BEFORE LORD JUSTICE STUART-SMITH, LORD JUSTICE BROOKE CA on appeal from Milton Keynes County Court. 29th February 2000

JUDGMENT : LORD JUSTICE BROOKE:

1. This is an appeal by the claimant, Mr Dermot Walsh, from an order made by Judge Serota QC at the Milton Keynes County Court on 16th August 1999 whereby he extended time for appealing and allowed an appeal by the defendant, Mr Andrew Misseldine, from an order made by District Judge Rhodes in the same court on 26th April 1999 when he directed the reinstatement of the claimant's action following an order by the same district judge on 21st January 1999 declaring that the action had been automatically struck out pursuant to the provisions of CCR Order 17 Rule 11.

2. In fact the only matter listed for hearing before Judge Serota on 16th August 1999 was an appeal by the claimant against a further order made by District Judge Rhodes on 22nd June 1999 whereby he struck the claimant's action out again, by reason of what would have been described as "want of prosecution" under the former CCR regime. The court's order did not refer to the way the judge disposed of that appeal, since he had taken the view that the appropriate course for him to adopt was to concentrate his attention on a different issue, namely whether the district judge should properly have reinstated the action in April 1999. Unhappily, he did not have all the facts in front of him, and Mr Dawson, who appeared for the claimant, told both the judge and this court that he was taken by surprise by the way the judge had not only encouraged the defendant to seek permission to appeal out of time against the April 1999 order on his own initiative, but had then proceeded to give judgment on the appeal there and then although Mr Dawson had not come to court prepared to argue a reinstatement point. I will explain what happened in more detail later in this judgment.

3. For present purposes it is sufficient to say that we told the parties at the outset that we were of the opinion that the judge's order could not stand for that reason. With their consent we then decided that we would exercise our discretion afresh under the CPR on the issue that had been before District Judge Rhodes on 22nd June, rather than subject the parties to even more delay and expense in sending the matter back to a different circuit judge, with the possibility of a further appeal to this court. We also told the parties, and they did not dissent, that in view of the further evidence now available on the CCR Order 17 Rule 11 issue we saw no merit in adding to the jurisprudence on that unlamented rule. We refused to allow it to haunt us from its grave.

4. This appeal is important, therefore, because it gives this court the opportunity for the first time to exercise its own discretion on a strike-out application under CPR 3.4(2)(b). The district judge heard the application by the defendants on 22nd June 1999 after the CPR came into effect, and nobody suggested that it was not appropriate for this court to consider the matter wholly within the four corners of the CPR regime.

5. It is first necessary to set out the facts. They tell a deplorable story of the law's delay, more than 30 years after Lord Denning MR quoted from Hamlet's famous soliloquy in ***Allen v McAlpine*** [1968] 2 QB 229 at p 245C.

6. Mr Walsh was 30 years old when he was involved in a very serious road traffic accident in July 1989. He is now 41. At the time of his accident he was exceptionally fit. He had a job as general manager of a furniture retail business. His marriage had ended in divorce, and he had one dependent son. His principal recreation was middle distance running. He used to run every day, covering a total of about 70 miles each week.

7. Because his post-accident medical history was a complicated one, the defendant's insurers took steps during 1992 to bespeak his medical records from the period before his injury in 1989, and with one exception they were all before their chosen orthopaedic surgeon, Mr Edmund Shepherd, when he reported on 19th October 1992. These records showed that in June 1988, 13 months before his accident, Mr Walsh had woken up one morning after a day of very heavy training with tight hamstrings. His left hamstring eased up, but the right one did not ease up completely. The symptoms were very severe at first, but they later became intermittent. He saw his GP on 25th August 1988, who found pain on spinal flexion but no other problems. He was given a prescription. By 9th September 1988 he had made no real

improvement, and physiotherapy was recommended. On 10th November 1988 he was still not improving. He was suffering pain at the base of his buttock and also behind his knees, mainly on the right. The GP referred Mr Walsh to a consultant. In his referral letter he mentioned that Mr Walsh had been seen for problems on his right knee in 1980, when the results of arthroscopy had been negative.

8. Mr Walsh then saw a consultant in rheumatology, who duly reported on 18th January 1989. He recorded Mr Walsh's symptoms, and mentioned the fact that he had no back pain. He said he was still running almost every day, but usually no more than ten miles at a time. The consultant had been unable to find any abnormality on examination.

9. There was only one matter in Mr Walsh's medical history about which Mr Shepherd could not be definitive. Mr Walsh had told him that he had a constant pain in his lower back, and that he remembered that he had begun to have physiotherapy for his back from a physiotherapist called Sue Gunter a few weeks after his injury. Mr Shepherd observed that the hospital notes did not refer to back pain until January 1990, six months after the accident, and that the only letter he had seen from Sue Gunter, written in June 1992, recorded that she had treated him in June 1991. It mentioned nothing earlier. Mr Shepherd said that if her records showed that Mr Walsh's recollection was correct, he would conclude that his lower back was strained on 5th July 1989, and that his subsequent back symptoms had largely been attributable to the accident.

10. Once Mr Walsh's solicitors received Mr Shepherd's report in March 1993, they checked this point with Ms Gunter. She said that she had first seen Mr Walsh on 23rd June 1989, when he was complaining of hamstring pain following track running sessions. He was at that stage running 55 miles a week. He returned to her on 10th August 1989 after his accident, complaining of lower back and neck pain. In her opinion his accident was very pertinent to his present problems. Mr Walsh's solicitors conveyed this information, reproduced in a report by their own orthopaedic surgeon Mr Nixon, to the defendant's insurers on 10th December 1993.

11. In a more efficient and co-operative era this one uncertainty would have been cleared up to everyone's satisfaction by the end of 1992, since Mr Shepherd saw Mr Walsh in July of that year, but at all events by the end of 1993 there were no longer any live issues between the parties as to Mr Walsh's pre-accident history or as to the injuries caused by his accident. Apart from his hamstring problem, which did not prevent him running 55 miles a week, he was a very fit 30-year-old man who enjoyed his middle-distance running.

12. There was never any issue as to liability for the accident. Mr Walsh was cycling along a major road at about 20 mph when Mr Misseldine drove out of a side road on his left. He pulled out immediately in front of Mr Walsh, giving him no time to brake. The front wheel of Mr Walsh's bicycle ran into the front offside wheel of Mr Misseldine's car, which had by this time stopped. Mr Walsh was thrown forward off his bicycle and landed with a belly-flop on the bonnet of the car. He then slid across the whole width of the bonnet and landed heavily on the road on the top of his head. He was wearing a polystyrene crash helmet at the time, and was not knocked out. Mr Misseldine was subsequently convicted at the local magistrates' court for driving without due care and attention.

13. Mr Walsh was detained in his local hospital for ten days. During that time he had an open reduction of the outer table of his frontal sinus under general anaesthetic. He remained under the care of the hospital as an out-patient after his discharge. He first instructed Mr Haworth, who is a partner in Messrs Wilkins, a firm of solicitors practising in Aylesbury, before the end of July 1989, and Mr Haworth seems to have worked diligently for his client over the next four years or so, collecting together the medical evidence in relation to a quite complicated set of injuries.

