Anwar et al v. Fairfield Greenwich Limited et al

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EXHIBIT 42

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C[1970 No. M. 5165]; [1972] 3 W.L.R. 57

***436 Moon v Atherton**

Court of Appeal

M.R. Lord Denning, Edmund Davies, and Roskill

1972 April 14

Practice—Parties—Representative action—Tenants' claim for damages against architect—Writ issued by named plaintiff on behalf of 10 other unnamed tenants—Named plaintiff and nine tenants withdrawing at interlocutory stage—Remaining tenant wishing to continue but out of time to bring action in own name—Whether unnamed person a "party"—Whether entitled to be substituted as named plaintiff—Whether power in court to amend with retrospective effect—R.S.C., Ord. 15 r. 6; Ord.

Between 1962 and 1964 a developer built a block of flats and leased them to 12 tenants by leases in identical terms which contained a covenant under which each tenant covenanted with the lessor/ developer to pay 1/12th of the cost of any structural repairs, including the roof; but the leases provided that the lessor's liability for repairs should continue only until the reversion was transferred. Shortly afterwards, the lessor/developer assigned the reversion to a management company in which the tenants were shareholders, thereby releasing himself from the liability for repairs.

Just before the expiry of the six-year period of limitation serious defects developed in the roof. It was repaired at a cost of £5,000 and each tenant paid a share of the cost. Eleven of the 12 tenants wished to claim compensation but were advised that the only person they could sue would be the developer's architect.

A representative action was begun in the name of "M on behalf of herself and the tenants of the block of flats ... except CER." The architect put in a defence; but in September 1971, M and nine of the other tenants decided to discontinue the action. The remaining tenant, A, wished to go on, but as any new action begun by her in her own name would have been statute-barred she applied for leave to amend the statement of claim under R.S.C., Ord. 20, r. 5 (1)1 by substituting herself as the named plaintiff in place of M and deleting all reference to the other tenants. Master Ritchie allowed the amendment on terms of an undertaking by M; but on the architect's appeal Chapman J. refused leave to amend on the ground that what was sought was to change a misconceived representative action into a personal action and that that could not be done.

On appeal by A:-

allowing the appeal, that in a representative action begun in the name of one person a person represented though not named on the record was a "party" to the action within the definition in section 225 of the Supreme Court of Judicature (Consolidation) Act 1925, and, if the named party withdrew from the action, the court had power under R.S.C., Ord. 20, r. 5 to amend the proceedings by substituting the unnamed person for the named plaintiff or by adding her as a***437** "necessary" party under R.S.C., Ord. 15, r. 6, a fortiori where the action might otherwise be statute-barred.Decision of Chapman J. reversed.

The following cases are referred to in the judgments:

- Price v. Rhondda Urban District Council [1923] W.N. 228.
- Watson v. Cave (No. 1) (1881) 17 Ch.D. 19, C.A..

The following additional cases were cited in argument:

- Bedford (Duke) v. Ellis [1901] A.C. 1, H.L.(E.).
- John v. Rees [1970] Ch. 345; [1969] 2 W.L.R. 1294; [1969] 2 All E.R. 274.
- Markt & Co. Ltd. v. Knight Steamship Co. Ltd. [1910] 2 K.B. 1021, C.A. .

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- Smith v. Cardiff Corporation [1954] 1 Q.B. 210; [1953] 3 W.L.R. 994; [1953] 2 All E.R. 1373, C.A..

INTERLOCUTORY APPEAL from Chapman J.

By a writ issued on October 15, 1970, Miss Glennys Moon, suing on behalf of herself and the tenants of the block of flats known as Petherton Court, Gayton Road, Harrow (except Catherine Eluned Roberts) began a representative action claiming damages for alleged negligence from Eric Atherton, the architect who had supervised the construction of the flats between 1962 and 1964, in respect of the defective condition of the roof of the flats. The architect entered an unconditional appearance to the writ and served a defence on November 10, 1970, denying, inter alia, the right of the named plaintiff to sue on behalf of any other person than herself. In January 1971 the architect's solicitors suggested that preliminary points of law should be tried, primarily on the question of the architect's duty in the circumstances and whether the claims were barred under the Limitation Acts, though the writ had been issued before the six-year period of limitation in respect of a tort had expired.

About a year after the proceedings had begun Miss Moon and nine of the 10 persons represented by her decided that they did not wish to continue with the action because of the costs of the proceedings. The eleventh, Mrs. Alice Art, being within the limits of means making her eligible for legal aid, obtained a certificate to apply under R.S.C., Ord. 20, r. 5 (1) for leave to be substituted as the person named as plaintiff in the writ by way of amendment of the writ. Master Ritchie on November 19, 1971, granted the application on an undertaking by Miss Moon that her solicitors would write an open letter to the architect's solicitors stating that she and all the tenants she represented except Mrs. Art would not bring any action against him in respect of the matters complained of; and on fulfilment of that condition leave was granted to substitute Mrs. Art as plaintiff subject to her written consent being filed as soon as possible. The claim was reduced to £500 and ordered to be transferred to the Willesden county court. The master ordered Mrs. Art to pay the costs.

The architect appealed against the master's order to Chapman J. who allowed his appeal and set aside the master's order, ordered that Mrs. Art pay the costs of the appeal and the application, and refused leave to appeal. When the parties appeared before the judge he expressed the view that the original application was misconceived and did not call on counsel for the architect; but after hearing submissions for the applicant, Mrs. Art, he***438** expressed the view that the action by Miss Moon was misconceived; that it was highly dubious whether it was a representative action; that each tenant had his own rights; that the case as a whole did not give the proper foundation for a representative action; that it was sought in effect to strike out the existing named plaintiff and start a new action, changing the representative action into an individual action; and that the fact that Mrs. Art was one of those represented in the representative action was not a ground for changing an action from a representative to a personal action.

An application was made to the Court of Appeal on behalf of Mrs. Art for leave to appeal from the judge's order, and a notice of appeal was filed, asking for an order that leave be given to substitute Mrs. Art as plaintiff and to amend the statement of claim in accordance with the draft initialled by the master. The grounds of appeal were (1) that the judge was wrong in law in holding that the proceedings were not properly founded; and (2) that he was wrong in law and/or wrongly exercised his discretion in refusing leave to substitute Alice Art as plaintiff and refusing leave to amend the statement of claim.

The defendant architect filed a notice of motion for leave to appeal from that part of the judge's order which ordered that Mrs. Art should pay the costs of his appeal against the master's order but did not order that Miss Moon should pay those costs and also a cross notice of appeal against the order as to costs made by the judge. In the events which happened the grounds of that cross appeal are irrelevant to the report.

Mark Myers for the applicant. First, the proceedings were properly constituted as a representative action. The individual contracts are identical, the parties are definite and identifiable and form a class: and the claim of each person represented is for the specific sum of £500. If 11 separate writs had been issued the master or the judge would have protested. The practice in representative actions has grown out of case law rather than the rules which are framed for ordinary actions and not primarily for representative ac-

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tions. The authorities establish that persons represented are all bound by the judgment but are not liable for the costs, nor are they required to give their consent. The test on whether persons form a class is in R.S.C., Ord. 15, r. 12: see also *The Supreme Court Practice 1970,* note on p. 188 on common interest and grievance; Smith v. Cardiff Corporation (No. 1) [1954] 1 Q.B. 210; Bedford (Duke) v. Ellis [1901] A.C. 1; and Price v. Rhondda Urban District Council [1923] W.N. 228. Fletcher-Moulton L.J. in Markt & Co. Ltd. v. Knight Steamship Co. Ltd. [1910] 2 K.B. 1021, 1039 said that one could not have a representative action where the sole relief sought was damages; but that does not accord with modern practice and in any event the claims in the present case though nominally for damages are in fact for a specific sum in each case.

Secondly, in representative proceedings, the person not named but represented is nevertheless a "party" who can apply to be substituted as named plaintiff by amendment of the pleadings under R.S.C., Ord. 20, r. 5 (1) . In Watson v. Cave (No. 1) (1881) 17 Ch.D. 19, 22, Cotton L.J. said that such an action must be treated as if all the persons represented were named on the record. That is relied on as authority for substituting the applicant as the named plaintiff because she is a "party." She cannot***439** be added as a defendant for there would then be no plaintiff; and if she started an action on her own it would be statute-barred and she would suffer an injustice. So the basic question is whether a represented person who wishes to go on when the named plaintiff has abandoned the action is to be left without a remedy. All persons in a representative action are plaintiffs in substance if not in form; and it is merely for convenience that the proceedings are brought in the name of one on behalf of the others: see John v. Rees [1970] Ch. 345 where Megarry J. at p. 370 described the rule as a flexible tool of convenience. Though it may appear anomalous that a person can be a party to proceedings and yet not be liable for the costs, such persons are to be treated as if they were parties. [Reference was made to R.S.C., Ord. 15, r. 13 and the note on p. 194 of The Supreme Court Practice 1970 on leave to enforce judgment in representative proceedings.]

Thirdly, if the applicant cannot be substituted by amendment under R.S.C., Ord. 20, r. 5 the court can exercise its powers under R.S.C., Ord. 2 to cure any irregularity rather than let proceedings irregularly taken fail as a nullity. If neither Order 2 nor Order 20 can be invoked, it is sought to rely on R.S.C., Ord. 15, r. 6 (2) (b), though it might be said that that applies only to adding a new party.

The principle stated in Watson v. Cave (No. 1) 17 Ch.D. 19, 22, should be applied and the person represented should not be prejudiced by the act of another plaintiff. If a named plaintiff totally abandons an action and there is no procedure available by which a represented plaintiff can be substituted to continue the action, it will create the danger that the named plaintiff may be bought off by the defendant; that would be contrary to justice. The court can and should substitute the one who wishes to go on as the named plaintiff.

Geoffrey Jones for the defendant. In view of the court's approach it is conceded that in a situation like the present a representative action was a common-sense solution and that though damages should not be sought by representative action the position may be different where the sum claimed in each case is the same. But the question does arise as to the point at which complaint would be made by the court if separate actions were brought by persons having a common interest and grievance. Obviously where the number is large a representative action is convenient; the word used is "numerous." Two may not be numerous; but in some cases 10 or 11 may not be numerous either, particularly where they are all ascertainable and all could come before the court by separate writs or by being named in one writ. The judge's decision was right in that (a) the applicant, not being a party, was the wrong person to make the application and (b) the application under R.S.C., Ord. 20, r. 5 was misconceived. If any application was to be made it should have been made under, and not enough was made of, Ord. 15, r. 6.

On the main issue, a person represented is not a "party" because (1) though the person represented can enforce the judgment he can only do so with leave of the court: see R.S.C., Ord. 15, rr. 12, 13. If he were a "party" leave would not be necessary. A person must either be a party or not a party, for there is no such thing as something less than a party. (2) A person represented is bound by the judgment and can only challenge***440** it in the limited way set out at p. 194 of *The Supreme Court Practice 1970* which does not apply here; he cannot challenge it by an appeal.

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(3) Persons represented are not liable for costs. That indicates that they are not "parties." The authority for that is Watson v. Cave (No. 1) 17 Ch.D. 19, on which the defendant architect also relies, for there the plaintiff as lord of the action had taken steps with which one of the persons represented did not agree and the court told the objector that the practice was to ask the court to replace the person representing him or make him a defendant. Both those steps would be for the purpose of making him a "party." If he were already a party that would not have been necessary. (4) Where the court is dealing with a representative action it is easy to slip into the error of referring to a person represented as a party; but if a person can be represented without even being asked or consenting and even without his knowledge, he cannot be a "party."

[LORD DENNING M.R. Look at the definition of "party" in section 225 of the Supreme Court of Judicature (Consolidation) Act 1925 which is not exhaustive but could apply. Do you say that only a person "named on the record" is a party? Section 225 shows that "party" is not confined to those whose names are on the record; and prima facie the rules have to be interpreted to accord with that Act.]

It is difficult to pursue the point in the light of that section. But if the amendment is sought it must be under R.S.C., Ord. 20, r. 5 subject to R.S.C., Ord. 15, r. 6; and the notes to that rule show the distinction between a person and a "party" and state that leave to add or substitute a plaintiff will not be granted where to do so would deprive a defendant of reliance on his defence under the Limitation Acts. The present application was made purely to overcome the applicant's difficulty on the limitation period; and if the amendment is allowed the defendant will be deprived of his defence.

The cross appeal is not pursued because the applicant does not object to the master's order.

Myers replied.

LORD DENNING M.R.

Between 1962 and 1964 a block of 12 flats was built at Petherton Court, Gayton Road, Harrow. They were built by building developers with the object of selling them to purchasers, or, rather, of selling long leaseholds to 12 tenants. But the transaction was carried through in a way which is now becoming fairly common. The building owners sold the reversion to a management company of which the 12 tenants were the 12 shareholders. The building owners stipulated on their assignment that they would not be liable thereafter in respect of anything in regard to the premises.

It so happened that some five years later the roof was found to be very badly constructed. The water came through. Repairs had to be done to the roof which covered all the 12 flats. The tenants of the 12 flats in the building all combined together to have the roof repaired. It cost them £5,000. They wished to obtain compensation, if they could, for this outlay. They seem to have been advised that the only person whom they might seek to make liable was the architect, Mr. Atherton. Eleven out of the 12 agreed to join in an action. Each made a contribution***441** to the cost. Miss Moon, one of the tenants, was named to lead an action. The writ was headed:

"Glennys Moon (spinster) suing on behalf of herself and the tenants of the block of flats known as Petherton Court, Gayton Road, Harrow (except Catherine Eluned Roberts)" - that is the one who stood out - "plaintiff, and Eric Atherton, defendant."

The writ was issued on October 15, 1970. It was within the six-year limit. A defence was put in. Particulars of the statement of claim were given. There were discussions about having preliminary points of law decided. But in September of 1971 Miss Moon herself and nine others decided to withdraw. They did not want to risk litigation and the costs of trial. So they decided to discontinue the claim on their own account. But there was one lady, Mrs. Alice Art, one of the tenants, who wanted to go on. She qualified for legal aid, whereas the others did not. She did not stand at risk for costs with the others.

On September 10, 1971, an application was made in these words:

"An application on the part of Alice Art (widow) one of the tenants referred to in the title to the writ of summons herein, for leave to amend the statement of claim as set forth in red ink in the pleading annexed hereto." The amended statement of claim showed the sole plaintiff as Alice Art (widow) and claimed on her behalf alone.

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That was not the proper form of application, but Master Ritchie granted it in substance. He required the plaintiff's solicitors to write an open letter withdrawing the claims of Miss Moon and the others, except Mrs. Art. He gave leave to substitute Mrs. Art as plaintiff, subject to her written consent being filed. and he ordered Miss Moon to pay the costs up to that time.

The defendant, Mr. Atherton, appealed to the judge in chambers. Chapman J. allowed the appeal. He would not allow Mrs. Art to be inserted as sole plaintiff. He said:

"This is a misconceived action by Miss Moon suing the defendant. She purports to sue on behalf of herself and others. Whether this is a representative action is highly dubious. ... If Mrs. Art has a claim she can bring her own action." Now there is an appeal to this court.

In a representative action, the one person who is named as plaintiff is, of course, a full party to the action. The others, who are not named, but whom she represents, are also parties to the action. They are all bound by the eventual decision in the case. They are not full parties because they are not liable individually for the costs. That was held by Eve J. in Price v. Rhondda Urban District Council [1923] W.N. 228. But they are parties because they are bound by the result.

What then is to happen when the named plaintiff decides to withdraw? It seems to me that then it is open to any one of those whom she represents to come forward and take the place of the named plaintiff. The case comes within Ord. 15, r. 6, which enables a party to be added whose presence is necessary. It also comes within Ord. 20, r. 5 (1) , which says:***442**

"... the court may at any stage of the proceedings allow the plaintiff to amend his writ, or any *party* to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct." In those rules the word "party" is used in the same sense as it is in the definition in section 225 of the Supreme Court of Judicature (Consolidation) Act 1925, which says that: "'Party' includes every person served with notice of or attending any proceeding, although not named on the record." So it includes one of the persons represented, even though not named in the writ.

In my opinion those rules enable the court to amend these proceedings by inserting the name of Mrs. Art instead of the named plaintiff. This is necessary in order to do justice. If it were not so, the named plaintiff might discontinue, or the defendant might settle with the named plaintiff, and then leave the other unnamed plaintiffs out in the cold. It might be too late for them to issue a new writ because of the Statutes of Limitation. That cannot be right. It seems to me that if, in a representative action, the named party falls out for any reason, the court has ample power to substitute one of the unnamed parties as the plaintiff, and to bring him in as at the date of the issue of the original writ.

I notice that the judge thought these tenants could not properly bring a representative action at all. Mr. Jones, who has presented this case admirably, admits that this point is not open to him. If it were not a proper case for a representative action, the defendant ought to have applied to stay the action or to strike it out at the initial stage. By putting in a defence he waived any such point. But I must say that I think it was perfectly proper to have this as a representative action for these tenants.

I would allow the appeal accordingly. Mrs. Art can continue the action as sole plaintiff with the amended pleading.

EDMUND DAVIES L.J.

I agree.

ROSKILL L.J.

I only add a few words out of deference to the admirable argument which we have had from Mr. Jones and because this question seems not to be covered by authority. When this action was begun it was a representative action. There is no doubt that the interests of Mrs. Art were sufficiently protected by the representative action in which Miss Moon was the named plaintiff. Mrs. Art now wishes to go on: Miss Moon now wishes to drop out. So do the other tenants.

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If Miss Moon and Mrs. Art alone had wished to go on, all the other tenants wishing to drop out, there could, I apprehend, be no difficulty in Mrs. Art obtaining permission to go on with Miss Moon in her personal capacity. But Miss Moon does not wish to go on. To my mind it would be most unjust that because Mrs. Art alone wants to go on she should be barred by some technical defect in our legal procedure from pursuing that which she claims to be her right. I agree with what has fallen from Lord Denning M.R., that this case falls within the language of Ord. 20, r. 5, because Mrs. Art is a "party" within that rule of that Order. That is supported by the definition of "party" in the Judicature Act of 1925 to***443** which the Master of the Rolls referred during the argument. It is also in line with the passage in the judgment of Cotton L.J. in Watson v. Cave (No. 1) (1881) 17 Ch.D. 19, 22, to which Mr. Myers referred. That was a representative action in which one person whose interests were said to be in conflict with those represented by the plaintiff sought to intervene. The attempted intervention failed. Cotton L.J. said a representative action "is a suit rather difficult of management, but it must be dealt with as if all those persons were named plaintiffs on the record."

It seems to me that we should treat Mrs. Art, whose interests were originally represented by Miss Moon, as though she had always been, in Cotton L.J.'s language, a person named upon the record. I think this case falls within Ord. 20, r. 5. But if I am wrong in that view, and she is not to be treated as a party, then it seems to me this case falls within Ord. 15, r. 6, to which Lord Denning M.R. has already referred.

For those reasons I think the appeal should be allowed and the order of the master restored.Appeal allowed. Order of Master Ritchie restored. (M. M. H.)

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1. R.S.C., Ord. 15, r. 6 (as amended by S.I. 1971 No. 1269): "(2) At any stage of the proceedings in any cause or matter the court may on such terms as it thinks just and either of its own motion or on application - ... (b) order any of the following persons to be added as a party, namely - (i) any person who ought to have been joined as a party or whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, or (ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter." Ord. 20, r. 5: "(1) Subject to Order 15, rules 6, 7 and 8 and the following provisions of this rule, the court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct."

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EXHIBIT 43

C

***1021 Markt & Co., Limited v Knight Steamship Company, Limited**

In the Court of Appeal

L.J. Vaughan Williams, Fletcher Moulton, and Buckley

1910 June 27, 28; July 7

Practice—Representative Action—Action by Shippers of Goods on a General Ship on behalf of themselves and other Shippers of Goods in the same Ship—"Persons having the same interest in one cause or matter"—Order XVI., r. 9.

The plaintiffs shipped goods on a general ship of the defendants for a voyage from New York to Japan. Before arriving at its destination the ship was sunk by a Russian cruiser on the ground that she was carrying contraband of war, and both ship and cargo were lost. In the writs in the present actions the plaintiffs were respectively described as suing "on behalf of themselves and others owners of cargo lately laden on board the steamship *Knight Commander*," and the writs were indorsed with a claim for "damages for breach of contract and duty in and about the carriage of goods by sea." A letter written by the plaintiffs' solicitors to the defendants' solicitors on the day of the issue of the writs stated that plaintiffs were suing on behalf of themselves and forty-four other persons, firms, or companies (whose names were given) who had shipped goods on board the ship:—

that, upon the writs as they stood, the plaintiffs and those whom they purported to represent were not "persons having the same interest in one cause or matter" within the meaning of Order XVI., r. 9, and that the plaintiffs were not entitled to bring representative actions.

further, by Vaughan Williams L.J. and Fletcher Moulton L.J. (Buckley L.J., dissenting), that shippers of goods in a general ship could not have "the same interest in one cause or matter" within the meaning of that rule, and that the writs were incapable of being so amended as to enable the plaintiffs to maintain representative actions.

by Buckley L.J., that the writs should be amended by describing the plaintiffs as suing on behalf of themselves and all others the owners of cargo lately laden on board the steamship *Knight Commander*, not being shippers of goods which are contraband of war, and the indorsements amended by asking for a declaration that the defendants were liable to the plaintiffs and to those on whose behalf they sued for breach of contract and/or duty in and about the carriage of goods by sea.*Per* Fletcher Moulton L.J.: No representative action can lie where the sole relief sought is damages.

APPEALS by the defendants from the refusal of Bucknill J. at chambers to set aside the writs in the respective actions.***1022**

The writ in the first action was issued on May 5, 1910, and upon its face the plaintiffs were described as "Markt & Co., Limited, on behalf of themselves and others owners of cargo lately laden on board the s.s. *Knight Commander*." The writ was indorsed with a claim for "damages for breach of contract and duty in and about the carriage of goods by sea." The writ in the action of Sale & Frazar, Limited, was in the same terms.

The facts shewed that the defendants were the owners of the steamship *Knight Commander*, which in the year 1904, during the Russo-Japanese war, sailed on a voyage from New York to Japan as a general ship. The plaintiffs Markt & Co., Limited, were merchants carrying on business in the United States, and the plaintiffs Sale & Frazar, Limited, carried on business as merchants in Japan; and both of them, together with about forty-three other firms, persons, or companies, had shipped goods for Japan on board the *Knight Commander* under separate bills of lading. The ship was stopped and searched on the high seas when nearing Japan by a Russian cruiser; the crew were taken on board the cruiser, and the *Knight Commander* was fired into and sunk by the guns of the cruiser on the ground that she was carrying contraband of war; both ship and cargo were wholly lost. Claims were made against the Russian Government

on behalf of the shipowners and cargo owners, but, no final decision having been given, these actions were brought in order to prevent the operation of the Statute of Limitations.

On the day on which the writs were issued the plaintiffs' solicitors (who were the same in both actions) wrote to the defendants' solicitors informing them that the plaintiffs Sale & Frazar, Limited, claimed on behalf of themselves and forty-four other persons, firms, or companies, and they gave a list of the names, which included the plaintiffs Markt & Co., Limited; and they went on to say that Markt & Co., Limited, claimed on behalf of themselves and all the other persons, firms, and companies mentioned in the list, and also on behalf of Sale & Frazar, Limited.

After service of the writs, the defendants took out a summons in each action asking that the writ should be set aside, or, ***1023** alternatively, that so much of the writ as referred to parties other than the plaintiffs named in the writ should be struck out, the ground of the application being that the case was not within Order XVI., r. 9, and that the plaintiffs could not sue in a representative character. The Master refused to set aside the writs or to make the suggested alterations in them, and his decision was affirmed by the judge. The defendants in each action appealed.

Leslie Scott, K.C. (*G. D. Keogh* with him), for the defendants. It is not competent for a plaintiff to sue as the representative of a class under Order XVI., r. 9, where the parties whom he claims to represent obviously have not the same interest in the cause or matter. In the present case the goods of the different shippers were shipped under separate bills of lading; the circumstances of the shipment would be different in the case of each shipper, and in respect of the claims of some of them there might be defences which would not be available in the case of the claims of the others. For instance, a shipper who himself had shipped contraband, or who knew that contraband was being carried on board but elected to run the risk, would be in a very different position from a shipper whose own goods were not contraband and who did not know that the ship was carrying contraband goods. Such an action as the present would therefore raise a heterogeneous collection of issues in respect of the various shippers respectively. By the terms of Order XVI., r. 9, there must be a common interest in the plaintiff and all those whom he represents; that is not the case here. The limit within which it is competent to a plaintiff to sue in a representative character was reached in Duke of Bedford v. Ellis. 1 To allow such an action as the present to be brought would be going far beyond that case. Even if the different shippers had been joined as plaintiffs by name, there would have been a joinder of plaintiffs not sanctioned by Order XVI., r. 1. [He also cited Smurthwaite v. Hannay. 2]

Bailhache, K.C., and *Leck*, for the plaintiffs. This is in fact an underwriters' action, and the plaintiffs have authority to sue ***1024** from all the shippers represented. All the shippers represented by the plaintiffs have a common interest, and the main facts are common to the cases of all of them. The *Knight Commander* was sunk on the ground that she was carrying contraband of war, and, so far as all the shippers of non-contraband goods are concerned, the cause of action is that it was a breach of contract on the part of the shipowners to be carrying contraband of war, which might render the non-contraband portion of the cargo liable to seizure. The action is prima facie well constituted. If at a later stage it should appear from the pleadings that there is any difference in the case of some of the shippers, an application may be made to confine the action to the case of the others. Proceedings are pending in the Russian Courts to have the seizure of these goods declared invalid, and, in the event of their being successful, it will probably be unnecessary to proceed with the present actions. Meanwhile the Statute of Limitationshas nearly run, and in order to prevent its possible operation as a bar to the claims of the shippers against the shipowners it was necessary to commence legal proceedings. It is true that a separate writ might have issued on behalf of each shipper, but that would have been stigmatized as oppressive and unnecessarily expensive. There was a difficulty in joining all the plaintiffs in one writ, for some of them were foreign firms, and, if the firm names had been inserted in the writ, it might not have been possible to comply with an order under Order XLVIIIA, r. 1, to give the names of the various co-partners. It was therefore decided to bring representative actions in the names of these plaintiffs and to give a list of the shippers represented by them, and it is submitted that upon the facts of the case this was a proper course to take, and that Order XVI., r. 9, is applicable. The intention was to sue on behalf of all those who shipped non-contraband goods; if any shippers of contraband goods have been included by mistake, their names can be struck out at a subse-

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quent stage. It is, of course, true that each particular shipper has a separate interest in respect of his own goods, but in every other respect the interests of all the shippers are the same. The case is governed by Duke of Bedford v. Ellis3 ; it ***1025** is immaterial that in that case the common right or interest was given by statute. [They also cited Drincqbier v. Wood. 4]

Keogh, in reply, cited Beeching v. Lloyd. 5

Cur. adv. vult.

July 7. VAUGHAN WILLIAMS L.J.

read the following judgment:—The plaintiffs in this case claim to sue in a representative character on behalf of themselves and others, owners of cargo lately laden on board the steamship *Knight Commander*. The defendants are the Knight Steamship Company, Limited. The indorsement on the writ is "The plaintiffs' claim is for damages for breach of contract and duty in and about the carriage of goods by sea." The question which we have to decide is whether or not the plaintiff company is entitled to sue in a representative character on behalf of "others the owners" of cargo lately laden on board the steamship *Knight Commander*. The writ does not quantify the word "others." The word does not disclose whether all the owners are intended and does not define which are the others. There is another action pending against the same defendants in which Markt & Co., Limited, are plaintiffs. This action is also a representative action and in all respects similar to the action in which Sale & Frazar, Limited, are plaintiffs, and the writ is issued by the same solicitors on the same day. A summons was issued in each case by the defendants for an order to set aside the writ of summons for irregularity, or in the alternative that so much of the writ as relates to parties other than the named plaintiffs be struck out on the grounds that the persons on whose behalf the action purports to be brought are not persons having the same interest in one cause or matter, and are not persons who have any right to relief in respect of or arising out of the same transaction or series of transactions, and that they are persons on whose behalf another action is brought for the same alleged causes of action.

These actions are not actions brought under the provisions of Order XVI., r. 1, which deals with the joinder of plaintiffs claiming right to relief in respect of or arising out of the same transaction or series of transactions as alleged to exist, whether ***1026** jointly, severally, or in the alternative where, if such persons brought separate actions, any common question of law or fact would arise. These actions are brought under the provisions of r. 9 of Order XVI., which runs: "Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorised by the Court or a judge to defend in such cause or matter, on behalf or for the benefit of all persons so interested." If one looks merely at the indorsement on the writ and at the words of Order XVI., r. 9, it is difficult to come to the conclusion that those words justify the present plaintiffs suing as representatives of numerous persons "having the same interest in one cause or matter who may sue or be sued" or "may be authorised by the Court to defend in such cause or matter on behalf of or for the benefit of all persons so interested."

The action is brought, as appears from the indorsement on the writ, "for damages for breach of contract and duty in and about the carriage of goods by sea." So far as this action is an action for breach of contract, the origin of the contract was the respective bills of lading issued by the ship to the respective shippers. There is nothing on the writ to shew that the bills of lading and the exceptions therein were identical or that the goods the subject of the bill of lading were of the same class either in kind or in relation to the rules of war, under which the same article may be contraband or not according to its destination. As to the letter of May 5, 1910, written by the solicitors for the plaintiffs and addressed to the solicitors for the defendants, if one treats it as part of the indorsement of the writ, which it is not, it is convenient to consider whether it affects substantially the question whether the action is one which on the face of it appears to disclose the fact that it is brought by numerous persons having the same interest in one cause or matter. The letter begins with a notice that the plaintiffs abandon some eight actions by owners of cargo lately on board the steamship *Knight Commander* against the Knight Steamship Company, and then in respect of writ No. 1379 informs the defendants that Messrs. Sale & Frazar are claiming damages on behalf of themselves and some forty-six persons with names ***1027** and addresses which include nations and places all over the world, and the letter concludes with these words: "In the writ issued in the name of

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Markt & Company, Limited, those gentlemen claim on behalf of themselves and all the other firms and companies above mentioned and also on behalf of Messrs. Sale & Frazar, Limited, above mentioned." I do not think that it appears by the writ, even as amplified by the letter, that there is any bond or connection uniting the persons whom the plaintiffs affect to represent, except that these people are all of them shippers of goods on board the same ship the whole cargo of which was lost by the sinking of the *Knight Commander* by a Russian warship during the Russo-Japanese war. There is, in my opinion, no common purpose so far as the shippers are concerned and no connection which would justify a representative action either under r. 9 or under the old Chancery practice. But a construction has been put upon this r. 9 of Order XVI. by the House of Lords in the case of Duke of Bedford v. Ellis6 which gives a somewhat more expanded area to the words of the rule than prima facie appears, and which, it is said, justifies the present representative action. I think not. Upon page 8 of the report of Duke of Bedford v. Ellis7 one finds in the judgment of Lord Macnaghten these words:

"Under the old practice the Court required the presence of all parties interested in the matter in suit, in order that a final end might be made of the controversy. But when the parties were so numerous that you never could 'come at justice,' to use an expression in one of the older cases, if everybody interested was made a party, the rule was not allowed to stand in the way. It was originally a rule of convenience; for the sake of convenience it was relaxed. Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent."

Now the words "Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent" are the words by which Lord Macnaghten ***1028** describes the old practice before the Judicature Actof the Court of Chancery. And on page 9 he says, "There are plenty of other cases which shew that, in order to justify a person suing in a representative character, it is quite enough that he has a common interest with those whom he claims to represent," and goes on to say, speaking of the case before him, "All growers have the same rights. They all rely on one and the same Act of Parliament as their common charter." Lord Macnaghten then proceeds to quote the following passage from the judgment of Lord Eldon in Cockburn v. Thompson8 :—"The strict rule," he (Lord Eldon) said, "was that all persons materially interested in the subject of the suit, however numerous, ought to be parties ... but that, being a general rule established for the convenient administration of justice, must not be adhered to in cases to which consistently with practical convenience it is incapable of application. It was better," he added, "to go as far as possible towards justice than to deny it altogether." He laid out of consideration the case of persons suing on behalf of themselves and all others, "for in a sense," he said, "they are before the Court." The headnote to the case of Adair v. New River Co.9 referred to by Lord Macnaghten contains the following passage:—"The general rule, requiring all persons interested to be parties, is dispensed with, where it is impracticable, or extremely difficult. In such a case, to obtain a decree, to establish the right of suit to a mill, for instance, the Court only requires parties sufficient to secure a fair contest; and, the right being established in that way, consequential relief may be had against the rest in another suit." These two quotations seem to dispose of any objection based upon the omission of some of the parties interested, and also of the suggestion that there cannot be a representative action in a case where individual consequential relief is claimed by or against those before the Court. I think that, even taking the old practice as described by Lord Macnaghten as governing the present practice, the writ in the present action cannot be supported, but I must observe that the practice regarding representative actions was limited to the Court of Chancery, and was ***1029** not adopted by the Common Law Courts. What we have to do is to construe the Rules under the Judicature Actwhich define the application of the practice as to representative actions for the Common Law Division and the Chancery Division alike, and which properly construed will, I suppose, govern the present practice, notwithstanding any prior practice in the Court of Chancery.

I will now call attention to some differences in the claim and in fact between Duke of Bedford v. Ellis10 and the present case. In Duke of Bedford v. Ellis11 the claim was based upon the Covent Garden Market Act, 1828, which plaintiffs alleged gave various preferential rights in respect of the use of the market to a class of growers. They alleged that the Duke of Bedford in the management of his market did not comply

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with the provisions of the Act in certain particulars, and had inter alia exacted excessive tolls from the growers. They claimed declarations that they were entitled to the alleged preferential rights, an injunction to restrain the Duke from doing any acts contrary to the declarations so claimed, and an account of the sums charged in excess during the six years preceding the issue of the writ; whereas in the present case there is no common origin of the claims of those who shipped goods on board the *Knight Commander*—the contracts were constituted by the bills of lading, which manifestly might differ much in their form, and as to the exceptions, and probably would vary somewhat according to the nature of the goods shipped. It was said that this difficulty was got over by the alternative claim to the rights of the shippers against the shipowner as constituted by the mere fact of shipment, and that such rights were in all cases identical. I doubt if the indorsement includes anything but a claim in contract. The bill of lading in each case might qualify the liabilities of the shipowner as a carrier by sea. I do not see anything in the indorsement to differentiate the class on whose behalf the plaintiff claims to sue as a representative from a class constituted by those who shipped goods on board the *Knight Commander* when she started on this voyage.

These shippers no doubt have a common wrong in that their ***1030** goods were lost by the sinking of the *Knight Commander* by the Russian warship; but I see no common right, or common purpose, in the case of these shippers who are not alleged to have shipped to the same destinations. Moreover, it may be that there were contraband goods on board which justified the Russian action—it may be that some of the shippers knowingly shipped goods which were contraband of war. It may be that some of the shippers were innocent of such shipping of contraband goods. All sorts of facts and all sorts of exceptions may defeat the right of individual shippers. The case of each shipper must to my mind depend upon its own merits. The case is in no sense covered by the words of Lord Macnaghten on page 9 of the report of the case of Duke of Bedford v. Ellis12 in the House of Lords. "All the growers have the same rights. They all rely on one and the same Act of Parliament' as their common charter." There is nothing in the indorsement to shew that the shippers for whom the plaintiffs seek to recover in a representative action may not in fact rely on different sources of right. I am not saying that on the facts suggested in argument, but not alleged in the indorsement on the writ, a class might not be constituted whose claims might be derived from, and based upon, a common source of right; but the indorsement on the writ is not limited to any such class, and I do not believe that recourse would have been had to any such form of action had it not been for difficulties arising in respect of the Statute of Limitations if any other form of action had been adopted, and I do not think that the Judicature Act Orders and Rules intended that r. 9 of Order XVI. should be available whenever those on whose behalf the plaintiff affected to sue could shew that the right to relief arose in respect of or arising out of the same transaction or series of transactions alleged to exist, whether jointly, severally, or in the alternative where, if such persons brought separate actions, any common question of law or fact would arise, such as to allow a joinder of plaintiffs under Order XVI., r. 1.

