their non-compliant behaviour. These cases provide a substantial body of information that can be drawn on to improve the application of case management proportionality.

In deciding what form those efforts may take, the central features of the case management proportionality analysis must be borne in mind. It is fact-specific, and decisions are made within the bounds of a broad discretion. Improvement efforts must work with these features, rather than restrict them. It is also essential to take an approach that encompasses the court, parties and lawyers. When there are issues on both sides of the Bench, targeting only one will reap significantly fewer benefits than targeting both. Publication of guidance would promote consistency, without imposing a rigid structure. The focus must be on ensuring that all relevant factors are weighed in the balance in every decision, rather than prescriptively dictating how those decisions should be made. Guidance for lawyers is as important as that for judges because, even with the best management will in the world, a court can only go so far without engagement from legal advisers. Rule amendments are also directed at improving the consistency of management decision-making and judges' ability to tailor decisions to the needs of each case, notably in the early stages of an action and at CMCs. By increasing the quality of the information on which judges base their decisions, and by requiring parties and lawyers to consider practicalities early on, management decisions would reflect as accurately as possible the needs of the case. These changes are complemented by amendments aimed at steering litigants and lawyers towards a more compliant approach to litigation. They comprise the addition of detail to the CPR 1.3 duty, and obligations to certify the factual and legal basis of a claim on issue.

Appropriately enough, optimising the provision of proportionate justice through the application of proportionality and case management requires striking a balance. A middle ground must be found between steering the actions and decisions of all involved in the litigation process towards compliance with the concepts of proportionate justice, and ensuring that the discretion and flexibility central to case management remain intact. Shifting too far in either direction

would be counterproductive. It would risk either forcing the infinite number of litigation management circumstances into an artificial structure, or allowing inconsistencies to proliferate due to a lack of any guidance on the exercise of discretion. A focus on the availability and quality of information that informs litigation decision-making strikes that balance.

The aim of this work has been twofold. It sought first to analyse, at a greater level of detail than has been explored in the literature to date, the meaning and application of proportionality in a case management context. Drawing on the results of that analysis, it then sought to make practical suggestions as to how the use of proportionality as a case management tool might be improved. The foundation on which those aims rest is that which underpinned Lord Woolf's review of the civil justice system and all subsequent reform efforts: the need to increase access to justice. Proportionality is central to procedural justice, which itself is a fundamental part of the justice that the system must provide. Improving both understanding and consistency of application can only be to the benefit of the system and its users. In this way, it is intended for this work to make a significant, practical contribution to the provision of proportionate justice.

## APPENDIX ONE

### PROPORTIONALITY CHECKLIST

This checklist sets out the main factors to be taken into account when determining the proportionality of a case management decision. In summary, those factors are:

- (1) value;
- (2) complexity;
- (3) relevance;
- (4) the substantive merits;
- (5) party asymmetry;
- (6) *inter partes* prejudice;
- (7) legitimate expectations;
- (8) party conduct;
- (9) systemic considerations;
- (10) settlement; and
- (11) other consequences.

The checklist is not intended to be prescriptive. It is intended to serve as a prompt to ensure that all relevant matters are considered during the decision-making process. The extent to which these factors are relevant, and the weight to be given to each in making a management decision, will differ depending on the specific features of the case at hand.

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#### (1) **Value**

- (a) What is the monetary value of the claim?
  - Consider relative to the parties' financial positions.
- (b) What is the non-monetary value of the claim? Consider:
  - the importance to the parties, e.g. in terms of reputation;
  - the seriousness of the underlying facts, e.g. in terms of any distress caused to a party; and
  - the importance, if any, to the public at large.

#### (2) **Complexity**

- (a) How complex are the issues?
  - Consider whether the issues are actually complex or whether they have simply been drafted to appear that way.
- (b) Separate complexity from value. Higher value does not necessarily mean higher complexity, and vice versa.