14. It is not necessary for the purposes of this judgment to describe Mr Walsh's injuries in any very great detail. Because he had landed on his face, reports had to be obtained from a consultant ENT surgeon, a consultant plastic surgeon and a consultant ophthalmologist. These were all disclosed to the defendants' insurers during 1991, and nobody has ever suggested that in relation to the injuries or disabilities which these reports record there was any need for further inquiries for the purpose of assessing the value of those parts of his claim. In the event, two further ophthalmic reports were commissioned because Mr

Walsh had a continuing problem with double vision, but although a locum consultant's report in October 1994 is rather more detailed than its predecessors, it does not really add anything of any significance.

15. The only aspect of his injuries which gave rise to any significant difference of expert medical opinion related to matters within the expertise of the two consultant orthopaedic surgeons, Mr Nixon and Mr Shepherd. They were mainly concerned with two types of injury, to the neck and the lower back. The whiplash injury to the neck was undoubtedly unpleasant and painful for a long time, but by 1992-3 it had largely cleared up. The injury to his lower back gave rise to greater difficulties.

16. In June 1991 Mr Nixon said that there was no evidence of a prolapsed intervertebral disc, but that Mr Walsh's symptoms were compatible with a chronic low back strain. Since he had now experienced back strain for almost two years since his accident, current research would indicate that there was an 80% to 90% likelihood that he would continue to experience low back pain indefinitely.

17. This report was disclosed to Mr Shepherd. He also read reports from those who were responsible for Mr Walsh's care in 1991-2. He read that there had been an MRI and CT scan which showed some disc bulging at L4/5, although the distribution of pain and muscle wasting was more in relation to L3. As I have already mentioned, Mr Shepherd left open the question whether the lower back strain was attributable to the accident. If it was, then he said:

"Radiographs are normal and MRI scan is said to show only bulging of the 4/5 intervertebral disc, there is no suggestion of degeneration, and I consider the bulge is probably not the cause of symptoms. Consequently, although Mr Walsh has complained of back symptoms for some time, I see no reason why they should be permanent or, alternatively, if they should persist, why they should be troublesome."

18. He added that Mr Walsh was somewhat obsessional in his attitude to bodily fitness and that consequently his appreciation of symptoms in his back might be somewhat enhanced. Mr Nixon later commented, not unreasonably, that Mr Walsh's attitude in this respect was typical of most competitive middle distance athletes.

19. There was a further problem relating to pain in the right groin and in the back of the right thigh, for which a further CT scan was undertaken. Following that scan and a further short report from Mr Shepherd there was no issue between Mr Shepherd and Mr Nixon about the likely cause of these symptoms, namely a muscular problem unrelated to the accident.

20. Mr Nixon produced three further reports. Two were dated 3rd August 1993 and the other 2nd November 1993. In the last two of these reports he commented on Mr Shepherd's two reports and reviewed a number of records from the units responsible for Mr Walsh's care since the accident. He also reviewed a number of X-rays and the MRI scan of the lumber spine taken on 3rd October 1991. Mr Nixon said of this scan:

"No evidence of fracture. The discs are normally hydrated. The evidence of degenerative change at the L4/5 disc is minimal. This scan would be considered within normal limits."

21. In his substantive report dated 3rd August 1993 Mr Nixon said that as a result of his accident Mr Walsh had developed a chronic low back strain. Earlier in his report he said that the symptoms Mr Walsh had described to him of pain in the right sacro-iliac joint were identical to the symptoms he had described in June 1991. The pain was aggravated by movement of the leg and walking. It was also aggravated by driving for half an hour or sitting for 15 minutes.

22. There were therefore at that time two unresolved issues. The first related to the attribution of the lower back pain to the accident. This must have been resolved by the disclosure of Ms Gunter's report in December 1993. The other related to the nature and intensity of this back pain and the future prognosis in that respect. Although he must surely have known of the research evidence to which Mr Nixon referred (which is fairly familiar to judges experienced in this field), Mr Shepherd did not comment on it in his report.

23. All three reports, and a further report from the ophthalmologist, were disclosed to the defendants' insurers under cover of a letter dated 10th December 1993. Subject to this one unresolved dispute about the back pain, there should have been no difficulty in letting the case go forward on agreed medical evidence. It was, incidentally, a classic case for mediation by a mediator with experience in this field of litigation. If this dispute had been referred to mediation, with the defendant's insurers present, it would almost certainly have been settled six years ago.

24. I turn now to the evidence about the financial losses Mr Walsh sustained and claimed. Subject to one outstanding query about his entitlement to recover more than £1,000 in respect of a claim for lost performance bonus, the defendant's insurers were making interim payments in full settlement of the claims made for losses and expenses as and when they were made. The first such claim, for £1,575 net loss of bonus and £502.34 for losses and expenses, was made on 1st June 1990. The latter claim was immediately accepted by the insurers in a letter in which they raised some questions about the loss of bonus claim, to which they received no response until 13th March 1991. Mr Walsh's solicitor then told them that the employers' accountant would be happy to attend a meeting with them for the discussion of the claim generally. This never happened. Following a telephone conversation, an interim payment of £1,502.34 was made on 19th March, leaving £575 still to be proved in respect of the loss of bonus claim.

25. On 26th March 1992 Mr Walsh's solicitor prepared a further, cumulative schedule of special damages which totalled £3,095.34. £1,502.34 had already been paid, and £575 still awaited proof. On 7th April 1992 the defendant's insurers made a further interim payment of £1,000, to be initially credited against special damages.

26. A county court summons had to be issued in July 1992, for limitation purposes, and the pleader simply repeated under the particulars of special damage the items amounting to £3,095.34 which had appeared in the recent schedule. The particulars of injury included a statement that the claimant was at a disadvantage on the open labour market, and a new item "net loss of earnings - details to be provided on discovery" was added at the end of the particulars of special damage. I will describe Mr Walsh as "the claimant" throughout this judgment even though until April 1999 he was, of course, described as "the plaintiff" in all documents concerned with the case.

27. This was an action to which the automatic directions regime applied. The claimant's solicitor in due course received Form N450 from the county court which informed him, incorrectly, that the defence (dated 20th July 1992), a copy of which was sent to him by the defendant's solicitors under cover of a letter of that date, had been received by the court on 12th August 1992. Although we do not have the whole of the inter-party correspondence, it is reasonable to infer that when they were first instructed the previous November those solicitors had intimated that their insurance clients were happy to continue direct discussions with the claimant's solicitors in relation to the settlement of the claim. That process was delayed for the whole of the first half of 1992 because the insurers' chosen expert, Mr Shepherd, was unable to offer Mr Walsh an appointment until the end of July, and his two reports, dated 19th October 1992 and 22nd February 1993, were not, as we have seen, disclosed until March 1993. It was, unhappily, a feature of this type of litigation at that time that the parties sometimes instructed medico-legal experts who were far too busy. They were not subject to any external pressure compelling them to seek an expert who could undertake to report within an acceptable time.