I ought to mention the case of Beeching v. Lloyd. 13 In that case there was a bill by two of the intended shareholders of a projected company on behalf of themselves and all other depositors ***1031** for the return of the deposits paid by the two plaintiffs. The bill alleged gross fraud in concocting the company and obtaining the deposits. A demurrer for want of equity, and on the ground that no two depositors could sue together for the mere return of deposits, was overruled. The bill prayed that it might be declared that the defendants named were severally bound to pay the plaintiffs, and the other persons who had paid deposits to the bankers of the New South Wales Navigation Company in respect of the shares subscribed for by them, the respective amounts which were paid by them respectively, and Kindersley V.-C. in overruling the demurrer said: "Now it appears to me to be a just principle that if an individual induces others to enter into a partnership and induces them by fraud to put money into what purports to be a common stock, it is impossible to say that each of those persons must file a separate bill. In such case there is not only a common object in the persons borrowing but a common object in those lending. Several persons here have been induced by fraud to concur in advancing money for the formation of a joint stock company; and it appears to me that in that state of things a bill may be filed by several of them, and that the principle established in Jones v. Garcia del Rio14 does not apply." Now the case of Jones v. Garcia del Rio15 to which the Vice-Chancellor referred, he says, establishes this principle, "that in cases simply of separate and distinct frauds against several persons

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those persons cannot join in suing. But it appears to me that there is a distinction between that case and this. There the object was on the part of the representatives of the Peruvian Government to raise a loan and to get for that purpose as much money lent as possible. Now the lending of money by one person has no sort of connection with the lending by another. There is a common purpose, it is true, so far as concerns the borrower, but there is no common purpose as concerns the lenders; there is no contract between them, and, therefore, that case it appears to me does not apply to the present." The common purpose in Beeching v. Lloyd16 of those who took shares was to enter into a partnership. I find no such common purpose between the shippers. The purpose of each shipper was ***1032** to forward his individual goods by a general ship to various destinations. The case of Beeching v. Lloyd17 does shew, however, that where there is a common purpose a plaintiff may sue in a representative capacity even though each party to the common purpose will have individually to shew that he personally was induced by the fraud alleged to do the act in respect of which relief is claimed on his behalf. This statement by Kindersley V.-C. seems to accord with the passage on page 7 of Lord Macnaghten's judgment in Duke of Bedford v. Ellis18 , in which he says: "If the persons named as plaintiffs are members of a class having a common interest, and if the alleged rights of the class are being denied or ignored, it does not matter in the least that the nominal plaintiffs may have been wronged or inconvenienced in their individual capacity." In the present case, as I have already said, I do not find the common interest or purpose. I think that the plaintiffs in these two actions cannot sue in a representative capacity, and that this appeal ought to be allowed.

It was urged before us that the indorsement on the writ might be amended in some such form as "The plaintiffs Sale, Frazar & Co. on behalf of themselves and all other owners of cargo lately shipped on board the steamship *Knight Commander*other than those who shipped goods which were absolute or conditional contraband." I do not think that such an amendment ought to be allowed. I find no common purpose in it. We have never had this amendment so brought before the Court as that both sides could have a proper opportunity of arguing the new points which might well be discussed before the Court allowed the amendment. I think that the plaintiffs should be left to issue such new writs as they may think fit. I doubt whether any amendment could be so framed as to disclose a common purpose of the shippers, or any class of the shippers. There is no common statutory right as there was in Duke of Bedford v. Ellis19 , nor any common fund in course of formation as there was in Beeching v. Lloyd. 20

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21 In the month of July, 1904, during the Japanese war, a Russian cruiser stopped and searched ***1033** on the high seas an English steamship called the Knight Commander. After the examination the cruiser transhipped the crew of the steamer and sank it there and then by shell fire. In defence of these proceedings the Russian Government alleged that the ship's papers were unsatisfactory, and that its cargo contained contraband both absolute and conditional. Legal proceedings on behalf of the owners of the ship and cargo were instituted before the Prize Court at Libau. These have been very protracted and are still unfinished, though it is suggested that the conclusion may be expected soon. Under these circumstances (confessedly influenced by the consideration that six years have nearly expired since the sinking of the vessel) parties interested in the cargo on board the *Knight Commander* have brought these two actions against the owners of that ship. In both cases the plaintiffs purport to sue in a representative character. The defendants contend that it is not competent for them so to do, and that they can only sue for their individual damages. We have to decide whether this contention is right.

Before discussing the important legal question here raised it is necessary to examine carefully the writs in the two actions. In the one writ the plaintiffs are described as Markt & Co., Limited, on behalf of themselves and others owners of cargo lately laden on board the steamship *Knight Commander*. In the other action the plaintiffs are described exactly in the same way, with the exception that Sale & Frazar are substituted for Markt & Co., Limited. It will be seen that the description of the classes on behalf of which the respective plaintiffs claim to sue is quite indefinite. The plaintiffs do not purport to sue, nor do they propose or desire to sue, on behalf of all the owners of cargo lately laden on board the ship in question, but only on behalf of some of such owners, and the writ does not specify which. In an endeavour to cure this defect, which must otherwise be unquestionably a fatal one, the solicitors for the plaintiffs in the two

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actions wrote a letter of May 5, 1910, to the solicitors of the defendant company, setting out a list of some forty-four firms (in which appears the name of Markt & Co., Limited) and informing the defendants that in the writ in the Sale & Frazar action Messrs. Sale & Frazar, Limited, were claiming to sue on ***1034** behalf of all the firms in this list. They further informed the defendant company that in the Markt & Co., Limited action the plaintiffs were claiming to sue on behalf of all the firms in the same list and also on behalf of Messrs. Sale & Frazar, Limited. It will be seen, therefore, that by admission of the solicitors for the plaintiffs the two actions are brought by two different plaintiffs in respect of precisely the same people, they being ascertained, not by anything appearing on the record, but by the letter in question. It is not pretended by the plaintiffs that these are the whole of the firms who shipped by the Knight Commander. On the contrary we were informed by counsel that they were only (so far as the plaintiffs' knowledge extended) the firms that had shipped goods free from the objection that they were either absolute or conditional contraband. No reference, however, is made to this principle' of selection either in the letter or in the writ, nor is there any evidence or admission that the facts are as thus suggested. It will be seen further that the firms in the list carry on business, some in Japan, some in the United States of America, and some in England and elsewhere. On behalf of this list of people, constituting, so far as can be gathered from the record, no specific class, but merely a collection of individuals identified by their names appearing in a list contained in a letter from the plaintiffs to the defendants, the plaintiffs each in his own action propose in a representative capacity to make claims for damages.

It can hardly admit of doubt that these two writs as they stand are hopelessly bad. In the first place it is essential in the case of representative actions that the class on behalf of which the relief is sought should be defined in the writ. It is impossible for the Court to give any judgment as to the rights of parties by virtue of their being members of a class without its being defined what constitutes membership of the class. A mere list tells the Court nothing, more especially when that list does not appear on the record. If such an action as this could possibly go to trial the case of each firm whose name appears in the list would have to be gone into in order to ascertain the facts relating to it, so that the Court might be able to pronounce whether and why its name should be included in such list. In ***1035** other words it would not be a representative action at all. If judgment were given upon such a writ as this, no estoppel could arise either for or against the defendants without each case being individually examined into.

But there is another objection which to my mind is absolutely fatal. I will take for the purpose of this part of my judgment that which I consider to be the most authoritative statement as to the cases in which representative actions can be brought, i.e., the statement of Lord Macnaghten in the case of Duke of Bedford v. Ellis. 22 It is as follows: "Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent." These words shew that where the claim of the plaintiff is for damages the machinery of a representative suit is absolutely inapplicable. The relief that he is seeking is a personal relief, applicable to him alone, and does not benefit in any way the class for whom he purports to be bringing the action. It is suggested, however, that these difficulties could be got over by amendment of the writ so that the plaintiffs would be described in the following fashion: "The plaintiffs Sale, Frazar & Co. on behalf of themselves and all other owners of cargo lately shipped on board the s.s. *Knight Commander*other than such as shipped goods which were absolute or conditional contraband." Plaintiffs' counsel shewed no willingness to accede to any such suggestion, but no doubt would prefer to amend his writs in this fashion rather than that the writs should be set aside so far as they are representative in character. I will therefore consider the case assuming this alteration to have been made.

There are two modes in which actions may be brought to establish the individual rights of several persona in one and the same action. The one mode is by joining them as plaintiffs, the other is by one or more bringing a representative action in respect of all of them. These modes of procedure are entirely distinct in character, and the cases to which they are applicable are widely different, and are laid down in separate and distinct rules, the former in Order XVI., r. 1, and the latter in Order XVI., ***1036** r. 9. The relation of the parties interested to the conduct of the action differs in the two cases, as does also the effect of the judgment. It is to my mind a confusion between these two modes of procedure, (which have nothing to do with each other,) that has led to the

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issue of the two writs which we have here to consider. The joinder as plaintiffs in one action of persons who are suing in respect of several rights claimed to belong to them individually is substantially a creation of the Judicature Acts and the Rules made under them. We are here dealing with actions for damages which under the old practice must have been brought in the Common Law Courts, and in such actions plaintiffs suing for individual relief were in general obliged to bring individual actions. But it is evident that in some cases such actions must, to a great extent, be mere repetitions one of the other, and, therefore, to avoid unnecessary expense various devices were resorted to even before the Judicature Acts by which the result of one action was made to govern the rights of many plaintiffs, as, for instance, the selection of one of the actions as a test action. But it was rare that any such method could be applied except with the consent of all parties, and this was felt to be an evil which needed to be remedied. Accordingly Order XVI., r. 1, was framed. In its original form it was held by the House of Lords not to apply to the joinder of plaintiffs with the object and effect of enforcing separate causes of action in one and the same action. Accordingly the form of the rule was altered, and now it clearly gives to distinct individuals in certain cases the right to unite as plaintiffs in one action to enforce separate rights of action belonging to them individually and not jointly. The cases in which this can be done are exhaustively enumerated in the rule by virtue of the alteration made therein, for by the decision of the House of Lords to which I have referred no right so to join different plaintiffs suing in respect of different causes of action existed while the rule was in its original form.

The rule reads as follows: "All persona may be joined in one action as plaintiffs in whom any right to relief in respect of or arising out of the same transaction or aeries of transactions is alleged to exist, whether jointly, severally, or in the alternative, ***1037** where, if such persons brought separate actions, any common question of law or fact would arise." There follows a proviso giving to the Court a power of modifying the procedure if it shall appear that such joinder may embarrass or delay the trial of the action. Judgment may be given for such of the plaintiffs as succeed, and the defendant is protected with regard to the costs which relate to the plaintiffs who are unsuccessful. This makes it clear that (subject to the control of the Court) persons can unite as plaintiffs though seeking individual relief in cases where the investigation would to a great extent be identical in each individual case. The policy of the rule is to avoid needless expense where it can be done without doing injustice to any one. And it carries out its object. No plaintiff can complain, for he cannot be made a plaintiff without his consent, so that if he avails himself of the rule it is because he desires to do so. The defendant has no cause to complain, because the plaintiffs are liable for his costs if he succeeds, and he has just the same rights in the action against each plaintiff as if a separate action had been brought against him by that plaintiff. No doubt there are cases in which he might be placed at a disadvantage by reason of the operation of our laws of evidence, but in such cases the Court can protect him from such an application of the rule as would work injustice.

Now I am far from saying that Order XVI., r. 1, might not be applied to such a case as the one to which the present actions relate, or that two or more owners of goods on board the Knight Commander might not unite in bringing an action against the owners of the ship in respect of the loss of their goods. But the parties interested decline to take this which is the proper course. The reasons are obvious, and to my mind they bring into prominence the justice of the rule. If such parties do unite as plaintiffs they must accept the ordinary responsibilities of plaintiffs. They would be liable for costs in case of failure, possibly they might have to give security for costs if not resident or carrying on business in this country, they could if necessary be ordered to give discovery or to answer interrogatories, and in short they would by so joining evade none of the rights or privileges which the defendants would as litigants possess if ***1038** separate actions had been brought by each plaintiff. But they would not in any way be penalized. They would have to establish their individual rights against the defendants as in separate actions, but nothing more, and the investigation and discussion of their claims as far as the evidence and arguments were applicable to all the cases would take place once for all, and thus expense would be saved. Seeing that their rights against the owners of the ship are in virtue of contracts separately made by each, and that the only common element is the partial identity in the alleged facts which must be established, and in the arguments which must be adduced to support their several claims, they certainly cannot in justice to the defendants claim greater advantages than those which they would obtain by such a joinder, and the fact that they are not content therewith prepares

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me to expect that what they seek to do in place of following this permissible procedure will be found to be in some way unfair to the defendants.

Representative actions are now regulated by Order XVI., r. 9. They originated in the Court of Chancery and were of common occurrence in that Court prior to the date of the Judicature Acts. There is no doubt that by Order XVI., r. 9, the procedure by representative action is extended to the Common Law aide of the Supreme Court. But here a word of caution is necessary. In extending it the rule also formulates it. It may or may not accurately express the practice of the Court of Chancery at that date, but that is immaterial. It is the language of the rule that must govern us now, and even if it could be shewn that before the Judicature Act the Court of Chancery would have applied the procedure in cases not within the language of the rule, that would not affect the present practice in any branch of the Supreme Court. The rule defined what was in the future to be the practice of the Supreme Court, and it is to my mind immaterial whether on a consideration of the older decisions we are of opinion that in thus laying down the future practice it limited or enlarged or left unchanged the existing practice. We are bound to take the rule as a statutory formulation of the practice and thus as a new point of departure.

Order XVI., r. 9, reads as follows: "Where there are numerous ***1039** persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorised by the Court or a judge to defend in such cause or matter, on behalf or for the benefit of all persons so interested." Nothing could be more striking than the contract between the language of this rule and that of Order XVI., r. 1. The reason is obvious. In cases under r. 1 all the parties have the status and responsibilities of ordinary litigants, and the plaintiffs are such by their own consent. In representative actions it is wholly different. The plaintiff is the self-elected representative of the others. He has not to obtain their consent. It is true that consequently they are not liable for costs, but they will be bound by the estoppel created by the decision. The differences from the point of view of the defendant are equally striking. Those in whose behalf the action (so far as it is a representative action) is brought are not responsible for the costs, and are not subject to the ordinary liabilities of litigants in respect of discovery, &c. The language of the rule appears to me to present no difficulties of construction and to make clear the limitations of its scope. They answer in all respects to what one would expect from the considerations to which I have referred. The essential condition of a representative action is that the persons who are to be represented have the same interests as the plaintiff in one and the same cause or matter. There must therefore be a common interest alike in the sense that its subject and its relation to that subject must be the same. As I have already stated, Lord Macnaghten phrases it thus:

"Given a common interest and a common grievance, a representative suit is in order if the relief sought is in its nature beneficial to all whom the plaintiff proposes to represent."

Whether we start from the language of the rule or from this authoritative interpretation of it, the present actions, even if the writs be amended as suggested, fail in every particular to answer the necessary condition of a representative action. The counsel for the plaintiffs suggests that the people in the list are in similar circumstances, because they shipped goods under similar bills of lading in the same ship. Assuming, for the sake of argument, that this is so (although nothing of the kind ***1040** appears on the record), each of these parties made a separate contract of shipment in respect of different goods entitling him to its performance by the defendants and to damages in case of non-performance. It may be that the claims are alike in nature, and that the litigation in respect of them will have much in common. But they are in no way connected; there is no common interest. Defences may exist against some of the shippers which do not exist against the others, such as estoppel, set-off, &c., so that no representative action can settle the rights of the individual members of the class. But that which to my mind most strikingly indicates the fundamental error of the suggestion that the circumstances of these cases justify a representative action is that I can conceive no excuse for allowing any one shipper to conduct litigation on behalf of another without his leave, and yet so as to bind him. The proper domain of a representative action is where there are like rights against a common fund, or where a class of people have a community of interest in some subject-matter. Here there is nothing of the kind. The defendants have made separate contracts which may or may not be identical in form with different persons. And that is all. To my mind it is im-

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possible to say that mere identity of form of a contract or similarity in the circumstances under which it has to be performed satisfies the language of r. 9. It is entirely contrary to the spirit of our judicial procedure to allow one person to interfere with another man's contract where he has no common interest. And to hold that by any procedure a third person can create an estoppel in respect of a contract to which he is not a party merely because he is desirous of litigating his own rights under a contract similar in form, but having no relation whatever to the subject-matter of the other contract, is in my opinion at variance with our whole system of procedure and is certainly not within the language of r. 9.

But the writs even as proposed to be amended fail to comply with Lord Macnaghten's interpretation of the rule in another and most essential particular. The relief sought is damages. Damages are personal only. To my mind no representative action can lie where the sole relief sought is damages, because ***1041** they have to be proved separately in the case of each plaintiff, and therefore the possibility of representation ceases. It is true that in Duke of Bedford v. Ellis23 there was the claim for damages, but that was only a personal claim by the named plaintiffs, and it was solely on that ground that the action was held to be well framed so far as damages were concerned. The claims here are necessarily claims for damages only, and therefore no representative action can be brought. To hold that a representative action can be brought in a case where the causes are mere independent actions for damages arising out of one and the same set of circumstances would be to confound r. 1 with r. 9, and, as I have said, the language of these two rules shews that they are intended to have wholly different applications.

As I have said, in my opinion, we have to consider the language of r. 9 and be guided by it, and we are not justified in treating the earlier Chancery decisions as being authorities if they would extend or limit the ambit of the rule according to its natural construction. But I have examined all the cases in Chancery to which we were referred, and I can find in no one of them the slightest justification for bringing a representative action under such circumstances as in the present case. The case that goes the farthest is Beeching v. Lloyd. 24 In that case it was alleged that subscriptions to a projected company had been obtained by gross fraud. The subscribers had paid sums into a certain banking house in respect of the shares subscribed for by them, and a representative action was brought by two of the subscribers on behalf of themselves and the other subscribers to have the deposits returned to them. It appeared that the money contributed was partly applied in paying for an estate called the Kennington estate, and Kindersley V.-C. held that if that were established there might be a common fund which might be applicable towards satisfaction of the plaintiffs' demands. He accordingly overruled the demurrer to the bill specifically on this ground alone, without deciding whether the action was maintainable otherwise. So far from this giving countenance to the plaintiffs' arguments in the present case, it emphasizes the necessity that there should be a common fund ***1042** against which the parties represented have claims if the procedure of a representative action is to be used.

Finally it is suggested that the difficulty can be got over by substituting for the claim for damages a claim for a declaration that persons shipping non-contraband goods are entitled to damages from the owners of the vessel under the circumstances of the case. To the best of my knowledge no declaration of this type has ever been made by English Courts, and it appears to me to be contrary to their practice. They do not permit a plain claim for damages to be split up by isolating out of it an abstract proposition of this kind. Each plaintiff has to prove the whole of his case. But even if such a declaration were made it would not in my opinion effect the purpose of the plaintiffs. A declaration by the Court has no further effect than an admission by the parties, and supposing such an admission were made by the parties, the Statute of Limitations would run from the original cause of action, and not from the date of the admission. For all these reasons I am of opinion that the writs before us are bad so far as they purport to be representative, and that they cannot be cured by any amendment, and that therefore this appeal should be allowed with costs here and below. If the plaintiffs choose to proceed with the actions as personal actions on behalf of the named plaintiffs, they can do so, but of course that does not affect the question of costs.

BUCKLEY L.J.

In the year 1904 numerous persons and firms amounting in the aggregate to some forty-five in

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number shipped goods upon the steamship *Knight Commander* on a voyage from New York to certain ports, including Yokohama and Kobe. When off Yokohama the *Knight Commander* was captured and sunk by Russian cruisers on the ground, as alleged, that she was carrying contraband of war to Japan. The plaintiffs named in the writs allege that the defendants the owners of the steamship are liable for damages for breach of contract and duty in and about the carriage of their goods, and each of the other forty-four persons and firms makes similar claims in respect of their goods. The claimants have not issued, as they might have, forty-five writs. They have issued two writs, each of them expressed to be ***1043** a writ in a representative action, and Mr. Bailhache has explained to us that the intent of the two writs (whether adequately expressed or not) is that the one shall be the writ in an action in which the plaintiffs are representative of all owners of goods shipped upon the vessel not being shippers of contraband goods, and the other representative of all owners of goods shipped on the vessel including shippers of contraband goods. The two writs were issued on May 5, and on the same day the plaintiffs sent to the defendants' solicitors a letter giving the names and addresses of all the persons and firms on whose behalf they claimed. The question before the Court does not arise in the usual form. Commonly the point is that, forty-five writs having been issued, an application is made by the defendants to consolidate them or to stay forty-four of them until the forty-fifth has been tried. There are here but two writs, and the defendants' complaint is that there are not forty-five. This is an objection which the plaintiffs might easily meet by issuing further numerous writs, but the Statute of Limitations has or may have run since these two writs were issued, and the point of substance is or may be whether these writs should be set aside or limited to the claims of the named plaintiffs alone, with the result that all the other represented plaintiffs shall become barred by the Statute of Limitations.

There is no doubt a difficulty in sustaining the writs in their present form, but in my opinion an order ought not to be made to set the writs aside if by amendment they can be put in such a form as to render the actions proper representative actions within the rules.

The question before the Court arises upon Order XVI., r. 9, and not upon Order XVI., r. 1. But considerations with reference to Order XVI., r. 1, are, in my opinion, not irrelevant. Order XVI., r. 1, is a rule which allows of the joinder of several persons as co-plaintiffs. Under that rule many named persons may be, in the circumstances mentioned in the rule, joined as co-plaintiffs in respect of several rights to relief. Order XVI., r. 9, is a rule which allows one named person to sue as representing both himself and numerous other persons. The purpose and intention of r. 9 was to apply to all Divisions of the High Court the practice which ***1044** had prevailed in the Court of Chancery when the parties were so numerous that you never could "come at justice" if everybody interested was made a party: per Lord Macnaghten in Duke of Bedford v. Ellis. 25 Taff Vale Ry. Co. v. Amalgamated Society of Railway Servants26 was a case in which the matter arose in the form of the question whether an unincorporated society could be sued by its collective name. Lord Lindley there said: "The rules as to parties to common law actions were too rigid for practical purposes when those rules had to be applied to such" (i.e., unincorporated) "societies. But the rules as to parties to suits in equity were not the same as those which governed Courts of common law, and were long since adapted to meet the difficulties presented by a multiplicity of persons interested in the subject-matter of litigation. Some of such persons were allowed to sue and be sued on behalf of themselves and all others having the same interest. This was done avowedly to prevent a failure of justice: see Meux v. Maltby27 and the observations of the Master of the Rolls, Sir George Jessel, in Commissioners of Sewers v. Gellatly. 28 The principle on which the rule is based forbids its restriction to cases for which an exact precedent can be found in the reports. The principle is as applicable to new cases as to old and ought to be applied to the exigencies of modern life as occasion requires." It is, of course, no objection to a representative action that the rights as between each of the represented parties and the defendants arise under a separate contract made by one party with the defendants to which no other of them is a party. That is so in most if not in every representative action. When one creditor sues on behalf of himself and all other creditors for administration, the debt of each represented creditor arose of course under a contract to which no other of his represented co-plaintiffs was a party. The question is not whether there are numerous separate contracts. "To justify a person suing in a representative character it is quite enough that he has a common interest with those whom he claims to represent": per Lord Macnaghten,

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Duke of Bedford v. Ellis. 29 "Given a common interest ***1045** and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent": per Lord Macnaghten. 30 It may be, and I think it is the case, that in a representative action the plaintiff must be in a position to claim some relief which is common to all, but it is no objection that he claims also relief personal to himself. In a creditor's action for administration the plaintiff claims administration for the benefit of all, but it results in relief to himself and to every represented creditor severally. Many representative actions are actions in which the represented parties all have a common right against property, e.g., where one debenture-holder sues on behalf of himself and all others to enforce a security which enures for the benefit of all. But it is not necessary that the represented parties shall have a common right against property. The creditor who sues on behalf of himself and all other creditors for administration is not enforcing a right against property on which he has a security. At the same time it is true that he is enforcing the right of himself and others to be paid out of the deceased's assets, and in that sense is enforcing rights against a fund. But in the Court of Chancery the rule did not stop here. In Beeching v. Lloyd31 Kindersley V.-C. overruled the demurrer on two grounds; the first was that there was an allegation sufficient to support a claim against a common fund which might be applicable towards satisfaction of the plaintiffs' demand. With this I am not concerned. But the second, which he calls the main, ground he also held to be good. The second was a claim by the plaintiffs for themselves and all others who had paid deposits in respect of the subscription for certain shares to recover from six gentlemen on the ground of fraud moneys which the defendants had received to be put into the common stock of a projected joint stock company. The Vice-Chancellor rested his decision upon the ground that there was a common purpose in several lenders if the subscriptions of all were to go into a common stock. His decision affirms the proposition that a common purpose in advancing money which is to go into a joint stock fund justifies a representative action to render defendants personally liable, ***1046** notwithstanding that the remedy sought is a personal judgment against them and not the enforcement of rights against that common fund or any common fund. In Duke of Bedford v. Ellis32 Lord Halsbury and Lord Brampton dissented from the judgment of the majority of the House, but there is a paragraph in Lord Brampton's judgment to which Lord Halsbury assented from which it seems to me plain that even the dissenting Lords in that case would have decided this case in favour of the view which I am taking. In that case there were four plaintiffs, Ellis, Gray, Miller, and Ashby, who claimed certain rights as tenants of yearly cart stands. There were other plaintiffs, Pullinger and Peacock, who claimed as tenants in respect of yearly pitching stands. The passage to which I refer and which I will read in a moment affirms that the four persons first named were rightly joined and could rightly sue in a representative action, and that the same was true of the latter two, but that the claim of the four and the claim of the two could not be combined in one action; that the action must be confined to either the one or the other. But the passage affirms that as to the one class the claim ought to stand. The passage is as follows: "As regards claim number 2, relating to the yearly cart stands, the four plaintiffs Ellis, Gray, Miller and Ashby have undoubtedly stated separate causes of action in respect of which they have jointly claimed a declaration; they have also claimed injunctions and separate accounts and repayment of excessive charges. They clearly are rightly joined. The same common question would have arisen if they had brought separate actions." So far this is a case under Order XVI., r. 1, and affirms that these four plaintiffs could combine in respect of separate causes of action in which they jointly claimed a declaration, but claimed separate accounts and payments of excessive charges made on each of them respectively. Lord Brampton then goes on: "They are also entitled to sue on behalf of all other growers having the same interest in one cause or matter, that is to say, the preferential rights they claim to be accepted as tenants of yearly cart stands as described in s. 7 of the Act." This passage relates to the right to sue under Order XVI., r. 9, and affirms that ***1047** these plaintiffs could under that rule sue on behalf of all other growers on the ground that they had within the words of r. 9 the same interest in one cause or matter.

To apply this to the present case. In the question whether the owners of the *Knight Commander* committed a breach of contract or duty in shipping on the vessel goods which were contraband of war all shippers of goods which were not contraband of war have the same interest. It is not accurate to say that they have a similar interest. They have exactly the same interest although it will result in the case of each of them in a different measure of relief. In Beeching v. Lloyd33 the common purpose or object (the Vice-

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Chancellor uses both words) was to contribute to the joint stock of the company to which all the represented parties intended to subscribe. In this case the purpose or object of each and all of the shippers was to consign their goods by a vessel which should observe the duty of not shipping also goods which were contraband of war—a duty which her owners owed to all such shippers alike. Cargo owners on a general ship are not partners, but they have a common interest in the ship on which their goods are carried. In respect of that interest they are in a position to claim relief which is common to all of them. They can claim a declaration that the defendants are liable to the plaintiffs and those on whose behalf they sue for breach of contract and of duty in shipping contraband of war. In respect of that liability which exists towards all each is entitled severally to relief which exists only towards himself. Supposing that declaration be made, the named plaintiffs, say Markt & Co., Limited, can recover the damage to which they are entitled. To enable the represented firms to recover the damages which upon the footing of the declaration may be recoverable by them requires, no doubt, further steps, such as are always necessary in a representative action to give to the represented parties the particular relief to which each is entitled in respect of the common relief which is for the benefit of all. Subsequent proceedings would be necessary, and in these it would be open to the defendants to contend that as regards any particular plaintiff by representation ***1048** he was for some reason personal to himself not entitled to recover. Such difficulties always occur in every representative action. The purpose of Order XVI., r. 9, was, I think, to extend to common law actions the flexibility which had for many years been enjoyed in actions in the Court of Chancery. If I may say so respectfully, I wholly agree with Lord Lindley that the principle upon which the rule is based forbids its restriction to cases for which an exact precedent can be found in the reports. This seems to me to be exactly a case in which the spirit, nay, more, the words, of Order XVI., r. 9, justify, and good sense requires, that the principle should be extended to a case for which I daresay no precedent is exactly to be found. If the writ in Markt & Co.'s action were amended so that the plaintiffs should be expressed to be Markt & Co., Limited, on behalf of themselves and all others the owners of cargo lately laden on board the steamship *Knight Commander* not being shippers of goods which were contraband of war, and the indorsement were amended so as to ask for a declaration that the defendants are liable to the plaintiffs and those on whose behalf they sue for breach of contract and/or duty in and about the carriage of goods by sea, and for damages, that writ would, I think, be good within Order XVI., r. 9. The same would be true with the writ in the other action if that were similarly amended but expressing the represented class to be owners of goods shipped, including shippers of goods which were contraband of war. The course which the Court ought to take, in my opinion, is to offer the plaintiffs an opportunity of amending their writs in these respects and, upon their electing so to do, to dismiss these appeals.Appeals allowed. (W. J. B.)

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1. [1901] A. C. 1.

2. [1894] A. C. 494.

3. [1901] A. C. 1.

4. [1899] 1 Ch. 393.

5. (1855) 3 Drew. 227.

6. [1901] A. C. 1.

7. [1901] A. C. 1.

8. (1809) 16 Ves. 321, at pp. 325, 326.

9. (1805) 11 Ves. 429.

10. [1901] A. C. 1.

11. [1901] A. C. 1.

12. [1901] A. C. 1.

13. 3 Drew. 227.

14. (1823) 1 T. & Russ. 297.

15. (1823) 1 T. & Russ. 297.

16. 3 Drew. 227.

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17. 3 Drew. 227.

18. [1901] A. C. 1.

19. [1901] A. C. 1.

20. 3 Drew. 227.

21. His Lordship's judgment was read by Vaughan Williams L.J.

22. [1901] A. C. 1.

23. [1901] A. C. 1.

24. 3 Drew. 227.

25. [1901] A. C. 1, at p. 8.

26. [1901] A. C. 426, at p. 443.

27. (1818) 2 Swans. 277.

28. (1876) 3 Ch. D. 610, at p. 615.

29. [1901] A. C. at p. 9.

30. [1901] A. C. at p. 8.

31. 3 Drew. 227.

32. [1901] A. C. 1.

33. 3 Drew. 227.

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EXHIBIT 44

[2005] UKHL 54

***118 Autologic Holdings plc v Inland Revenue Commissioners**

House of Lords

Lord Nicholls of Birkenhead, Lord Steyn, Lord Hope of Craighead, Lord Millett, and Lord Walker of Gestingthorpe

2005 May 17, 18, 19; July 28

European Community—Breach of Community law—Remedy—Alleged contravention of Community law by national tax rules relating to group loss relief—Whether ordinary statutory procedure for determination of tax disputes to be followed

The claimants were companies which had made payments of advance corporation tax under the United Kingdom tax regime. In reliance on subsequent decisions of the European Court of Justice, and pursuant to a group litigation order, the claimants commenced an action in the High Court for restitution and damages against the Inland Revenue Commissioners alleging that the United Kingdom tax rules relating to group loss relief denied them a benefit to which they were entitled under Community law. The claimants fell into two broad classes. The first class comprised those to whom, if their class contentions on Community law were well founded, it was still open to obtain in full the group relief to which they would be entitled in accordance with Community law. The second class comprised those to whom that course was not open due to procedural obstacles such as the claim being outside the prescribed statutory time limits. The judge granted an application by the revenue to strike out the actions on the ground that the claims could be pursued under the ordinary statutory procedure for the determination of tax disputes and, therefore, the High Court either lacked or should decline jurisdiction. The Court of Appeal allowed the claimants' appeal on the ground that it was a principle of Community law that every court of a member state in a case within its jurisdiction was obliged to apply that law in its entirety, and therefore the High Court was obliged to entertain the claims.

On the revenue's appeal—

allowing the appeal in respect of the first class of claimants (Lord Hope of Craighead and Lord Walker of Gestingthorpe dissenting), (1) that Parliament had by statute given exclusive jurisdiction to the special and general commissioners to hear taxpayers' appeals against assessments to tax, and that statutory scheme would be defeated if it were open to a taxpayer to leave undisturbed an assessment which he disputed and adopt the expedient of applying to the High Court for a declaration of how much tax he owed and, if he had already paid the tax, for an order for repayment of the amount he claimed to be wrongly assessed; that in substance, although not in form, that would be an appeal against an assessment, and the effect of the relief sought in the High Court would be to negative an assessment otherwise than in accordance with the statutory code; that, therefore, the High Court proceedings would be an abuse of the of the court's process, since the dispute was one which Parliament had assigned for resolution exclusively to a specialist tribunal; and that, accordingly, the dissatisfied taxpayer was required to follow the statutory appeal procedure (post, paras 12-15, 47, 61-63).In re Vandervell's Trusts [1971] AC 912, HL(E) considered . (2) That the question as to which court or tribunal had jurisdiction to hear disputes involving rights derived from Community law was a matter for determination by each member state, provided that full effect was given to such rights; that the special commissioners had the same powers and duties as the High Court in giving effect to all directly enforceable Community rights by disapplying or ***119** adapting domestic statutory requirements to the extent necessary to enable them to be applied in a manner consistent with Community law and to refer any necessary questions to the European Court of Justice; that, accordingly, the claimants in the first class were able to obtain group relief by following the route prescribed by statute and there was no justification for their claiming damages in the High Court; but that the special commissioners had

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no jurisdiction to hear the cases of the second class of claimants whose remedy lay in claiming restitutionary and other relief in respect of the United Kingdom's failure to give proper effect to Community law; that the claimants in the second class should first apply to the revenue or the special commissioners for an extension of the time limits so as to enable the claimants to use the statutory route, and if their application was refused they could proceed with their claims in the High Court (post, paras 16, 17, 20, 21, 23-33, 39-44, 47, 61-63).Metallgesellschaft Ltd v Inland Revenue Comrs; Hoechst AG v Inland Revenue Comrs (Joined Cases C-397 and 410/98) [2001] Ch 620, ECJ distinguished . Decision of the Court of Appeal [2004] EWCA Civ 680; [2005] 1 WLR 52; [2004] 3 All ER 957 reversed in part

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The following cases are referred to in the opinions of their Lordships:

- Amministrazione delle Finanze dello Stato v Simmenthal SpA (Case 106/77) [1978] ECR 629, ECJ
- Amministrazione delle Finanze dello Stato v SpA San Giorgio (Case 199/ 82) [1983] ECR 3595, ECJ
- Anisminic Ltd v Foreign Compensation Commission [1968] 2 QB 862; [1967] 3 WLR 382; [1967] 2 All ER 986, CA
- Argosam Finance Co Ltd v Oxby [1965] Ch 390; [1964] 3 WLR 774; [1964] 3 All ER 561, CA
- Barraclough v Brown [1897] AC 615, HL(E)
- Biggs v Somerset County Council [1995] ICR 811, EAT ; [1996] ICR 364; [1996] 2 All ER 734, CA
- Brasserie du Pêcheur SA v Federal Republic of Germany; R v Secretary of State for Transport, Ex p Factortame Ltd (No 4) (Joined Cases C-46 and 48/93) [1996] QB 404; [1996] 2 WLR 506; [1996] All ER (EC) 301; [1996] ECR I-1029, ECJ
- D v Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen (Case C-376/03) [2006] 1 WLR 46, ECJ
- Deutsche Morgan Grenfell Group plc v Inland Revenue Comrs [2005] EWCA Civ 78; [2006] 2 WLR 103; [2005] 3 All ER 1025; [2005] STC 329, CA
- Dorsch Consult Ingenieurgesellschaft mbH v Bundesbaugesellschaft Berlin mbH (Case C-54/96) [1997] ECR I-4961, ECJ
- Emmott v Minister for Social Welfare (Case C-208/90) [1993] ICR 8; [1991] ECR I-4269, ECJ
- Glaxo Group Ltd v Inland Revenue Comrs [1995] STC 1075
- Imperial Chemical Industries plc v Colmer [1996] 1 WLR 469; [1996] 2 All ER 23, HL(E)
- Imperial Chemical Industries plc v Colmer (Case C-264/96) [1999] 1 WLR 108; [1998] ECJ I-4695, ECJ
- Imperial Chemical Industries plc v Colmer (No 2) [1999] 1 WLR 2035; [2000] 1 All ER 129, HL(E)
- Johnson v Chief Adjudication Officer (Case C-410/92) [1995] ICR 375; [1994] ECR I-5483, ECJ
- Köbler v Republik Österreich (Case C-224/01) [2004] QB 848; [2004] 2 WLR 976; [2004] All ER (EC) 23, ECJ
- Litster v Forth Dry Dock & Engineering Co Ltd [1990] 1 AC 546; [1989] 2 WLR 634; [1989] 1 All ER 1134, HL(Sc)
- Marks & Spencer plc v Halsey [2003] EWHC 1945 (Ch); [2003] STC (SCD) 70

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- Marshall v Southampton and South West Hampshire Health Authority (Teaching) (No 2) (Case C-271/91) [1994] QB 126; [1993] 3 WLR 1054; [1993] 4 All ER 586; [1993] ECR I-4367, ECJ ; [1994] AC 530; [1994] 2 WLR 392; [1994] 1 All ER 736, HL(E)
- Metallgesellschaft Ltd v Inland Revenue Comrs; Hoechst AG v Inland Revenue Comrs (Joined Cases C-397 and 410/98) [2001] Ch 620; [2001] 2 WLR 1497; [2001] ECR-I 1727; [2001] All ER (EC) 496, ECJ

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- NEC Semi-Conductors Ltd v Inland Revenue Comrs [2003] EWHC 2813 (Ch); [2004] STC 489
- Peterbroeck, Van Campenhout & Cie SCS v Belgian State (Case C-312/93)[1995] ECR I-4599, ECJ
- Pickstone v Freemans plc [1989] AC 66; [1988] 3 WLR 265; [1988] 2 All ER 803, HL(E)
- R v Inland Revenue Comrs, Ex p Bishopp [1999] STC 531
- R v Secretary of State for Transport, Ex p Factortame Ltd [1990] 2 AC 85; [1989] 2 WLR 997; [1989] 2 All ER 692, HL(E)
- R v Secretary of State for Transport, Ex p Factortame Ltd (No 2) (Case C-213/89) [1991] 1 AC 603; [1990] 3 WLR 818; [1991] 1 All ER 70; [1990] ECR I-2433, ECJ
- Rewe-Handelsgesellschaft Nord mbH v Hauptsollamt Kiel (Case 158/80) [1981] ECR 1805, ECJ
- Reyners v Belgian State (Case 2/74) [1974] ECR 631, ECJ
- Roquette Frères SA v Direction des Services Fiscaux du Pas-de-Calais (Case C-88/99) [2000] ECR I-10465, ECJ
- Sanz de Lera, Criminal proceedings against (Joined Cases C-163/94, 165/94 and 250/94) [1995] ECR I-4821, ECJ
- Staffordshire County Council v Barber [1996] ICR 379, EAT; [1996] ICR 379; [1996] 2 All ER 748, CA
- Steenhorst-Neerings v Bestuur van de Bedrijfsvereniging voor Detailhandel Ambachten en Huisvrouwen (Case C-338/91) [1993] ECR I-5475, ECJ
- Vandervell's Trusts, In re [1971] AC 912; [1970] 3 WLR 452; [1970] 3 All ER 16, HL(E)
- Woolwich Equitable Building Society v Inland Revenue Comrs [1993] AC 70; [1992] 3 WLR 366; [1992] 3 All ER 737, HL(E)

The following additional cases were cited in argument:

- Beecham Group plc v Inland Revenue Comrs [1992] STC 935
- Commission of the European Communities v Italian Republic (Case C-257/86) [1988] ECR 3249, ECJ
- Dunk v General Comrs for Havant (Note) [1976] STC 460
- Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Comrs [2005] EWCA Civ 389; [2006] QB 37; [2005] 3 WLR 521; [2005] STC 687, CA

APPEAL from the Court of Appeal

By leave of the House of Lords (Lord Hoffmann, Lord Scott of Foscote and Lord Walker of Gestingthorpe) granted on 11 October 2004, the Inland Revenue Commissioners appealed from a decision of the Court of Appeal (Peter Gibson and Longmore LJJ) on 28 May 2004 allowing an appeal by Autologic Holdings plc, BNP Paribas UK Holdings Ltd, British Telecommunications plc, Perkins Engines Co Ltd, Future Network plc and H J Heinz Co Inc, as test claimants under a group litigation order made by the Chief Chancery Master on 23 May 2003, from a decision of Park J on 3 March 2004 striking out the claimants' action for restitution and damages against the Inland Revenue Commissioners in respect of sums paid as advance corporation tax.***121**

The facts are stated in the opinions of their Lordships.