**(3) Relevance**

- (a) To which of the issues in dispute is the subject of this decision relevant?
  - How do those issues fit into the context of the case as a whole – are they central or peripheral?
- (b) How relevant is the subject of this decision to those issues?
  - Consider that relevance is a spectrum – is there sufficient relevance?
  - Is the matter in question essential, or merely useful?
- (c) To what extent will the outcome of this decision contribute to the resolution of the dispute as a whole?

**(4) The Substantive Merits**

- (a) The substantive merits are only one factor to be taken into account and balanced against all others.
- (b) The relevance of the merits may differ depending on the nature of the management decision in question, for example:
  - Amendments to statements of case: in general, the later permission is sought, the stronger the merits of the proposed amendments must be.
  - Strike out due to non-compliance: merits are generally irrelevant, except potentially where the strength of the case to be struck out would entitle that party to summary judgment.

**(5) Party Asymmetry**

- (a) Is there any resource inequality between the parties which needs to be accounted for?
- (b) Is there any asymmetry of information between the parties which need to be accounted for?

**(6) Inter Partes Prejudice**

- (a) What prejudice, if any, will each party suffer as a result of this decision?
- (b) Will a party be required to carry out additional and/or duplicative work, and if so how much?
  - Consider in the context of the work to which they are already committed.
- (c) Will there be a delay, and if so what effect it will have on the parties? For example:
  - Will a party's financial situation be worsened?
  - Will their chances of recovering on any eventual judgment be reduced?
  - Will there be a delay in vindication?

- (d) If there has already been delay, consider the effect of any *additional* delay.
- (e) Will a party be unable to have relevant evidence before the court, or be unable to pursue all or part of its case, as a result of this decision?
  - Refer to (3) above ('Relevance').
  - Consider whether a party will have a remedy against its legal advisors, but note that it may be unsatisfactory to relegate a litigant to a claim based on loss of chance.
- (f) To what extent, if at all, will any prejudice to a party have been caused by that party's own actions or lack thereof?

**(7) Legitimate Expectations**

- (a) Which of a party's legitimate expectations are relevant to this decision and how, if at all, will the decision frustrate those expectations? For example:
  - an expectation that claims or counterclaims will be disposed of at the listed trial; or
  - an expectation that an opponent will or will not be relying on certain evidence, in reliance on which a party has carried out its preparations for trial.
- (b) Which of the court's legitimate expectations are relevant to this decision and how, if at all, will the decision frustrate those expectations? For example:
  - an expectation that parties will comply with timetables and work to maintain listed hearing and trial dates; or
  - an expectation that parties will cooperate with each other and the court throughout the litigation process.

**(8) Party Conduct**

- (a) Have the parties complied with the CPR, including pre-action requirements, and court orders and directions?
- (b) Have the parties complied with their CPR 1.3 duty?
- (c) Has the parties' behaviour affected only this litigation, or has it also had systemic consequences? How have those effects manifested or how might they manifest in future?
- (d) Have parties taken steps to minimise or mitigate the effects of their behaviour?

**(9) Systemic Considerations**

- (a) Will this decision have an adverse effect on the court's list or the use of court resources?

- (b) Consider the proceeding as a whole, rather than simply the immediate result of this particular decision.
  - If a hearing is adjourned, it will need to be relisted at some future point.
  - Will the decision lead to the use of more court time in terms of further applications or appeals?
- (c) Take into account any specific information available, for example the state of a given list, or the likelihood of finding other cases to fill any gaps in the court's schedule created by this decision.

**(10) Settlement**

- (a) Will the decision assist in encouraging settlement and/or participation in ADR?
- (b) Conversely, will the decision make settlement and/or participation in ADR less likely?
- (c) Is there a risk that a party may be pressured into settlement as a result of this decision?

**(11) Other Consequences**

- (a) Is this decision likely to have any other consequences for the parties, the court, the public and/or the administration of justice?

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