29. We do not have the whole of the inter-party correspondence during 1993, when time was of course running under CCR Order 17 Rule 11. Although the defendant's solicitors asked on 2nd March 1993 for an up to date calculation of special damage, this request was ignored. It appears that Mr Walsh's solicitor gave priority to the outstanding issues between the orthopaedic surgeons. Mr Nixon saw Mr Walsh again in July and reported on 3rd August 1993, as I have already described. It was then thought wise to ensure that Mr Nixon saw all the hospital records, X-rays and so on, and he delivered his further report at the beginning of November. It was disclosed to the defendant's insurers on 10th December 1993, under cover of a letter in which Mr Walsh's solicitor said that he was in the course of preparing a detailed schedule of loss and supporting documents which would shortly be ready for service. These documents, it appears, were never in fact served.

30. On 25th November 1993, one day before what they mistakenly believed to be the guillotine date for the purpose of CCR Order 17 Rule 11, the claimant's solicitors applied to the court for directions. They sought directions for an exchange of medical reports within 35 days, for special damages to be agreed if possible, for the action to be set down for trial with an estimated length of one day, and for "such further directions as the district judge deems appropriate".

31. On 10th December 1993 they sent a copy of their notice of application to the defendant's solicitors, together with a listing information form. The defendant's solicitors replied on 24th December, enclosing the completed form. They were willing to agree the suggested directions, subject to their belief that a day and a half should be allowed.

32. On 4th January 1994 District Judge Western made the first two orders requested. Since the experts' reports were not agreed, he considered that a day and a half was not a realistic assessment of the time required for the hearing. He therefore directed that the action be set down for trial when both parties notified the court that they were ready for trial. He thereby handed control over the timetable back to the parties' representatives who had just allowed two and a half years to elapse between July 1991 and January 1994 in a single further exchange of orthopaedic evidence.

33. The matter seems to have been handled on the defendant's solicitors' side by Mr David Beck, a managing clerk in the firm acting for the defendant's insurers. Although no witness statement had been served, and no list of documents had ever been served by the claimant's solicitors, in breach of the automatic directions, Mr Beck did not seek any order that they be served within a given time or at all. Nor did he or his clients attend court on 4th January. Instead, a sum of money was paid into court on 24th January 1994. Mr Beck had previously ascertained that Mr Walsh did not have the benefit of a legal aid certificate.

34. On 12th April 1994 the claimant's solicitors wrote to the effect that the sum in court was not acceptable, and they were now anxious to obtain a trial date as quickly as possible. On 18th April 1994 the defendant's solicitors confirmed, in response to a request, that the medical evidence was not agreed. Since it appeared that Mr Shepherd wished to see Mr Walsh again in June, they would be willing to agree a trial date from September onwards. They supplied a list of dates when Mr Shepherd would be available. Mr Shepherd did in fact see Mr Walsh again on 9th June 1994, but no further report has ever been disclosed. We do not therefore know what he said then, nearly five years after the accident, about Mr Walsh's back pain.

35. Apart from an exchange of correspondence (31st October/8th December) in relation to a reference to the interim payments in the notice of payment into court that had been made, that was all that happened during 1994. There is no evidence before the court either from Mr Walsh or from his then solicitor Mr Haworth, and it would be wrong for us to speculate about the reason why nothing was done to update the schedule of loss (as promised in the letter of 10th December 1993), or to try to agree the special damages, or to request the court for a hearing date. We do not know if Mr Walsh had been able to pay his solicitors' fees and the bills for all the consultants' reports that had been commissioned, and he was no doubt warned of the likely cost of a two-day trial, with three different professional disciplines being retained on each side. He did not obtain legal aid. According to a schedule of special damages subsequently prepared for him in August 1999, he was out of work between January 1994 and October 1994, and it is said that he only earned £1,500 between the beginning of November 1994 and the 5th April 1995. We know nothing of the circumstances in which he decided to reject the payment into court when, on the face of it, he would have been unable to produce the money necessary for taking the action forward to trial.

36. At all events, the next the defendant's solicitors heard about the matter was when they received a letter dated 30th July 1996 from the claimant's present solicitors, who were then known as Cole and Cole.

37. Mr Lumb who practises from the Reading office of the firm now known as Morgan Cole, has explained that in the middle of 1995 Mr Walsh instructed a sole practitioner in Covent Garden to take over the conduct of his claim. This proved to be a mistake, since that solicitor appears to have taken no steps in the action at all, and in July 1996 Mr Lumb's firm was instructed. It seems that that solicitor was later

suspended from practice by the Law Society for professional offences embracing the period when he was instructed by Mr Walsh.

39. Messrs Cole and Cole told the defendant's solicitors in their letter that they had now come on the record. They inquired about the state of the medical evidence and said that they were currently obtaining a report from a psychiatrist. This letter was acknowledged on 1st August 1996, and on the same day the defendant's solicitor wrote to the court to inquire whether it regarded the action as being struck out. They said, in effect, that the trigger date for CCR Order 17 Rule 11 was 3rd August 1992, and they did not know whether the claimant had applied for a hearing date before the guillotine date.

40. The county court appears to have mislaid the file, and after the defendant's solicitors had sent it a copy of their pleadings and orders file, an officer of the county court told them in a letter dated 16th September 1996 that the district judge had commented that there was no record of any request for a trial date, and that it would appear from the court file that the matter had been struck out.

41. On 24th September 1996 the defendant's solicitors sent the claimant's solicitors a copy of that letter, which also appears to have been sent to them direct by the court. A week earlier the claimant's solicitors had written to the court themselves, enclosing a copy of the order made by District Judge Western on 4th January 1994. They contended, somewhat surprisingly, that this order ousted the automatic directions. On 4th October 1996 they told the defendant's solicitors what they had done, and on 9th October they told them that they understood that the court file had gone from Aylesbury to Milton Keynes. On 25th October 1996 they received a letter from an officer of the court saying:

"[Your letter] was placed before the District Judge who directs that the effect of District Judge Western's order would be to displace the Automation struck out (sic). List for trial."

42. This letter, although received by Cole and Cole on 30th October 1996, was not included in the documentary evidence before Judge Serota QC. Although the county court had sent its earlier letter of 16th September 1996 to the solicitors for both parties, Mr Beck did not mention this later letter in his affidavit, and there is no reason to infer that a copy of it was sent to him. The claimant's solicitors certainly never sent him one. The view ascribed to the district judge was, of course, quite wrong, because the true guillotine date had passed before the claimant's solicitor made the application to the court which resulted in the order of 4th January 1994. A letter like this, purporting to record a "direction" by a district judge, and addressed to only one party to the proceedings, should, of course, never have been sent in this way.