Richard Plender QC and *David Ewart* for the revenue. The issues in this appeal are whether the High Court has jurisdiction to hear the claim for restitution for moneys paid under the United Kingdom tax regime, and if so, whether the High Court should hear such a claim.

The decided cases establish that where a statute confers a right and specifies a remedy for its infringement it is not open to a claimant to seek damages by way of the High Court. The general principle is that the existence of a statutory scheme containing its own system of remedies excludes the ordinary remedies available in a court of law. By conferring a

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statutory remedy the legislature has implied that no other court has jurisdiction. [Reference was made to Marks & Spencer plc v Halsey [2003] STC (SCD) 70 ; Barraclough v Brown [1897] AC 615 ; Argosam Finance Co Ltd v Oxby [1965] Ch 390 ; In re Vandervell's Trusts [1971] AC 912 ; Beecham Group plc v Inland Revenue Comrs [1992] STC 935 ; Woolwich Equitable Building Society v Inland Revenue Comrs [1993] AC 70 ; Glaxo Group Ltd v Inland Revenue Comrs [1995] STC 1075 ; R v Inland Revenue Comrs, Ex p Bishopp [1999] STC 531 and Metallgesellschaft Ltd v Inland Revenue Comrs; Hoechst AG v Inland Revenue Comrs (Joined Cases C-397 and 410/98) [2001] Ch 620 .]

Claims for repayment of corporation tax ought to be brought by the statutory procedure laid down. Under that procedure any dispute between a taxpayer and the revenue is to be litigated at first instance before the specialist tax tribunal, which is either the special commissioners or the general commissioners. The special commissioners do not lack the appropriate powers to deal with group litigation and are the best tribunal to decide how loss should be calculated for tax purposes.

A member state of the European Union has a right to prescribe the appropriate forum for the resolution of a dispute. There is nothing in European Community law which alters the position as regards the jurisdiction of the High Court to hear the claims in issue in the present case. A claimant invoking European Community law has the same remedy as one invoking domestic law. European Community law does not give the High Court jurisdiction which it would not otherwise have and does not compel the High Court to exercise jurisdiction over the claims if it would not otherwise do so. [Reference was made to Dunk v General Comrs for Havant (Note) [1976] STC 460 ; Amministrazione delle Finanze dello Stato v Simmenthal SpA (Case 106/77) [1978] ECR 629 and Köbler v Republik Österreich (Case C-224/01) [2004] QB 848 .] The High Court has no jurisdiction to hear these claims.

Alternatively, if the High Court does have jurisdiction, Park J was correct in exercising his discretion to decline jurisdiction. The decision of the Court of Appeal was therefore wrong and should be reversed.

Graham Aaronson QC, David Cavender and *Paul Farmer* for the claimants. As a matter of domestic law the special commissioners have no power to make a compensatory order. If the special commissioners have jurisdiction, the High Court has co-ordinate jurisdiction. There is no restriction on the High Court's jurisdiction and the High Court has residual jurisdiction in all cases unless jurisdiction is specifically excluded by statute. The special commissioners do not have exclusive jurisdiction in the true ***122** sense, namely exclusive jurisdiction given by statute. Direct and immediate relief is only available in the High Court.

There are difficulties in the present case in the making of the claims, in the managing of the claims and in the giving of relief. None of these difficulties exist if the claims go to the High Court. The special commissioners have no jurisdiction to give remedies, including interest and costs, for some categories of claimants. A requirement that a claimant should make some makeshift claim is contrary to European Community law. [Reference was made to Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Comrs [2006] QB 37 ; D v Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen (Case C-376/03) [2006] 1 WLR 46 ; Argosam Finance Co Ltd v Oxby [1965] Ch 390 ; Glaxo Group Ltd v Inland Revenue Comrs [1995] STC 1075 ; Köbler v Republik Österreich (Case C-224/01) [2004] QB 848 ; Amministrazione delle Finanze dello Stato v Simmenthal SpA (Case 106/77) [1978] ECR 629 and Commission of the European Communities v Italian Republic (Case C-257/86) [1988] ECR 3249 .]

Even if the special commissioners have jurisdiction to hear some of the claims, they do not have jurisdiction to hear all the claims. The High Court has co-ordinate jurisdiction to hear all the claims and should exercise that jurisdiction. Moreover, Community law requires the High Court to exercise jurisdiction over the claims whether or not the High Court would otherwise have jurisdiction over the claims or would choose to exercise jurisdiction. The decision of the

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Court of Appeal was correct and ought to be upheld.

Plender QC replied.

Their Lordships took time for consideration.

28 July. LORD NICHOLLS OF BIRKENHEAD

1 My Lords, on these appeals the question before the House is procedural: should the principal substantive issues raised by the six claimant groups of companies be heard and decided by the High Court or by the special commissioners? Resolution of this question is difficult partly because of the variety of claims being advanced and partly because not all the claimants are in the same position. The huge number of companies involved adds a further practical complication.

The background

2 Simplified as far as possible, the background is this. On the procedural question now under consideration six groups of companies have been selected as test cases. They represent a large number of claimant companies in proceedings started in the Chancery Division against the Commissioners of Inland Revenue. This litigation is currently being managed under a group litigation order made by the Chief Chancery Master in May 2003. The claims within this order are known as the "loss relief group litigation". The principal substantive issues raised by these claims are issues of Community law. These issues of law are also the subject of a large number of appeals pending before the special commissioners. In many instances claimants have both appealed to the special commissioners and started proceedings in the High Court.***123**

3 The origin of this mass of litigation lies in two decisions of the European Court of Justice: Imperial Chemical Industries plc v Colmer (Case C-264/96) [1999] 1 WLR 108 , and the combined cases of Metallgesellschaft Ltd v Inland Revenue Comrs; Hoechst AG v Inland Revenue Comrs (Joined Cases C-397 and 410/98) [2001] Ch 620 , usually known as the Hoechst case. Stated shortly, these decisions made plain that United Kingdom legislation restricting fiscal reliefs or advantages to cases where the relevant companies are resident in the United Kingdom may be inconsistent with the EC Treaty . The ICI case [1999] 1 WLR 108 concerned consortium relief. The European Court ruled that article 52 , now article 43, of the EC Treaty precludes legislation of a member state which makes tax relief subject to the requirement that the subsidiaries of the holding company are established in the member state concerned. The Hoechst case [2001] Ch 620 concerned advance corporation tax. The European court ruled it is contrary to article 43 for the tax legislation of a member state to afford companies resident in that state the opportunity to benefit by paying dividends without paying advance corporation tax where their parent company is also resident in that state but to deny that opportunity where their parent company has its seat in another member state.

4 Multi-national groups of companies were quick to seize on the possibility of applying the reasoning underlying these two decisions to other tax provisions. Hundreds of claims have now been made against the Commissioners of Inland Revenue amounting to many billions of pounds. One of the fiscal provisions thought to be vulnerable concerns group relief from corporation tax. Corporation tax is charged on the profits of companies. Group relief is a relief from corporation tax available when one company in a group surrenders its losses to another company in the same group, thereby enabling the latter to claim the benefit of those losses as a set off against its profits. Thus, in essence, group relief is a transfer of tax relief from one company to another. It was introduced into United Kingdom tax law in 1973. Chapter IV of Part X of the Income and Corporation Taxes Act 1988 ("ICTA") now regulates this relief. Until 2000 one of the prescribed conditions was that both the company surrendering its losses and the claimant company must be resident in the United Kingdom: section 413(5) . The equivalent condition from 2000 is that both the surrendering company and the claimant company must be either resident in the United Kingdom or a non-resident company carrying on a trade in the United Kingdom through a branch or agency: section 402(3A) and (3B) .
The tax legislation also includes provision for the surrender of losses between companies having a con-

sortium relationship. For present purposes it is sufficient to confine attention to group relief claims. For the purpose of these appeals there is no material distinction between group relief claims and consortium relief claims.

5 In 2002 Marks & Spencer plc appealed against the refusal of group relief, on the ground that these statutory limitations on the territorial scope of group relief were incompatible with, and overridden by, Community law. The special commissioners dismissed the taxpayer's appeal: Marks & Spencer plc v Halsey [2003] STC (SCD) 70 . On appeal to the High Court Park J referred questions to the European Court of Justice. Advocate General Maduro delivered his opinion on 7 April 2005. The decision of the European Court of Justice is awaited. ***124**

6 As was to be expected, other international groups of companies showed interest in following Marks & Spencer's lead. A mass of proceedings followed in the High Court. The loss relief group litigation order was made in order to manage these claims. The House was told that currently there are 95 claimants subject to this order, involving 70 corporate groups and more than 1,000 individual companies. These claims raise some difficult questions of Community law. For present purposes it suffices to note that the primary contention of substantive law is that the provisions in ICTA restricting group relief to companies resident or carrying on an economic activity in the United Kingdom are incompatible with article 43 of the EC Treaty (freedom of establishment) and article 56 (abolition of restrictions on movements of capital and payments).

7 The procedural dispute now before the House arises out of a contention by the Inland Revenue that the principal claims for relief covered by the loss relief group litigation order are not properly justiciable in the High Court. Claims for group relief should be made to an inspector of taxes. If he wrongly refuses a claim the taxpayer should appeal to the general or special commissioners. These appeal commissioners, as I shall describe them, will give effect to directly applicable provisions of Community law, just as much as the High Court. Over 300 groups of companies have followed this route in challenging the group relief provisions. They include 65 of the High Court claimants. That, say the Inland Revenue, is the correct way to proceed. Six test claimants were selected as the vehicle for resolving this jurisdictional dispute.

8 The first major complicating factor on this appeal can now be noted. Four different types of loss are said to have been suffered by reason of the alleged breaches of Community law. The test claimants assert they have suffered loss under at least two, and in some instances, all four headings: (1) A claim for group relief. This comprises loss of profits of the UK profit-making company which should have been relieved by the losses of a non-UK resident company. (2) A claim in respect of utilised reliefs. Profit-making companies used other reliefs (e g capital allowances or surplus ACT) they would not have used had basic group relief been available. (3) A claim for recovery of surrendered reliefs. Other UK members of the group surrendered their own reliefs to the UK profit-making company. (4) A claim for payments. Companies which would have surrendered losses, possibly for payment, had the group relief rules not been confined to UK resident companies seek compensation for the loss of those payments.

9 Park J [2004] STC 594 struck out claims in category (1). These are matters for the appeal commissioners. The Inland Revenue accept that the so-called "satellite" claims in categories (2) to (4) are outside the jurisdiction of the appeal commissioners. In a characteristically lucid judgment Park J said it does not greatly matter whether the High Court lacks jurisdiction to decide the category (1) claims or has a discretion to accept or decline jurisdiction since, if the latter is the position, he would decline to exercise whatever jurisdiction he had: p 596, para 4. He said the most important factor is that "whether it would be more convenient to commence the entire case in the High Court or not, that is not the system our law provides for the resolution of tax disputes between taxpayers and the revenue": p 607, para 35. Further, he considered it was not "a major inconvenience" to have two sets of proceedings when they would proceed ***125** sequentially and not simultaneously, with the High Court proceedings claiming consequential relief going ahead only if the taxpayers were successful in the proceedings before the special commissioners: p 607, para 36.

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10 The Court of Appeal, comprising Peter Gibson and Longmore LJJ, allowed the taxpayers' appeals [2005] 1 WLR 52. Peter Gibson LJ said the judge's attitude was one which would perhaps appeal to most lawyers experienced in tax matters if Community law considerations could be left out of account: p 57, para 12. The court held that Community law obliges the High Court to entertain the claims: p 63, para 28. On these appeals the Inland Revenue seek to restore the order of Park J.

The statutory code

11 In resolving this question of jurisdiction the starting point is to note two basic principles. The first concerns the exclusive nature of the appeal commissioners' jurisdiction to decide certain types of disputes arising in the administration of this country's tax system. The present disputes concern claims for group relief. The way a taxpayer claims group relief depends on whether the claim relates to an accounting period before or after 1 July 1999. Before that date the corporation tax (pay and file) system was in force. This has now been replaced by the corporation tax (self-assessment) system. For present purposes this difference is immaterial. What matters is that, whichever system is applicable, an assessment which disallows a group relief claim cannot be altered except in accordance with the express provisions of the tax legislation. Statute so provides: see, in respect of the pay and file system, section 30A of the Taxes Management Act 1970 (as inserted by the Finance Act 1994, section 196, Schedule 19, Part 1, paragraph 5) and, in respect of the self-assessment system, paragraphs 47(2) and 97 of Schedule 18 to the Finance Act 1998 . Further, the statutory code makes its own provision for appeals. Under both the "pay and file" system and the self-assessment system a taxpayer has a right of appeal to the appeal commissioners against assessments of tax, including amendments made by the revenue to a taxpayer's tax return. The appeal commissioners' findings of fact are final. In appropriate cases a further appeal lies to the High Court by way of case stated on a point of law. Where the appeal commissioners reduce the amount of an assessment, any overpaid tax must be repaid to the taxpayer, with a repayment supplement by way of interest as provided in section 825 of the ICTA .

12 Clearly the purpose intended to be achieved by this elaborate, long established statutory scheme would be defeated if it were open to a taxpayer to leave undisturbed an assessment with which he is dissatisfied and adopt the expedient of applying to the High Court for a declaration of how much tax he owes and, if he has already paid the tax, an order for repayment of the amount he claims was wrongly assessed. In substance, although not in form, that would be an appeal against an assessment. In such a case the effect of the relief sought in the High Court, if granted, would be to negative an assessment otherwise than in accordance with the statutory code. Thus in such a case the High Court proceedings will be struck out as an abuse of the court's process. The proceedings would be an abuse because the dispute presented to the court for decision would be a dispute Parliament has assigned for resolution exclusively to a specialist tribunal. The dissatisfied ***126** taxpayer should have recourse to the appeal procedure provided by Parliament. He should follow the statutory route.

13 I question whether in this straightforward type of case the court has any real discretion to exercise. Rather, the conclusion that the proceedings are an abuse follows automatically once the court is satisfied the taxpayer's court claim is an indirect way of seeking to achieve the same result as it would be open to the taxpayer to achieve directly by appealing to the appeal commissioners. The taxpayer must use the remedies provided by the tax legislation. This approach accords with the views expressed in authorities such as Argosam Finance Co Ltd v Oxby [1965] Ch 390 , In re Vandervell's Trusts [1971] AC 912 and, more widely, Barraclough v Brown [1897] AC 615 .

14 In Vandervell's case [1971] AC 912 , 939-940, Lord Wilberforce sought to clarify the limits of this "exclusivity" principle. This principle, he said, is not to be taken to exclude the jurisdiction of the courts to decide a question of fact or law which is a basis for an income tax assessment where the taxpayer and the revenue so agree, provided the assessment to which the question relates has not become final and provided also the question, "in form suitable for decision by the court", is not "so

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close to the question of the assessment itself" that the court should decline to entertain it. But Lord Wilberforce was at pains to add that either the taxpayer or the revenue have the right to insist the statutory procedure should be followed.

15 Lord Wilberforce's formulation indicates that, apart from cases of straightforward abuse, there is an area where the court has a discretion. In Glaxo Group Ltd v Inland Revenue Comrs [1995] STC 1075 , 1083-1084, Robert Walker J put the matter this way:

"It is not easy to discern any clear dividing-line between High Court proceedings which are, and those which are not, objectionable as attempts to circumvent the exclusive jurisdiction principle. Possibly the correct view is that there is an absolute exclusion of the High Court's jurisdiction only when the proceedings seek relief which is more or less co-extensive with adjudicating on an existing open assessment: but that the more closely the High Court proceedings approximate to that in their substantial effect, the more ready the High Court will be, as a matter of discretion, to decline jurisdiction." I respectfully agree with this approach, subject to noting that, at least as a general principle, the taxpayer and the revenue are each entitled to insist that the statutory procedure for dealing with disputed assessments should be followed.

Community law

16 The second basic principle concerns the interpretation and application of a provision of United Kingdom legislation which is inconsistent with a directly applicable provision of Community law. Where such an inconsistency exists the statutory provision is to be read and take effect as though the statute had enacted that the offending provision was to be without prejudice to the directly enforceable Community rights of persons having the benefit of such rights. That is the effect of section 2 of the European Communities Act 1972 , as explained by your Lordships' House in R v Secretary of State for Transport, Ex p Factortame Ltd [1990] 2 AC 85 , ***127** 140, and Imperial Chemical Industries plc v Colmer (No 2) [1999] 1 WLR 2035 , 2041.

17 Thus, when deciding an appeal from a refusal by an inspector to allow group relief the appeal commissioners are obliged to give effect to all directly enforceable Community rights notwithstanding the terms of sections 402(3A) and (3B) and 413(5) of ICTA . In this regard the commissioners' position is analogous to that of the Pretore di Susa in Amministrazione delle Finanze dello Stato v Simmenthal SpA (Case 106/77) [1978] ECR 629 . Accordingly, if an inconsistency with directly enforceable Community law exists, formal statutory requirements must where necessary be disapplied or moulded to the extent needed to enable those requirements to be applied in a manner consistent with Community law. Paragraph 70 of Schedule 18 to the Finance Act 1998 is an instance of such a requirement. Paragraph 70 provides that a claim for group relief requires the consent of the surrendering company, which must be given by notice in writing to its own inspector of taxes when or before the claim is made. This provision cannot be applied literally in the case, say, of a German subsidiary which makes no tax returns in this country. So if the residence restriction is found to be inconsistent with Community law this provision will need adapting so as to give effect to the overriding Community rights. In this regard the appeal commissioners have the same powers and duties as the High Court.

Claimant companies which can still obtain group relief

18 Against that background I turn to the other complicating feature of these appeals: the different positions of the claimants. The six test claimants exemplify different claims histories. They were chosen for that purpose. In referring to these six cases I shall adhere to the position as it existed when the proceedings were before Park J in March 2004 [2004] STC 594 even though in some instances the actual claims positions of the claimants, agreed between the parties for the purpose of these appeals, have changed since then.

19 As I see it, these claimants fall into two broad classes. One class comprises cases where, if the claimant company's contentions on Community law are well-founded, it is still open to the company to

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obtain in full the group relief to which, on that footing, the company is entitled. The other class comprises cases where this course is not open to the claimant company. The difference between these two classes corresponds to the distinction between (a) giving effect to the group relief provisions as read and applied in accordance with Community law and (b) awarding damages for breach of a Community law right.

20 In my view in the former of these two classes the category (1) claims in the High Court are misconceived. Where a claimant company can obtain through the statutory procedures the very tax relief of whose non-availability it is complaining, I see no justification for the company by-passing the statutory route and, instead, going to the High Court and claiming damages or a restitutionary remedy based on the proposition that the company has been wrongly refused the tax relief to which it is entitled under Community law.

21 Take a case where an inspector disallowed a claim for group relief and an appeal to the special commissioners is pending. If that appeal proceeds the special commissioners will give effect to all relevant directly ***128** applicable provisions of Community law. The special commissioners can refer any necessary questions to the European Court just as readily as the High Court. They can resolve any questions of fact which may arise on issues such as the amount of the losses claimed. They can inquire into the group structure to see if it meets the statutory requirements. Indeed, detailed questions of this character are more suited for determination by the special commissioners than the High Court, especially where large numbers of companies are involved. In short, in this example the claimant is still able to obtain the tax relief it seeks despite its claim having been refused by an inspector.

22 The Autologic group exemplifies this factual situation. The material facts are that one of the companies in the group submitted corporation tax returns for the years ending 31 December 1999 and 31 December 2000 making group relief claims in respect of losses surrendered by two French subsidiaries. Having conducted inquiries into these returns, the inspector refused the claims and amended the returns accordingly. The claimant company appealed to the special commissioners against the revenue amendments. Corporation tax was paid on the basis of the amended assessments. These appeals are still pending. An inquiry into the tax return for the year ended 31 December 2001 is still in progress. In the High Court Autologic claims that, in refusing to grant group relief in respect of the losses of the French subsidiaries, the revenue unlawfully failed to give effect to the EC Treaty . They claim as damages, and by way of restitution, the amounts of corporation tax overpaid. These are the category (1) claims.

23 In my view these claims in the High Court are prima facie a misuse of the court's process. These claims cover the same ground in all respects as the appeals pending before the appeal commissioners. The remedy sought is co-extensive with adjudicating upon existing, open assessments. The essence of the High Court claims is that these assessments were wrong, that the court should so hold, and that the court should itself calculate the amounts which ought to have been assessed and order repayment of the overpaid excess. There could hardly be a more obvious example of seeking to sidestep the statutory procedure.

24 The taxpayers say that recourse to the appeal commissioners is a poor alternative to the High Court proceedings. If their appeals succeed their position regarding interest and costs before the special commissioners will compare unfavourably with their position in the High Court. The appeal commissioners do not have power to award interest as such. The statutory repayment supplement is restricted to simple interest at a specified rate, usually about 1% below base rate, starting 12 months after the date the corporation tax was paid. The special commissioners' power to award costs is confined to cases where a party has acted wholly unreasonably in connection with the hearing: Special Commissioners (Jurisdiction and Procedure) Regulations 1994 (SI 1994/1811), regulation 21 . These limitations on the special commissioners' powers, it is said, offend the Community law principle which requires that relief for breach of Community rights must be effective.

25 I am not attracted by this submission. Appeals to the special commissioners when novel points

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of law arise are part of the ordinary statutory procedure. Usually the points of law concern United Kingdom tax legislation. But a dispute on the interpretation and application of *129 Community law, and the need to refer questions to Luxembourg, do not make a case fundamentally different. Once the interpretation and application of Community law have been clarified by the European court, the principal difficulty surrounding these appeals will be gone. Confining claimants to the statutory route, with the interest and costs consequences just mentioned, can hardly be regarded as rendering this route to reimbursement "excessively onerous", to adopt the phrase of Advocate General Colomer in D v Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen (Case C-376/03) [2006] 1 WLR 46 .

26 The Autologic group exemplifies cases where the statutory claims procedures have reached an advanced stage. In other cases the claims for group relief are less advanced. In some cases the claimant company is in time to make a group relief claim to the revenue but has not yet done so. The H J Heinz group is an instance of this. In other cases claims for group relief have been made and are still being considered by the revenue, as with the British Telecommunications group. In further cases claims have been made and refused and the claimants are in time to appeal to the appeal commissioners but have not yet done so. The Future Network group is an example of this.

27 In my view in each of these types of case the category (1) claims in the High Court are prima facie misconceived, for the reason set out above. The claimants are able to obtain the group relief to which they are entitled by following the statutorily-prescribed route. That is the route they should follow.

28 The taxpayers contend that to oblige all claimants to follow this route, especially those who have not yet made group relief claims to the revenue, would be inconsistent with the approach indicated by the European Court of Justice in the Hoechst case. As matters stand the revenue are bound to refuse claims for group relief where the surrendering company is not resident in this country. The European court, it is said, has ruled that claimants should not be required to take futile steps of this nature when seeking to enforce their rights under Community law. In the Hoechst case [2001] Ch 620 , 667, para 107, the European court said:

"it is contrary to Community law for a national court to refuse or reduce a claim brought before it by a resident subsidiary and its non-resident parent company for reimbursement or reparation of the financial loss which they have suffered as a consequence of the advance payment of corporation tax by the subsidiary, on the sole ground that they did not apply to the tax authorities in order to benefit from the taxation regime which would have exempted the subsidiary from making payments in advance and that they therefore did not make use of the legal remedies available to them to challenge the refusals of the tax authorities, by invoking the primacy and direct effect of the provisions of Community law, where on any view national law denied resident subsidiaries and their non-resident parent companies the benefit of that taxation regime." The Court of Appeal regarded this ruling as determinative of these test cases.

29 I am unable to agree. The taxpayers' reliance on this ruling in the present cases is misplaced. The taxpayers are seeking to apply the European court ruling out of context. In the Hoechst case this ruling was directed at *130 rejecting a governmental defence based on the taxpayers' alleged lack of reasonable diligence in pursuing its claims. The Hoechst ruling was not directed at a situation where, as here, the claimants' claims have yet to be decided by the national court and there exists a statutorily prescribed route by which the claimants are able to obtain the tax relief they say is their entitlement under Community law. Which court or tribunal has jurisdiction to hear disputes involving rights derived from Community law is a matter for determination by each member state: see, for instance, Dorsch Consult Ingenieurgesellschaft mbH v Bundesbaugesellschaft Berlin mbH (Case C-54/96) [1997] ECR I-4961 , 4996, para 40.

30 Of course, to be compliant with Community law the remedial route prescribed by the legal system of a member state must be such that the rules

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"are not less favourable than those governing similar domestic actions (principle of equivalence)" and, additionally, the rules must not render "practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)": see the Hoechst case, para 85. The statutory route prescribed for group relief claims was not designed for claims in respect of non-resident companies. So, as United Kingdom law presently stands, at the initial step a taxpayers' group relief claim will inevitably be refused by the revenue. Further, as already noted, some statutory requirements will need adaptation to accommodate claims in respect of non-resident companies. But neither of these features should present any major problem. Neither of them renders the statutory route "practically impossible or excessively difficult". Adaptation of the formal requirements will be needed whichever route is followed, and the appropriate adaptation is a matter on which the special commissioners' practical expertise will be invaluable.

31 Mr Aaronson advanced further arguments on the inconvenience of requiring claimant companies to follow the statutory route. He submitted that in cases where no claim for group relief has yet been made a claimant should not have to incur "up front" expenses unnecessarily. A claim for group relief must quantify the amount of relief claimed. The revenue require that companies' accounts be drawn in accordance with United Kingdom accounting principles and adjusted for UK tax rules. If the claimants proceed in the High Court the expense of complying with these requirements can be postponed until the European court has ruled on the Community law problems.

32 The force of this argument is difficult to evaluate. That some expense will be involved is clear. That this will be substantial is not self-evident. Since the revenue are insisting on taxpayers following the statutory route even though this was not designed for non-resident companies, it behoves the revenue to exercise their dispensing powers with appropriate regard to the circumstances. I consider that, looking at matters in the round, the House should proceed on the footing that, at least in general, the "up front" expenses involved will not be a significant factor in the context of individual company claims.

33 One other general point calls for brief mention. Unlike the High Court the appeal commissioners have no power to co-ordinate proceedings by making a group litigation order or the equivalent. I doubt whether in practice this should prove a significant handicap in marshalling the mass of ***131** appeals involved in this litigation. I see no reason to doubt that the parties will co-operate in making sensible practical arrangements.

34 Thus far I have been dealing with the category (1) claims. I turn now to the claims in categories (2) to (4) in this class of case. The appeal commissioners have no jurisdiction to decide these "satellite" claims. The taxpayers, understandably, rely heavily on the practical undesirability of severing the category (1) claims from the satellite claims. At first sight there is force in this point. Indeed, the existence of these satellite claims is perhaps the strongest point in favour of the claimant companies on these appeals.

35 However, the claims in categories (2) to (4) are not without their own difficulties. They are all based on the assumption that the claimant companies have been unable to obtain the group relief to which they are entitled under Community law. But in the class of case now under consideration this is not so. Group relief claims in this class of case are still capable of being allowed in full. The difficulties do not stop there. For instance if, as the category (4) claims suggest, the practice is that surrendering companies are paid the value of the reliefs they surrender, the United Kingdom companies which surrendered their reliefs presumably were paid accordingly. This would undermine the category (3) claims. In the case of the category (4) claims, the loss-making non-resident subsidiaries may not have been paid for surrendering their reliefs but they still have those reliefs which may still be capable of being turned to account within the group.

36 The House is not in a position to reach any conclusions on these matters. But the House is entitled to take note of the potential difficulties confronting these claims. I consider significant weight should not be attached to the existence of these claims when deciding the appropriate course for resolving the category (1) claims in this class of case. In my view the existence of the satellite claims is not sufficiently weighty to displace the prima facie conclusion that the category (1) claims in the High Court in this class

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of case should be regarded as an inappropriate use of the court's process. So far as this class of case is concerned Park J was entitled, and right, to decline to permit the category (1) claims to proceed in the High Court as sought by the claimant companies.

37 Underlying this conclusion is a point of general policy concerning cases where an applicant claims he has been wrongly deprived of benefits to which he is entitled under directly applicable provisions of Community law. Where Parliament has assigned to a specialist tribunal responsibility for adjudicating on disputes over the payment of such benefits, and an application to that tribunal is not time-barred, in the ordinary course the primary remedy for non-receipt of such benefits is to have recourse to that tribunal. That tribunal will give effect to the applicant's rights under directly enforceable provisions of Community law as well as his rights under domestic law. The tribunal will afford him the benefits to which he is properly entitled. In such cases, where that course is still available to an applicant, claims in the High Court founded on an alleged breach of Community law will not normally be appropriate.

38 No doubt in such cases there may have been a violation of Community law. Community law requires that national law must ensure rights conferred on individuals by Community law are fully effective in each ***132** member state. This obligation can hardly be said to be fulfilled when and so long as national authorities, such as government departments, rely on the terms of the national legislation as the reason for declining to afford an individual benefits to which he is entitled under directly applicable provisions of Community law. The right of individuals to rely on directly applicable provisions of the EC Treaty before national courts is not sufficient in itself to ensure full and complete implementation of the Treaty: Brasserie du Pêcheur SA v Federal Republic of Germany and R v Secretary of State for Transport, Ex p Factortame Ltd (No 4) (Joined Cases C-46 and 48/93) [1996] QB 404 , 495, para 20. But a claim for damages for breach of Community law is not, in general, the appropriate remedy when currently it is still open to an applicant to obtain the benefits to which he is entitled by making an application to the specialist tribunal: provided always that the statutory route accords with the Community law principles of equivalence and effectiveness.

Claimant companies which cannot now obtain group relief

39 Thus far I have been considering cases where the subject matter of the category (1) claims in the High Court is group relief claims which can still be allowed by the appeal commissioners if the claimants' Community law contention is correct. I now turn to the other class of cases, where this is not so. The most obvious example is where it is now too late, in respect of the relevant accounting periods, for a claimant to make a group relief claim to the revenue or to appeal to the appeal commissioners. The claimant is outside the prescribed time limits. The Paribas group is an instance of this, where the claim advanced in the High Court relates to group relief for an accounting period ending 31 December 1998. No group relief claim in respect of the losses in question has been made.

40 Time bars of this character are commonplace. I see no reason to suppose the statutory time bars applicable to group relief claims are in themselves inconsistent with Community law: cf Steenhorst-Neerings v Bestuur van de Bedrijfsvereniging voor Detailhandel Ambachten en Huisvrouwen (Case C-338/91) [1993] ECR I-5475 and Johnson v Chief Adjudication Officer (Case C-410/92) [1995] ICR 375 . This means that, in respect of this class of cases, it is now too late for the taxpayers to obtain group relief by following the statutory route. A similar view has, rightly, been expressed by the Court of Appeal in respect of an employment tribunal's jurisdiction to entertain claims for unfair dismissal involving directly applicable Community rights outside the statutory time limits: see Biggs v Somerset County Council [1996] ICR 364 .

41 In such cases the taxpayers' remedy necessarily lies elsewhere. In such cases the taxpayer's remedy is of a different character. The taxpayer's remedy lies in pursuing proceedings claiming restitutionary and other relief in respect of the United Kingdom's failure to give proper effect to Community law. The appeal commissioners have no jurisdiction to hear such claims. Such claims are outside the com-

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missioners' statutory jurisdiction, and the commissioners have no inherent jurisdiction. Claims in this class should therefore proceed in the High Court. Difficult questions, both of domestic law and Community law, may arise about the time limits applicable to High Court claims of this character. Some of these questions were explored recently by the Court of Appeal in ***133** Deutsche Morgan Grenfell Group plc v Inland Revenue Comrs [2006] 2 WLR 103 . Those are not matters arising on these appeals.

42 I add one caveat. The revenue and the appeal commissioners have power to extend time limits for late amendments and late appeals. Before proceeding with their High Court claims claimant companies in this class of cases should therefore take the simple step of inviting the revenue or the appeal commissioners to extend the time limits appropriately. If this invitation is accepted, the claimants should proceed along the statutory route. If the invitation is declined, or if the revenue and the appeal commissioners have no power to grant the necessary extensions, the way will be clear for the High Court proceedings to continue.

43 I recognise there may be instances where a claimant company has claims in both the classes I have described. In respect of some accounting periods a company may have made a group relief claim or still be in a position to make such a claim, in respect of more distant accounting periods it may now be too late for the company to put forward such a claim. The need for one company to pursue proceedings before the appeal commissioners and separately and additionally in the High Court is unfortunate. But this possibility is inherent in the distinction between the two classes of case: the distinction between obtaining the tax relief to which the claimant is entitled and obtaining damages for unlawful failure to make such relief available. Unless the circumstances are exceptional, having claims in both classes is not a sufficient reason for a company declining to make a group relief claim in respect of accounting periods where this can still be done.

Conclusion

44 I would therefore allow these appeals. The parties' arguments have been much more fully developed before the House than was possible in the limited time available in the Court of Appeal. I would set aside the orders of the Court of Appeal. The cases falling within the first class described above ("claimant companies which can still obtain group relief") should be stayed. They should be stayed until further order rather than struck out the more readily to accommodate any unforeseen turn of events. And the stay should not preclude the court referring questions to the European Court if practical convenience so dictates. The cases in the second class ("claimant companies which cannot now obtain group relief") should proceed in the High Court. These six test cases should be remitted to the Chancery Division to give effect to the judgment of the House.

45 Mr Aaronson formulated a question he submitted should be referred to the European Court in the event of the House being minded to allow these procedural appeals. In my view, on this procedural issue there is no question which calls for a reference. The applicable principles of Community law are clear. The differences between your Lordships arise from the application of these principles in the particular circumstances of these cases.

46 The loss relief group litigation order includes cases where it is said that the statutory group relief provisions regarding residence offend the non-discrimination articles in double taxation conventions entered into between the United Kingdom and other states. In most of these cases this discrimination claim is coupled with claims for breach of Community law. In a handful of cases the discrimination claim is the sole issue. None of these ***134** cases was the subject of separate argument. It is common ground that on the jurisdictional point now in issue the outcome, so far as domestic law is concerned, should be the same as in the other cases comprised in this group litigation order. Having regard to the conclusion I have reached it is not necessary to deal separately with these double taxation cases.

LORD STEYN

47 My Lords, I have had the advantage of reading the opinion of my noble and learned friend, Lord Nicholls of Birkenhead. I agree with it. I would also make the order which Lord Nicholls proposes.

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LORD HOPE OF CRAIGHEAD

48 My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Walker of Gestingthorpe, in which he has so carefully and fully set out the background to this appeal. I agree with his analysis, and for the reasons that he gives I would dismiss the appeal.

49 This is a dispute about jurisdiction. The respondents are seeking relief in the High Court in respect of corporation tax which they say was wrongly paid because of the unlawful restriction of group relief to UK resident companies. This is said to have been unlawful in the case of some of the respondents because it was contrary to article 43 EC, which prohibits restrictions on the freedom of establishment, and article 56 EC, which prohibits restrictions on the movements of capital and on payments between member states of the EU. In other cases it is said to have been unlawful because of prohibitions on discrimination contained in double taxation agreements between the United Kingdom and other countries outside the EU. As Lord Walker has explained, their claims fall into four distinct categories. The jurisdictional dispute relates only to claims for relief which fall within the first category, where a UK company is said to have sustained loss of profits which should have been relieved by the losses of a non-UK resident company. It is conceded that claims falling within the other three categories are outside the jurisdiction of the special commissioners.

50 Claims which fall within the first category are presented in the statements of claim as claims for restitution at common law on the ground of unjust enrichment. The argument is that the public purse has been unjustly enriched at the expense of these taxpayer companies. This was because they paid more corporation tax than they should have done, as the legislation that was in force for group relief in the United Kingdom did not accord treatment to subsidiaries in other states which was equivalent to that given to subsidiaries resident or carrying on trade in the United Kingdom through a branch or agency. They are not, on this presentation of the claim, seeking repayment of corporation tax. They are seeking payment of an amount of money that will reimburse them, by way or restitution or damages, for the amount of corporation tax that they wrongly paid to the revenue.

51 There is no doubt that the High Court has jurisdiction to entertain restitutionary claims presented to it under the common law principle of unjust enrichment. The revenue say nevertheless that the High Court does not have jurisdiction to hear these claims and that in any event, if it does have jurisdiction, it should decline to exercise it. They contend that these are in essence claims about the amount of group relief and that they should be brought under the statutory procedure for the determination of disputes ***135** about tax. They say that the claims should be made by the appropriate company to the appropriate inspector of taxes and, if they are disallowed, the decisions should then be appealed to the special commissioners.

52 In my opinion there would be no room for argument if the claims that the respondents were seeking to make fell fairly and squarely within the statutory code which Parliament has laid down for group relief in paragraphs 66 to 77 of Schedule 18 to the Finance Act 1998. The current legislation lacks the clear and unequivocal declaration that was contained in section 5(6) of the Taxes Management Act 1964 and re-enacted in section 29(6) of the Taxes Management Act 1970, that after the notice of assessment has been served the assessment shall not be altered except in accordance with the express provisions of the Taxes Acts. The only place where these words are now to be found is in paragraph 47(2) of Schedule 18. There is no equivalent provision in the group of paragraphs dealing with group relief in that Schedule. Mr Aaronson for the respondents submitted that, as the overriding declaration was no longer present, dicta by Lord Wilberforce and Lord Diplock in In re Vandervell's Trusts [1971] AC 912, 939 and 944, that the power to alter an assessment once it has been made is conferred to the exclusion of any court of law on the special commissioners are no longer strictly applicable. In my opinion however the plain inference that the statutory code gives rise to is that it is the statutory procedure only that may be used where issues are raised as to the correctness of an assessment.

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53 Had these claims involved the amendment or alteration of assessments, therefore, I would have thought that there was no answer to the revenue's argument that they ought to have been made under the statutory procedure and that the High Court has no jurisdiction to deal with them.

54 The crucial point which emerged from Mr Aaronson's argument however and was at no point, as it seemed to me, effectively answered by Dr Plender for the revenue is that these claims are made at common law and not with a view to obtaining any statutory remedy. They do not require any amendment or alteration of the assessments that were made under the relevant paragraphs of Schedule 18 to the Finance Act 1998 . The whole point of these claims is that the relevant paragraphs did not provide for the group relief that, under Community law and the double taxation agreements, ought to have been available. The statutory procedure for the obtaining of group relief, which would have been subject to appeal to the special commissioners had it applied, was not available in the case of any of the claims falling within the first category.

55 It would perhaps be possible—this has yet to be tested—for the statutory code to be construed in a way that conformed with the United Kingdom's obligations under the EC Treaty and the double taxation agreements: Pickstone v Freemans plc [1989] AC 66 ; Litster v Forth Dry Dock & Engineering Co Ltd [1990] 1 AC 546 ; Imperial Chemical Industries plc v Colmer (No 2) [1999] 1 WLR 2035 . But Community law provides that the appellants are entitled to an effective remedy, and they are not to be forced to go down that route if to do so would be impossible or excessively difficult: Metallgesellschaft Ltd v Inland Revenue Comrs; Hoechst AG v Inland Revenue Comrs (Joined Cases C-397 and 410/98) [2001] Ch 620 , para 106. The fact that the strict rules which the code lays down were not ***136** designed for this exercise suggests strongly that the appellants are entitled to seek relief instead by way of the common law remedy.

56 That is the context in which the appellants seek an effective remedy at common law to obtain reimbursement of or compensation for the loss which they say they have sustained and from which the state has unjustly benefited. The amount of the appellants' loss due to the state's unjust enrichment cannot, of course, be established without re-examining the assessments. There will have to be set against the tax paid the amount of the group relief in respect of losses sustained by the non-resident subsidiaries that would have been available had the legislation made provision for it. This is an exercise in quantification that will have to be done. But it does not follow that the issuing of fresh assessments will be necessary.

57 It is in this context that the following observations in Lord Wilberforce's speech in Vandervell's case [1971] AC 912 , 939 become relevant:

"There may be questions, in form suitable for decision by the court, which are in fact so close to the question of the assessment itself that the court ought not to entertain them but leave them to the statutory procedure. And nothing that I have said must be taken to imply that either the Crown, or the taxpayer, may not be entitled to insist that a particular question, as between them, be so decided. But I find nothing in the income tax legislation to justify the comprehensive proposition for which the appellants must contend, namely, that the High Court is absolutely excluded from a vast range of issues of a kind normally justiciable by it, just because those questions arose between taxpayer and Crown and form a basis, even a necessary basis, for an income tax assessment."

58 In my opinion there is no doubt that the common law unjust enrichment claim which the appellants seek to make is of a kind normally justiciable by the High Court. The reissuing of an assessment is not a necessary part of it, because the court's order will do all that is needed to provide the appellants with their remedy once the amount of the loss has been quantified. On these short and simple grounds I would, in agreement with the Court of Appeal, reject the revenue's argument that the High Court has no jurisdiction to deal with it.

59 My noble and learned friend, Lord Nicholls of Birkenhead, sees the appellants' claims as falling into two broad classes: one where it is still open to the UK company to obtain in full the group relief to which it claims to be entitled, the other where it is not because

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the claim is outside the prescribed time limits. For the reasons which I have given, I am unable to agree with him that the appellants must follow the statutory route with regard to claims falling within the first class. But I agree with his conclusion that the appellants' remedy with regard to claims falling within the other class lies in pursuing proceedings for relief in the High Court. My grounds for taking this view differ from his. But I would be content to make the same order that he proposes with regard to them on the alternative basis that, for the reasons that he has given, these claims are outside the statutory jurisdiction of the special commissioners.

60 I cannot part with case without noting that the hearing of this appeal took place on the eve of the 200th anniversary of the creation of the special ***137** commissioners by William Pitt the Younger on 5 June 1805. The history of this most distinguished body has been traced by Dr J F Avery Jones in two articles which he has contributed to a special issue of the British Tax Review marking the bi-centenary: "The Special Commissioners from Trafalgar to Waterloo" [2005] BTR 40 and "The Special Commissioners after 1842: from Administrative to Judicial Tribunal" [2005] BTR 80. The very high standing which the special commissioners have earned for themselves and their ability to deal with cases of the greatest complexity is not in issue here. The answer to the issue of jurisdiction does not depend on an assessment of the relative skills of the special commissioners on the one hand or of the judges of the High Court on the other. So I mean no disrespect to the special commissioners when I say that in my opinion all these claims belong to the High Court and not to them.

LORD MILLETT

61 My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Nicholls of Birkenhead, with which I am in complete and respectful agreement. I had prepared a short speech of my own which reached the same conclusion; but in the light of the masterly analysis of Lord Nicholls I consider that no useful purpose would be served by delivering it.

62 It is sufficient to say that three propositions are well established. First, it is for the legal system of each member state to identify the court or tribunal which has jurisdiction to determine disputes involving individual rights derived from Community law, provided that full effect is given to such rights; secondly, in the United Kingdom the computation of a taxpayer's taxable profits for the purpose of determining his liability to tax is within the exclusive jurisdiction of the commissioners; and thirdly, owing to the primacy and direct effect of Community law, the commissioners, in exercising their jurisdiction, are not only entitled but bound to give effect to Community law, disregarding any provisions of domestic law which are inconsistent with it or which make it impossible or excessively difficult to apply. Accordingly, where it is still possible for a claim to group relief to be made, waiving or extending time limits and other conditions or requirements where necessary, the taxpayer must have recourse to the statutory machinery and not to the courts. Only where this is no longer possible, (for example where the commissioners or the revenue are unable to extend a time limit or refuse to exercise a power to do so or where the relevant assessment has become final and conclusive so that the commissioners have no jurisdiction to reopen it), may the taxpayer bring proceedings of the kind contemplated in the High Court.

63 It is impossible to foresee all eventualities, and I agree with Lord Nicholls that the proceedings in the High Court in respect of claims which should have been brought before the commissioners should be stayed and not struck out. This would have two advantages. It should encourage the revenue to cooperate in waiving or extending time limits and removing procedural and other obstacles to the commissioners' jurisdiction; and it would enable the High Court claims to be revived in the event of unforeseen difficulties arising before the commissioners which cannot be overcome. ***138**

LORD WALKER OF GESTINGTHORPE

Introduction

64 My Lords, this appeal could be described as being concerned with a purely procedural question: whether numerous sets of proceedings which have been commenced by numerous companies in the Chancery Division of the High Court, and which have been made subject to a group litigation order ("GLO")

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should continue on their course in the High Court; or whether some of the claims made in the proceedings (that is, those in respect of overpaid corporation tax) should be struck out on the ground that they can be heard and decided only by the special commissioners. Even if it is right to describe this as a purely procedural question, it is one which raises important issues of principle; the sums at stake are very large indeed; and the lower courts have taken sharply different views on the question.

65 All the companies concerned in the litigation are members of groups of companies, and all the groups have the common feature (although presented in various structural permutations) that at least one company in the group is resident in the United Kingdom, and at least one is resident in another member state of the European Union ("EU"). The United Kingdom tax code makes available to groups of companies various types of group relief, as a sort of practical mitigation of the strict theory of the separate juristic personality of each company in the group. One of the most important of these reliefs is group loss relief. But that relief is, on the face of the legislation, restricted to companies resident in the United Kingdom (or non-resident but trading in the United Kingdom through a branch or agency).

66 For many years this restriction was accepted at its face value by groups of companies which were predominantly resident in the United Kingdom, but had one or more subsidiaries trading in EU countries. But about ten years ago corporate tax advisers started to consider whether the restrictions infringed a basic principle of EU law, embodied in article 43 of the Treaty, which prohibits restrictions on freedom of establishment. The ground was broken (although the taxpayer company was ultimately unsuccessful) in Imperial Chemical Industries plc v Colmer (Case C-264/96), a case concerned with consortium relief. This House's reference of the matter to the Court of Justice of the European Communities ("ECJ") is reported [1996] 1 WLR 469; the judgment of the ECJ [1999] 1 WLR 108; and this House's disposal of the matter [1999] 1 WLR 2035.

67 More closely in point, and still unresolved, is Marks & Spencer plc v Halsey [2003] STC (SCD) 70, in which group loss relief claims for years ending 31 March 1998, 1999, 2000 and 2001 were made in respect of that company's French, Belgian and German subsidiaries. The claims came before the special commissioners at the end of 2002, and were rejected (see [2003] STC (SCD) 70). The special commissioners held that the United Kingdom rule restricting group relief by reference to residents did not constitute either a discriminatory or a non-discriminatory restriction on freedom of establishment, and they regarded the matter as acte clair. On appeal Park J made a reference to the ECJ. Advocate General Maduro delivered his opinion on 7 April 2005, and it has since been subjected to a great deal of detailed and anxious scrutiny. Since your Lordships are not concerned with the substance of the matter, and since the ECJ has yet to give ***139** judgment, it is sufficient to say that the opinion of the Advocate General gives some comfort to each side, and clear victory to neither.

68 That is the background to the present flood of High Court litigation concerned with the lawfulness, under EU law, of various territorial restrictions on different types of group relief. The GLO to which this appeal relates is by no means the only GLO which has been made in order to stem and channel the flood. But the claims raised in the proceedings subject to this GLO are the first in which the revenue has raised any significant procedural objection. Park J (who has the heavy responsibility of managing almost all these GLOs) acceded to the revenue's objection. But the Court of Appeal took a different view. The revenue now appeals to your Lordships' House.

69 That is a brief sketch of what this appeal is about. It is now necessary to go into the different strands of the problem more systematically and in more detail.

Domestic tax law: group relief

70 Group relief of various types has been a feature of United Kingdom corporation tax law since 1973. The most important provisions are in Part X Chapter IV of the Income and Corporation Taxes Act 1988 ("ICTA"). Section 402 (as amended by the Finance Act 2000 and as explained by the interpretation

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provisions in section 413) lays down the framework of the reliefs:

"402(2) Group relief shall be available in a case where the surrendering company and the claimant company are both members of the same group."

"413(3) For the purposes of this Chapter—(a) two companies shall be deemed to be members of a group of companies if one is the 75% subsidiary of the other or both are 75% subsidiaries of a third company ..."

"413(5) References in this Chapter to a company apply only to bodies corporate resident in the United Kingdom; and in determining for the purposes of this Chapter whether one company is a 75% subsidiary of another, the other company shall be treated as not being the owner ... (c) of any share capital which it owns directly or indirectly in a body corporate not resident in the United Kingdom."

"402(3A) [taking effect for accounting periods ending after 31 March 2000] Group relief is not available unless the following condition is satisfied in the case of both the surrendering company and the claimant company.

"(3B) The condition is that the company is resident in the United Kingdom or is a non-resident company carrying on a trade in the United Kingdom through a branch or agency."

71 Park J (who has exceptional knowledge and experience in this field) summarised the effect of these provisions [2004] STC 594, 598, para 8:

"The points which matter for the purposes of this judgment are the requirements in section 413(5) that the companies must be resident in the United Kingdom, and, from 2000 onwards, the similar residence requirements of section 402(3B). They mean that, if they take effect ***140** according to their terms, group relief is only available if the surrendering and claimant companies are resident in the United Kingdom and are both members of a group which has a United Kingdom parent (which can, however, itself be a subsidiary of a non-United Kingdom parent). An exceptional case, introduced in 2000, is that group relief is available to or from the United Kingdom branch of a non-resident company."

72 The judge then gave three examples of the restrictive effect of the residence requirement: a United Kingdom parent company with one United Kingdom subsidiary (both profitable) and one loss-making French subsidiary; a loss-making French parent company with a profitable United Kingdom subsidiary; and a non-resident parent company with two United Kingdom subsidiaries, one profitable and one loss-making. He added that these were very simple examples, at para 9:

"In the practical reality of many large multi-national groups more complicated structures are likely to arise, particularly so if one introduces the possibility of consortium companies. The revenue and the professional advisers of the participants in the GLO have identified many variants on the basic patterns, and most of them are exemplified in one way or another by the six groups which have been identified as potential test cases for this GLO ."

73 The different categories of group structure have been designated (in the GLO relevant to this appeal) as classes 1, 1A, 1B, 1C, 2, 3, 3A, 4, 4A and 5. The House was told that more categories may be identified as more companies come in under the GLO . But to avoid confusion it should be noted that the six lead groups have been selected, not by reference to the different categories of group structure, but by reference to their participation or non-participation (and for the participants, by their state of progress) in what might be called conventional tax proceedings (that is, proceedings starting with an appeal heard by the special commissioners). That is the next strand of the matter which I must address.

Domestic tax law: jurisdiction and procedure

74 In Barraclough v Brown [1897] AC 615 this House stated and applied a general principle which has important consequences in many different fields of law, including tax law. Section 47 of the Aire and Calder Navi-

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gation Act 1889 (52 & 53 Vict c xxxii) gave statutory undertakers who had incurred expenditure in removing a sunken vessel a right "to recover such expenses from the owner of such vessel in a court of summary jurisdiction". This House affirmed the decisions of the lower courts that the expenses were not recoverable in an action the High Court. Lord Watson said, at p 622:

"By these words the legislature has, in my opinion, committed to the summary court exclusive jurisdiction, not merely to assess the amount of expenses to be repaid to the undertaker, but to determine by whom the amount is payable; and has therefore, by plain implication, enacted that no other court has any authority to entertain or decide these matters."

75 Lord Watson added, in relation to the suggestion that the High Court could at least have made a declaration of liability, also at p 622:
***141**

"It is possible that your Lordships might accede to such a suggestion, if it were necessary, in order to do justice. But apart from the circumstance that such a declaration would not be in accordance with law, the substance of it is one of those matters exclusively committed to the jurisdiction of the summary court." The rest of the House either agreed, or expressed similar views.

76 This principle has often been applied when taxpayers who are in dispute (or anticipate being in dispute) with the revenue seek to ventilate the matter by initiating proceedings in the High Court, rather than by pursuing the conventional path of an appeal (against an assessment or the refusal of a claim) to the general or special commissioners. For example in Argosam Finance Co Ltd v Oxby [1965] Ch 390, a share-dealing company issued an originating summons in the Chancery Division seeking a declaration as to the correct method of computing its income for the purposes of loss relief. The revenue challenged the proceedings as an abuse of process. The Court of Appeal, affirming Plowman J, struck out the proceedings as an abuse of process. Lord Denning MR said, at p 423:

"If the summons had been limited to question (a)—that is, to determine whether the company was entitled to relief under section 341 [of the Income Tax Act 1952] —I would agree that the courts would have no jurisdiction to determine it. The question is one which is entrusted by the legislature to the exclusive province of the commissioners, and the courts cannot entertain it. It falls within the decision of the House of Lords in Barraclough v Brown." The position was made no better by the inclusion in the originating summons of question (b), which was a hypothetical "Will-o-the-wisp" (see Harman LJ, at pp 424-425) except so far as it followed on from the objectionable question (a).

77 Barraclough v Brown [1897] AC 615 was also cited and referred to in this House in In re Vandervell's Trusts [1971] AC 912. That was the second occasion on which this House had to consider different aspects of the complicated, expensive and regrettable litigation set in train by Mr Vandervell's flawed attempt to make a tax-efficient gift to the Royal College of Surgeons. I need not go into the facts beyond noting that it was (as Lord Wilberforce accepted at pp 936-937) an exceptional case, in which the real issue was (as Lord Reid observed at p 928) not jurisdiction but res judicata. Although the decision was unanimous, the House showed some divergence in reasoning. But subject to those caveats I find it helpful to see what Lord Wilberforce said about Barraclough v Brown. He quoted from the speech of Lord Herschell [1897] AC 615, 620:

"I do not think the appellant can claim to recover by virtue of the statute, and at the same time insist upon doing so by means other than those prescribed by the statute which alone confers the right." Lord Wilberforce commented on this [1971] AC 912, 939:

"The limits of this decision are obvious from these words. In order to compare (in fact to contrast) the situation under the Income Tax Acts, it is necessary to see precisely what it is that under that legislation has been made the subject of the statutory procedure. This is the validity and ***142** quantum of the assessment to tax which has been made upon the subject. It is this which, when made, is the subject of appeal to the special

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commissioners under section 52 (5) of the Income Tax Act 1952 and section 12 (5) of the Income Tax Management Act 1964 ; it is the assessment which cannot be altered except in accordance with the Income Tax Acts (Income Tax Management Act 1964, section 5) and which ultimately becomes final and conclusive. All this is undoubted and, if necessary, the authority of Barraclough v Brown could be invoked to show that the High Court cannot interfere with assessments." Lord Wilberforce went on to express doubt whether the principle was wider than that.

78 At this point it is appropriate to say something about the status and functions of the general commissioners and the special commissioners (the familiar abbreviations of their full titles, the commissioners for the General Purposes of the Income Tax and the Commissioners for the Special Purposes of the Income Tax Acts). They are venerable institutions whose history has been well documented (see for instance H H Monroe's 1981 Hamlyn Lectures, "Intolerable Inquisition? Reflections on the Law of Tax" and two recent articles by Dr John Avery Jones, "The Special Commissioners from Trafalgar to Waterloo" [2005] BTR 40 and "The Special Commissioners after 1842: from Administrative to Judicial Tribunal" [2005] BTR 80). The general commissioners have been described as the lay magistracy of the tax world (and as with lay magistrates their future is uncertain). They sit in regional divisions throughout the United Kingdom. The special commissioners, by contrast, are the equivalent of an elite cadre of legally qualified and highly experienced stipendiary magistrates, dealing with particularly demanding tax matters. The status and functions of the general commissioners and the special commissioners are now provided for in Part I of the Taxes Management Act 1970 . Section 4(5) provides, "By virtue of their appointment the special commissioners shall have authority to execute such powers, and to perform such duties, as are assigned to them by any enactment." Their powers are therefore wholly statutory. A list of their principal functions can be found in Simon's Direct Tax Service, vol 2, para A 2.516. The special commissioners are not a court of record, or indeed a court of any sort, but a statutory tribunal subject to the oversight of the Council on Tribunals.

79 The Special Commissioners (Jurisdiction and Procedure) Regulations 1994 (SI 1994/1811) (made under powers conferred by the Taxes Management Act 1970), provide for procedure before the special commissioners. Their express case-management powers are limited. They have power (regulation 7) to order proceedings raising a common issue to be heard either together or consecutively, but their only express power to designate lead cases (regulation 7A) (as inserted by the General Commissioners and Special Commissioners (Jurisdiction and Procedure) (Amendment) Regulations 2002 (SI 2002/2976), regulation 5) applies only to certain social security matters. They have only a very limited power (regulation 25) to make orders for costs. In arguing that the High Court is the appropriate forum for their claims the respondents rely on the special commissioners' very limited powers of case-management, their very limited powers to make orders as to costs, and the absence of any power for them to ***143** award interest (repayment supplement, which the respondents regard as inadequate compensation, being a matter of statutory machinery and not something ordered by the special commissioners).

80 In arguments about the exclusive jurisdiction of the special commissioners under the principle in Barraclough v Brown [1897] AC 615 much emphasis is often placed on the almost ritual significance, in the history of tax law, of the assessment made by a revenue official, originally called a surveyor, and later an inspector of taxes. This is reflected, for instance, in the passage from the speech of Lord Wilberforce in Vandervell's case [1971] AC 912 , 939 which I have already quoted. Similarly, Lord Diplock said, at p 940:

> " Section 5(6) of the Income Tax Management Act 1964 provides that after notice of assessment has been served 'the assessment shall not be altered except in accordance with the express provisions of the Income Tax Acts.' The only way in which an assessment can be altered under the provisions of the Income Tax Acts is by the special commissioners on an appeal to them by the

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party assessed."

81 It is not easy to see how far this hallowed principle still has the same force in the current tax system, which differs in very many respects from the system in force before 1965 (the period with which Vandervell's case was concerned). 1965 was a watershed year as under the Finance Act 1965, companies became subject to an entirely new tax, corporation tax, instead of being subject to income tax in much the same way as individuals. Since 1965 corporation tax has become much more complicated and has diverged further and further away from income tax, both in its substantive provisions and in the provisions for assessment and collection. Moreover, the assessment of both income tax and corporation tax has been put on a new basis, that is self-assessment, which is provided for (in relation to corporation tax) principally in Parts I to IV of Schedule 18 to the Finance Act 1998. It replaced the "pay and file" system which had operated from 1993. Schedule 18 operates for accounting periods ending on or after 30 June 1999 and has effect as if contained in the Taxes Management Act 1970 (the Finance Act 1998, section 117(2)). Part VIII of Schedule 18 contains new procedural provisions about group loss relief, and Part XI contains supplemental provisions.

82 Part II of Schedule 18 provides for companies to make company tax returns for an accounting period which must include (paragraph 7(1)):

"an assessment (a 'self-assessment') of the amount of tax which is payable by the company for that period—(a) on the basis of the information contained in the return, and (b) taking into account any relief or allowance for which a claim is included in the return or which is required to be given in relation to that accounting period." Paragraph 8 prescribes how the tax payable is to be calculated. Most claims (including claims for group relief) can be made only by inclusion in a company tax return (paragraph 10). Part III imposes statutory duties to keep and preserve records. Part IV (enquiry into company tax return) is the closest equivalent to the old system of assessment by an inspector of taxes. The revenue may by notice to a company amend its self-assessment in order to make good a perceived deficiency in the amount of tax shown as due ***144** under a self-assessment (paragraph 30). The company has a right of appeal (paragraph 30(3)-(5)). Such an appeal lies to the general or special commissioners (paragraphs 93 and 94 in Part XI).

83 The provisions of Part VIII of Schedule 18 (claims for group relief) are detailed and, in some respects, inflexible. A claim for group relief must quantify the amount of relief claimed (paragraph 68). If the amount claimed proves to be excessive the claim is wholly ineffective (paragraph 69(2)). The first prescribed step in the computation of the relief assumes that the surrendering company makes a company tax return showing its income computed in accordance with United Kingdom tax law (paragraph 69(3)). Overseas companies which do not trade in the United Kingdom would not prepare their accounts in this way, but your Lordships were shown copies of recent correspondence indicating that the revenue have been insisting on these requirements. The respondents say that for a non-resident surrendering company to comply with these procedural requirements would create difficulties which are not imaginary, hypothetical or trivial.

84 It is a curiosity that the only corporation tax provision closely corresponding to section 5(6) of the Income Tax Management Act 1964 (to which Lord Diplock attached importance) appears to be paragraph 47(2) in Part V of Schedule 18. Part V contains default provisions which apply if a company does not comply with the statutory self-assessment procedure. But other provisions in Parts I to IV and XI of Schedule 18, briefly summarised above, seem to produce much the same practical effect. I can discern no parliamentary intention to alter the general principle embodied in tax law before self-assessment, that any dispute with the revenue about an individual's liability to income tax or a company's liability to corporation tax is to be determined in the first instance by the general commissioners or the special commissioners.

85 There is another very significant change

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which has occurred since 1965: that is the extraordinary growth of judicial review. Tax lawyers were not in the forefront of this expansion but they have been catching up during the last two decades. Judicial review is available not only for procedural errors or unfairness on the part of the general or special commissioners but also to challenge the validity of secondary tax legislation, as in the case of Woolwich Equitable Building Society v Inland Revenue Comrs [1993] AC 70 . But judicial review in the High Court is not an appropriate remedy in cases where Parliament has provided a special appeal procedure for determining substantive questions as to tax liability.

GLOs

86 GLOs were introduced with effect from 2000 in implementation of one of Lord Woolf's proposals for procedural reform. They are provided for in Part III , rules 19.10 to 19.15 of the Civil Procedure Rules 1998 , as supplemented by the practice direction on group litigation. The key features and normal effect of any GLO are that it identifies the common issues which are a precondition for participation in a GLO ; it provides for the establishment and maintenance of a register of GLO claims; it gives the managing court wide powers of case management, including the selection of test claims and the appointment of a lead solicitor for the claimants or the defendants, as appropriate; it provides for judgments on test claims to be ***145** binding on the other parties on the group register; and it makes special provision for costs orders.

87 The GLO relevant to this appeal exhibits all these features. It was made on 23 May 2003 by the Chief Chancery Master. It has been amended several times. There are now a large and growing number of corporate groups on the group register (the revenue's printed case puts the total at 89 groups and the respondents' printed case puts the total number of companies involved at over 1,000).

88 Five of the six selected test claims were commenced (as Part 8 proceedings) on 23 or 24 December 2002. The revenue moved swiftly and issued striking-out applications on 30 January 2003. The timing and procedure in the BNP Paribas claim (and in other claims which have not been selected as test cases) were different but the details are unimportant. What is noteworthy is that the GLO was made under the shadow of strike-out applications which had already been made. The revenue cannot be accused of having been dilatory in launching its jurisdictional challenge to claims covered by the GLO . There was a reference to the challenge in para 24 of the GLO :

"This order disapplies the terms of CPR 1998, Part 11 , so that the defendants need not file or serve a Part 23 application with witness evidence in support where they indicate in an acknowledgment of service that they dispute the jurisdiction of the High Court to try the claim or where they contend that the High Court should decline jurisdiction to try the claim and the question of jurisdiction shall be dealt with as one of the issues in the litigation."

Community law: articles 43 and 56 and direct effect

89 Article 43 EC of the Treaty (formerly article 52) is in the following terms:

"Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a member state in the territory of another member state shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any member state established in the territory of any member state.

"Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of article 48, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital." This article has direct effect (Reyners v Belgian State (Case 2/74) [1974] ECR 631

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[1974] ECR 631) and it is therefore to be enforced by courts in the United Kingdom as an "enforceable Community right" within the meaning of section 2 (1) of the European Communities Act 1972 .

90 Article 56 EC of the Treaty (formerly article 73(b)) is in the following terms: ***146**

"(1) Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between member states and between member states and third countries shall be prohibited.

"(2) Within the framework of the provisions set out in this Chapter, all restrictions on payments between member states and between member states and third countries shall be prohibited." Thus the reach of article 56 EC extends beyond transfers between states which are members of the EU. It can also apply to a transfer between the United Kingdom and (say) the United States (though it is, in both applications, subject to a number of qualifications which it is unnecessary to explore here).Article 56 also has direct effect (Criminal proceedings against Sanz de Lera [1995] (Joined Cases C-163/94, 165/94 and 250/94) [1995] ECR I-4821 , 4841-4843, paras 40-48, a case concerned with exporting bank notes from Spain to Switzerland).

Community law: the principle of effectiveness

91 In their written and oral submissions the respondents have relied on three general principles of EU law: the principle of effectiveness, the principle of equivalence and the principle of certainty. It is on the principle of effectiveness that the argument has centred. This principle is derived from article 5 (formerly 10) of the Treaty, which imposes on national courts the duty of ensuring the legal protection which individuals derive from EU law. There is a measure of agreement about the general principle, but sharp disagreement as to its practical implications and its application in this case.

92 The general principle has been stated many times by the ECJ. One of the most recent statements is in Köbler v Republik Österreich (Case C-224/01) [2004] QB 848 , 903, paras 46 and 47:

"According to settled case law, in the absence of Community legislation, it is for the internal legal order of each member state to designate the competent courts and lay down the detailed procedural rules for legal proceedings intended fully to safeguard the rights which individuals derive from Community law: see Rewe-Zentralfinanz eG v Landwirtschaftskammer für das Saarland (Case 33/76) [1976] ECR 1989 , 1997-1998, para 5; Comet BV v Produktschaap voor Siergewassen (Case 45/76) [1976] ECR 2043 , 2053, para 13; Hans Just I/S v Danish Ministry for Fiscal Affairs (Case 68/79) [1980] ECR 501 , 522-523, para 25; Francovich v Italian Republic (Joined Cases C-6/90 and C-9/90) [1995] ICR 722 , 772, para 42, and Peterbroeck, Van Campenhout & Cie SCS v Belgian State (Case C-312/93) [1995] ECR I- 4599 , 4620-4621, para 12.

"Subject to the reservation that it is for the member states to ensure in each case that those rights are effectively protected, it is not for the Court of Justice to become involved in resolving questions of jurisdiction to which the classification of certain legal situations based on Community law may give rise in the national judicial system: judgments in SEIM-Sociedade de Exportaçao e Importaçao de Materiais, Lda v Subdirector-Geral das Alfandegas (Case C-446/93) [1996] ECR I-73 , 110, para 32 and Dorsch Consult Ingenieurgesellschaft mbH v Bundesbaugesellschaft Berlin mbH (Case C-54/96) [1997] ECR I-4961 , 4996, para 40." ***147**

In the same case Advocate General Leger referred (in passages strongly relied on by Mr Aaronson for the respondents) to the utmost importance of "the direct, immediate and effective protection of the rights which individuals derive from Community law" (p 866, para 52; see also pp 862 and 868, paras 39 and 57-58).

93 The ECJ has, no doubt for good reasons, been reluctant to interfere more than necessary in domestic rules as to the jurisdiction and procedure of

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national courts, and the remedies which they can grant. In an early case, Rewe-Handelsgesellschaft Nord mbH v Hauptzollamt Kiel (Case 158/80) [1981] ECR 1805 , para 44, the ECJ stated that, "it was not intended to create new remedies in the national courts to ensure the observance of Community law other than those already laid down by national law." Since then it has become apparent that national courts may have to alter their procedure and remedies, and even their jurisdiction, in order to meet the demands of the principle of effectiveness. The process has been described by Takis Tridimas, The General Principles of EC Law (1999), pp 278-279:

"More recent cases, however, show that the case law has made significant inroads in the area of remedies so much so that the statement that the Treaty was not intended to provide new remedies is no longer valid. Gradually, the case law has transformed the principle of primacy from a general principle of constitutional law to a specific obligation on national courts to provide full and effective protection of Community rights. The seminal judgment in Simmenthal marked the first step in that direction. The question arose whether a national court could disregard a national law which had been held by the court to be incompatible with Community law or whether it should follow the procedure provided for by the Italian Constitution and refer that law to the Italian Constitutional Court which under the Constitution was the only competent body to rule on the validity of national law ... Procedural protection was further extended in Factortame . The culmination of this trend in the case law has been the establishment of member state liability in damages."

94 The areas in which national courts may have to adapt their rules include limitation periods and other time limits, monetary limits to awards of compensation, interest and costs, and rules of evidence. Time limits have been a controversial area in which some difficult distinctions have been drawn: contrast Emmott v Minister for Social Welfare (Case C-208/90) [1993] ICR 8 and Steenhorst-Neerings v Bestuur van de Bedrijfsvereniging voor Detailhandel Ambachten en Huisvrouwen (Case C-338/91) [1993] ECR I-5475 . National restrictions on monetary compensation may have to be disregarded even by a tribunal which has limited statutory powers: see the judgment of the ECJ in Marshall v Southampton and South West Hampshire Health Authority (Teaching) (No 2) (Case C-271/91) [1994] QB 126 (the final order by this House is reported [1994] AC 530). In Amministrazione delle Finanze dello Stato v SpA San Giorgio (Case No 199/82) [1983] ECR 3595 , a rule of Italian law creating a presumption as to the defence of passing-on was held unlawful on the ground that, though not discriminatory, it made it practically impossible for the claimant to obtain restitution. ***148**

95 The correct general approach to these issues has been described by the ECJ in Peterbroeck, Van Campenhout & Cie SCS v Belgian State (Case C-312/93) [1995] ECR I-4599 , 4621, para 14:

"For the purposes of applying those principles, each case which raises the question whether a national procedural provision renders application of Community law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. In the light of that analysis the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure, must, where appropriate, be taken into consideration." That guidance is expressed in such general terms as to give only meagre assistance. There is further guidance on the principles in the opinion of Advocate General Jacobs in that case, at pp 4610-4612, paras 40 and 43. The Advocate General observed:

"The case law of the court in this area establishes a balance between, on the one hand, the need to respect that autonomy [of national courts] and, on the other hand, the need to ensure the effective protection of Community rights in the national courts. That is true both of the case law on the subject of time limits which I have set out above and of the decisions in Simmenthal and Factortame which are mentioned in the order for reference and are relied on

by Peterbroeck, and which illustrate the court's concern for the effective protection of Community rights." He considered the cases of Simmenthal [1978] ECR 629 and R v Secretary of State for Transport, Ex p Factortame (No 2) (Case C-213/89) [1991] 1 AC 603 , and continued [1995] ECR I-4599, 4611, para 43:

"The decisions in Simmenthal and Factortame were necessary to ensure that the court seised was not precluded from giving effect to the Community rights claimed in the respective national proceedings. The decisions demonstrate the way in which Community law can have an impact—indeed a remarkable impact—on national procedures. But it will be noted that in both cases the effect of Community law was to exclude a national rule which would have made the judicial protection of Community rights by the court seised wholly impossible."

96 These issues were also raised in Metallgesellschaft Ltd v Inland Revenue Comrs ; Hoechst AG v Inland Revenue Comrs (Joined Cases C-397 and 410/98) [2001] Ch 620 but since the significance of that case is controversial, and has been the subject of extended argument in this appeal, it is better to defer discussion of Hoechst until a later stage.

Double taxation treaties

97 Some but not all of the test cases selected under the GLO include claims founded on an alleged breach of the general non-discrimination article (based on the OECD model) which is included in many double taxation treaties. This appears as article 24 of the United Kingdom-United States of America Double Taxation Convention of 1975 (relevant to the ***149** Perkins and Heinz cases) and as article 25 of the United Kingdom-France Double Taxation Convention of 1968 (relevant to the BNP Paribas case).