43. There was then no further progress in the action during 1997. This inaction continued during 1998 until the defendant's solicitors broke the impasse by applying to the court on 16th December 1998 for a declaration that the action had been automatically struck out pursuant to CCR Order 17 Rule 11, alternatively that it should be struck out for want of prosecution.

44. On 21st January 1999 District Judge Rhodes made a declaration, in effect, that the action had been struck out automatically. This was inevitable, since no request for a hearing date had been made before the "true" guillotine date of 3rd November 1993.

45. The claimant's solicitors applied on 7th April for an order that the action be reinstated, on the grounds that their predecessors had been misled by the Form N450 issued by the county court in August 1992. On 26th April, after hearing counsel on both sides, District Judge Rhodes granted this application and directed that the application to strike out for want of prosecution should be heard on 22nd June 1999. The defendant's solicitors did not appeal against the order for reinstatement.

46. On 7th June 1999 Mr Lumb swore an affidavit in resistance to that application. He said that he had updated Mr Walsh's witness statement to the end of 1998, and that it now simply needed updating to June 1999. He had also updated the schedule of loss, although he was still waiting for a few supporting documents, whose nature he identified. All that was required, he said, was a counter-schedule from the defendant, a sight of Mr Shepherd's June 1994 report, and a pre-trial examination of Mr Walsh by the orthopaedic experts for each side. In these circumstances, he said, the claimant's case was again virtually ready for trial, and a trial date in three to four months' time could easily be met.

47. After describing the history of events until November 1993, and laying a lot of the blame for delay in 1992-3 to the immensely long time taken by Mr Shepherd in 1992-3 to make an appointment with Mr Walsh and to provide his report, Mr Lumb took the wholly novel point that the action had been struck out in November 1993 and remained struck out until 26th April 1999. There could therefore be no justified criticism of the claimant or his advisers for any inaction during that period because the action did not exist. The delay from November 1993 to April 1999 was therefore excusable, almost by definition.

48. He then maintained that the defence was wholly unable to show any prejudice. The sole area of dispute was over the claimant's back injury, and in this context the evidence of the two opposing experts was enshrined in their reports. Both of them would be entitled to pre-trial re-examinations of the claimant, if necessary, so as to bring their evidence up to date.

49. I should add, by way of completeness, that the prejudice described by Mr Beck in paragraphs 8 to 11 of his affidavit was identified in very general terms.

50. If the judgment of District Judge Rhodes on 22nd June was recorded, as it should have been, a transcript of it was never bespoken. He appears to have given the claimant's solicitor's ingenious argument short shrift before striking the action out for want of prosecution.

51. The claimant appealed against this order. His appeal came on before Judge Serota QC on 21st August 1989. By this time his solicitors had prepared what they called a further interim schedule of special damages. This amounted to £43,046.38, made up as to £2,593.09 for miscellaneous items of loss and expenses, £37,246.89 past loss of earnings, and £3,306.40 future loss. This document disclosed an entirely new case on special damages. This was to the effect that the claimant had been made redundant by his old employers in June 1992 because of his injuries, and had then suffered increasing amounts of loss of earnings in 1992-3 (£7,170), 1993-4 (£7,770) and 1994-5 (£12,320). His claim for lost earnings was then reduced to £3,087.38 in 1995-6 and £4,444.18 in 1996-7. Thereafter he earned more than he would have earned at his old job. The claim for future loss related to the future cost of physiotherapy.

52. When the appeal came on for hearing, the judge immediately took the point that reinstatement was a discretionary remedy. Mr Dawson, who had the conduct of the appeal on behalf of the claimant, understandably told him that he had not come prepared to deal with reinstatement as such. The judge then referred to ***Williams v Globe Coaches Ltd*** [1996] 1 WLR 553, from which he derived the proposition that in the absence of very special circumstances the court should be willing to reinstate an action if a claimant's solicitor had been misled by a clear and unequivocal statement in Form N450. The judge said he had serious difficulties because he simply could not understand on what basis the action could have been reinstated in April and struck out again in June. He thought that very special circumstances might exist.

53. Both counsel were resistant to this approach. Mr Bell, who appeared for the defendant, urged him to reject the claimant's appeal on conventional grounds because of the prejudice his clients would have suffered from the inexcusable and inordinate delay. With the judge's encouragement, however, he prepared a notice of application for permission to appeal out of time from the order dated 26th April. Mr Dawson objected to this application, and Mr Bell said he accepted that the point the judge had raised had never been taken before. The judge, however, said he was unhappy about dealing with the matter otherwise than on what he considered to be the real substantive merits.

54. Mr Dawson then addressed arguments to him in support of his opposition to the application for permission to appeal out of time. He said the defendant had elected not to appeal against the order of 26th April, and had proceeded on the basis that the action had now been effectively reinstated. He then made submissions to the judge in support of his appeal.

55. The judge gave an ex tempore judgment. He was very critical of what he called a lamentable failure to prosecute the proceedings since January 1994. He took the view that on 26th April 1999 District Judge Rhodes was bound, when considering the application, to have regard to the Civil Procedure Rules which came into effect that day, and in particular to the overriding objective as set out in Part 1, when exercising his discretion as to whether or not the action might be reinstated.

56. The judge clearly felt that if the action was reinstated on 26th April, it could not very well have been struck out for inexcusable delay two months later. He therefore granted the defendant permission to appeal out of time against the earlier order and allowed the appeal. He said that it seemed to him, having regard to the overall purpose and content of the Civil Procedure Rules and the overriding objective, that he should not allow an order to stand, even where the time for appealing had expired, if he considered that that order was manifestly wrong.

57. It is clear (see page 15 of the judgment) that if the judge had been applying the pre-CPR tests, he would have considered that because of the delay a fair trial of the action could not now be had. He decided, however, that the appropriate course for him to take was to decide the matter on the basis that under the CPR he was not willing to reinstate the action.

58. After judgment was given, Mr Dawson said that he had been taken by surprise, and that he would have wanted an adjournment if he had known that the judge was going to grant permission to appeal out of time. The judge apologised to him if he had not appreciated this. He later added a footnote to his judgment in which he described what had happened and said that in any event he considered that all relevant submissions which could have been made as to the merits were in fact made. He then granted the claimant permission to appeal.

59. As I have said, we told counsel at the start of the hearing that we did not consider that the judge's order could stand in these circumstances. Mr Dawson had not been ready to argue the reinstatement point, and the judge did not know of the court's letter to his solicitors of 25th October 1996 in which an officer of the court had told them that a district judge had directed that the action was reinstated.

60. Before I leave the CCR Order 17 Rule 11 issue, I will make one further comment. The judge fastened on eight words "in the absence of very special circumstances" in ***Williams v Globe Coaches Ltd*** as the justification for taking the course he did. I believe I am correct in saying that the point taken by the judge was not taken in any of the appeals or applications or in any of the reported or unreported judgments of this court which a special division of this court had to consider during a seven-week period in April-May 1997 (see ***Bannister v SGB plc*** [1997] 4 All ER 129 and ***Greig Middleton v Denderowicz*** [1997] 4 All ER 181). There were more than 100 cases in the former category, and over 40 in the latter, and I personally considered the issues in all of them. The words on which the judge seized were not repeated in the authoritative guidance on Form N450 issues which this court restated in paragraphs 21.19 to 21.22 of its judgment in ***Bannister.*** In that case the court took the view that once a plaintiff could show he had been genuinely and reasonably misled, the action would be reinstated retrospectively as at the date it had been automatically struck out. In the present action the claimant had been so misled not once but - and this was unknown to the judge - twice. Under the approach approved in ***Bannister*** everything that was done during the period of suspended animation was validated by a judge's retrospective order. As a result, orders for costs could be enforced if costs were in fact incurred and ordered at a time when the parties were proceeding with the action in ignorance of the automatic strike-out.

61. It is clear that the judge adopted an approach fit for argument in this court if CCR Order 17 Rule 11 was still raising a substantial number of live issues, instead of being a rule whose baleful memory is best consigned to the history books. The relationship between the Order 17 Rule 11 regime and the CPR regime (on an application made under the former regime and decided on the latter); the effect of the decision in ***Bannister;*** and the effect of the court's letter dated 25th October 1996 all raised issues which could have engaged the attention of this court for a couple of days if we had not remitted the matter to a different circuit judge for decision. As it was, we took the pragmatic course, with which both parties agreed, of going straight to the issues raised by the claimant's appeal from District Judge Rhodes's order of 22nd June.

62. Although the judge disclosed the view he would have adopted if he had been hearing that appeal along ***Birkett v James*** lines, he did not in fact make any order on it, and his judgment shows that he would have considered the effect of the CPR as well before deciding what order to make, if he had not taken the course he did in fact adopt. It follows that although it is not difficult to guess the conclusion the judge would have reached, he did not in fact exercise his discretion on the claimant's appeal at all. In these

circumstances, both counsel agreed that we should exercise our own discretion in determining the "want of prosecution" appeal.

63. It is now well known that the decision of this court in ***Allen v McAlpine*** [1968] 2 QB 229 spawned an almost relentless flow of expensive, time consuming, ancillary litigation over the next 30 years. In those days the court had no effective power to manage cases, and the orders it made (whether manual or automatic) were often as much honoured in the breach as in the observance. Although the House of Lords is generally content to leave interlocutory disputes to the Court of Appeal, it, too, became involved in disentangling some of the complex problems that arose when courts tried to give effect to the "abuse of process" tests enunciated in ***Allen v McAlpine***. See ***Birkett v James*** [1978] AC 297; ***Department of Transport v Chris Smaller (Transport) Ltd*** [1989] AC 1197; ***Roebuck v Mungovin*** [1994] 2 AC 224; and ***Grovit v Doctor*** [1997] 1 WLR 640.

64. The language of one branch of the abuse of process test ("inordinate and inexcusable delay such that there is a substantial risk that a fair trial of the issues in the litigation will not be possible") stemmed originally from the judgment of Diplock LJ in ***Allen v McAlpine*** at pp 259-261. It was derived from the principle he declared at p 255E of his judgment, when he said that when such a stage had been reached, the public interest in the administration of justice demanded that the action should not be allowed to proceed. Salmon LJ, for his part, introduced at p 268G an alternative third stage criterion, namely that the defendants were likely to be seriously prejudiced by the delay that had taken place.

65. Although this language was judge-made, it used to be treated as if it was the language of statute. Little real difficulty need have arisen on the application of the first two of these tests (the inordinacy and the inexcusability of the delay) although problems cropped up from time to time, particularly when the defendants' solicitors' actions or inactions contributed to the delay.

66. Great difficulty arose, however, on the application of the third of these tests. These difficulties increased after the decision of the House of Lords in ***Birkett v James*** highlighted the problems that were created when the courts tried to apply this test side by side with a generous statutory limitation regime. If the case could not be tried fairly when the writ was issued, because people's memories had faded, how could any further delay prejudice anybody? In ***Grovit v Doctor*** [1997] 1 WLR 640 the House of Lords 20 years later sanctioned an alternative "abuse of process" approach which would be available to a court if it was satisfied that the delay in question stemmed from the fact that the claimant had been maintaining the proceedings with no intention of carrying them forward to trial. Lord Woolf at pp 643-4 gave a vivid description of the problems created by the need to show that the delay had caused "serious prejudice" to the defendants. He made it clear that both the court and the defendants had the means of achieving greater control of delay through recourse to peremptory orders, even before new rules of procedure were introduced.

67. Needless to say, a small new cottage industry of ancillary litigation was beginning to grow up prior to April 1999 in connection with this alternative way of using the blunt hammer of an "abuse of process" strike-out: see, for example, ***Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd*** [1998] 1 WLR 1426 and ***Choraria v Sethia*** (The Times, 29th January 1998).

68. On 26th April 1999 the Civil Procedure Rules came into effect. As is well known, Parts 1 and 3 of the rules give the courts ample powers to control and manage cases. The delays which used to disfigure the conduct of litigation ought not to occur in future. Rules 1.1 - 1.4, 3.1 and 3.4 are particularly important in the present context. I would pick out the following rules or sub-rules for special attention:

1.1(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.
(2) Dealing with a case justly includes, so far as practicable -
(d) ensuring that it is dealt with ... fairly;
1.2 (a) The court must seek to give effect to the overriding objective.
1.3 The parties are required to help the court to further the overriding objective.
1.4(1) The court must further the overriding objective by actively managing cases.
2. Active case management includes -
(e) encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure;
(f) helping the parties to settle the whole or part of the case;
(g) fixing timetables or otherwise controlling the progress of the case;

(1) giving directions to ensure that the trial of a case proceeds quickly and efficiently.

3.1(1) The list of powers in this rule is in addition to any powers given to the court by any other rule or practice direction or by any other enactment or any powers it may have.

(2) Except where these Rules provide otherwise, the court may -

(m) take any other step or make any other order for the purpose of managing the case and furthering the overriding objective.

(3) When the court makes an order, it may - (a) make it subject to conditions.....; and (b) specify the consequence of failure to comply with the order or a condition.

(4) Where the court gives directions it may take into account whether or not a party has complied with any relevant pre-action protocol.

3.4(2) The court may strike out a statement of case if it appears to the court -

(a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;

(b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or

(c) that there has been a failure to comply with a rule, practice direction or court order.

69. Although CPR 3.1 (1) expressly preserves the court's inherent jurisdiction to protect its process from abuse, this is a residual long-stop jurisdiction. The main tools the courts have now been given to exterminate unnecessary delays are to be found in the rules and practice directions and in the orders they may make from time to time.