98 The standard form of the article is as follows:

"(5) Enterprises of a contracting state, the capital of which is wholly or partly owned or controlled, directly or indirectly, by one or more residents of the other contracting state, shall not be subjected in the first-mentioned contracting state to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which other similar enterprises of that first-mentioned state are or may be subjected." Its effect in connection with another type of group relief has recently been considered by Park J in NEC Semi-Conductors Ltd v Inland Revenue Comrs [2004] STC 489 . Your Lordships were told that an appeal from that decision is to be heard by the Court of Appeal this month. The main area of controversy is as to the appropriate comparator for the purpose of the comparison called for by the non-discrimination article.

99 Double taxation treaties do not have direct effect. They need to be imported into domestic tax law by express enactment. In relation to income tax and corporation tax this is achieved by section 788(3) of the ICTA , which provides:

"Subject to the provisions of this Part, the arrangements [specified in an Order in Council relating to double taxation] shall, notwithstanding anything in any enactment, have effect in relation to income tax and corporation tax insofar as they provide—(a) for relief from income tax, or from corporation tax in respect of income or chargeable gains ..."

100 The alternative claims based on the non-discrimination article are a peripheral issue in this appeal (indeed they were not mentioned at all in the judgments in the Court of Appeal). That is because, as is stated in para 101 of the respondents' printed case, in every case the claim in respect of a breach of the non-discrimination article is coupled with a parallel claim under the provisions of article 56 EC. However, during the revenue's oral submissions your Lordships were told that of 306 appeals about group loss relief now pending before the special commissioners, there are six in which the non-discrimination article is the sole issue. Dr Plender (for the revenue) realistically acknowledged the convenience of having the double taxation treaty claims heard at the same time, and in the same forum,

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as the claims based on articles 43 and 56 . Mr Aaronson appeared to accept that when the issue of substance finally comes to be decided none of his clients is likely to win on the double taxation treaty point if it loses on the EU points.

The companies' claims

101 The claims of the claimants in the six test cases are set out in similar form in their respective Part 8 claim forms. The claims are not however identical. I have already mentioned that some but not all include claims based on non-discrimination articles in double taxation treaties. Another and much more important difference is in the type of loss which is said to have been occasioned by the alleged breaches of articles 43 and 56 (and other articles which are put into the pleading for good measure).***150**

102 There are four different types of loss said to have been sustained as a result of the alleged breaches. Park J [2004] STC 594, 600, para 14, quoted the description in the skeleton argument for the companies (the claimants before him). It is convenient to repeat this, especially as much of the oral argument before your Lordships referred to claims in categories (i), (ii), (iii) and (iv):

"The claims by each of the test claimant groups are for at least two, and in some cases for all four, of the following. (i) For the profits of the UK profit-making company to be relieved by the losses of a non-UK resident company. It may be helpful to refer to this as 'basic group relief'. (ii) Because of the clear legislative requirement for all the relevant companies to be resident in the UK basic group relief was regarded in every case as not available. In many cases the profit-making companies used other reliefs (e g capital allowances or surplus ACT) which they would not have used had basic group relief been available. In these cases the profit-making companies claim restitution of the other reliefs, or, in the alternative, compensation for their use. It will be convenient to refer to this as 'the reclaim of utilised reliefs'. (iii) In many cases other UK members of the group surrendered their own reliefs to the UK profit-making company; and those companies are reclaiming the reliefs. It will be convenient to refer to this as 'the recovery of surrendered reliefs'. (iv) In all of the cases the companies which would have surrendered losses, if the group relief rules were not confined to UK resident companies, may have been paid for allowing their losses to be set-off against the profit-making companies' profits, and they seek compensation for the loss of these payments. It will be convenient to refer to this as 'the claim for payments'."

103 The way these claims have been pleaded can be illustrated by the pleading in the Autologic case. Para 8A of the statement in the claim form is a long and very elaborately subdivided paragraph particularising the claims for restitution and damages. Para 8A.1.4 claims damages under three heads as follows: (1) para 8A.1.4.1 "Amounts of corporation tax overpaid by [a UK subsidiary] 'the paying company' "—a category (i) or "basic group relief" claim; (2) para 8A.1.4.2 "The value of reliefs surrendered to the paying company by [other UK group companies] and which would not have been used or surrendered and which may otherwise have been available for use elsewhere in the company group or for other accounting periods had the paying company been able to claim loss relief from [loss-making French subsidiaries] and thereby offset its chargeable profits"—a category (ii) or "reclaim of utilised reliefs" claim; and (3) para 8A.1.4.3 "The sums [the loss-making French subsidiaries] would have received from the paying company had they been able to surrender their losses and other eligible amounts to the paying company which they were precluded from doing in the manner set out in this claim"—a category (iv) or "claim for payments" claim. Paras 8A.2.1 and 8A.2.2 then follow the same sort of pattern in respect of the restitutionary claims, omitting the category (iv) claim but including express claims for the time value of money.

104 It is over the category (i) claims that battle has been joined. The revenue regard the category (i) claims as being of central importance, and as being a plain breach of the principle that group loss relief claims are to be ***151** determined (in the first instance) by the special commissioners, to whose exclusive jurisdiction Parliament has assigned them. The revenue regard categories (ii), (iii) and (iv) as "satellite" claims which cannot be considered until after the essential issue of category (i) claims has been decided. It was the category (i) claims that Park J struck out (see for instance para 1.3

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of his order drawn up on 31 March 2004, in the Autologic case, striking out paras 8A.1.4.1 and 8A.2.2.1).

The judgments below

105 In his judgment Park J [2004] STC 594, having covered all the matters to which I have already referred, with the important exception of the EU principle of effectiveness, turned to the issue of tax appellate jurisdiction. He referred to the changes during the 1990s in the administration of corporation tax, but observed, at p 601, para 18: "It has always remained the case that a corporate taxpayer which wishes to dispute some point of tax law with the revenue has a statutory right of appeal to the commissioners." He mentioned the line of tax cases which had considered and applied the principle in Barraclough v Brown [1897] AC 615 the most recent being R v Inland Revenue Comrs, Ex p Bishopp [1999] STC 531 . He then crisply summarised his own view, at p 603, para 25:

"I am not going to go through the judgments in the cases which were cited to me. They are all consistent in the result: the courts did not decide questions of principle which went to liability. Such questions (as opposed to questions of machinery) were properly the subject of appeals to the general or special commissioners. I would accept that the precise reasoning which led the courts to that result has varied between some of the judgments. Some observations are to the effect that there is a simple rule of law that the court has no jurisdiction at all in such matters, an approach which appears to me to be consistent with the second strand in the speech of Lord Watson in Barraclough v Brown [1897] AC 615 , 622. Other observations are to the effect that there might in theory be a jurisdiction to decide questions of tax principle in cases begun in the High Court, but that, given the existence of the statutory jurisdiction of the commissioners, it would be wrong for the High Court to exercise any such original jurisdiction as it might possess."

106 Park J then referred to Marks & Spencer plc v Halsey , summarising the decision of the special commissioners ([2003] STC (SCD) 70) and his own decision to make a reference to the ECJ). He noted that the revenue said that in that case the taxpayer company followed the correct procedure in order to get the critical question of tax principle decided. Mr Aaronson, who appeared for the taxpayer company in the Marks & Spencer case, told your Lordships that it was a much more straightforward case on the facts, and that in any case there might have been second thoughts about the wisdom of going to the special commissioners. He could also point out that the revenue had not objected to the High Court assuming jurisdiction in the Hoechst case [2001] Ch 620 . But this important appeal cannot be decided by weighing and striking a balance between the alleged procedural inconsistencies of the revenue, on the one hand, and taxpayer companies and their advisers, on the other hand. ***152**

107 In discussing the competing arguments Park J started from the basic principle as he had formulated it [2004] STC 594, 603, para 25. That basic principle could not be evaded by a company stealing a march, and starting High Court proceedings before an assessment (or some other formal trigger for an appeal to the commissioners) was in place. Nor would the principle cease to apply because there was a large number of companies which could band together for a GLO . Nor would it cease to apply because another company in a group claimed to have suffered financial loss in consequence of a refusal of group relief. He concluded, at p 606, para 31(iv):

"Finally, I combine the foregoing examples. Suppose that several companies are having the same argument of tax law with the revenue. They all have associated companies which wish to make consequential claims for damages against the revenue. In my opinion they cannot cause the High Court to have or to exercise a jurisdiction to determine the disputed question of tax law—a jurisdiction which otherwise it would either not have or not exercise—by uniting to create a GLO in which all of the companies with the tax disputes and all of the associated companies with consequential damages claims combine to bring High Court proceedings against the revenue. The example in this subparagraph is in principle the same as the case before me."

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108 Only towards the end of his judgment did Park J refer to the EU principle of effectiveness and the decision of the ECJ in the Hoechst case [2001] Ch 620 , paras 98-107 (the paragraphs dealing with the fifth question). He dealt with the point in the following passage, at p 608, para 38:

"Points of the nature which I have described in the foregoing paragraph [the procedural difficulties on which Mr Aaronson relied] are important and potentially difficult, but I cannot see what they have to do with the jurisdictional issue which is the subject matter of this judgment. If a claimant company argues on an appeal to the special commissioners that it is entitled to group relief for losses of a group company resident outside the United Kingdom, the Inland Revenue's arguments against the company might include submissions that the appeal fails anyway for procedural reasons such as the lack of a notice from the surrendering company to its inspector or the omission by the companies to make formal claims for group relief within the prescribed time limits. If the revenue's arguments do include such submissions, the claimants can respond before the commissioners, just as they could if the case had commenced in the High Court, by arguing that, in reliance in the passages in the Metallgesellschaft/Hoechst judgment, Community law overrides the procedural and formal requirements. The special commissioners are just as capable of adjudicating on these arguments as is the High Court."

109 In the Court of Appeal (which heard the case in a single day, as an on-notice application for permission to appeal, with the appeal to follow on permission being granted) the outcome was very different. Peter Gibson LJ [2005] 1 WLR 52, 53, para 1, placed the Hoechst case in the forefront of his judgment. He recorded, at p 57, para 13, the appellant companies' main criticisms of the judgment below: ***153**

"(1) By reason of the Hoechst case the judge should have found that the High Court not only had jurisdiction but was required to hear the category (i) claims. (2) The judge erred in not deciding whether he had jurisdiction; he should have found on the authorities that he had jurisdiction and should have exercised it. (3) The judge erred in failing to appreciate or give adequate consideration to the practical difficulties in requiring the category (i) claims to be severed from all the other claims and consigned to the commissioners; those difficulties should have led the judge to exercise jurisdiction by hearing all the claims in the High Court."

110 Peter Gibson LJ quoted at some length, pp 58-60, paras 17 and 18, from the opinion of Advocate General Fennelly and the judgment of the ECJ in the Hoechst case. He also referred to the cases of Simmenthal [1978] ECR 629 , Köbler [2004] QB 848 and Roquette Frères SA v Direction des Services Fiscaux du Pas-de-Calais (Case C-88/99) [2000] ECR I-10465 . He observed [2005] 1 WLR 52, 62, para 25, that the importance of the principle of effectiveness in Community law cannot be overstated, and that in the present case there is a very serious difficulty, if not an impossibility, for companies resident outside the United Kingdom to comply with the formal statutory requirements for group loss relief.

111 Peter Gibson LJ's essential conclusion was as follows, at p 63, para 28:

"With due respect to the judge, I do not think that thereby he gave effect to the full import of the ECJ's decision on question (5) in the Hoechst case. Given that the United Kingdom tax law has denied groups of resident and non-resident companies the benefit of group loss relief, it is no answer to the claimants' claims in the High Court, by which they seek to invoke the primary and direct effect of Community law, to require the claimants to apply for a tax benefit denied to them by national law with a view to challenging the inevitable refusal of that application through the statutory procedure for tax appeals. In my judgment, consistently with the Hoechst case, the High Court was obliged to entertain the claims and, if made out, give effect to them, and the judge was wrong to strike out part of the claims."

112 Peter Gibson LJ did not find it necessary to say anything about the other grounds of appeal (including

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the issue of jurisdiction of the High Court apart from the EU context). Longmore LJ gave a short judgment agreeing with Peter Gibson LJ.

The Hoechst case

113 Before your Lordships the revenue contended that the Court of Appeal gravely misunderstood the significance of the Hoechst case [2001] Ch 620 . It is therefore necessary to examine it in a little detail. It was in fact two linked cases on essentially the same factual situation, a German parent company was a trading subsidiary resident in the United Kingdom. It was concerned with a different form of group relief (which ceased to exist on 6 April 1999), that is a group income election under section 247 of the ICTA enabling an intra-group dividend to be paid without a simultaneous payment of advance corporation tax ("ACT") if (and only if) both companies were resident in the United Kingdom (see section 247 (4) , now *154 repealed together with all the other provisions relating to ACT). This resulted in a financial detriment to a group where the receiving company was resident in another member state of the EU, although the detriment was transitory (and equivalent to a loss of interest) because mainstream corporation tax would (absent another form of group relief) be payable in due course.

114 The relevant companies in each of the two groups commenced proceedings against the revenue in the High Court. They relied on articles 43 and 56 (then articles 52 and 73b) of the Treaty and claimed "damages or compensation for the loss of the use of the money in respect of the periods between the payments of advance corporation tax made and the time when their mainstream corporation tax, against which those payments were set off, was due." The periods concerned were 1974 to 1995 in the case of one group, and 1989 to 1994 in the case of the other (see the Advocate General's opinion, pp 626-627, paras 9-11). On 2 October 1998 Neuberger J made an order for the reference to the ECJ of five questions.

115 There is no suggestion that the revenue raised any objection to the procedural course which I have just described. Nor did the revenue dispute that national law deprived non-resident companies of any possibility of a group income election (see the Advocate General's opinion, at p 627, para 12). That was the basis on which the United Kingdom government fought the case in the ECJ, arguing that the differential between resident and non-resident companies was justified and was not discriminatory.

116 The first and second questions raised the main issues as to the alleged breaches of EU law. The ECJ, agreeing with the Advocate General, found the breaches established. The first question was answered as follows, at p 661, para 76:

"The answer to the first question must therefore be that it is contrary to article 52 of the Treaty for the tax legislation of a member state, such as that in issue in the main proceedings, to afford companies resident in that member state the possibility of benefiting from a taxation regime allowing them to pay dividends to their parent company without having to pay advance corporation tax where their parent company is also resident in that member state, but to deny them that possibility where their parent company has its seat in another member state." The second question was answered as follows, at p 665, para 96:

"where a subsidiary resident in one member state has been obliged to pay advance corporation tax in respect of dividends paid to its parent company having its seat in another member state even though, in similar circumstances, the subsidiaries of parent companies resident in the first member state were entitled to opt for a taxation regime that allowed them to avoid that obligation, article 52 of the Treaty requires that resident subsidiaries and their non-resident parent companies should have an effective legal remedy in order to obtain reimbursement or reparation of the financial loss which they have sustained and from which the authorities of the member state concerned have benefited as a result of the advance payment of tax by the subsidiaries. The mere fact that the sole object of such an action is the payment of interest equivalent to the financial loss suffered as a result of the loss of use of the sums paid *155 prematurely does not constitute a ground for dismissing such an action. While, in the absence of Community rules, it is for the domestic legal system of the member state con-

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cerned to lay down the detailed procedural rules governing such actions, including ancillary questions such as the payment of interest, those rules must not render practically impossible or excessively difficult the exercise of rights conferred by Community law." In the light of these rulings it was unnecessary to answer the third and fourth questions.

117 The fifth question is restated in the judgment of the ECJ at pp 665-666, para 98, but with the addition at the end of 20 words which give a clue as to the court's eventual answer:

"By its fifth question, the national court is seeking in substance to ascertain whether it is contrary to Community law for a national court to refuse or reduce a claim brought before it by a resident subsidiary and its non-resident parent company for reimbursement or reparation of the financial loss which they have suffered as a consequence of the advance payment of corporation tax by the subsidiary, on the sole ground that they did not apply to the tax authorities in order to benefit from the taxation regime which would have exempted the subsidiary from making payments in advance and did not therefore make use of the legal remedies available to them to challenge the refusals of the tax authorities, by invoking the primacy and direct effect of the provisions of Community law, where on any view national law denied resident subsidiaries and their non-resident parent companies the benefit of that taxation regime."

118 Subsequent paragraphs of this part of the judgment (paras 98-107) make clear that the ECJ was considering the issue as an alleged defence, in line with the principles stated in the joined cases of Brasserie du Pêcheur and Factortame [1996] QB 404 , 503, based on a lack of reasonable diligence on the part of the claimant. Nevertheless these paragraphs also emphasise the futility of requiring a claimant to adopt, at the outset of his claim, a special and possibly burdensome procedure which was doomed to failure from the start: see paras 103 ("it is not disputed that, had the claimants applied for that taxation regime, their application would have been refused by the inspector of taxes"); 104 ("since no such right to reimbursement exists under English law"); 105 ("It is thus criticising the claimants for complying with national legislation and for paying advance corporation tax without applying for the group income election regime or using the available legal remedies to challenge the refusal with which the tax authorities would inevitably have met their application"); and 106 ("had not applied for a tax advantage which national law denied them").

119 The same line of thought is reflected in the conclusion in para 107:

"The answer to the fifth question must therefore be that it is contrary to Community law for a national court to refuse or reduce a claim brought before it by a resident subsidiary and its non-resident parent company for reimbursement or reparation of the financial loss which they have suffered as a consequence of the advance payment of corporation tax by the subsidiary, on the sole ground that they did not apply to the tax authorities in order to benefit from the taxation regime which would have ***156** exempted the subsidiary from making payments in advance and that they therefore did not make use of the legal remedies available to them to challenge the refusals of the tax authorities, by invoking the primacy and direct effect of the provisions of Community law, where on any view national law denied resident subsidiaries and their non-resident parent companies the benefit of that taxation regime."

120 The first criticism which Dr Plender made of the Court of Appeal's treatment of the Hoechst case [2001] Ch 620 (made by reference to the very first sentence in the judgment of Peter Gibson LJ) was that the effect of the decision was too widely stated. I see little force in this criticism (the second sentence in the judgment qualifies the generality of the first) and little relevance in any element of criticism that might survive.

121 The second criticism (central to Dr Plender's submissions) needs fuller examination. It is true that the ECJ, in dealing with the fifth question, was not concerned at all with the issue of the jurisdiction of any national court, but only with whether relief should be reduced (or even refused completely) on the ground that the claimant had not shown reasonable diligence in seeking domestic remedies. That criticism is, so far as it goes, correct. The ECJ was not faced with the argument that the High Court did

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not have jurisdiction, because the revenue chose not to contest that point. But I do not consider that this takes the revenue very far. The clear and robust terms in which the ECJ dealt with the fifth question in paras 103 to 107 of its judgment (and the similarly robust and clear language in para 58 of the Advocate General's opinion) leave little room for doubt that, had the question of jurisdiction been raised, it would have been disposed of in the same way, and for the same reasons.

Conclusions

122 My Lords, I have set out the background to this appeal, and the issues which it raises, at some length—I fear at tedious length. I can however state my opinion fairly shortly, especially as I have the misfortune to differ from the majority of your Lordships. With great respect to Park J, who has exceptional knowledge and experience in tax cases, I think (as the Court of Appeal did) that he underestimated the impact, in these cases, of the superior legal order constituted by EU law. I also think that he took too narrow a view of the High Court's jurisdiction in proceedings with a tax content. I prefer the formulation put forward by Lord Wilberforce in Vandervell's case [1971] AC 912 , 939f-h (with which Lord Morris of Borth-y-Gest agreed, and with which none of their Lordships positively disagreed). That passage is quoted in the opinion of my noble and learned friend, Lord Hope of Craighead, and I need not repeat it.

123 I also respectfully differ from the view of the Court of Appeal that because of the Community principle of effectiveness it was unnecessary to address the question of jurisdiction in its purely domestic context. The Court of Appeal had very little time to consider this difficult matter, and cannot have had the benefit of such fully developed argument as your Lordships have had. But the general guidance given by the ECJ in Peterbroeck's case [1995] ECR I-4599 , 4621, para 14 (which I have already set out) suggests that whenever an issue is raised as to the principle of *157 effectiveness, it is necessary to analyse the position under national jurisdictional and procedural rules.

124 I do not in this context discern any bright line between jurisdictional and procedural limitations. Dr Plender contended that there is an important distinction, drawing attention to the phrase "in a case within its jurisdiction" used in Simmenthal's case [1978] ECR 629 , 643, para 16, and reflected in later cases (including Peterbroeck [1995] ECR I-4599 , 4623, para 21—"seised of a matter falling within its jurisdiction"). Jurisdiction is "an expression which is used in a variety of senses and takes its colour from its context" (Diplock LJ in Anisminic Ltd v Foreign Compensation Commission [1968] 2 QB 862 , 888). I am not sure what precise shade of meaning the ECJ intended it to have in this context, but I think it likely that it was being used in a fairly broad sense. I am sure that the ECJ would have rejected as absurd (in much the same way as in Peterbroeck's case it rejected the notion that there was no court or tribunal capable of making a reference to the ECJ) any suggestion that, because tax law is involved, there is in the United Kingdom no court or tribunal with jurisdiction to hear the respondents' claims alleging serious breaches of EU law.

125 On the contrary, as the argument before your Lordships developed it seemed that each side was embracing the notion that the "remarkable impact" of EU law (the expression used by Advocate General Jacobs in Peterbroeck's case [1995] ECR I-4599 , 4611, para 43) could if necessary transform the jurisdiction and powers of either the High Court or the special commissioners. Dr Plender came close to submitting (though he did not put it in these colloquial terms) that the principle of effectiveness made it a zero-sum game in which anything the High Court could do, the special commissioners could do better (the same thought appears briefly in the judgment of Park J [2001] STC 594, 608, para 38).

126 I must with great respect differ from the view expressed in para 41 of the opinion of my noble and learned friend, Lord Nicholls of Birkenhead, that if taxpayer companies are time-barred before the special commissioners their remedy necessarily lies elsewhere. If the companies are compelled to seek their remedy before the special commissioners, that tribunal would have the power (and indeed the duty) to disapply any time limits which were incompatible with Community law, even if this involved an extension of their jurisdiction: see the decisions of the

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Court of Appeal (handed down on the same day) in two appeals from the Employment Appeal Tribunal, Biggs v Somerset County Council [1996] ICR 364, 370 and Staffordshire County Council v Barber [1996] ICR 379, 395 both of which expressly approve passages from the judgment of Mummery J in the Biggs case in the Employment Appeal Tribunal [1995] ICR 811, 826-827. But if (as in those cases) the time limit was compatible with Community law, and the claimant had no remedy in the statutory tribunal, she had come to the end of the road. Similarly the out-of-time category (i) claimants would, as it seems to me, find that they can go no further if they are required to go to the special commissioners as their first port of call, and are there held to be time-barred.

127 I come back to the position under domestic law. As Mr Aaronson made clear in answering questions from your Lordships at the beginning of the third day of the hearing, the complaint in the test cases under the GLO is not that the claimants are entitled to group loss relief. It is perfectly clear from the legislation ("on any view" as the ECJ said in the Hoechst case [2001] Ch 620, ***158** 666, para 98) that they are not entitled to group loss relief. Their complaints (seeking a restitutionary remedy and/or damages, interest and costs) are that their non-entitlement to group loss relief is a serious breach of EU law (in that sense it is impossible to look at the matter in an entirely domestic context, since but for EU law, there would be no complaint.) These claims are in my view within the jurisdiction of the High Court, in line with Lord Wilberforce's observation in Vandervell's case [1971] AC 912, 939f-h. They are miles away from the sort of artificial expedient which was adopted in Argosam Finance Co Ltd v Oxby [1965] Ch 390, and was rightly held to be an abuse of process.

128 In paragraph 16 of his opinion my noble and learned friend, Lord Nicholls of Birkenhead, describes the effect of an inconsistency between a United Kingdom statute and a directly applicable provision of Community law, citing R v Secretary of State for Transport, Ex p Factortame [1990] 2 AC 85, 140 and Imperial Chemical Industries plc v Colmer (No 2) [1999] 1 WLR 2035, 2041. In the latter case Lord Nolan explained, at p 2041f, that the relevant provisions of the taxing statute took effect as if enacted as being "without prejudice to the directly enforceable Community rights of companies established in the Community". It is not a matter of construing the taxing statute, but of determining whether it is overridden by a rule from a higher legal order which gives the taxpayer companies a restitutionary claim.

129 The conclusion which I have reached seems to me to be confirmed by (but is by no means wholly dependent on) the practical difficulties and disadvantages, including the absence of GLOs, which the appellants would face in bringing their claims before the special commissioners. Like the Court of Appeal I think that those difficulties (which I need not repeat) are formidable and that Park J did not give enough weight to them.

130 For these reasons, and for the reasons stated in the opinion of my noble and learned friend, Lord Hope of Craighead, I would dismiss these appeals. I do not think your Lordships have to express a definite view about the tiny handful of cases (not before the House) in which there is said to be an issue on the OECD non-discrimination article and no corresponding issue of EU law. At present my view is that they should properly go to the special commissioners, because of the plain terms of section 788(3) of the ICTA. But the revenue will no doubt consider (as Dr Plender hinted they might) whether to press for that course if it is wasteful of time and costs on both sides.

Appeals allowed.

Orders of Court of Appeal and of Park J set aside.

Cases remitted to Chancery Division.Question of costs adjourned for parties to make written submissions. S H

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EXHIBIT 45

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Chapter 17 Multi-Party Actions

Introduction

1. The second part of my Inquiry was partly intended to deal with types of litigation causing particular problems for the system of civil justice. It was also designed to examine specific developments which would further access to justice. Clearly the arrangements for multi-party actions must be near the top of the list in both respects. As the National Consumer Council said in its submission to the Inquiry:

"As we become an increasingly mass producing and mass consuming society, one product or service with a flaw has the potential to injure or cause other loss to more and more people. Yet our civil justice system has not adapted to mass legal actions. We still largely treat them as a collection of individual cases, with the findings in one case having only limited relevance in law to all of the others."

2. Unlike the position in some other common law countries, there are no specific rules of court in England and Wales for multi-party actions. This causes difficulties when actions involving many parties are brought. In addition to the existing procedures being difficult to use, they have proved disproportionately costly. It is now generally recognised, by judges, practitioners and consumer representatives, that there is a need for a new approach both in relation to court procedures and legal aid. The new procedures should achieve the following objectives:

(a) provide access to justice where large numbers of people have been affected by another's conduct, but individual loss is so small that it makes an individual action economically unviable;

(b) provide expeditious, effective and proportionate methods of resolving cases, where individual damages are large enough to justify individual action but where the number of claimants and the nature of the issues involved mean that the cases cannot be managed satisfactorily in accordance with normal procedure;

(c) achieve a balance between the normal rights of claimants and defendants, to pursue and defend cases individually, and the interests of a group of parties to litigate the action as a whole in an effective manner.

3. In 1992 the Court of Appeal said that there might be a strong case for legislation to provide a jurisdictional structure for the collation and resolution of mass product liability claims (*Nash v Eli Lilly & Co*. [1993] 4 All ER, at p.409). The Legal Aid Board has called for new procedures tailored to multi-party litigation, which will emphasise the central issues rather than investigating every individual claim in detail. Other common law jurisdictions have similarly found the need to enact statutory provision for multi-party actions. Nearer to home, the report of the Scottish Law Commission has been completed and is being published.

4. During the second stage of the Inquiry, a working party of the Civil Litigation Committee of the Law Society has prepared a report. The working party included practitioners who act

regularly for claimants and for defendants. On nearly all issues the working party reached a consensus and a number of detailed recommendations for change were formulated. These included a new rule which deals comprehensively with the conduct of group actions from their initiation to judgment or settlement. Their recommendations are especially valuable because they have applied the philosophy of case management, espoused in the interim report, to the problem (*Group Actions Made Easier*, A Report of the Law Society's Civil Litigation Committee, September 1995).

5. The Inquiry published an issues paper raising a number of further questions in January 1996, and held a seminar involving many of those practising in this area of litigation and representatives of claimants and defendants. I have received 55 responses to the issues paper from practitioners, judges and others who were generous in offering lessons from their own experience. I have also benefited from the deliberations of a small working party, and I am indebted to the Inquiry's academic consultant, Professor Ross Cranston, for a detailed commentary on the experience in other jurisdictions. This, most notably in the United States, draws attention to problems which should be taken into account in developing new multi-party rules in England and Wales.

6. In this area of litigation more than any other my examination of the problems does not pretend to present the final answer but merely to try to be the next step forward in a lively debate within which parties and judges are hammering out better ways of managing the unmanageable.

Existing rules

7. Although the existing rules of court provide means of dealing with multi-party actions, they were not drafted with group actions in mind and therefore none has provided a sufficient answer to the problems they create. Representative actions are provided for by RSC Order 15, rule 12 but the experience here and in comparable jurisdictions is that there are definite limits to the weight the rule can bear. Cases can also be joined or consolidated under Order 15, rule 4 and Order 4, rule 9(1). But consolidation deals with situations where actions have already been begun, and it is better that multi-party litigation be dealt with on a collective basis before then, and joinder is not satisfactory where the interests of claimants differ.

The problems with multi-party litigation

8. The problems of cost and delay identified in my interim report are magnified in the context of group actions. Cases take on a life of their own and there is insufficient independent continuing consideration of whether the cost of the litigation is justified by what is at stake. There is a great risk that actions involving large numbers of claimants will become management or organisation driven because of the sheer scale of the numbers involved. Decisions which in a single case might have a small negative impact, when multiplied many hundreds or even thousands of times, can produce waste of effort and resources on a large scale. In addition the complexity and intractability of the intrinsic subject matter can generate major discovery exercises and escalating use of experts to an even greater extent than in ordinary litigation. The large numbers of potential claimants can mean that substantial cost becomes the norm.

9. The positions of claimants and defendants appear inevitably to become polarised over strategy: the claimants' wish to broadly focus on the common or generic issues, the defendants' wish to identify and investigate each individual case. A confrontational climate develops which fuels this divergence of views.

10. The differing interests of group members, even where there are substantial common

issues or interests, give rise to difficulties in establishing generic issues applicable to the entire group, maintaining overall progress of the case and achieving settlement for the whole group. Separate claimants with separate representatives may find themselves at odds with each other or unnecessarily duplicating effort and expense. Although most attention is generally given to the problems of high profile 'disaster' cases, similar problems arise in relation to a wide variety of cases. In housing cases, for example, tenants in high rise blocks may have different objectives from those in low rise housing; long lessees from weekly tenants; tenants who wish repairs to be executed from those who seek rehousing.

11. The desire of defendants to know the scale of the action they face leads to the setting of cut-off dates which in turn can cause the swamping of valid claims with weak or hopeless claims. Defendants may suffer from the adverse publicity resulting from the number of potential claimants and may have to bear the expenses of the individual investigation of such cases. There are also problems arising from the need to protect the rights of individuals who are not part of the group and to balance this need against the desire of the defendants for finality. Settlement of some cases or settlement without any court supervision of lead or test cases may undermine the viability of the group as a whole.

12. In larger actions, the costs may be so enormous and so uncertain that only those eligible for legal aid can contemplate involvement. The escalation of costs in such cases can put the initial cost benefit analysis at risk. In more modest actions, the cost is more proportionate but current legal aid and court arrangements do not always contribute to the most cost effective resolution of the issues. The present rules on legal aid funding appear to rule out the funding of representative actions and yet these may provide a more cost effective solution than litigating a group of many individual cases. Lack of clarity about cost sharing arrangements and what costs are recoverable create significant problems on taxation.

13. In the absence of legislative support, courts have had to tackle these problems pragmatically, making decisions on a creative and improvised basis with regard to cut-off dates, on how investigation should be conducted, on whether to process some or all cases in the group and on costs. While many judges have risen to the challenge, they themselves have indicated the need for a clearer framework in which to operate.

A new framework

14. The Law Society's Working Party has recommended that multi-party actions should be managed from the outset. Multi-party actions, of whatever description, will almost invariably merit the full hands-on judicial control which I am recommending for the most complex cases. The system of case management which I propose generally will provide judicial scrutiny at the stage when a defence is filed and appropriate handling thereafter. But in multi-party actions there is a need for the court to exercise control at a much earlier stage. Special arrangements will be required.

15. My proposals are designed to ensure that the court is notified of the existence of potential multi-party actions as early as possible. At this early stage no immediate decision is required but from then on the judge will be required to take a succession of decisions, all of which will impact on the successful handling of the actions. In this chapter I set out the factors which should be taken into account in relation to three main aspects:

(a) the initial stages, involving the application for and certification of a multi-party situation (MPS), appointment of a designated judge and the arrangements for lead representation;

(b) the strategic priorities for court management, including the definition of the group, the establishment of a register, the need to provide an effective filter, costs; and

(c) protecting the interests of litigants through the court's oversight of lawyers, the appointment of a trustee, the court's approval of settlements.

The initial stages

16. The earlier the court exercises control in a potential multi-party action the better chance of managing the case to a satisfactory resolution. Other jurisdictions have achieved this by requiring certification of a group or class action where there is an identifiable class or a specified number of persons, and the claims give rise to common issues of fact and law and where handling them together appears to the court to provide the best and the most practicable approach. The disadvantage of the solution usually adopted in other jurisdictions is that there may be many claimants with similar complaints but their claims may be more satisfactorily dealt with, at least in part, in separate proceedings. In this situation, it is likely that a group action will not be certified even though the case would benefit from collective management by the court.

17. Another approach is to stipulate that for the application of multi-party treatment the claims should give rise to common but not necessarily identical issues. The Law Society's rule extends this concept of flexibility. It recognises that there are clear advantages in drawing together claims which may be in some way related. I would wish to go further and to make it clear that cases that have been drawn together could be dealt with in different ways.

A multi-party situation

18. To achieve this I recommend that where proceedings will or may require collective treatment to a greater or lesser degree, provision should be made for a multi-party situation (MPS) to be established. This should be achieved with minimum expense by providing that the parties or the Legal Aid Board should make an application to the court which contains a formal declaration that the action meets the criteria for a multi-party situation and the grounds to demonstrate this. There should also be a power for the court itself to initiate or encourage an application. The application will be an executive act. The simplicity and lack of expense will encourage the proposed parties not to delay such a request, thus ensuring that the matter is brought to the attention of the court at the earliest opportunity.

19. The criteria to be met suggested by the Law Society's working party (draft rule 1.1) are:

"(a) ten or more persons have claims against one or more parties;
(b) the claims are in respect of, or arise out of, the same or similar circumstances;

(c) a substantial number of the claims give rise to common questions of fact or law; and

(d) the interests of justice will be served by proceedings under this rule."

20. I would broadly follow this suggestion, subject to two points. First, the minimum number of ten parties should not be written into the rules but be regarded simply as a guide. Especially in local cases, five may be a sufficient number. Secondly, the common issues need not necessarily predominate over issues affecting only individuals. All that is required is that the court is satisfied that the group will be sufficiently numerous and homogenous for the cases within the MPS to be more viable if there is a collective approach than if they are handled individually.

21. The MPS will provide maximum flexibility in that it may be proposed that parts of the

proceedings are common to some or all of the claimants, and other parts are limited to individual claimants. In addition, individual and common proceedings should take place in parallel or the individual proceedings should take place in advance of or following the common proceedings. One MPS could accommodate the common tools used for disposal of multi-party proceedings, namely test or lead cases, and preliminary or common issues. It could also accommodate a representative action. All actions relating to the MPS could be stayed with their claimants fully protected as to limitation, at minimum cost and without the action being swamped by an influx of new claimants. An MPS will be a suitable framework for handling all the different types of multi-party actions common in this jurisdiction from local housing and environmental actions, consumer cases, financial actions such as the Lloyds litigation, single 'one-off' disasters and large scale complex environmental actions and product liability actions, including pharmaceutical and medical cases. The possible options for dealing with cases within the MPS are explored later in this chapter.

22. The subsequent procedure for the initial stages of the MPS following the application will be similar to that outlined in the Law Society's rule: a judge will need to decide whether an MPS which has been established should be certified. If it is, then a managing judge should be appointed and should have control of all proceedings arising out of the cases within the MPS. He will need to make decisions about notification of the action, lead lawyers, arrangements for representing the interests of the group, and on how costs will be treated. I deal with these detailed arrangements below.

Joining the MPS

23. Individual claimants would be able to participate in the application for the MPS by entering their names on a register, as suggested by the Law Society (paragraph 6.10.1-6.10.6) rather than by issue of a separate application for each possible action. Joining the register in this way would, after notification to the proposed defendants of the application for the MPS, suspend the operation of the Limitation Act. While this helps those who are on the register, it does not provide equivalent protection for those in the broader class who have not yet joined the register and the managing judge will therefore need to consider at an early stage the best means of achieving this. I consider this also in paragraph 45 below.

Certification

24. Certification is confirmation by the court that the criteria for the MPS have been met, so that cases can be treated within it and appropriate orders made and procedures applied. The court will arrange to consider certification after the initial application. If necessary it will ask for further information to enable it to reach a decision. The period for fixing a hearing may vary depending on the scale and complexity of the subject matter of the cases within the MPS but should be no more than three months. Parties may request an earlier hearing.