70. Rule 3.1(4) calls for particular mention in the present context. All too often under the former regime each party had done nothing very effective before the start of court proceedings to identify to the other what their case was on the various issues that were likely to arise between them. It was the need to address this problem that gave birth to a wholly new device, the pre-action protocol. Three pre-action protocols are now in use, in relation to personal injury claims, the resolution of clinical disputes, and road traffic accidents respectively. In his judgment in ***Biguzzi v Rank Leisure plc*** [1999] 1 WLR 1926 Lord Woolf MR drew attention at p 1933F-H to the type of order the court may now make, using the powers given to it by Rule 3.1(4), if in its opinion a party's non-compliance with a protocol has led to one of the consequences set out in that passage in his judgment.

71. Transitional difficulties are always bound to arise when a procedural revolution takes place on this scale. For the first year or two (and, perhaps, sadly, for longer) the courts will be confronted with cases left over from the former regime, in which the absence of any effective court control gave rise to all the difficulties that have arisen. There was also during 1999 a period when the lower courts had to decide whether to apply the pre-CPR rules or the post-CPR rules to the appeals and applications which came before them after 26th April 1999. Further difficulties arose when some judges and practitioners interpreted post-April 1999 decisions of this court as if they were made under the new CPR regime when all that the court was doing was to review the exercise of discretion by a judge under the pre-CPR regime. Still further difficulties arose when pre-CPR decisions of the courts started creeping back into the case-law, despite a number of authoritative dicta in this court to the effect that recourse should not be had to them for the purposes of interpreting a quite new procedural regime.

72. There have now been three decisions in this court in which the court has been given the opportunity of reviewing the exercise of discretion by a judge in a strike-out case under the new CPR regime.

73. In **Biguzzi v *Rank Leisure Plc*** [1999] 1 WLR 1926 (Lord Woolf MR, Brooke and Robert Walker LJJ), the claimant, who was a bar manager, sustained injuries in a fight at a night club in November 1993. Proceedings were started in October 1995. In January 1999 the defendants applied for an order that they be struck out for want of prosecution. There had been no court control, because the only substantive direction in the case, made in August 1996, had handed back the control of the pace of the litigation to the parties' solicitors.

75. Unhappily the claimant suffered psychological sequelae to his accident in the summer of 1996, and as in the present case his solicitors then allowed the pace of the litigation to be dictated for the most part by the speed with which the busy psychiatrists they instructed could deal with the matter. The claimant's psychiatrist did not report until June 1997. The defendant's psychiatrist, for his part, reported in June 1998. The defendant's solicitors then caused the further delays I described at p 1936 of my judgment. They took a number of wholly unreasonable points about the availability of the claimant's pre-incident medical records, while continuing to withhold their agreement that the case was ready for trial. Judge

Kennedy QC considered that the case could still be tried fairly. He dismissed the defendants' strike-out application, and directed an early trial. This court dismissed the defendants' appeal.

76. In the second case, **UCB *Corporate Services Ltd v Halifax (SW) Ltd*** (CAT 6th December 1999, Ward LJ and Lord Lloyd of Berwick), the claimant bank claimed damages against the defendants for their negligence when valuing a nursing home that was offered as security for a bank loan. The valuation report was delivered in October 1989. The proceedings were started just under six years later. Directions were given in December 1996 and February 1997, and the action should have been set down by the end of July 1997. There then followed a succession of failures by the claimants to comply with their obligations under the rules and under orders of the court, notwithstanding repeated reminders by the defendants. Virtually nothing happened in connection with the conduct of the action between February 1997 and May 1999 when the defendants applied for an order striking out the action. Judge Prosser QC granted their application on the grounds that its continuation would be an abuse of the process of the court in view of the claimants' wholesale disregard of the court's rules and orders. This court dismissed the claimants' appeal. In view of the breaches of rules and orders, this was a very straightforward case under CPR 3.4(2)(c).

77. In the third case, ***Purdy v Cambran*** (CAT 17th December 1999), Swinton Thomas and May LJJ and Singer J), the claimant sustained serious injuries in a road traffic accident in December 1989. He issued proceedings at the end of November 1992. Liability was not in issue. In September 1994 interlocutory judgment was entered in the claimant's favour for damages to be assessed. No further steps were then taken in the action until June 1997, when the defendants applied for the case to be listed for hearing. In July 1997 a district judge duly ordered that the assessment of damages be listed upon the filing of a joint certificate of readiness, and in January 1998 the defendant's solicitors sent to the claimant's solicitors a joint certificate of readiness. A year later the defendant applied for an order striking out the action for want of prosecution.

78. An important feature of this case was that there was not a great deal of disagreement in substance between the two consultant orthopaedic surgeons who were originally instructed by the parties. The defendant's expert had examined the claimant in February 1993 and again in the autumn of 1995. In view of their first expert's opinion, the claimant's solicitors decided to seek the help of a different expert. In April 1998 their new expert expressed a view, not shared with his predecessor, to the effect that but for the accident the claimant would have been able to work for the remainder of a normal working life. The defendant's expert died in August 1988. He had taken the view that the claimant would have recovered from the effects of the accident in a matter of months. The judge struck out the action on the basis that there could no longer be a fair trial now that the defendant's expert had died. This court dismissed the claimant's appeal.

79. Although Lord Woolf MR said in **Biguzzi** at p 1934G that earlier authorities are no longer generally of any relevance, the language of some of the judgments in these cases is perhaps reminiscent of the language used in cases decided in the pre-CPR regime, and this is causing difficulties to some practitioners. The ground rules under which courts are now, however, required to operate are clearly set out by May LJ in his judgment in **Purdy** (paras 45-46):

> "45. Under the Civil Procedure Rules, the court has ample power in an appropriate case to strike out a claim for delay. The power is to be found, if nowhere else, in rule 3.4(2)(c), which provides that the court may strike out a statement of case if it appears to the court that there has been a failure to comply with a rule, practice direction or court order; or in rule 3.1(2)(m), which provides that the court may take any step or make any other order for the purpose of managing the case and furthering the overriding objective; or under the court's inherent jurisdiction, expressly preserved by rule 3.1(1); each of these to be exercised and interpreted in accordance with rule 1.2(a) and (b) to give effect to the overriding objective.
>
> 46. The Civil Procedure Rules are a new procedural code with an overriding objective enabling the court to deal with cases justly in accordance with considerations which include those to be found in rule 1.1(2). One element expressly included in rule 1.1(2) as guiding the court towards dealing with cases justly is that the court should ensure, so far as is practical, that cases are dealt with

expeditiously and fairly. Delay is, and always has been, the enemy of justice. The court has to seek to give effect to the overriding objective when it exercises any powers given to it by the rules. This applies to applications to strike out a claim. When the court is considering, in a case to be decided under the Civil Procedure Rules, whether or not it is just in accordance with the overriding objective to strike out a claim, it is not necessary or appropriate to analyse that question by reference to the rigid and overloaded structure which a large body of decisions under the former rules had constructed..."

80. For a transitional case of the present kind, paragraph 48 of his judgment is also relevant:

"48. [In ***Biguzzi]*** Lord Woolf accepted that, for transitional cases, the parties' conduct before the introduction of the Civil Procedure Rules has to be assessed by reference to the rules which were then applicable. Obviously a party will not be considered to have been in breach historically of a former rule when they were not. You do not ignore the fact that the parties were previously acting under a different regime. But the decision has to be made applying the principles under the Civil Procedure Rules, not those under the previous regime: see Lord Woolf in ***Biguzzi*** at 1932A-D."

81. In paragraphs 50 and 51 May LJ referred to the range of powers now available to the court in its search for justice, and to the way in which the court is now able, when deciding what order to make in a given case, to make a broad judgment after considering the available possibilities:

"50. Lord Woolf MR in ***Biguzzi*** drew attention to the armoury of powers which the court has under the Civil Procedure Rules in addition to that of striking out: see in particular his judgment at 1932G to 1934C. In doing so, he was doing no more than emphasising the range of powers available to the court in its search for justice, indicating that the court should consider such powers as may be relevant to a particular case before deciding which to use. He was not indicating that any one of those powers was inherently more appropriate than any other....

51 The effect of this is that, under the new procedural code of the Civil Procedure Rules, the court takes into account all relevant circumstances and, in deciding what order to make, makes a broad judgment after considering available possibilities. There are no hard and fast theoretical circumstances in which the court will strike out a claim or decline to do so. The decision depends on the justice in all the circumstances of the individual case. As I read the judgments of Lord Lloyd of Berwick and Ward LJ in ***[UCB Corporate Services Ltd v Halifax (SW) Ltd],*** they are saying nothing different from this. As Ward LJ said in the ***UCB*** case, Lord Woolf MR in ***Biguzzi*** was not saying that the underlying thought processes of previous decisions should be completely thrown overboard. It is clear, in my view, that what Lord Woolf was saying was that reference to authorities under the former rules is generally no longer relevant. Rather is it necessary to concentrate on the intrinsic justice of a particular case in the light of the overriding objective."

82. I would add that the court is no longer necessarily faced, in a case in which liability is not in issue, with making a decision wholly in favour of one side or the other on a strike-out application. It may be able to take a middle course if this is more consistent with the overriding objective of doing justice.

83. I turn now to the facts of the present case. Like **Biguzzi** and **Purdy,** this was a case which cried out for effective control from the court which it did not receive. The solicitors on both sides permitted an inordinate length of time to elapse between the middle of 1991 and the end of 1993, a period in which they allowed the timetable for negotiations to be dictated by the diaries of busy orthopaedic surgeons. Even when the proceedings began in July 1992, both sides treated the automatic directions regime as a dead letter. They agreed, expressly or impliedly, to relieve each other of the obligations which would otherwise have fallen on them between August 1992 and February 1993 under the directions regime contained in CCR Order 17 Rule 11(3). The court did not take control, because nobody asked it to take control. The claimant's solicitor was eventually obliged to make an application to the court at the end of 1993. The court then made an open-ended order which deprived it of control again.

84. Despite the complexity of Mr Walsh's injuries, the issues were comparatively straightforward when the defendant's insurers valued his claim in January 1994 for the purposes of a payment into court. Liability was not in issue. Because no witness statement was served, Mr Walsh could not go beyond what he had

told the doctors from time to time about the effect of his injuries. Although there had been talk by Mr Walsh's solicitor of a loss of earnings claim, of discovery, and of an updated schedule of loss, none were ever forthcoming. The medical issues were now clear. The only significant dispute between the parties concerned the frequency and intensity of the pain from which Mr Walsh continued to suffer in his lower back. Neither consultant discredited his account of that pain. What divided them was the length of time for which he was likely to suffer it in future. Mr Nixon saw Mr Walsh in August 1990, June 1991 and July 1993. Mr Shepherd saw him in July 1992 and June 1994.

85. The very small issue that divided them was a comparatively straightforward issue for an experienced judge to try in the spring of 1995, when this action ought to have been heard. In my judgment, it would still be perfectly possible to conduct a fair trial of that issue today. Although we were told by Mr Bell that Mr Shepherd is now in his mid-80s, the dispute between the two consultants turns not so much on what they observed when they examined Mr Walsh but on the judge's assessment of the degree of trouble Mr Walsh was likely to suffer from his back for the remainder of his life. This would turn much more on an assessment of the research evidence and with the experts' practical experience of patients (not suffering from fractures or disc lesions) with chronic back problems than it would on the witnesses' memories of Mr Walsh's condition when they examined him.

86. It is also quite clear that it would not be possible or fair to conduct a trial of the additional issues Mr Walsh's advisers sought to introduce into his case in August 1999. Their predecessors had had their opportunity to set out his case in 1993 and early 1994, and they did not take it. It would be wrong to allow them to amend their schedule of loss now to include a whole lot of new issues dating back over the previous seven years. In my judgment the defendant's insurers were entitled to say that it would be unjust to expose them now to an inquiry into the reasons why Mr Walsh was made redundant in June 1992 and to a claim that any loss of income he sustained after that time must be ascribed to the effects of his 1989 accident.

87. As Mr Bell very fairly said, it is unlikely that a fair trial could now sensibly take place in relation to the issue of loss of earnings. Mr Walsh has now worked for no less than five different employers since his accident, and he is now suggesting that he might by now have become the operations director or the managing director of the firm for which he was working when he had his accident, being the same firm which made him redundant three years later.

88. We are faced, therefore, with a case in which the defendant has caused the claimant serious injuries by his negligence, for which he has accepted responsibility. It is still possible to conduct a fair trial of the claim (as then formulated by the claimant's solicitors, and supported by medical evidence and a pleaded special damages claim) as it stood at the time the court gave directions in January 1994. That claim should have been tried in the spring of 1995. On the other hand, it is not possible to conduct a fair trial now of any further issues the claimant may wish to add to his claim. In so far as he is precluded from recovering any damages arising out of those issues (to which he might otherwise have been entitled) because of any negligence by any of his legal advisers (as opposed to any culpable actions or inactions on his own part), then he would have an action against the relevant advisers. Is it possible, in these circumstances, under the new rules to allow his original claim to be tried as at, say, 15th March 1995 (when the trial ought to have taken place) and to bar any additional claims from the trial?

89. In my judgment, it is. In deciding what order to make on the defendant's application, we now apply a new procedural code which was designed with the overriding objective of enabling us to deal with the case justly. So far as practicable, we must ensure that it is dealt with fairly.

90. It would not be fair to expose the defendant now to a claim which incorporates all the additional items the claimant sought to introduce into it for the first time in August 1999. On the other hand, since his claim, as formulated at the time the court gave directions in January 1994, could still be justly assessed today, it would not be fair to dismiss his action altogether. This would entail permitting the negligent defendant to retrieve all the money his insurers paid into court, ordering repayment of the interim payments made between 1991 and 1993, and directing the claimant to pay the defendant his costs of the entire action, as District Judge Rhodes ordered on 22nd June 1999. This type of order had to be made

under the former "all or nothing" regime. It is no longer obligatory to make such an order today, if it would be unjust to do so.