25. There is no need for the court to take a view of the merits at the certification stage. The discussion paper on multi-party actions of the Scottish Law Commission (*Multi-Party Actions*, Discussion Paper No.98, p.184) describes the problems that consideration of the merits would involve for both the court and the parties:

"... the applicant would no doubt be obliged, as in Quebec and Ontario, to lodge documents vouching the facts alleged in the application, such as affidavits and experts' reports; and in fairness the proposed defenders would have to be given an opportunity to inspect these documents and lodge documents of their own. The procedure would be elaborate and

expensive, and the judge's task might be insuperably difficult, even with the assistance of counsel: he would have to try to digest the materials lodged and the submissions made ...There are the further objections that the applicant would be required to satisfy the court on the merits twice over, once at certification and again at the trial."

26. If the certificate were refused then a date for the determination of the MPS would be fixed. If a party wanted to continue proceedings the party would have to file a claim prior to that date to avoid the action coming to an end. A power to decertify is also needed because the situation can change so it is subsequently found that a multi-party situation is no longer appropriate.

Appointment of a managing judge

27. I have proposed generally that complex cases requiring full hands-on judicial control should be assigned to a single judge. This is to ensure continuity of decision making and will be of particular importance in cases involving complex technical subject matter. The Law Society's Working Party similarly recommended the appointment of a designated High Court judge with power to transfer the proceedings to a designated Circuit judge if "damages were likely to be modest and/or the litigation has a particular connection with a given locality." The appointment of an alternate judge was also recommended. All of this should be done either at or immediately after the certification stage.

28. Those responding to the issues paper have emphasised that it would be helpful to have arrangements for handling multi-party actions not only in the High Court in London but at courts elsewhere in the country although there is concern that it may not be possible to provide a single managing judge outside London. However, experience over the last year has demonstrated that it is possible to achieve this, particularly at major trial centres on Circuit or by coming to other arrangements such as the transfer of the multi-party estate litigation in Hackney, London to an Official Referee for management throughout the life of the action. I consider that it is important for lower value or local cases to be tried locally at appropriate courts and by either a High Court or Circuit judge. In making these arrangements it is important that the managing judge is appointed as soon as possible following certification and that the judge will be available throughout the life of the action.

29. The Law Society's working party recommended that the managing judge should appoint a designated Master or district judge. Experience of previous multi-party actions indicates that the judicial workload may be heavy and involve considerable time which it may be difficult for full-time Masters and district judges to provide alongside their other responsibilities. In these circumstances I see benefit in the temporary appointment of a deputy Master or deputy district judge, drawn from those practitioners who already have considerable experience of such litigation. There may also be a role in heavy, complex cases for a law clerk, as I recommend in relation to other complex cases in chapter 8 on the supporting structure.

30. At this stage, so early in the proceedings, it will be very difficult for any appointed judge to have reached the same stage of familiarity with the subject matter as the claimants and defendants. This problem was specifically discussed at the multi-party action seminar in February 1996 and it was generally agreed that it would be helpful for the judge to have background material made available before he makes any key decisions so that those decisions are based on a reasonable familiarity with the background. Ideally the information made available to the judge should be in the form of a joint submission prepared by the parties and including the background facts, stated jointly, in so far as they are agreed, or the different versions so far as they are not agreed, and a reading list, agreed as far as possible, together

with instructions on technical matters.

Arrangements for lead representation

31. The Law Society's working party suggested that the court should have power to approve the lead lawyer for the group. In privately funded actions, private litigants will normally organise themselves efficiently. In legal aid cases the Legal Aid Board has special arrangements for this purpose. The court's responsibility is not to ensure that the legal services are adequate but to ensure the efficient conduct of the litigation. As this might be hindered by disagreements about lead lawyers in a mixed legal aid and private case such as tenants on a housing estate, or in a private case alone, where parties did not agree, the court should have a residual power to approve the lead lawyer if a difficulty arises. I deal later (paragraphs 70 - 74) with the court's general oversight of lawyers.

Court management: strategic priorities

32. The Law Society's working party recommended that the designated judge in a multi-party action should be given wide ranging powers to control the litigation and to ensure that it is expeditiously and economically progressed. The need for imagination and creativity in dealing with such litigation is attested to by every judge who has tried such a case. The kernel of the problem is the claimant's desire to pursue generic or common issues and the defendant's equally strong wish to investigate every individual case. There are three basic matters which a judge is almost invariably going to have to start to tackle at the certification stage and immediately after in an MPS.

(a) Deciding whether there are generic issues present and whether they can be effectively decided within the MPS (this bears particularly on the composition and identity of the proposed beneficiaries of the proceedings).

(b) Deciding whether there are issues applicable to certain individuals which need to be determined separately as to those individual claims; and if so to establish machinery for that purpose.

(c) Deciding the order in which the issues identified at (a) and (b) are to be determined.

33. It is likely to be the case that the judge will usually need to treat (a) as the priority. On the whole, this is likely to be the most rational and economic way of working through the case. But this cannot be a rigid rule. There may be cases where, for example, it will be possible to establish, at relatively limited cost, that there are so few cases in the group in which damage can be proved that it is simply not worthwhile going into the generic issues in any detail.

34. In many cases, testing the likely viability of a sufficient number of individual cases cannot fairly be postponed until resolution of the generic issues is completed. This is because of the interdependence of the generic and individual issues. The latter shape the former. The cost-benefit justification of the proceedings depends on an adequate number of sufficiently promising cases. And, bearing in mind the adverse effects of a group action on defendants, it is necessary as a matter of basic justice to which they too are entitled.

35. This does not of course mean that examination of each case is required initially. More selective methods can be used. Although defendants traditionally oppose any selection of lead cases, there is a growing recognition that statistically valid samples of the wider group may be helpful in establishing criteria which individuals must meet to join the action. But above all,

consideration of individual cases must not be allowed to paralyse overall progress of the group action.

36. At this early point the managing judge needs to be pro-active in addressing various key matters with the parties. Some of these will be decisions common to all complex litigation: identifying main and preliminary issues; drawing up a strategy for disclosure, for further investigative work and for the use of expert evidence; establishing a timetable. Others are specific to multi-party actions:

(a) definition of the group;

(b) considering the utility of sub-groups, lead cases or sampling;

(c) considering whether the MPS should be managed on an 'opt-out' basis;

(d) arrangements for giving notice of the action;

(e) establishing a filter by agreeing with the parties the diagnostic or other criteria to facilitate the identification of valid claims and the early elimination of weak or hopeless claims;

(f) determining the approach to costs.

37. There may be value in the court adopting a less formal approach to proceedings at this stage in order to encourage a more co-operative atmosphere of mutual endeavour to find the best ways of resolving the problems ahead. I understand that at the outset of the Lloyds litigation the court held an informal meeting with interested parties to identify the categories of case involved and to receive information so as to enable the court to apply management techniques.

Definition of the group

38. In some actions, the claimant group will be already well defined. In a transport disaster there will be a finite group. In a housing case, the group will be the tenants of the estate or lessees of a block of flats and although sub-groups may be helpful there will be a finite number of claimants. In other cases there will be a potential group defined by its circumstances; for instance all those within a specific geographical area in an environment case, or in medical cases, all those treated over a specific period. In some cases the potential group may be very numerous. In each case the judge will need to decide on the most efficient way of bringing potential claimants into the action, on the stage at which this should be done and whether it is appropriate to do this before or after examination of issues of principle or some of the generic issues common to all potential claimants. Clearly, it is pointless establishing a register for a large number of potential claimants if a decision on a key issue of liability or causation might determine the action at an early stage.

Sub-groups, lead cases and sampling

39. If there is already a substantial number of claims the court can proceed at once to identifying groups and sub-groups, agreeing on lead cases or samples. Most cases will fall into this category. But in large, generally pharmaceutical or other consumer cases, the problems are more complex. The court must be pro-active in considering how best to progress the action so that valid claims are included and weak or hopeless claims excluded. This involves considering whether claimants should be required to join a register: to 'opt-in', or whether unidentified potential claimants should be deemed to be included unless they 'opt-out' and the notice that should be given to potential claimants. It also involves consideration of the best way of providing

an effective filter. I consider each of these below.

40. There are, however, difficulties in relation to test cases. Firstly, both claimants and defendants need to accept that the case will be a test case in relation, say, to liability for all those claimants in the same position. It is therefore necessary to make express orders in advance of determination that parties will be bound by the results. Secondly, there are also problems if the test case turns out to be atypical - if it is disposed of on particular grounds or if the judgment is couched in such a way that it leaves undetermined the similar issues in other cases. It is therefore necessary for the difficulties of identifying cases as test or lead cases to be specifically addressed by the court at an early stage. Thirdly, the current rules on legal aid make it difficult to pursue the test case approach, even though it may offer the most economical way of resolving actions affecting numbers of people in cases as diverse as pharmaceutical products and housing disrepair. It would clearly be sensible for the legal aid provisions to support, rather than to impede cost effective resolution by this means. I recommend that this should be looked at especially in relation to the sharing of costs between privately paying and legally aided clients.

41. The Lloyds litigation gives an example of what can be achieved. At an early stage the court identified and decided a number of preliminary issues of principle common to one or more categories of cases. With the active co-operation of the Court of Appeal and the House of Lords, appeals were expedited. The court selected from cases in a particular category lead or pilot cases for trial as to liability and principles relating to quantum in the hope that decisions in these cases would provide firm guidance in relation to other cases in the same category.

'Opt-out' or 'opt-in'

42. Typically multi-party rules in other jurisdictions adopt an 'opt-out' approach, in that a person's rights may be determined in a multi-party action without his or her express consent to or participation in the litigation (the approach is under rule 23 in the US, and similar rules in Ontario, British Columbia and Australia). Members of the group may, however, opt out - in other words, indicate that they wish to be excluded. If they opt out, a person is not able to benefit from any award of damages, although they may always bring a separate action. It has generally been considered that there would be difficulties in this jurisdiction in taking forward cases on an 'opt-out' basis because of the cost sharing rules, but the experience of 'opt-in' registers with cut-off dates has not been altogether positive or, indeed, helpful in resolving the allocation of costs, particularly since most multi-party actions are legally aided.

43. For personal injury claims, it has been argued that an 'opt-out' scheme is unfair to defendants because it does not enable them to know the size of the group and the number of claims and their nature. The Law Society's working party therefore recommended an 'opt-in' approach with the establishment of a register at the initial stage of certification; provisions for varying the criteria for joining the register, as the case developed; and provisions for establishing cut-off dates and for costs sharing. This is the preferred approach where there is a well defined or identifiable group of claimants.

44. There are, however, problems in establishing an 'opt-in' register too early in the life of a potential multi-party action where there is a large pool of unidentified claimants. Although the register may appear to give defendants an idea of the size of the group, experience has shown that early cut-off dates tend to result in a rush to register which encourages many weak or hopeless claims to be registered and inflates the pool of potential claimants. The bandwagon effect may raise unrealistic hopes of compensation from claimants. Adverse publicity may have

a severe negative impact on the business of defendants at a stage when there has been insufficient investigative work to establish clear criteria for the claims or, in some cases, to establish any clear indication of causation.

45. In some circumstances defendants and the Legal Aid Board may be well aware that there are large numbers of people who might be affected by the product in question. In those circumstances the claim may be more manageable if the initial certification puts any further individual applications for legal aid on hold and provides for deemed inclusion of unidentified potential claimants on an 'opt-out' basis until definitive criteria can be established to provide for the effective filtering of potential claims before they are entered on the register. There is, however, a need for action to be taken in relation to the limitation period and this can only be effective if there are provisions to suspend or freeze the running of the limitation period on certification of the MPS, as in many other jurisdictions, so that further claimants whose claims were not being considered in detail at this stage were not disadvantaged. This will require primary legislation. In the absence of such legislation I have no doubt that courts will continue to exercise their discretion to admit latecomers since the existence of the MPS ensures that defendants are already aware of the potential claims against them.

46. The court should have powers to progress the MPS on either an 'opt-out' or an 'opt-in' basis, whichever is most appropriate to the particular circumstances and whichever contributes best to the overall disposition of the case. In some circumstances it will be appropriate to commence an MPS on an 'opt-out' basis and to establish an 'opt-in' register at a later stage.

Notice

47. If members of a group are to opt out, or to join the register, they must know about the multi-party action. Notice may also be necessary at various other times throughout the course of the proceedings, eg, determination of generic issues; on settlement. In reaching the decision on notice the court must have in mind the cost of such notice and its usefulness: in some cases notice may be so expensive as to be disproportionate to the costs and benefits of the litigation, or it may not serve a useful purpose.

48. In a multi-party action where there are many claims, each of which is small, there is little to recommend in a rule making notice to each potential claimant mandatory. The costs of identifying potential claimants, and preparing and sending the notice, will make the litigation as a whole uneconomic. In any event, where such claimants receive the notice and choose to opt out, they will receive nothing. Because with small claims it is uneconomic for them to litigate individually, they will almost invariably remain members of the group. In the United States, in small claims group actions, very few of the tens of thousands - in some cases millions - of potential claimants actually notified choose to opt out. Accordingly, courts must have the discretion to dispense with notice enabling parties to opt out having regard to factors such as the cost, the nature of the relief, the size of individual claims, the number of members of a group, the chances that members will wish to opt out and so on.

49. Once the claims become more substantial, however, individual notice is economically possible. It is difficult to set a figure and the matter must be left to judicial discretion, taking into account the factors I have already mentioned. Yet even if the court decides that notice must be given to members of a group, it should have a discretion as to how this is to be done - individual notification, advertising, media broadcast, notification to a sample group, or a combination of means, or different means for different members of the group. In each case the court must take

into account the likely cost and benefit before deciding on the course of action.

50. The court should have a discretion to order by whom the advertising should be undertaken. The Law Society's working party recommended that the Law Society should provide further guidance to solicitors on advertisements placed in the early stages prior to the establishment of a group action. I welcome that. The Law Society also recommended that the timing and placement of subsequent advertisements should be approved by the court. There is also a need to approve the content of the advertisements and for the court to decide on the appropriate body who should place the advertisement - either the lead solicitor, the Law Society itself with its substantial media expertise, the Legal Aid Board or the court itself.

Establishing a filter

51. It is important for the court to address one of the major problems identified in every response: the need to find better ways of weeding out weak and/or hopeless claims or, if possible, to prevent them entering the action in the first place. In legally aided cases, it also requires consideration of the best way in which the legal aid decisions on merits and cost-benefit can be meshed in with court procedures.

52. Once sufficient investigative work has been completed, it should be possible to establish criteria for entry to or removal from the register. Such an agreement, reached at an early stage, even if that in itself takes several months to arrive at, should lead to a considerable saving of time and legal costs both to the Legal Aid Board and for the defendants. The court, in effect will have drawn up the criteria for the merits test that will be applied to each individual claim. It would also mean that parties who have no realistic chance of bringing a claim are weeded out at an earlier stage or not brought in. This will be beneficial not only for defendants but also for the individuals themselves and for those claimants with stronger claims who do proceed. It has been emphasised that the bandwagon effect, in cases such as benzodiazepine, has the effect of swamping stronger claims with a host of weaker claims, many of them with very questionable foundation, and making the action as a whole unviable. While criteria for entry will be of most concern in 'creeping disaster' cases including pharmaceutical and environmental claims, I see a clear need to establish equivalent criteria in all multi-party situations.

53. Agreement on criteria should assist in drawing up standard questionnaires, agreed between the parties, the court and the Legal Aid Board. These would ensure that the initial information obtained from potential claimants enables all concerned to make a clearer assessment of the number of claimants who might actually have a case. They would enable the Board to make a more accurate cost-benefit assessment, than it can at present. They would provide the criteria for the merits test for the initial wave of entrants to a register if the Board decides to grant legal aid.

54. In legally aided cases, the present arrangements for assessing the merits of potential multi-party actions rest largely with the Legal Aid Board. Many commentators consider that it has proved difficult to establish appropriate and satisfactory arrangements despite repeated endeavours. Suggested refinements include the obtaining of an independent opinion from counsel on the merits and allowing representations from defendants as in Scotland.

55. Through the registration of an MPS the court will be involved from an early stage and will determine the shape and progress of the action. It will provide an independent focus on the preliminary investigative effort and will provide a more natural context in which to consider the defendant's representations. The Legal Aid Board has difficulty, at least procedurally, in dealing

with these and getting the claimants' response to the defendants' allegations. It is difficult for the Board to 'adjudicate' between them. This essentially adversarial process is more naturally controlled by the court. The alternative is parallel assessment of the merits by the court and the Board. The preferred approach is for the court to delineate the shape of the action and determine the criteria which must be met by those wishing to join the action. The Board would make its decisions on funding in the light of the court's decision.

Costs of multi-party actions

56. The Chief Taxing Master drew attention, at the Inquiry's seminar, to the need for the court to address the question of costs at an early stage, and for the judge to make costs sharing orders in respect of both claimants and defendants. These orders have to apply both to the costs of clients in respect of their own solicitors and of the opposing party should it obtain an order for costs. Orders on costs may need the assistance of the Taxing Masters if appropriate.

57. If the treatment of costs is not examined from the outset, the result is either subsidiary litigation or protracted problems when the matter comes to taxation. My general proposals for information on costs to be made available at every stage when the managing judge is involved are all the more important in relation to multi-party actions, where many claimants will be legally aided and have no direct control over costs and where costs can escalate dramatically. At every stage in the management of the MPS the judge should consider, with the help of the parties, the potential impact on costs of the directions that are contemplated, and whether these are justified in relation to what is at issue. Parties and their legal representatives, as in other cases on the multi-track, should provide information on costs already incurred and be prepared to estimate the cost of proposed further work. It has been suggested that such examination should occur at intervals of three months. That must be for the managing judge to determine in each individual case.

58. Other common law jurisdictions with a cost-shifting rule have not changed it when introducing special rules for multi-party actions. Multi-party actions are not so significantly different from ordinary litigation as to justify such a change. However, there are several respects in which the ordinary approach to costs needs to be modified.

59. The court needs a wide discretion in deciding what are costs for the purposes of the ordinary rule. Multi-party actions involve costs which do not normally arise in individual litigation, such as co-ordinating and communicating within the group and liaising with the media in what are often high profile cases. At present the costs of action groups or claimants' co-ordinating committees are not generally met on taxation, although they have been in some cases. Yet without such groups it may be difficult to co-ordinate an action. It is also probably the case that effective co-ordination of the action saves defendants costs overall. It is necessary that the costs of action groups should be met on taxation and that a reasonable basis for acknowledging these, and any others considered necessary or appropriate, should be established and applied by the court from the start. The Law Society's working party recommended that work done to co-ordinate between claimants and their solicitors should be recoverable inter partes and I support this.

60. Thirdly, in some cases it will be fair that the group as a whole bears a proportionate share of any costs. This was the approach in the well known decision involving the drug Opren, *Davies (Joseph Owen) v Eli Lilly & Co.* [1987] 1 WLR 1136, CA. However, this approach cannot be adopted as an invariable rule for multi-party litigation. The Scottish Law Commission has

cogently set out the reasons (op.cit., p.278):

"Similarly, we think it is only reasonable that the members of a class should contribute to the expenses of a class action brought on their behalf. It would be difficult, however, to give effect to this policy in a class action procedure with an opt out scheme. It is significant that in those jurisdictions with opt out schemes the other class members are not obliged by the rules to contribute to the representative party's expenses. It would obviously be impossible to enforce an order for contribution against class members who could not be identified, and inequitable to enforce it only against those who could be identified."

61. The result of always adopting the Davies approach would be that in non-legally aided cases there would be a denial of access to justice. Indeed, this was evident in the Opren litigation itself. The claimants' legal advisers hoped that the lead cases could be chosen entirely from those legally aided claimants with nil contributions. When the Court of Appeal in Davies held that costs should be borne equally amongst all claimants, the privately funded clients were advised to discontinue because of the threat which costs posed to them. Ultimately a private benefactor agreed to underwrite their costs and the case was soon after settled without trial.

62. It is therefore essential that the court approves any cost sharing arrangement at the outset, and that this includes any arrangements between the privately paying and legally aided claimants. Information on costs already incurred and to be incurred in the future will allow claimants to assess their eventual liability as the case develops.

Legal aid funding

63. At present in most group actions the Legal Aid Board is underwriting the majority of claimants' costs. The Lloyds litigation, although it is largely privately funded, includes a number of legally aided claimants. In other smaller cases, notably housing cases, there is often a mix of legally aided and private claimants. Until now the cost of large product liability actions has been a significant deterrent to unassisted claimants. It therefore seems sensible to consider whether it would be possible for future actions affecting substantial numbers of people to be handled in a way which either combines funding from legal aid and private sources or extends financial eligibility to those who might normally be ineligible.

64. Tight control by the court over the management of the case should reduce cost and make it more predictable. The arrangements I outline for establishing an effective filter prior to entry on the register should reduce the overall numbers of claimants and particularly those with weak claims. This of itself should enable privately paying litigants to enter into cases with more confidence than they can at present where costs are totally uncontrolled.

65. Legally aided clients already contribute to the costs of their cases through contributions and the operation of the statutory charge. At present this is an open-ended commitment. I consider it appropriate that legally aided clients should continue to contribute to the costs, but there should be scope within a more managed system for this to be estimated as the case develops. There may also be scope to extend the upper limits of financial eligibility on the basis of increased contributions. In appropriate cases, with tight judicial management and control on costs it may be possible to make an estimate of overall liability in advance. Such an approach could be structured in a way which included a requirement to make a personal financial commitment to the action at the stage of initial entry to the register, and perhaps at later stages, when, for example, the judge imposes a cut-off date. At each stage the commitment should be for a fixed and finite amount rather than the present general open-ended liability.

66. The requirement of a personal financial commitment would reduce the element of speculative litigation which is one of defendants' main concerns. If it could be balanced by a limit on individual claimants' liability for costs at each stage, that would meet the main concern of claimants.

67. A number of those who represent the interests of claimants and consumers have suggested that such a scheme could be combined with the often-floated idea of a contingency legal aid fund (CLAF) funded by percentage success fees from successful claimants or an institutionalised conditional fee scheme for multi-party actions. They believe that their clients would be more than happy to forgo such a percentage if it meant that they could be on the register for a specified entry fee and that their maximum liability for costs could be known in advance. There may be interest in developing this approach from those currently providing legal expenses insurance. While personal injury cases could be funded on the basis of conditional fees without the establishment of a CLAF, such funding is a possibility at present for other multi-party actions. I hope that the Lord Chancellor's Department and Legal Aid Board can reconsider the possibility of a CLAF in the context of the greater financial control over litigation which my proposals represent.

68. A precedent for such a multi-party action fund, started initially by government, but subsequently funded by a percentage levy on successful litigants, is Ontario's 'class proceedings fund', funded by the Law Foundation of Canada. With its counterparts elsewhere, the Law Foundation derives its income mainly from interest on trust accounts. The fund is to provide financial support for claimants to class proceedings in respect of disbursements - not legal costs generally - related to the proceedings, and for payments to defendants in respect of costs awards made in their favour against claimants who have received financial support from the fund. The principal advantages of such a fund are that it would be entitled to assist all multi-party litigants, not just those with incomes low enough to qualify for legal aid.

Protecting the overall interests of litigants

69. The rationale behind multi-party actions is that the diminution of the individual rights of claimants and defendants makes the overall action more practicable and less costly to progress. But there is a need to ensure that those rights are protected: for defendants by the perceived fairness of the balance between generic issues and by establishing effective criteria for entry to the action. For claimants, the court has a more explicit role in ensuring that their interests are protected:

(a) in supervising the activity of lawyers;

(b) in ensuring the effective representation of their interests through the appointment of a trustee in appropriate cases;

(c) in approving settlement.

Lawyers and multi-party actions

70. There is nothing wrong with lawyers taking the initiative in actions multi-party actions. A typical claimant in such cases is often poorly informed, or ignorant of the particular facts, and it will only be the lawyer who recognises the potential for claiming. Moreover, even if a claimant does suspect a violation of the law and seeks redress, the cost of doing so may act as a disincentive to action. Enhancing access to justice demands that those ignorant of their legal rights, or unable because of the cost to pursue them, be given the opportunity of vindicating

them. If this requires lawyer initiative, then so be it.

71. But because the lawyers will often be taking the initiative in multi-party actions, there are potential conflicts between their interests and those of group members. This can derive from the very reasons which make multi-party litigation attractive in the first place - the possible ignorance of potential claimants, and that they are disorganised and possibly also dispersed. Thus the opportunities for self-interested behaviour are generally greater in group litigation than in ordinary litigation. Particular forms which this has taken include bringing claims known to be unfounded for harassing purposes and genuine but limited value claims, knowing in both cases that defendants will feel impelled to settle on terms advantageous to the lawyer though possibly of little benefit to the group members. It would be remiss of the Inquiry not to make some recommendations to anticipate problems which experience here and elsewhere demonstrates can arise.

72. In general terms the problems arise because of the relative absence of client control. When a group is large, members may not even be aware of the litigation until it is well under way. Even if they are aware of the litigation, how are claimants to have an influence? The view of individual claimants is greatly diluted, if not excluded, in a large group. As for a majority view, the costs of communicating between claimants, and organising meetings, may be so great as to make it impractical in many cases. If claimants are not involved in the conduct of litigation, however, they cannot really act as a monitor on the way the lawyers handle it.

73. Among the strongest disincentives to meritless or frivolous multi-party litigation will be prompt dismissal by the courts. Court control from the very early days will ensure this. So too will an early determination of the merits. Courts must also be prepared to visit sanctions on lawyers who do not live up to the standards of professional behaviour expected. The Bar and the Law Society must give special attention to the ethical problems involved in multi-party litigation.

74. Lawyers conducting multi-party litigation are entitled, of course, to reasonable remuneration but there are reports that working excessive hours and inflation of the time spent on a case are common abuses in multi-party action litigation in the United States. Where multi-party litigation in this country is legally aided, the Legal Aid Board has a duty to oversee the lawyers and to call a halt to this type of behaviour. Courts, too, have a role in this regard. I am recommending generally that costs should be actively considered by the judge throughout the case and that, if appropriate, a Taxing Master should also be involved throughout. Because of this continuing involvement, they will have a store of knowledge about the case. That involvement at the taxing stage will be invaluable. Moreover, if the lawyers know that the judge and his team managing the case may have an influence on their remuneration, this is likely to act as a strong incentive to proper and reasonable behaviour on their part.

Multi-party litigants and their support

75. Multi-party actions are in any event an area of litigation which is even more lawyer-driven than any other. This may be exacerbated when the lead firm is funded on contract by the Legal Aid Board and the case will become driven by the legal team in conjunction with the Board. In those circumstances the court has a duty to ensure that the interests of the client group are protected. In the past it has been assumed that this was achieved by individuals being represented by their own solicitor and the action co-ordinated by a steering committee or lead firm. While this may provide a degree of local hand-holding and support, it does not enable the client group, either individually or as a whole, to assume the role of an informed client.

76. But there is a wider issue here which may be particularly relevant in legally aided cases. That is the need to represent the interests of all the group, including those not specifically identified, and to ensure effective conduct of the litigation from the claimants' point of view.

77. The Inquiry has heard how action groups can take on the role of an informed client, with formal constitutions established at the outset to provide for later problems, particularly in relation to settlement. Such groups can take account of their members' interests and ensure that these are reflected in the instructions to their legal representatives. Where there is no formal group representing the interests of the claimants, or where it is considered that the litigants' interests require separate representation, a trustee should be appointed by the court. There may also be a need for a trustee in cases where there are both privately paying and legally aided litigants, to ensure that the interests of both are taken into account. The trustee would be publicly funded, in some cases by the Legal Aid Board, on the basis that he or she would be fulfilling a role that would otherwise be met by an assisted person's own solicitors, or by arrangements under an 'all work' contract, which would require the lead firm to make arrangements for looking after individual clients as well as fulfilling a wider role.

78. The role of trustee would be flexible but the main elements might be:

(a) to identify the objectives and priorities of the parties (by meeting them at an early stage to determine their needs), and to assist with devising a plan to meet those objectives;

(b) to maintain a watching brief on the public interest elements of the action to ensure that opportunities to instigate change are not missed;

(c) where necessary, to look after the interests of unidentified or unborn claimants and to act as protection against defendants picking out lead cases for settlement;

(d) if appropriate, to assist in the formation of an informal support group, if one does not come into being spontaneously (this could be done by advertising and holding regional meetings to inform people of the impending action and put them in touch with one another).

Approving settlement

79. There is a strong case for court approval of all multi-party settlements, especially where the defendant offers a lump sum settlement, because:

(a) it is necessary to ensure that the lawyers do not benefit themselves while obtaining minimal benefit for their clients, or, alternatively, profiting from the vulnerability of commercially sensitive defendants;

(b) all members of the group are bound although they may be only indirectly represented;

(c) a lump sum settlement must be fair although it explicitly does not try to match individual loss exactly.

80. There are two possible approaches to enabling the court to provide additional safeguards in this context. First, and particularly in cases where there may be unidentified or unborn potential claimants, the judge should satisfy himself that proper arrangements have been made, or request the trustee to do so.

81. Secondly, the court could require an identified and finite group of claimants to have in place from the outset a constitution including provisions relating to acceptance of settlement,

such as majority voting. The Inquiry heard how important this was considered to be by the action groups in the Lloyds litigation, which represented numbers of largely privately paying claimants. In such a case where a minority objected to the settlement, it would be open to the judge to hear their objections. The court may also have a role in administering settlements or resolving points of difficulty in borderline cases where criteria for settlement have been agreed.

82. Experience elsewhere suggests that the court also has a role in cases which are before the court solely for settlement purposes. Experience, particularly in the USA, suggests that judicial oversight of settlements is not effective unless there are understood criteria for approval, which provide for cases which may be before the court solely for settlement purposes. Although the MPS is primarily a vehicle for managing actions, it could, if necessary, be requested to provide court oversight and approval of settlement. In such a case the criteria might cover such matters as whether:

(a) the pre-requisites for a multi-party situation have been met;

(b) the multi-party definition is appropriate and fair, taking into account, among other things, whether it is consistent with the purpose for which it is certified, whether it may be over-inclusive or under-inclusive, and whether division into sub-groups may be necessary or advisable;

(c) persons with similar claims will receive similar treatment, taking into account any differences in treatment between present and future claimants;

(d) notice to members of the group is adequate, taking into account the ability of persons to understand the notice and its significance to them;

(e) the representation of members of the group is adequate, taking into account the possibility of conflicts of interest in the representation of persons whose claims differ in material respects from those of other claimants;

(f) 'opt-out' rights are adequate to fairly protect interests of group members;

(g) provisions for lawyers' fees are reasonable, taking into account the value and amount of services rendered and the risks assumed;

(h) the settlement will have significant effects on parties in other actions pending;

(i) the settlement will have significant effects on potential claims of group members for injury or loss arising out of the same or related occurrences but excluded from the settlement;

(j) the compensation for loss and damage provided by the settlement is reasonable, taking into account the balance of costs to defendant and benefits to class members; and

(k) any claims process under the settlement is likely to be fair and equitable in its operation.

A special tribunal?

83. In the issues paper published in January 1996, views were sought on the merits of establishing a special tribunal to act as a substitute for proceedings in court as to liability. The response has been overwhelmingly negative. There is a general consensus that the courts are rapidly developing case management techniques that will be further assisted by my general proposals and that the substitution of an inquiry would necessitate greatly increased funding to allow for the representation of the interests of the parties. It is considered that there would be no benefits to the process or to the funding of multi-party actions

benefits to the process or to the funding of multi-party actions.

84. There was also concern about my proposal that, in appropriate circumstances, a judge in charge of a multi-party action should move into 'inquiry' mode. The powers which the new rules will give to judges to control and limit evidence will result in far greater judicial control over the pace, scope and ordering of litigation. At a time of significant change this in itself represents a major shift of responsibility towards a more pro-active judicial involvement. I see no need for any further rules in this respect.

Inquiries

85. The Law Society's working party recommended that legal aid be extended to boards or inquiries and that the costs of such representation should in principle be recoverable in any subsequent group action. It also recommended that there should be a presumption that any findings of fact be binding on the parties to any subsequent proceedings and inquests if the presumption was agreed by the parties before the inquiry. My own preference would be for a *prima facie* assumption that the findings are correct.

86. The Scottish Law Commission has pointed out the difficulty of devising a single set of proceedings to serve with fairness all the purposes envisaged: the fatal accident inquiry is concerned with establishing, in the public interest, the circumstances surrounding particular fatalities; the criminal trial is obviously concerned with commission of a criminal offence, and there are strong rules excluding certain evidence in relation to this; and civil proceedings are concerned with person's claims, mainly to damages (Scottish Law Commission, *Multi-Party Actions*, Discussion Paper No.98, pp.50-1). It is clear from responses to the Inquiry that there appears to be a considerable element of duplication in the current approach to the establishment of disaster inquiries, inquests and subsequent criminal and civil litigation. There are also useful lessons to be learned from the study of previous inquiries and subsequent litigation. It was not part of the remit of my Inquiry to investigate this area but, despite the difficulties identified by the Scottish Law Commission, I consider that this is an area which requires further work, in particular in relation to its potential to inform or in part replace litigation in appropriate cases.

Conclusion

87. Although in the Inquiry's issues paper I encouraged consideration of more radical alternatives to the new rule proposed by the Law Society's working party, I have been persuaded by the strength of the response that such approaches are not yet necessary, given the continuing development of more effective ways of handling multi-party actions. I hope that my proposals of a multi-party situation, of pro-active judicial control and prospective arrangements as to how costs should be dealt with (although not the actual amounts involved) as well as the other recommendations in this chapter, will contribute to that process. It will be for the Lord Chancellor, if these proposals meet approval, to develop them in conjunction with the relevant interests.

Recommendations

My recommendations are as follows.

(1) Where proceedings will or may require collective treatment, parties or the Legal Aid Board should apply for a multi-party situation (MPS) to be established. This would suspend the operation of the Limitation Act. The court may also initiate an application. Within the MPS, part of the proceedings could be common to some or all of the claimants, and other parts could be limited to individual claimants.

(2) Individual claimants would be able to join the MPS at the application stage and subsequently

by entering their names on an initial register.

(3) The court should certify an MPS if it is satisfied that the group or groups will be sufficiently large and homogeneous, and that the cases within the MPS will be more viable if there is a collective approach than if they are handled individually.

(4) Lower value or local cases should be dealt with locally at appropriate courts by either a High Court or Circuit judge.

(5) A managing judge should be appointed at or as soon as possible following certification and should handle the action throughout.

(6) In appropriate cases additional support may be provided by the appointment of a deputy Master or deputy district judge from those practitioners who already have considerable experience of multi- party litigation.

(7) The court should have a residual power to approve the lead lawyer if a difficulty arises in appointing one.

(8) The court should usually aim to treat as a priority the determination of the generic issues while establishing economic methods of handling the individual cases.

(9) The court should have power to progress the MPS on an 'opt-out' or 'opt-in' basis, whichever contributes best to the effective and efficient disposition of the case.

(10) In reaching a decision on notice of the action to potential claimants, the court must take into account the cost of such notice and its usefulness.

(11) The court should be responsible for determining whether the action has merit and should proceed and the criteria which must be met by those wishing to join the action.

(12) The court should determine the arrangements for costs and cost sharing at the outset. The costs of action groups should be recoverable on taxation.

(13) The Lord Chancellor's Department and Legal Aid Board should consider the possibility of extending the upper limits of financial eligibility on the basis of increased contributions. In appropriate cases, with tight judicial management and control on costs it may be possible for assisted persons' liability to be assessed and fixed in advance.

(14) The possibility of a contingency legal aid fund should be reconsidered in the context of these proposals.

(15) The court has a duty to protect the interests of claimants, especially those unidentified or unborn.

(16) In appropriate cases the court should appoint a trustee.

(17) Multi-party settlements should be approved by the court especially where the defendant offers a lump sum settlement.

(18) The court should require an identified and finite group of claimants to have in place from the outset a constitution including provisions relating to acceptance of settlement.

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EXHIBIT 46

[1986] 3 W.L.R. 972

***460 Spiliada Maritime Corporation Appellants v Cansulex Ltd Respondents**

House of Lords

Lord Keith of Kinkel, Lord Templeman, Lord Griffiths, Lord Mackay of Clashfern, and Lord Goff of Chieveley

1986 July 7, 8, 9; Nov. 19

Practice—Writ—Application to set aside—Shipowners bringing action in England alleging damage to vessel caused by shipping wet sulphur cargo—Shippers carrying on business in British Columbia—Whether case suitable for service out of jurisdiction—Relevance of claim being time barred in British Columbia—R.S.C., Ord. 11, r. 4(2)

Ships' Names—Spiliada

In 1980 a Liberian owned vessel was chartered to carry a cargo of bulk sulphur from Vancouver, British Columbia, to Indian ports. The shipowners alleged that the cargo was wet when loaded and as a result caused severe corrosion to the vessel. They obtained leave ex parte to serve proceedings on the shippers in Vancouver or elsewhere in Canada on the ground that it was an action to recover damages for breach of a contract governed by English law. The shippers issued a summons under R.S.C., Ord. 12, r. 8, asking that the ex parte order be discharged on the ground, inter alia, that the case had not been shown to be "a proper one for service out of the jurisdiction" under R.S.C., Ord. 11, r. 4(2)1 . At the hearing of the application Staughton J., who had already started to hear the trial of a similar action for damages involving the same shippers in respect of another ship, the *Cambridgeshire* considered, inter alia, the availability of witnesses, potential multiplicity of proceedings and the fact that the accumulated experience of counsel and solicitors derived from their participation in the *Cambridgeshire* action would lead to savings of time and money. He dismissed the application.