91. In my judgment, it would not be just to strike out this statement of case under CPR 3.4(2) in these circumstances. By the same token, it would not be just to allow the claimant to enlarge his pleading or his schedule of special damages in any way, or to allow him to serve a witness statement or to give any evidence which goes in any way beyond what he is reported to have told his doctors and the other medical experts in the reports which culminated in Mr Shepherd's report in 1994 (if the defendant wishes to rely on that undisclosed report). He may of course rely on his pleaded case, which will sound in general damages, that by reason of his injuries he is at a disadvantage on the open labour market. The action should be allowed to proceed to trial on that basis, and subject to the condition, which will form part of the order of this court, that the judge assesses the compensation which would have been payable to Mr Walsh at a trial conducted on 15th March 1995 and that he is not entitled to any interest on those damages between that date and the date of this court's order allowing his appeal. If in the event he did not suffer the continuing pain Mr Nixon thought he probably would suffer, he should not be given any award (as at March 1995) for future suffering which did not in fact occur. To that extent only, the trial judge should be permitted to know of events since March 1995.

92. I must stress that this is the order which I consider it just to make on the facts of the present case. Courts will be faced with an infinite variety of factual situations, and even in cases where liability is not in issue, it would be quite wrong for anyone to infer from this judgment that the order we are making today can simply be replicated in other cases without the court first taking a careful look at all the relevant circumstances and weighing up carefully the order that it considers it just to make on the facts before it. The real significance of this judgment is that it shows that the court's ability to do justice is much less constrained under the new rules than it was under the old.

93. For these reasons, the appeal should be allowed, and the judge's order set aside. A pre-trial review should take place as soon as possible before the local designated civil judge, so that he can consider this judgment and give appropriate directions for trial.

94. **LORD JUSTICE STUART-SMITH:** I agree that this appeal should be allowed for the reasons given by my Lord; I also agree with his proposed order. I only add a few words because it is important that the profession understands the radical change that has come about since the introduction of the Civil Procedure Rules on 26 April 1999, in relation to applications to strike out for want of prosecution or abuse of process. The new rules enable the Court to adopt a much more flexible approach. I would just observe that under the new regime of case management by the Court, appalling delays, such as are exemplified by this case, should be a thing of the past. But that may be unduly optimistic and in any event there are likely still to be some cases outstanding from before the introduction of the rules.

95. Under the old law as derived from ***Allen v McAlpine*** [1968] 2 QB 229 and ***Birkett v James*** [1978] AC 297, an application to strike out for want of prosecution could only successfully be made after the limitation period expired. The Defendant then had to show that the Claimant had been guilty of inordinate and inexcusable delay such that either a fair trial was no longer possible, or the inordinate and inexcusable delay had caused specific prejudice to the Defendant. Once that was established, the Court had a discretion to strike out; but the discretion was usually exercised in favour of the Defendant, unless the prejudice was slight.

96. Now the Court's powers to strike out the statement of case are contained, so far as is relevant in Part 3.4(2) where it appears to the Court:

97. It is to be observed that this is a much lower threshold than inordinate and inexcusable delay. On the other hand the power is only to be exercised in accordance with the overriding objective of dealing justly with the case. Thus Part 1 provides:

1(1) These Rules are a new procedural code with the overriding objective of enabling the Court to deal with cases justly.
(2) Dealing with a case justly includes, so far as practicable - (d) ensuring that it is dealt with ..... fairly.
1.2 The Court must seek to give effect to the overriding objective when it - (a) exercises any power given to it by the Rules
1.3 The parties are required to help the Court to further the overriding objective.

98. Furthermore the Court has wide powers in making any order. Part 3.1(3) provides:

When the Court makes an order, it may - (a) make it subject to conditions; ..... and (b) specify the consequence of failure to comply with the order or a condition.

order. (c) that there has been a failure to comply with a rule, practice direction or Court

99. It is clear that the Court is now able to adopt a much more flexible approach to the question of striking out for delay or non-compliance with an order, than was possible under the somewhat rigid rules of the old law. In ***Biguzzi v Rank Leisure plc-****[1999] 1* WLR 1926, this Court made it clear that references should no longer be made to the old cases (see per Lord Woolf MR at p1932). But some of the considerations which were relevant before are obviously relevant now. For example the length of, explanation for and responsibility for the delay; whether the Defendant has suffered prejudice as a result and if so whether it can be compensated for by some order relating to costs or interest or it is so serious that it would be unjust to the Defendant to require the case to be tried. Moreover, the delay may be such that it is no longer possible to have a fair trial.

100. It is particularly important to notice that there may well now be a significant difference between a case in which liability is not in dispute and one where it is. Under the old law, this tended not to make all that much difference. The choice was a stark one, either to strike out or not. But as this case illustrates, where liability is not in dispute, it may be possible to protect a Defendant from prejudice by making orders for costs or disallowing interest, which will have a real impact. The order for costs can be deducted from the Claimant's damages and he can be deprived of interest which he would otherwise recover. Where liability is in dispute, such an order may be of little effect if the claim fails, unless the costs order can be enforced against the Claimant. And deprivation of interest will not be effective if the claim fails.

101. Furthermore where liability is not in dispute, it is likely that a payment into Court will have been, very often, as in this case, long ago. The payment may have been a realistic and good payment in at the time it was made which should have been accepted by the Claimant; but by the passage of time and the effects of inflation it will be insufficient if there is long delay. If the Defendant is obliged to increase the payment in to take account of these factors, it would be unjust since on acceptance the Claimant could recover all his costs. In such a case I see no reason why the Court, if it decides not to strike out under Part 3.4(2)(c) should not make it a condition that the judge at trial should consider whether or not the payment in was one which should have been accepted at the time; and if it was, either deprive the Claimant of costs after the payment in or order him to pay some or all of the Defendant's costs thereafter.

102. In a case where liability is not in dispute, it is not prima facie just that the tortfeasor should escape all liability for his wrongdoing, though there may be exceptional circumstances where even so, it would be just to strike out the whole action. It may be, as in the present case, that it is perfectly possible to try the issue of general damages, but to strike out a belated and exaggerated claim for special damage and future loss, which by reason of the great delay it would be unjust to require the Defendant to meet.

103. I do not say that it may not be possible even in a case where there is a dispute on liability to limit the claim in some such way as a condition to be imposed in making the order dismissing an application to strike out; but I think it may be more difficult than in a case where the Claimant is bound to recover something against the tortfeasor.

104. I have not of course sought to give an exhaustive account of the courses which the Court may adopt as an alternative to striking out. Each case will depend upon its own peculiar circumstances. But rather the case illustrates how the Court, in an attempt to deal justly with the matter, can protect a Defendant from prejudice which he would otherwise be exposed to if the Court simply decided not to make an order striking out for failure to comply with a rule or order.

Order: Appeal Allowed. The Appellant to pay and Respondents costs 15 March 1995 to 16 December 1998 as Defendants costs of three applications before district judge. The defendant to pay Claimants costs of appeal to His Hon Judge Seroton at the Court of Appeal. Order does not form part of the approved judgment.