On the shippers' appeal, the Court of Appeal held that it was impossible to conclude that the factors considered by the judge, when taken together, showed that the English court was distinctly more suitable for the ends of justice, and that a further factor, not considered by Staughton J., that if the present proceedings were set aside the shipowners would be faced with a defence of limitation in British Columbia, was a neutral factor. The Court of Appeal allowed the appeal and set aside the writ.

On appeal by the shipowners:-

allowing the appeal, that in order to determine whether a case was a proper one for service out of the jurisdiction under R.S.C., Ord. 11, r. 4(2) the court had, as in applications for a stay of proceedings founded on the ground of forum non***461** conveniens where the action was as of right by service on a defendant within the jurisdiction, to identify in which forum the case could most suitably be tried for the interests of all the parties and for the ends of justice; that, accordingly, the judge having identified the correct test and considered the relevant factors, including the advantages of efficiency, expedition and economy in bringing the action in England following the *Cambridgeshire* action, the Court of Appeal had had no grounds for interfering with the exercise of his discretion (post, pp. 464F, G, 465G - 466A, 480F-G, 484E-F, 485F - 486B).Dictum of Lord Kinnear in Sim v. Robinow (1892) 19 R. 665 applied.Ilyssia Compania Naviera S.A. v. Bamaodah [1985] 1 Lloyd's Rep. 107, C.A. approved.MacShannon v. Rockware Glass Ltd. [1978] A.C. 795, H.L.(E.) considered.Dicta of Lord Diplock and Lord Wilberforce in Amin Rasheed Shipping Corporation v. Kuwait Insurance Co.

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 [1987] A.C. 460 [1986] 3 W.L.R. 972 [1986] 3 All E.R. 843 [1987] 1 Lloyd's Rep. 1 [1987] E.C.C. 168 [1987] 1 F.T.L.R. 103 (1987) 84 L.S.G. 113 (1986) 136 N.L.J. 1137 (1986) 130 S.J. 925 Financial Times, November 25, 1986

[1984] A.C. 50, 65, 72, H.L.(E.) and of Stephenson L.J. in Aratra Potato Co. Ltd. v. Egyptian Navigation Co. (The El Amria) [1981] 2 Lloyd's Rep. 119, 129, C.A. explained.*Per curiam.* Had the point arisen, the shipowners had not acted unreasonably in failing to commence proceedings in British Columbia before the expiry of the limitation period there. Had the judge erred in the exercise of his discretion, the proceedings would only have been set aside on condition that the shippers waived their right to rely on the time bar in British Columbia (post, pp. 464F, 465G - 466A, 487G - 488A).*Per* Lord Templeman. The solution of disputes about the relative merits of trial in England and trial abroad is preeminently a matter for the trial judge, before whom submissions should be measured in hours not days. An appeal should be rare and the appellate court should be slow to interfere (post, p. 465E-G).Decision of the Court of Appeal [1985] 2 Lloyd's Rep. 116 reversed.

The following cases are referred to in the opinion of Lord Goff of Chieveley:

- Abidin Daver, The [1984] A.C. 398; [1984] 2 W.L.R. 196; [1984] 1 All E.R. 470; [1984] 1 Lloyd's Rep. 339, H.L.(E.).
- Amin Rasheed Shipping Corporation v. Kuwait Insurance Co. [1984] A.C. 50; [1983] 3 W.L.R. 241; [1983] 2 All E.R. 884, H.L.(E.).
- Aratra Potato Co. Ltd. v. Egyptian Navigation Co. (The El Amria) [1981] 2 Lloyd's Rep. 119, C.A..
- Atlantic Star, The [1973] Q.B. 364; [1972] 3 W.L.R. 746; [1972] 3 All E.R. 705, C.A.; [1974] A.C. 436; [1973] 2 W.L.R. 795; [1973] 2 All E.R. 175, H.L.(E.).
- Blue Wave, The [1982] 1 Lloyd's Rep. 151
- Britannia Steamship Insurance Association Ltd. v. Ausonia Assicurazioni S.p.A. [1984] 2 Lloyd's Rep. 98, C.A..
- B.P. Exploration Co. (Libya) Ltd. v. Hunt [1976] 1 W.L.R. 788; [1976] 3 All E.R. 879
- Clements v. Macaulay (1866) 4 Macph. 583
- Credit Chimique v. James Scott Engineering Group Ltd. 1982 S.L.T. 131
- European Asian Bank A.G. v. Punjab and Sind Bank [1982] 2 Lloyd's Rep. 356, C.A..

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- Hadmor Productions Ltd. v. Hamilton [1983] 1 A.C. 191; [1982] 2 W.L.R. 322; [1982] 1 All E.R. 1042, H.L.(E.).
- Hagen, The [1908] P. 189, C.A..
- Ilyssia Compania Naviera S.A. v. Bamaodah [1985] 1 Lloyd's Rep. 107, C.A..
- Longworth v. Hope (1865) 3 Macph. 1049
- MacShannon v. Rockware Glass Ltd. [1978] A.C. 795; [1978] 2 W.L.R. 362; [1978] 1 All E.R. 625, H.L.(E.).
- Sim v. Robinow (1892) 19 R. 665
- Société du Gaz de Paris v. Société Anonyme de Navigation "Les Armateurs Français," 1926 S.C. 13, H.L.(Sc.).
- Société Génerale de Paris v. Dreyfus Brothers (1885) 29 Ch.D 239
- Trendtex Trading Corporation v. Credit Suisse [1982] A.C. 679; [1981] 3 W.L.R. 766; [1981] 3 All E.R.

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520, H.L.(E.).

- Tyne Improvement Commissioners v. Armement Anversois S/A (The Brabo) [1949] A.C. 326; [1949] 1 All E.R. 294, H.L.(E.).
- Tyne Improvement Commissioners v. Armement Anversois S/A (The Brabo)
- Union Industrielle et Maritime v. Petrosul International Ltd. (The Roseline) (unreported), 23 March 1984

The following additional cases were cited in argument:

- Adolf Warski, The [1976] 1 Lloyd's Rep. 107; [1976] 2 Lloyd's Rep. 241, C.A..
- Bruce (W.) Ltd. v. J. Strong [1951] 2 K.B. 447; [1951] 1 All E.R. 1021; [1951] 2 Lloyd's Rep. 5, C.A..
- Cantieri Navali Riuniti S.p.A. v. N.V. Omne Justitia [1985] 2 Lloyd's Rep. 428, C.A..
- Castanho v. Brown & Root (U.K.) Ltd. [1981] A.C. 557; [1980] 3 W.L.R. 991; [1981] 1 All E.R. 143, H.L.(E.).
- Indian Fortune, The [1985] 1 Lloyd's Rep. 344
- Maharani Woollen Mills Co. v. Anchor Line (1927) 29 Ll.L.Rep. 169, C.A..
- Media, The (1931) 41 Ll.L.Rep. 80.
- Shiloh Spinners Ltd. v. Harding [1973] A.C. 691; [1973] 2 W.L.R. 28; [1973] 1 All E.R. 90, H.L.(E.).
- Siskina (Owners of cargo lately laden on board) v. Distos Compania Naviera S.A. [1979] A.C. 210; [1977] 3 W.L.R. 818; [1977] 3 All E.R. 803; [1978] 1 Lloyd's Rep. 1, H.L.(E.).
- Ward v. James [1966] 1 Q.B. 273; [1965] 2 W.L.R. 455; [1965] 1 All E.R. 563; [1965] 1 Lloyd's Rep. 145, C.A..

Appeal from the Court of Appeal.

This was an appeal by the plaintiffs, Spiliada Maritime Corporation, by leave of the House of Lords from an order of the Court of Appeal [1985] 2 Lloyd's Rep. 116 (Neill and Oliver L.JJ.) allowing an appeal from the order of Staughton J. of 16 November 1984 whereby he had dismissed the application of the defendants, Cansulex Ltd., under R.S.C., Ord. 12, r. 8 to set aside service of proceedings upon them in British Columbia, and alternatively for a stay of the proceedings, and whereby he accordingly refused to discharge the ex parte order of Neill J. on 10 October 1983 giving leave to the plaintiffs to serve proceedings upon the defendants pursuant to R.S.C., Ord. 11, r. 1(1)(f)(iii).

The facts are set out in the opinion of Lord Goff of Chieveley.***463**

Kenneth Rokison Q.C. and *Nicholas Legh-Jones* for the plaintiffs. The trial judge applied the correct test as to whether the case was a proper one for service out of the jurisdiction. He exercised his discretion in accordance with that test and therefore the Court of Appeal ought not to have intervened and substituted its own discretion: see Amin Rasheed Shipping Corporation v. Kuwait Insurance Co. [1984] A.C. 50, 65-68, *per* Lord Diplock. The way in which Lord Diplock's speech has been interpreted in Britannia Steamship Insurance Association Ltd. v. Ausonia Assicurazioni S.p.A. [1984] 2 Lloyd's Rep. 98 and Ilyssia Compania Naviera S.A. v. Bamaodah [1985] 1 Lloyd's Rep. 107 is correct - that the list of relevant factors is not exhaustive and the court has to carry out a balancing act of all the factors. [Reference was also made to Cantieri Navali Riuniti S.p.A. v. N.V. Omne Justitia [1985] 2 Lloyd's Rep. 428]. The Court of Appeal was only entitled to intervene and interfere with the judge's

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[1987] A.C. 460 [1986] 3 W.L.R. 972 [1986] 3 All E.R. 843 [1987] 1 Lloyd's Rep. 1 [1987] E.C.C. 168 [1987] 1 F.T.L.R. 103 (1987) 84 L.S.G. 113 (1986) 136 N.L.J. 1137 (1986) 130 S.J. 925 Financial Times, November 25, 1986

discretion in the circumstances set out by Lord Brandon of Oakbrook in The Abidin Daver [1984] A.C. 398, 420, namely where (1) the judge had misdirected himself with regard to the principles in accordance with which his discretion had to be exercised; (2) the judge, in exercising his discretion, had taken into account matters which he ought not to have done or failed to take into account matters which he ought to have done; or (3) his decision was plainly wrong. Further, in Shiloh Spinners Ltd. v. Harding [1973] A.C. 691, 728, Lord Simon of Glaisdale commented that the fact that the appellate court would give different weight to the various considerations assessed by the first instance court was not a reason to interfere. The judge had not only applied the correct test, but he had taken into account all relevant matters and cannot be said to have been "plainly wrong." Indeed, the judge was in the best position to weigh the relevant factors and in the particular the relevance and importance of the fact that the *Cambridgeshire* action had been fully prepared and fought in London (although it subsequently settled in the course of the trial). In the event that such circumstances were satisfied in the present case so that the Court of Appeal was entitled to consider the matter afresh and substitute its own discretion, then the fact that the defendants could rely on a time bar in British Columbia was not, as the Court of Appeal suggested, a neutral factor, but a powerful one which ought to have been weighed in the balance in the plaintiffs' favour. See Castanho v. Brown & Root (U.K.) Ltd. [1981] A.C. 557; The Adolf Warski [1976] 1 Lloyd's Rep. 107, 110; [1976] 2 Lloyd's Rep. 241; The Blue Wave [1982] 1 Lloyd's Rep. 151 and Aratra Potato Co. Ltd. v. Egyptian Navigation Co. (The El Amria) [1981] 2 Lloyd's Rep. 119.

Robert Alexander Q.C. and *Peter Goldsmith* for the defendants. The correct test to be applied is that of Lord Diplock in Amin Rasheed [1984] A.C. 50, 68: "The exorbitance of the jurisdiction sought to be invoked ... is an important factor to be placed in the balance against granting leave. It is a factor that is capable of being outweighed if the would-be plaintiff can satisfy the English court that justice either could not be obtained by him in the alternative forum; or could only be obtained at excessive cost, delay or inconvenience." That passage provides an exhaustive list of the circumstances in which a plaintiff can***464** satisfy the burden upon him of showing that the case is a proper one for service out of the jurisdiction. The plaintiffs in the present case could not satisfy that burden. [Reference was made to MacShannon v. Rockware Glass Ltd. [1978] A.C. 795 as to the weight to be applied to a preference for representation by lawyers in one jurisdiction rather than another; and to Ward v. James [1966] 1 Q.B. 273, 293, as illustrating the correct approach to whether an appellate court may interfere with the exercise of discretion by a trial judge.] In the present case the Court of Appeal was right to review the exercise of the judge's discretion: [Detailed reference was made to the judgments and factual material]. The Court of Appeal was also right to hold that the time-bar point was a neutral factor: see: Maharani Woollen Mills Co. v. Anchor Line (1927) 29 Ll.L.Rep. 169; W. Bruce Ltd. v. J. Strong [1951] 2 K.B. 447; The Media (1931) 41 Ll.L.Rep. 80 and The Indian Fortune [1985] 1 Lloyd's Rep. 344. The existence of a time-bar was only given significance in The Blue Wave [1982] 1 Lloyd's Rep. 151 - a case which turned very much on its facts.

Rokison Q.C. in reply. In determining whether a case is a proper one for service out of the jurisdiction, one starts with the balancing exercise, and only at a later stage does one move on to the considerations set out by Lord Diplock in the passage relied upon by the defendants at [1984] A.C. 50, 68, There, Lord Diplock was merely illustrating by reference to examples the way a plaintiff seeking to invoke the English jurisdiction could satisfy the burden placed upon him. There is no difference between that speech and that of Lord Wilberforce at p. 72. It is one and the same test - correctly applied in the Britannia case [1984] 2 Lloyd's Rep. 98 and the Ilyssia case [1985] 1 Lloyd's Rep. 107. The present is not a case where one can say that there is

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a natural forum. On the time-bar point, all the cases relied upon by the defendants were cases with an "exclusive jurisdiction" clause and where the same time-bar applied abroad as in England. They are not, therefore, of assistance.

Their Lordships took time for consideration. 19 November. LORD KEITH OF KINKEL.

MY Lords, I have had the benefit of reading in draft the speech to be delivered by my noble and learned friend Lord Goff of Chieveley. I agree with it and for the reasons he gives would allow the appeal and restore the order of Staughton J.

LORD TEMPLEMAN.

MY Lords, in these proceedings parties to a dispute have chosen to litigate in order to determine where they shall litigate. The principles which the courts of this country should apply are comprehensively reviewed and closely analysed in the speech of my noble and learned friend Lord Goff of Chieveley. Where the plaintiff is entitled to commence his action in this country, the court, applying the doctrine of forum non conveniens will only stay the action if the defendant satisfies the court that some other forum is more appropriate. Where the plaintiff can only commence his action with leave, the court, applying the doctrine of forum conveniens will only grant leave if the ***465** plaintiff satisfies the court that England is the most appropriate forum to try the action. But whatever reasons may be advanced in favour of a foreign forum, the plaintiff will be allowed to pursue an action which the English court has jurisdiction to entertain if it would be unjust to the plaintiff to confine him to remedies elsewhere.

In the present case, a vessel managed partly in Greece and partly in England, flying the flag of Liberia and owned by a Liberian corporation is said to have been damaged by a cargo loaded by a British Columbia shipper and carried from Vancouver to India. Both sets of insurers are English. Similar litigation took place in Canada concerning the vessel *Roseline*. Similar litigation took place in England over another vessel, the *Cambridgeshire*, after Staughton J. had refused to stay the action. If Staughton J. had good reason to try the *Cambridgeshire*, it is difficult to see that he had bad reason for trying the *Spiliada*.

The factors which the court is entitled to take into account in considering whether one forum is more appropriate are legion. The authorities do not, perhaps cannot, give any clear guidance as to how these factors are to be weighed in any particular case. Any dispute over the appropriate forum is complicated by the fact that each party is seeking an advantage and may be influenced by considerations which are not apparent to the judge or considerations which are not relevant for his purpose. In the present case, for example, it is reasonably clear that Cansulex prefer the outcome of the *Roseline* proceedings in Canada to the outcome of the *Cambridgeshire* proceedings in England and prefer the limitation period in British Columbia to the limitation period in England. The shipowners and their insurers hold other views. There may be other matters which naturally and inevitably help to produce in a good many cases conflicting evidence and optimistic and gloomy assessments of expense, delay and inconvenience. Domicile and residence and place of incident are not always decisive.

In the result, it seems to me that the solution of disputes about the relative merits of trial in England and trial abroad is pre-eminently a matter for the trial judge. Commercial court judges are very experienced in these matters. In nearly every case evidence is on affidavit by witnesses of acknowledged probity. I hope that in future the judge will be allowed to study the evidence and refresh his memory of the speech of my noble and learned friend Lord Goff of Chieveley in this case in the quiet of his room without expense to the parties; that he will not be referred to other decisions on other facts; and that submissions will be measured in hours and not days. An appeal should be rare and the appellate court should be slow to interfere. I agree with my noble and learned friend Lord Goff

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of Chieveley that there were no grounds for interference in the present case and that the appeal should be allowed.

LORD GRIFFITHS.

My Lords, I have had the advantage of reading in draft the speeches prepared by my noble and learned friends, Lord Templeman and Lord Goff of Chieveley. For the reasons they give I would allow the appeal.***466**

LORD MACKAY OF CLASHFERN.

My Lords, I have had the advantage of reading in draft the speeches prepared by my noble and learned friends, Lord Templeman and Lord Goff of Chieveley. I agree with them and for the reasons which they give I would allow the appeal.

LORD GOFF OF CHIEVELEY.

My Lords, there is before your Lordships an appeal, brought by leave of your Lordships' House, against a decision of the Court of Appeal [1985] 2 Lloyd's Rep. 116 (Oliver and Neill L.JJ.) whereby they reversed a decision of Staughton J. in which he refused an application by the respondents, **Cansulex** Ltd., to set aside leave granted ex parte to the appellants, **Spiliada** Maritime Corporation, to serve proceedings on the respondents outside the jurisdiction. The effect of the decision of the Court of Appeal was, therefore, to set aside the leave so granted and the proceedings served on the respondents pursuant to that leave.(1)

The facts of the case

As this appeal is concerned with an interlocutory application, I must, like the courts below, take the facts from the affidavit evidence filed on behalf of the parties. The appellants (whom I shall refer to as "the shipowners") claim to be (and can, for the purposes of this appeal, be accepted as being) the owners of a bulk carrier, of about 20,000 tonnes deadweight, called *Spiliada*. The shipowners are a Liberian Corporation, and their vessel flies the Liberian flag; but their managers are in Greece, though some part of the management takes place in England. The respondents (whom I shall refer to as "Cansulex") carry on business in British Columbia as exporters of sulphur. The shipowners chartered their vessel to an Indian company called Minerals & Metals Trading Corporation of India Ltd. (whom I shall refer to as "M.M.T.C.") under a voyage charter dated 6 November 1980, for the carriage of a cargo of sulphur from Vancouver to Indian ports. The charterparty contained a London arbitration clause. Pursuant to that charterparty, the vessel proceeded to Vancouver and there loaded a cargo of sulphur between 18 and 25 November 1980. The sulphur was loaded on board the vessel by order of Cansulex, who were f.o.b. sellers of the sulphur to M.M.T.C. Bills of lading were then issued to, and accepted by, Cansulex. The bills were shipped bills, Cansulex being named as shippers in the bills. Clause 21 on the reverse of the bills of lading provided that, subject to certain clauses which are for present purposes immaterial, the bills of lading "no matter where issued, shall be construed and governed by English law, and as if the vessel sailed under the British flag." The bills were signed by agents for and by authority of the master. The cargo was discharged at ports in India between 29 December 1980 and 6 February 1981.

It has been alleged by the shipowners that the cargo of sulphur so loaded on the vessel was wet when loaded and as a result caused severe corrosion and pitting to the holds and tank tops of the vessel. The shipowners have claimed damages from Cansulex in respect of the damage so caused. The shipowners rely upon the age of the ship at the***467** time of the voyage (she was then three years old) and the condition of the holds before and after the voyage. The shipowners have advanced their claim against Cansulex as shippers under the contract of carriage contained in or evidenced by the bills of lading to which I have already referred, basing their claim on article 4, rule 6, of the Hague Rules (contained in the International Convention for the Unification of certain rules relating to Bills of Lading, dated Brus-

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sels, 25 August 1924) incorporated into the bills, and on a warranty implied by English law that dangerous cargo will not be shipped without warning. Arbitration proceedings have also been commenced by the shipowners against M.M.T.C. in London under the arbitration clause in the voyage charter. It is open to M.M.T.C. to bring arbitration proceedings in London against Cansulex under the sale contract between them, by virtue of the London arbitration clause in that contract. Leave was obtained by the shipowners to issue and serve a writ upon Cansulex outside the jurisdiction on a ground contained in the then R.S.C., Ord. 11, r. 1(1)(f)(iii), viz. that the action was brought to recover damages in respect of breach of a contract which was by its terms governed by English law.

Cansulex then applied for an order to set aside such leave and all subsequent proceedings. The application came before Staughton J. on 26 October 1984. The hearing of the application took place while there was proceeding before Staughton J. a very similar action, in which Cansulex were also defendants. That action concerned a ship called the *Cambridgeshire*, owned by an English company, Bibby Bulk Carriers Ltd. In it, the owners claimed damages for damage alleged to have been caused to their vessel by a cargo of sulphur loaded on her at Vancouver in November and December 1980, for carriage to South Africa and Mozambique. The defendants in the action were the charterers of the ship, Cobelfret NV, and three shippers - Cansulex, Petrosul International Ltd., and Canadian Superior Oil Ltd. In that action, Cansulex (supported by Petrosul International Ltd., another Canadian company) who had been served with proceedings outside the jurisdiction on the same ground as in the present case, applied in September 1982 for the leave to serve proceedings upon them outside the jurisdiction, and all subsequent proceedings, to be set aside. Staughton J. heard that application and dismissed it, holding that there was a good arguable case that the Canadian companies were parties to a contract governed by English law, and that the case was a proper one for service out of the jurisdiction. There was no appeal from that decision. The trial of the *Cambridgeshire* action started on 15 October 1984, again before Staughton J. He recorded in his judgment in the present case that there were no less than 15 counsel engaged in the *Cambridgeshire* action; that each was equipped with 75 files; and that the then estimate for the length of the trial was six months.

There has been another set of proceedings concerning damage to a vessel alleged to have been caused by a wet sulphur cargo shipped at Vancouver, Union Industrielle et Maritime v. Petrosul International Ltd. (unreported), 23 March 1984. This concerned a ship called the Roseline. The matter came before a Canadian Federal Court in March 1984, the***468** defendant being Petrosul International Ltd. The owners of the *Roseline* claimed a declaration that a contract existed between them and Petrosul under which disputes were to be referred to arbitration in Paris. The contract was said to have been contained in or evidenced by a bill of lading, in which Petrosul were named as shippers. Reed J. upheld a contention by Petrosul that they were not a party to any contract with the owners, or at least not a party to any contract containing an arbitration clause; her conclusion was reached on the basis that the bill of lading, in the hands of Petrosul, "partook of the nature of a receipt or a document of title," and that use for this purpose did not make the document a contractual one so far as Petrosul were concerned. There is doubt whether a similar conclusion would be reached in English law; Staughton J. was told that there was an unreported decision of Mustill J. to the contrary effect. However, Staughton J. held, and it is now accepted by Cansulex, that in the present case there is a good arguable case that Cansulex were parties to the bill of lading contract, and so parties to a contract governed by English law.

It is right that I should record that the judge was told that there were other disputes concerning similar damage to ships alleged to have been caused by sulphur loaded at Vancouver; but he knew no more about them.(2)

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The decision of Staughton J.

The judge approached the application of Cansulex in the present case as follows. Having concluded that there was a good arguable case that the shipowners and Cansulex were parties to a contract governed by English law, he then proceeded to consider whether the case had been shown to be, as a matter of discretion, a proper case for service out of the jurisdiction. He referred first to the decision of this House in Amin Rasheed Shipping Corporation v. Kuwait Insurance Co. [1984] A.C. 50, and in particular to certain passages (which I will quote later) from the speeches in that case of Lord Diplock, at p. 65, and Lord Wilberforce, at p. 72, and to a suggested conflict between those two passages; but, following a decision of the Court of Appeal in Ilyssia Compania Naviera S.A. v. Bamaodah [1985] 1 Lloyd's Rep. 107, he concluded that the suggested conflict was more apparent than real, and that the appropriate test for him to apply was that, if the English court is shown to be distinctly more suitable for the ends of justice, then the case is a proper one for service out of the jurisdiction. He then said:

"In considering the exercise of discretion I must, of course, assume that the *Spiliada* action will come to trial eventually, either in England or in Canada. In fact, that seems to me improbable. After the *Cambridgeshire* proceedings have reached a final conclusion, with vast expenditure of money, time and effort, I think it very likely that the parties to the ***Spiliada*** dispute will have little appetite for litigation, and will reach a compromise. **Cansulex** feature as defendants in both actions, and are presently represented by the same solicitors and counsel in both. The plaintiff shipowners are, of course, different in the two actions, but they too are represented by***469** the same solicitors and counsel, and it may be that they are supported by the same insurers. So I suspect that what I am in fact deciding is not where the *Spiliada* action will ultimately be tried, but whether a settlement will be reached against the background of litigation pending in England or of litigation pending in Canada. Nevertheless, it is the prospect of a trial which provides the sanction to induce a settlement, and in my judgment I must decide this application on the assumption that a trial there will be." This was, so far as the *Cambridgeshire* action was concerned, a prescient observation. For, on 18 January 1985, the parties to that action settled their differences. Furthermore his thought that "it may be that [the shipowners] are supported by the same insurers" was one which would certainly have occurred to other experienced commercial practitioners, and the judge's tentative inference that both the *Cambridgeshire* and the ***Spiliada*** were entered in the same P. and I. club was confirmed before your Lordships; indeed the solicitors acting for the owners in both cases have commenced proceedings against a number of Canadian sulphur exporters, including **Cansulex**, on behalf of various shipowners all entered in the same P. & I. club.

The judge then turned to consider the various factors which were said to influence the choice between an English and Canadian court. I need not list them all. The most important were (1) availability of witnesses, (2) multiplicity of proceedings, and (3) a matter which was regarded as crucial by the judge, which I will call the *Cambridgeshire* factor and which relates to preparation for very substantial proceedings.

On availability of witnesses, the judge had this to say:

"Apart from those matters, I now have, after listening to the opening speech in the *Cambridgeshire* trial for 15 days, a somewhat clearer picture of what the relative importance of the issues is likely to be. The principal or most important events in the case occurred in Vancouver, but many events of significance occurred in many other places. The most important witnesses of fact will be from Cansulex and various other concerns in Vancouver, and the ship's officers. But there are likely to be a great many witnesses from other places. In the *Cambridgeshire* applications I concluded that, in terms of witness/hours, events in Vancouver were likely to loom largest at the trial. I am no longer con-

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vinced that that was right, even leaving out of account the expert evidence. Certainly, there will be a very substantial body of evidence dealing with events which did not take place in Vancouver. As to the expert witnesses, I am told that all but one of them in the *Cambridgeshire* are English. But, as I then said, experts can travel, or be replaced by other experts.

"It is true that the *Cambridgeshire* plaintiffs are an English company and the ship is British, whereas the *Spiliada* plaintiffs are Liberian; so is their ship; and their managers are in Greece, although some part of the management takes place in England. That means that the *Spiliada* action has much less connection with England, but it does not give it any greater connection with***470** Vancouver. It is also true that two witnesses in the *Cambridgeshire* action decline to come to England to give evidence, so that their evidence will have to be taken on commission in North America. Nevertheless, I reach the clear conclusion that Vancouver is not overall a more suitable place for trial than England in terms of the convenience of witnesses. Indeed, if one assumes that the parties will wish to have the same experts as in the *Cambridgeshire*, I would say that England is shown to be more suitable." I should interpolate that the judge was not right in thinking that all but one of the experts in the *Cambridgeshire* action were English; in fact, two of the defendants' experts came from England and four from elsewhere (one from Canada, one from the United States, and two from Europe - from Scandinavia and Greece). This was drawn to the judge's attention at the end of his judgment. The judge then stated that he did not however regard this difference as significant - no doubt he had it in mind that all the owners' experts were from England.

Next, turning to the question of multiplicity of proceedings, he referred to the facts that Cansulex wished to join their insurers and possibly others as third parties, which they could only do in Canada, and that the shipowners wished to join M.M.T.C. as co-defendants with Cansulex, which would obviously be a sensible course if it could be achieved. As to the former, he gave the same weight to it as he did in the *Cambridgeshire* application; as to the latter, he gave less, because, whereas the relevant charterers were joined as co-defendants in the *Cambridgeshire* action, in the present case (following, it appears, lobbying by both sides) he felt that he should regard the shipowners' objective of joining M.M.T.C. as problematical.

Turning to the *Cambridgeshire* factor, which he regarded as crucial, the judge had this to say:

"But at the end of the day what seems to me important is this. Mr. Evans submits that Cansulex, having been put to the trouble and expense of bringing their witnesses and senior executives here once, should not have to bear the same burden again. Mr. Rokison replies that litigation is not like a football or cricket season, with one fixture at home and the other away. The trouble with such an attractive analogy or metaphor is that it tends to take one's eye off the ball, so to speak. Indeed, if all other things were equal, I should be inclined to hold that even-handed justice *would* be served best if one action were tried here and the other in Canada. But all other things are far from equal. The plaintiff's solicitors have made all the dispositions and incurred all the expense for the trial of one action in England; they have engaged English counsel and educated them in the various topics upon which expert evidence will be called; they have engaged English expert witnesses; and they have assembled vast numbers of documents. They have also, no doubt, educated themselves upon the issues in the action. All that has been done on behalf of Cansulex as well, save that one of their expert witnesses is Canadian. If they now wish to start the process again in Canada, that is their choice Rut it seems to me that the additional***471** inconvenience and expense which would be thrust upon the plaintiffs if this action were tried in Canada far outweighs the burden which would fall upon Cansulex if they had to bring their witnesses and senior executives here a second time.

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 [1987] A.C. 460 [1986] 3 W.L.R. 972 [1986] 3 All E.R. 843 [1987] 1 Lloyd's Rep. 1 [1987] E.C.C. 168 [1987] 1 F.T.L.R. 103 (1987) 84 L.S.G. 113 (1986) 136 N.L.J. 1137 (1986) 130 S.J. 925 Financial Times, November 25, 1986

"There might have been an appeal from my decision on the *Cambridgeshire* applications, but there was not. I appreciate that there are a number of significant points of distinction between the two cases, including the principal ones that I have mentioned. It may then in a sense be hard on Cansulex if the decision reached on the *Cambridgeshire* applications should have the effect of determining their application in this case. But in my judgment it does, in the circumstances and for the reasons that I have mentioned. Overall it would be wasteful in the extreme of talent, effort and money if the parties to this case were to have to start again in Canada. The case is a proper one for service out of the jurisdiction."

On that basis, the judge decided not to accede to Cansulex's application. After he had prepared his judgment, evidence was placed before him on behalf of the shipowners with regard to the relevant limitation period applicable in British Columbia. It transpired that that period was two years, and had expired by November 1982, long before the hearing of Cansulex's application before the judge. The shipowners sought to rely on this point, apparently on the basis that to send the case back to British Columbia would deprive them of a legitimate juridical advantage in this country. However the judge, having already concluded that the action should be tried here, irrespective of the time bar point, did not think it necessary to consider that matter.(3)

The decision of the Court of Appeal

In the Court of Appeal [1985] 2 Lloyd's Rep. 116, Neill L.J. (who delivered the first judgment) referred to the speech of Lord Diplock in Hadmor Productions Ltd. v. Hamilton [1983] 1 A.C. 191, 220 and both he and Oliver L.J. referred to the speech of my noble and learned friend Lord Brandon of Oakbrook in The Abidin Daver [1984] A.C. 398, 420, which state the limited grounds upon which an appellate court may interfere with the exercise of a trial judge's discretion. They also, like the judge, regarded themselves bound by the decision of the Court of Appeal in the Ilyssia case [1985] 1 Lloyd's Rep. 107 to regard the difference between the speeches of Lord Diplock and Lord Wilberforce in the Amin Rasheed case [1984] A.C. 50 as more apparent than real. Neill L.J. reviewed the judge's assessment of the various factors as follows. With regard to the availability of witnesses, he felt that, even on the judge's own analysis of the facts, the convenience of the parties and the witnesses probably tilted the scales towards British Columbia as the forum, but certainly did not show that an English court was "distinctly more suitable for the ends of justice." On multiplicity of proceedings, he saw force in the criticism of Mr. Goldsmith (counsel for Cansulex) that this was at most a neutral factor, and certainly did not bring the scales down heavily on the side of England. On the relevance of the *Cambridgeshire* factor, while rejecting Mr. Goldsmith's primary***472** submission that the *Cambridgeshire* litigation was wholly irrelevant, he considered that the judge attached far too much importance to it. He said [1985] 2 Lloyd's Rep. 116, 124:

"The fact that the London solicitors who are presently acting are firms of great eminence and the further fact that members of these firms have acquired detailed knowledge about the shipment of sulphur cargoes from Vancouver are pointers to trial in England but should not be regarded as of decisive importance if other factors tilt the balance the other way." He held that it was impossible to conclude that the relevant factors, when taken together, showed that the English court was distinctly more suitable for the ends of justice. On this view of the case, it became necessary for him to consider the impact of the time bar in British Columbia. On that he adopted the view of Oliver L.J. that the existence of a time bar was a neutral factor. He therefore decided to allow the appeal.

Oliver L.J., like Neill L.J., accepted that they were bound to follow the decision of the Court of Appeal in the Ilyssia case, on the basis of which he thought it right to follow the view of Lord Wilberforce in

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the Amin Rasheed case; and he did not therefore accept the submission of Mr. Goldsmith for Cansulex that the judge had propounded the wrong test. He then considered the exercise of the judge's discretion. He reviewed the judge's assessment of the availability of witnesses in considerable detail; and pointed out that the judge had proceeded on an erroneous assumption that all the experts in the *Cambridgeshire* action were English. He went on to express the opinion that the supposed advantages of England as a forum were, in this respect, far less clear cut than the judge had appeared to have imagined. In his opinion, the highest that it could be put on the shipowners' side was that the factor of convenience of witnesses was neutral. He then considered the point of multiplicity of proceedings, and rejected criticism of the judge's approach because the point seemed to him to have played a neutral role in the judge's decision. Turning to the *Cambridgeshire* factor, he was very critical of the judge's approach. He summarised Mr. Goldsmith's principal criticism at [1985] 2 Lloyd's Rep. 116, 133:

"But what, Mr. Goldsmith asks forensically, does all that amount to beyond this, that the plantiffs say, in effect, 'we wish, for the purposes of our own and because it is convenient to do so, to retain the services of particular legal advisers and experts who happen to be resident and practising in England. Therefore, our desire to retain English legal advisers makes England a more appropriate forum for the hearing of the dispute?"'

Oliver L.J. accepted that criticism as well-founded. He concluded that, in giving to the *Cambridgeshire* action the decisive and conclusive weight that he did, the judge erred in principle.

Finally, Oliver L.J. considered the impact of the time bar in British Columbia. He came to the conclusion that the time bar was not of itself a factor which ought to carry the day. The difficulty in the way of the***473** shipowners' argument that, by sending the case to be tried in British Columbia, they would be deprived of a legitimate juridical advantage in that the action was not time-barred in England, was that what was one side's advantage must be another's disadvantage. This pointed, of course, to a time bar being regarded as a neutral factor. Even if, following the decision of Sheen J. in The Blue Wave [1982] 1 Lloyd's Rep. 151, it was to be treated as a factor on which the shipowners as plaintiffs could rely unless they had acted unreasonably in allowing the time bar to elapse in the relevant foreign jurisdiction, that could be of no benefit to the shipowners in the present case, because there was no evidence tendered on their behalf providing any satisfactory explanation why no steps were taken to ascertain what the law of British Columbia was. Furthermore, the factor of the time bar in British Columbia could not in any event be conclusive; because the evidence showed that it was open to the shipowners to sue Cansulex in the Federal Court in any province in Canada. Accordingly, in agreement with Neill L.J., he decided that the appeal of Cansulex should be allowed.(4)

Submissions of counsel

Before your Lordships, the shipowners submitted that the Court of Appeal, having accepted that the judge applied the correct test, went beyond their limited power of review of the exercise of the judge's discretion. The real reason for their intervention was that they disagreed with the weight attached by the judge to the *Cambridgeshire* factor and were then, it was submitted, over-astute to discover an error which would enable them to substitute their own discretion for his. For Cansulex, on the other hand, it was submitted that the Court of Appeal were fully entitled to interfere with the judge's exercise of his discretion, substantially for the reasons given by them; but it was further submitted that, in any event, both the judge and the Court of Appeal should have applied the more stringent test set out in the passage from Lord Diplock's speech in the Amin Rasheed case [1984] A.C. 50, 68, which, if correctly applied, should certainly have led to the same order as that made by the Court of Appeal.

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In considering the submissions of counsel, for whose assistance I am most grateful, it is necessary to review the applicable principles. I say this for two particular reasons. First, since the courts below have been troubled by apparent differences between observations of Lord Diplock and Lord Wilberforce in the Amin Rasheed case, it is, I think, desirable that this House should now resolve those differences. Second, since the question of the relevance of a time bar has now arisen in a number of cases, including the present, it is desirable that this House should give further consideration to the relevance of what has been called a "legitimate personal or juridical advantage," with special reference to time bars. But, in any event, the law on this subject is still in a state of development; and it is perhaps opportune to review the position at this stage, and in particular to give further consideration to the relationship between cases where jurisdiction has been founded as of right by service of proceedings on the defendant within the jurisdiction, but the defendant seeks a stay of the proceedings on the ground of forum non conveniens,***474** and cases where the court is invited to exercise its discretion, under R.S.C., Ord. 11, to give leave for service on the defendant out of the jurisdiction.(5)

The fundamental principle

In cases where jurisdiction has been founded as of right, i.e. where in this country the defendant has been served with proceedings within the jurisdiction, the defendant may now apply to the court to exercise its discretion to stay the proceedings on the ground which is usually called forum non conveniens. That principle has for long been recognised in Scots law; but it has only been recognised comparatively recently in this country. In The Abidin Daver [1984] A.C. 398, 411, Lord Diplock stated that, on this point, English law and Scots law may now be regarded as indistinguishable. It is proper therefore to regard the classic statement of Lord Kinnear in Sim v. Robinow (1892) 19 R. 665 as expressing the principle now applicable in both jurisdictions. He said, at p. 668:

"the plea can never be sustained unless the court is satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice." For earlier statements of the principle, in similar terms, see Longworth v. Hope (1865) 3 Macph. 1049, 1053, *per* Lord President McNeill, and Clements v. Macaulay (1866) 4 Macph. 583, 592, *per* Lord Justice-Clerk Inglis; and for a later statement, also in similar terms, see Société du Gaz de Paris v. Société Anonyme de Navigation "Les Armateurs Français," 1926 S.C.(H.L.) 13, 22, *per* Lord Sumner.

I feel bound to say that I doubt whether the Latin tag forum non conveniens is apt to describe this principle. For the question is not one of convenience, but of the suitability or appropriateness of the relevant jurisdiction. However the Latin tag (sometimes expressed as forum non conveniens and sometimes as forum conveniens) is so widely used to describe the principle, not only in England and Scotland, but in other Commonwealth jurisdictions and in the United States, that it is probably sensible to retain it. But it is most important not to allow it to mislead us into thinking that the question at issue is one of "mere practical convenience." Such a suggestion was emphatically rejected by Lord Kinnear in Sim v. Robinow, 19 R. 665, 668, and by Lord Dunedin, Lord Shaw of Dunfermline and Lord Sumner in the Société du Gaz case, 1926 S.C.(H.L.) 13, 18, 19, and 22 respectively. Lord Dunedin, with reference to the expressions forum non competens and forum non conveniens, said, at p. 18:

"In my view, 'competent' is just as bad a translation for 'competens' as 'convenient' is for 'conveniens.' The proper translation for these Latin words, so far as this plea is concerned, is 'appropriate.'" Lord Sumner referred to a phrase used by Lord Cowan in Clements v. Macaulay (1866) 4 Macph. 583, 594, viz. "more convenient and preferable for securing the ends of justice," and said, at p. 22:***475**

"one cannot think of convenience apart from the convenience of the pursuer or the defender or the

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court, and the convenience of all these three, as the cases show, is of little, if any, importance. If you read it as 'more convenient, that is to say, preferable, for securing the ends of justice,' I think the true meaning of the doctrine is arrived at. The object, under the words 'forum non conveniens' is to find that *forum* which is the more suitable for the ends of justice, and is preferable because pursuit of the litigation in that *forum* is more likely to secure those ends." In the light of these authoritative statements of the Scottish doctrine, I cannot help thinking that it is wiser to avoid use of the word "convenience" and to refer rather, as Lord Dunedin did, to the *appropriate* forum.(6)

How the principle is applied in cases of stay of proceedings

When the principle was first recognised in England, as it was (after a breakthrough in The Atlantic Star [1974] A.C. 436) in MacShannon v. Rockware Glass Ltd. [1978] A.C. 795, it cannot be said that the members of the Judicial Committee of this House spoke with one voice. This is not surprising; because the law on this topic was then in an early stage of a still continuing development. The leading speech was delivered by Lord Diplock. He put the matter as follows, at p. 812:

"In order to justify a stay two conditions must be satisfied, one positive and the other negative; (a) the defendant must satisfy the court that there is another forum to whose jurisdiction he is amenable in which justice can be done between the parties at substantially less inconvenience or expense, and (b) the stay must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the jurisdiction of the English court." This passage has been quoted on a number of occasions in later cases in your Lordships' House. Even so, I do not think that Lord Diplock himself would have regarded this passage as constituting an immutable statement of the law, but rather as a tentative statement at an early stage of a period of development. I say this for three reasons. First, Lord Diplock himself subsequently recognised that the mere existence of "a legitimate personal or juridical advantage" of the plaintiff in the English jurisdiction would not be decisive: see The Abidin Daver [1984] A.C. 398, 410, where he recognised that a balance must be struck. Second, Lord Diplock also subsequently recognised that no distinction is now to be drawn between Scottish and English law on this topic, and that it can now be said that English law has adopted the Scottish principle of forum non conveniens: see The Abidin Daver [1984] A.C. 398, 411. It is necessary therefore now to have regard to the Scottish authorities; and in this connection I refer in particular, not only to statements of the fundamental principle, but also to the decision of your Lordships' House in the Société du Gaz case, 1926 S.C.(H.L.) 13. Third, it is necessary to strike a note of caution regarding the prominence given***476** to "a legitimate personal or juridical advantage" of the plaintiff, having regard to the decision of your Lordships' House in Trendtex Trading Corporation v. Credit Suisse [1982] A.C. 679, in which your Lordships unanimously approved the decision of the trial judge to exercise his discretion to stay an action brought in this country where there existed another appropriate forum, i.e., Switzerland, for the trial of the action, even though by so doing he deprived the plaintiffs of an important advantage, viz. the more generous English procedure of discovery, in an action involving allegations of fraud against the defendants.

In my opinion, having regard to the authorities (including in particular the Scottish authorities), the law can at present be summarised as follows.

(a) The basic principle is that a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice.

(b) As Lord Kinnear's formulation of the principle indicates, in general the burden of proof rests on the

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defendant to persuade the court to exercise its discretion to grant a stay (see, e.g., the Société du Gaz case, 1926 S.C.(H.L.) 13, 21, *per* Lord Sumner; and Anton, Private International Law (1967) p. 150). It is however of importance to remember that each party will seek to establish the existence of certain matters which will assist him in persuading the court to exercise its discretion in his favour, and that in respect of any such matter the evidential burden will rest on the party who asserts its existence. Furthermore, if the court is satisfied that there is another available forum which is prima facie the appropriate forum for the trial of the action, the burden will then shift to the plaintiff to show that there are special circumstances by reason of which justice requires that the trial should nevertheless take place in this country (see (f), below).

(c) The question being whether there is some other forum which is the appropriate forum for the trial of the action, it is pertinent to ask whether the fact that the plaintiff has, ex hypothesi, founded jurisdiction as of right in accordance with the law of this country, of itself gives the plaintiff an advantage in the sense that the English court will not lightly disturb jurisdiction so established. Such indeed appears to be the law in the United States, where "the court hesitates to disturb the plaintiff's choice of forum and will not do so unless the balance of factors is strongly in favor of the defendant,": see Scoles and Hay, Conflict of Laws (1982), p. 366, and cases there cited; and also in Canada, where it has been stated (see *Castel, Conflict of Laws* (1974), p. 282) that "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." This is strong language. However, the United States and Canada are both federal states; and, where the choice is between competing jurisdictions within a federal state, it is readily understandable that a strong preference should be given to the forum chosen by the plaintiff upon which jurisdiction has been conferred ***477** by the constitution of the country which includes both alternative jurisdictions.

A more neutral position was adopted by Lord Sumner in the Société du Gaz case, 1926 S.C.(H.L.) 13, 21, where he said:

"All that has been arrived at so far is that the burden of proof is upon the defender to maintain that plea. I cannot see that there is any presumption in favour of the pursuer." However, I think it right to comment that that observation was made in the context of a case where jurisdiction had been founded by the pursuer by invoking the Scottish principle that, in actions in personam, exceptionally jurisdiction may be founded by arrest of the defender's goods within the Scottish jurisdiction. Furthermore, there are cases where no particular forum can be described as the natural forum for the trial of the action. Such cases are particularly likely to occur in commercial disputes, where there can be pointers to a number of different jurisdictions (see, e.g., European Asian Bank A.G. v. Punjab and Sind Bank [1982] 2 Lloyd's Rep. 356), or in Admiralty, in the case of collisions on the high seas. I can see no reason why the English court should not refuse to grant a stay in such a case, where jurisdiction has been founded as of right. It is significant that, in all the leading English cases where a stay has been granted, there has been another clearly more appropriate forum - in The Atlantic Star [1974] A.C. 436 (Belgium); in MacShannon's case [1978] A.C. 795 (Scotland); in Trendtex [1982] A.C. 679 (Switzerland); and in the The Abidin Daver [1984] A.C. 398 (Turkey). In my opinion, the burden resting on the defendant is not just to show that England is not the natural or appropriate forum for the trial, but to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum. In this way, proper regard is paid to the fact that jurisdiction has been founded in England as of right (see MacShannon's case [1978] A.C. 795, *per* Lord Salmon); and there is the further advantage that, on a subject where comity is of importance, it appears that there will be a broad consensus among major common law jurisdictions. I may add that if, in any case, the connection of the defendant with the English forum is a

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fragile one (for example, if he is served with proceedings during a short visit to this country), it should be all the easier for him to prove that there is another clearly more appropriate forum for the trial overseas.

(d) Since the question is whether there exists some other forum which is clearly more appropriate for the trial of the action, the court will look first to see what factors there are which point in the direction of another forum. These are the factors which Lord Diplock described, in MacShannon's case [1978] A.C. 795, 812, as indicating that justice can be done in the other forum at "substantially less inconvenience or expense." Having regard to the anxiety expressed in your Lordships' House in the Société du Gaz case, 1926 S.C. (H.L.) 13 concerning the use of the word "convenience" in this context, I respectfully consider that it may be more desirable, now that the English and Scottish principles are regarded as being the same, to adopt the expression used by my noble and learned friend, Lord Keith of Kinkel, in The Abidin***478** Daver [1984] A.C. 398, 415, when he referred to the "natural forum" as being "that with which the action had the most real and substantial connection." So it is for connecting factors in this sense that the court must first look; and these will include not only factors affecting convenience or expense (such as availability of witnesses), but also other factors such as the law governing the relevant transaction (as to which see Crédit Chimique v. James Scott Engineering Group Ltd., 1982 S.L.T. 131), and the places where the parties respectively reside or carry on business.

(e) If the court concludes at that stage that there is no other available forum which is clearly more appropriate for the trial of the action, it will ordinarily refuse a stay; see, e.g., the decision of the Court of Appeal in European Asian Bank A.G. v. Punjab and Sind Bank [1982] 2 Lloyd's Rep. 356. It is difficult to imagine circumstances where, in such a case, a stay may be granted.

(f) If however the court concludes at that stage that there is some other available forum which prima facie is clearly more appropriate for the trial of the action, it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. In this inquiry, the court will consider all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions. One such factor can be the fact, if established objectively by cogent evidence, that the plaintiff will not obtain justice in the foreign jurisdiction; see the The Abidin Daver [1984] A.C. 398, 411, *per* Lord Diplock, a passage which now makes plain that, on this inquiry, the burden of proof shifts to the plaintiff. How far other advantages to the plaintiff in proceeding in this country may be relevant in this connection, I shall have to consider at a later stage.(7)

How the principle is applied in cases where the court exercises its discretionary power under R.S.C., Ord. 11

As I have already indicated, an apparent difference of view is to be found in the speeches of Lord Diplock and Lord Wilberforce in the Amin Rasheed case [1984] A.C. 50. In that case, Lord Diplock said, at pp. 65-66:

"the jurisdiction exercised by an English court over a foreign corporation which has no place of business in this country, as a result of granting leave under R.S.C., Ord. 11, r.1(1)(f) for service out of the jurisdiction of a writ on that corporation, is an exorbitant jurisdiction, i.e., it is one which, under general English conflict rules, an English court would not recognise as possessed by any foreign court in the absence of some treaty providing for such recognition. Comity thus dictates that the judicial discretion to grant leave under this paragraph of R.S.C., Ord. 11, r.1(1) should be exercised with circumspection in cases where there exists an alternative forum, viz. the courts of the foreign country where the proposed defendant does carry on business, and whose jurisdiction would be recognised under English conflict rules." Again, said, at

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"the onus under R.S.C., Ord. 11, r.4(2) of making it 'sufficient to appear to the court that the case is a proper one for service out of the jurisdiction under this Order' lies upon the would-be plaintiff. Refusal to grant leave in a case falling within rule 1(1)(f) does not deprive him of the opportunity of obtaining justice, because ex hypothesi there exists an alternative forum, the courts of the country where the proposed defendant has its place of business where the contract was made, which would be recognised by the English courts as having jurisdiction over the matter in dispute and whose judgment would be enforceable in England.

"The exorbitance of the jurisdiction sought to be invoked where reliance is based exclusively upon rule 1(1)(f)(iii) is an important factor to be placed in the balance against granting leave. It is a factor that is capable of being outweighed if the would-be plaintiff can satisfy the English court that justice either could not be obtained by him in the alternative forum; or could only be obtained at excessive cost, delay or inconvenience." In contrast, Lord Wilberforce said, at p. 72:

"R.S.C., Ord. 11, r. 1 merely states that, given one of the stated conditions, such service is permissible, and it is still necesssary for the plaintiff (in this case the appellant) to make it 'sufficiently to appear to the court that the case is a proper one for service out of the jurisdiction under this Order' (r.4(2)). The rule does not state the considerations by which the court is to decide whether the case is a proper one, and I do not think that we can get much assistance from cases where it is sought to stay an action started in this country, or to enjoin the bringing of proceedings abroad. The situations are different: compare the observations of Stephenson L.J. in Aratra Potato Co. Ltd. v. Egyptian Navigation Co. (The El Amria) [1981] 2 Lloyd's Rep. 119, 129. The intention must be to impose upon the plaintiff the burden of showing good reasons why service of a writ, calling for appearance before an English court, should, in the circumstances, be permitted upon a foreign defendant. In considering this question the court must take into account the nature of the dispute, the legal and practical issues involved, such questions as local knowledge, availability of witnesses and their evidence and expense."

In the Ilyssia case [1985] 1 Lloyd's Rep. 107, the Court of Appeal had to consider the apparent difference between the two approaches expressed by Lord Diplock and Lord Wilberforce. Ackner L.J. resolved the difference as follows, at p. 113:

"Mr. Gross submits that Lord Diplock's statement was intended to be an exhaustive one. When reliance is based exclusively upon r.1(1)(f)(iii), it is *only* capable of being outweighed if the would-be plaintiff can satisfy the English court that either justice cannot be obtained by him in the alternative forum or could only be obtained at excessive cost, delay or inconvenience. Like Staughton J., I do not accept that submission. As I read the speech in the context of ***480** that case as a whole Lord Diplock was emphasising that where exclusive reliance is placed upon r.1(1)(f)(iii) then the burden of showing good reasons justifying service out of the jurisdiction is a particularly heavy one, and he illustrated this by the examples which he gave of situations which were capable of tipping the balance in favour of the granting of leave. Thus constructed, as the judge points out, there is no conflict between Lord Diplock's statement and that of Lord Wilberforce ... Lord Wilberforce there states that in order to decide whether the case is a proper one the court must take into account the nature of the dispute, the legal and practical issues involved, such questions as local knowledge, availability of witnesses and their evidence and expense." May L.J. spoke in similar terms, at p. 118. The practical effect was, however, as is reflected in the judgment of Oliver L.J. [1985] 2 Lloyd's Rep. 116, 127, in the present case, that the statement of principle of Lord Wilberforce was accepted as being the applicable principle.

With that conclusion, I respectfully agree; but I wish to add some observations of my own. The first

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is this. Lord Wilberforce said that he did not think that we can get much assistance from cases where it is sought to stay an action started in this country, or to enjoin the bringing of proceedings abroad; in this connection he referred to certain observations of Stephenson L.J. in Aratra Potato Co. Ltd. v. Egyptian Navigation Co. (The El Amria) [1981] 2 Lloyd's Rep. 119, 129. It is right to point out that, in the relevant passage in his judgment in that case, Stephenson L.J. was only expressing caution with regard to assimilating cases of a stay to enforce a foreign jurisdiction clause with cases of a stay on the principle of forum non conveniens under MacShannon's case [1985] A.C. 795. He was not addressing himself to the question of the applicable principles under R.S.C., Ord. 11, and, while sharing Lord Wilberforce's concern about help to be derived, in Order 11 cases, from cases where an injunction is sought to restrain proceedings abroad, I respectfully doubt whether similar concern should be expressed about help to be derived from cases of forum non conveniens. I cannot help remarking upon the fact that when Lord Wilberforce came, at the end of the passage from his speech which I have quoted, to state the applicable principle, his statement of principle bears a marked resemblance to the principles applicable in forum non conveniens cases. It seems to me inevitable that the question in both groups of cases must be, at bottom, that expressed by Lord Kinnear in Sim v. Robinow, 19 R. 665, 668, viz. to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice. That being said, it is desirable to identify the distinctions between the two groups of cases. These, as I see it, are threefold. The first is that, as Lord Wilberforce indicated, in the Order 11 cases the burden of proof rests on the plaintiff, whereas in the forum non conveniens cases that burden rests on the defendant. A second, and more fundamental, point of distinction (from which the first point of distinction in fact flows) is that in the Order 11 cases the plaintiff is seeking to persuade the court to exercise its discretionary power to***481** permit service on the defendant outside the jurisdiction. Statutory authority has specified the particular circumstances in which that power *may be* exercised, but leaves it to the court to decide whether to exercise its discretionary power in a particular case, while providing that leave shall not be granted "unless it shall be made sufficiently to appear to the court that the case is a proper one for service out of the jurisdiction:" see R.S.C., Ord. 11, r.4(2).

Third, it is at this point that special regard must be had for the fact stressed by Lord Diplock in the Amin Rasheed case [1984] A.C. 50, 65 that the jurisdiction exercised under Order 11 may be "exorbitant." This has long been the law. In Société Générale de Paris v. Dreyfus Brothers (1885) 29 Ch.D. 239, 242-243, Pearson J. said:

"it becomes a very serious question ... whether this court ought to put a foreigner, who owes no allegiance here, to the inconvenience and annoyance of being brought to contest his rights in this country, and I for one say, most distinctly, that I think this court ought to be exceedingly careful before it allows a writ to be served out of the jurisdiction." That statement was subsequently approved on many occasions, notably by Farwell L.J. in The Hagen [1908] P. 189, 201, and by Lord Simonds in your Lordships' House in Tyne Improvement Commissioners v. Armement Anversois S/A (The Brabo) [1949] A.C. 326, 350. The effect is, not merely that the burden of proof rests on the plaintiff to persuade the court that England is the appropriate forum for the trial of the action, but that he has to show that this is clearly so. In other words, the burden is, quite simply, the obverse of that applicable where a stay is sought of proceedings started in this country as of right.

Even so, a word of caution is necessary. I myself feel that the word "exorbitant" is, as used in the present context, an old-fashioned word which perhaps carries unfortunate overtones: it means no more than that the exercise of the jurisdiction is extraordinary in the sense explained by Lord Diplock in the Amin Rasheed case [1984] A.C. 50, 65. Furthermore, in Order 11 cases, the defendant's place

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 [1987] A.C. 460 [1986] 3 W.L.R. 972 [1986] 3 All E.R. 843 [1987] 1 Lloyd's Rep. 1 [1987] E.C.C. 168 [1987] 1 F.T.L.R. 103 (1987) 84 L.S.G. 113 (1986) 136 N.L.J. 1137 (1986) 130 S.J. 925 Financial Times, November 25, 1986

of residence may be no more than a tax haven to which no great importance should be attached. It is also significant to observe that the circumstances specified in Order 11, r. 1(1), as those in which the court may exercise its discretion to grant leave to serve proceedings on the defendant outside the jurisdiction, are of great variety, ranging from cases where, one would have thought, the discretion would normally be exercised in favour of granting leave (e.g., where the relief sought is an injunction ordering the defendant to do or refrain from doing something within the jurisdiction) to cases where the grant of leave is far more problematical. In addition, the importance to be attached to any particular ground invoked by the plaintiff may vary from case to case. For example, the fact that English law is the putative proper law of the contract may be of very great importance (as in B.P. Exploration Co. (Libya) Ltd. v. Hunt [1976] 1 W.L.R. 788, where, in my opinion, Kerr J. rightly granted leave to serve proceedings on the defendant out of the jurisdiction); or it may be of little importance as seen in the context of the whole case. In these circumstances, it is, in***482** my judgment, necessary to include both the residence or place of business of the defendant and the relevant ground invoked by the plaintiff as factors to be considered by the court when deciding whether to exercise its discretion to grant leave; but, in so doing, the court should give to such factors the weight which, in all the circumstances of the case, it considers to be appropriate.(8)

Treatment of "a legitimate personal or juridical advantage"

Clearly, the mere fact that the plaintiff has such an advantage in proceedings in England cannot be decisive. As Lord Sumner said of the parties in the *Société du Gaz* case, 1926 S.C.(H.L.) 13, 22:

"I do not see how one can guide oneself profitably by endeavouring to conciliate and promote the interests of both these antagonists, except in that ironical sense, in which one says that it is in the interests of both that the case should be tried in the best way and in the best tribunal, and that the best man should win." Indeed, as Oliver L.J. [1985] 2 Lloyd's Rep. 116, 135, pointed out in his judgment in the present case, an advantage to the plaintiff will ordinarily give rise to a comparable disadvantage to the defendant; and simply to give the plaintiff his advantage at the expense of the defendant is not consistent with the objective approach inherent in Lord Kinnear's statement of principle in Sim v. Robinow, 19 R. 665, 668.

The key to the solution of this problem lies, in my judgment, in the underlying fundamental principle. We have to consider where the case may be tried "suitably for the interests of all the parties and for the ends of justice." Let me consider the application of that principle in relation to advantages which the plaintiff may derive from invoking the English jurisdiction. Typical examples are: damages awarded on a higher scale; a more complete procedure of discovery; a power to award interest; a more generous limitation period. Now, as a general rule, I do not think that the court should be deterred from granting a stay of proceedings, or from exercising its discretion against granting leave under R.S.C. Ord. 11, simply because the plaintiff will be deprived of such an advantage, provided that the court is satisfied that substantial justice will be done in the available appropriate forum. Take, for example, discovery. We know that there is a spectrum of systems of discovery applicable in various jurisdictions, ranging from the limited discovery available in civil law countries on the continent of Europe to the very generous pre-trial oral discovery procedure applicable in the United States of America. Our procedure lies somewhere in the middle of this spectrum. No doubt each of these systems has its virtues and vices; but, generally speaking, I cannot see that, objectively, injustice can be said to have been done if a party is, in effect, compelled to accept one of these well-recognised systems applicable in the appropriate forum overseas. In this, I recognise that we appear to be differing from the approach presently prevailing in the United States: see, e.g., the recent opinion of Judge Keenan in Re Union Carbide Corp. (1986) 634 F.Supp. 842 in the

District Court for the Southern District of New York, where a stay of proceedings in New York, commenced on behalf of Indian plaintiffs against Union Carbide ***483** arising out of the tragic disaster in Bhopal, was stayed subject to, inter alia, the condition that Union Carbide was subject to discovery under the model of the United States Federal Rules of Civil Procedure after appropriate demand by the plaintiff. But in the Trendtex case [1982] A.C. 679, this House thought it right that a stay of proceedings in this country should be granted where the appropriate forum was Switzerland, even though the plaintiffs were thereby deprived of the advantage of the more extensive English procedure of discovery of documents in a case of fraud. Then take the scale on which damages are awarded. Suppose that two parties have been involved in a road accident in a foreign country, where both were resident, and where damages are awarded on a scale substantially lower than those awarded in this country. I do not think that an English court would, in ordinary circumstances, hesitate to stay proceedings brought by one of them against the other in this country merely because he would be deprived of a higher award of damages here.

But the underlying principle requires that regard must be had to the interests of all the parties and the ends of justice; and these considerations may lead to a different conclusion in other cases. For example, it would not, I think, normally be wrong to allow a plaintiff to keep the benefit of security obtained by commencing proceedings here, while at the same time granting a stay of proceedings in this country to enable the action to proceed in the appropriate forum. Such a conclusion is, I understand, consistent with the manner in which the process of saisie conservatoire is applied in civil law countries; and cf. section 26 of the Civil Jurisdiction and Judgments Act 1982, now happily in force. Again, take the example of cases concerned with time bars. Let me consider how the principle of forum non conveniens should be applied in a case in which the plaintiff has started proceedings in England where his claim was not time barred, but there is some other jurisdiction which, in the opinion of the court, is clearly more appropriate for the trial of the action, but where the plaintiff has not commenced proceedings and where his claim is now time barred. Now, to take some extreme examples, suppose that the plaintiff allowed the limitation period to elapse in the appropriate jurisdiction, and came here simply because he wanted to take advantage of a more generous time bar applicable in this country; or suppose that it was obvious that the plaintiff should have commenced proceedings in the appropriate jurisdiction, and yet he did not trouble to issue a protective writ there; in cases such as these, I cannot see that the court should hesitate to stay the proceedings in this country, even though the effect would be that the plaintiff's claim would inevitably be defeated by a plea of the time bar in the appropriate jurisdiction. Indeed a strong theoretical argument can be advanced for the proposition that, if there is another clearly more appropriate forum for the trial of the action, a stay should generally be granted even though the plaintiff's action would be time barred there. But, in my opinion, this is a case where practical justice should be done. and practical justice demands that, if the court considers that the plaintiff acted reasonably in commencing proceedings in this country, and that, although it appears that (putting on one side the time bar point) the appropriate forum for the trial of the action is ***484** elsewhere than England, the plaintiff did not act unreasonably in failing to commence proceedings (for example, by issuing a protective writ) in that jurisdiction within the limitation period applicable there, it would not, I think, be just to deprive the plaintiff of the benefit of having started proceedings within the limitation period applicable in this country. This approach is consistent with that of Sheen J. in The Blue Wave [1982] 1 Lloyd's Rep. 151. It is not to be forgotten that, by making its jurisdiction available to the plaintiff - even the discretionary jurisdiction under R.S.C., Ord. 11 - the courts of this country have provided the plaintiff with an opportunity to start proceedings here; accordingly, if justice demands, the court should not deprive the plaintiff of the benefit of

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having complied with the time bar in this country. Furthermore, as the applicable principles become more clearly established and better known, it will, I suspect, become increasingly difficult for plaintiffs to prove lack of negligence in this respect. The fact that the court has been asked to exercise its discretion under R.S.C., Ord. 11, rather than that the plaintiff has served proceedings upon the defendant in this country as of right, is, I consider, only relevant to consideration of the plaintiff's conduct in failing to save the time bar in the other relevant alternative jurisdiction. The appropriate order, where the application of the time bar in the foreign jurisdiction is dependent upon its invocation by the defendant, may well be to make it a condition of the grant of a stay, or the exercise of discretion against giving leave to serve out of the jurisdiction, that the defendant should waive the time bar in the foreign jurisdiction; this is apparently the practice in the United States of America.(9)

Application of the principles to the facts of the present case

The judge proceeded on the basis that the relevant test was that "if the English court is shown to be distinctly more suitable for the ends of justice, then the case is a proper one for service out of the jurisdiction." The applicable principles are, I believe, as I have stated them to be; and the judge's approach was in accordance with those principles. I am therefore unable to accept the submission made on behalf of Cansulex that there was any material error of principle on the part of the judge.

I turn then to the question whether the Court of Appeal was entitled to interfere with the judge's exercise of his discretion. First, I take the criticism of the judge's assessment of the factor of availability of witnesses. It was said that he erred in thinking that all Cansulex's expert witnesses in the *Cambridgeshire* action were from England, whereas in fact two were from England, and four were from elsewhere. However, as I have recorded, this was drawn to his attention at the end of his judgment: he then took into account the true position, and said that this difference was not of significance. No doubt, in making that observation, he had it in mind that all the owners' expert witnesses in the *Cambridgeshire* action were from England. Next, Neill L.J. commented [1985] 2 Lloyd's Rep. 116, 123 that

"even on his own analysis of the facts the convenience of the parties and the witnesses probably tilted the scales towards British Columbia***485** as the forum, but certainly did not show that an English court would be 'distinctly more suitable for the ends of justice.'" Similar observations were made by Oliver L.J. For my part, I consider, with all respect, that these comments were not justified. At this stage, the judge did not have to apply the overall test, but merely to assess the merits of the particular factor under consideration; and I cannot help but think that the judge, with all his experience derived from hearing a substantial part of the *Cambridgeshire* action, was better placed to make an assessment of this factor than the Court of Appeal.

Turning to the factor of multiplicity of proceedings, the judge referred to the possibility of M.M.T.C. being joined as co-defendants in the English proceedings as problematical. Before the Court of Appeal, Mr. Goldsmith submitted on behalf of Cansulex that the other proceedings were at most a neutral factor and certainly did not bring the scales down on the side of England. Neill L.J. saw force in this criticism. But, once again, the judge did not have to decide, and did not decide, that this particular factor was decisive of the case. Moreover, if (as I think) the judge gave weight to this factor, he was, in my judgment, entitled to do so. There is much to be said, in the interests of justice, in favour of the shipowners' claims against both Cansulex and M.M.T.C. being tried in the same proceedings; and, having regard to the advice given to M.M.T.C. by their solicitors, there was a prospect that, if it was decided that the case should be heard in England, M.M.T.C. would, acting in their own interests, accept their own solicitors' advice. Indeed, if this were to happen, it might also be agreed that a claim

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over by M.M.T.C. against Cansulex should be included in the same proceedings, rather than be arbitrated in London under an arbitration clause in the sale contract.

But the crucial point, in the judge's view, was the *Cambridgeshire* factor. This was regarded, certainly by Neill L.J., as relevant; and in this I find myself to be in agreement. The criticism of the judge's view of this factor goes, therefore, to its weight, as Neill L.J. indicated [1985] 2 Lloyd's Rep. 116, 124 when he said that it seemed to him that the judge attached far too much importance to this factor. With all respect, however, when I read the judgments of both the Lords Justices, I consider that they underrated it. I believe that anyone who has been involved, as counsel, in very heavy litigation of this kind, with a number of experts on both sides and difficult scientific questions involved, knows only too well what the learning curve is like; how much information and knowledge has to be, and is, absorbed, not only by the lawyers but really by the whole team, including both lawyers and experts, as they learn about the interrelation of law, fact and scientific knowledge, having regard to the contentions advanced by both sides in the case, and identify in their minds the crucial matters on which attention has to be focused, why these are the crucial matters, and how they are to be assessed. The judge in the present case has considerable experience of litigation of this kind, and is well aware of what is involved. He was, in my judgment, entitled to take the view (as he did) that this matter was not merely of advantage to the shipowners, but also constituted an***486** advantage which was not balanced by a countervailing equal disadvantage to Cansulex; and (more pertinently) further to take the view that having experienced teams of lawyers and experts available on both sides of the litigation, who had prepared for and fought a substantial part of the *Cambridgeshire* action for Cansulex (among others) on one side and the relevant owners on the other, would contribute to efficiency, expedition and economy - and he could have added, in my opinion, both to assisting the court to reach a just resolution, and to promoting a possibility of settlement, in the present case. This is not simply a matter, as Oliver L.J. suggested, of financial advantage to the shipowners; it is a matter which can, and should, properly be taken into account, in a case of this kind, in the objective interests of justice.

For these reasons alone, I am of the opinion that this is a classic example of a case where the appellate court has simply formed a different view of the weight to be given to the various factors, and that this was not, therefore, an appropriate case for interfering with the exercise of the judge's discretion. But, in addition, there are two other factors which the judge could, but did not, take into account, in support of the conclusion which he in fact reached. First, he was, in my judgment, entitled to take into account, in assessing the *Cambridgeshire* factor, the fact that, although the owners in the two cases were different, the solicitors for the owners were in both cases instructed by the same insurers; and he was also entitled to take into account that the insurers of the shipowners in the present case are managed in England. Usually this is a matter of no concern in English litigation; because, in subrogation claims, the action is in this country (unlike other countries) brought in the name of the assured, and the rights being enforced are the rights of the assured. But in the case of an application such as that in the present case, it is shutting one's eyes to reality to ignore the fact that it is the insurers who are financing the litigation and are dominus litis; and this is, in my view, a relevant factor to be taken into account: see the Société du Gaz case, 1926 S.C.(H.L.) 13, 20, *per* Lord Sumner. Second, it was a relevant factor that this litigation was being fought under a contract of which the putative governing law was English law, and that this was by no means an insignificant factor in the present case, since there was not only a dispute as to the effect of the bill of lading contract (as to which, as I have already recorded, there appears to be some difference of opinion between English and Canadian judges), but also, it appears, as to the nature of the obligations under the contract in respect of what is

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 [1987] A.C. 460 [1986] 3 W.L.R. 972 [1986] 3 All E.R. 843 [1987] 1 Lloyd's Rep. 1 [1987] E.C.C. 168 [1987] 1 F.T.L.R. 103 (1987) 84 L.S.G. 113 (1986) 136 N.L.J. 1137 (1986) 130 S.J. 925 Financial Times, November 25, 1986

usually called dangerous) cargo. However, had the judge taken these matters into account, they would only have reinforced the conclusion which he in fact reached.(10)

The effect of the time bar in British Columbia

On the view of the case which I have formed, it is not strictly necessary to consider the effect of the time bar in British Columbia; but since the point has been fully argued before us, I propose briefly to express my views upon it.

First, I cannot think that the fact (if it be the case) that the shipowners' claim was not time barred if brought in the Federal Courts***487** of Canada in provinces other than British Columbia - one suggestion was the Federal Court sitting in the neighbouring Province of Alberta - was of any relevance. On this, I accept the submission of the shipowners that it cannot be in the interests of the parties or in the interests of justice that the action should effectively be remitted to a forum which cannot be described as appropriate for the trial of the action.

Second, I do not think that the discretionary power which is, I understand, vested in the courts of British Columbia to waive the time bar, is relevant in this case. The point is simply that the shipowners' claim is not time barred in England but may be treated as time barred in British Columbia. In these circumstances, the question inevitably arises whether the English court, if it were minded to set aside the leave to serve proceedings on Cansulex out of the jurisdiction, should do so on the condition that Cansulex should waive any right to rely on the time bar applicable in British Columbia.

So it is necessary to consider whether justice required the imposition of such a term. The evidence before the Court of Appeal showed that neither the shipowners nor their legal advisers were aware of the two-year limitation period applicable in British Columbia. Cansulex did not draw the matter to their attention in their affidavit evidence; the shipowners' solicitors simply stumbled upon it when investigating the availability of suitable lawyers in Vancouver. Next, although Cansulex had applied to the English court to set aside the proceedings in the *Cambridgeshire* action, they had not appealed from the judge's adverse decision on the point and the *Cambridgeshire* action had proceeded to trial. Furthermore, had the shipowners' solicitors considered the matter, experience would have indicated that, having regard to the law as generally understood to prevail before the decision of this House in the Amin Rasheed case [1984] A.C. 50, in which the speeches were delivered in July 1983, and to the prominence hitherto given to legitimate personal and juridical advantages in the English jurisdiction (see, in particular, the decisions of the Court of Appeal in Britannia Steamship Insurance Association Ltd. v. Ausonia Assicurazioni S.p.A. [1984] 2 Lloyd's Rep. 98 and the Ilyssia case [1985] 1 Lloyd's Rep. 107), it was improbable that any different conclusion would be reached on an application to set aside the leave granted in the present case. In this connection, it is to be observed that the shipowners' cause of action against **Cansulex** in the present case must have accrued in November 1980 (when the loading of the cargo on board the **Spiliada** in Vancouver was completed) and so was prima facie time barred in British Columbia by November 1982, nine months before the decision of this House in the Amin Rasheed case. In my judgment, had the point arisen, I would have been minded to hold that, in all the circumstances of the case, the shipowners had acted reasonably in commencing proceedings in this country, and that they had not acted unreasonably in failing to commence proceedings in British Columbia before the expiry of the limitation period there. In these circumstances, had I agreed with the Court of Appeal that the judge erred in the exercise of his discretion, I would nevertheless only have set aside the proceedings, to enable proceedings to be brought in***488** British Columbia, on the condition that Cansulex should waive their right to rely on the time bar in British Columbia.

However, for the reasons I have given I would al-

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low the appeal with costs here and below, and restore the order of Staughton J.(11)

Postscript

I feel that I cannot conclude without paying tribute to the writings of Jurists which have assisted me in the preparation of this opinion. Although it may be invidious to do so, I wish to single out for special mention articles by Mr. Adrian Briggs in (1983) 3 Legal Studies 74 and in [1984] L.M.C.L.Q. 227, and the article by Miss Rhona Schuz in (1986) 35 I.C.L.Q. 374. They will observe that I have not agreed with them on all points; but even when I have disagreed with them, I have found their work to be of assistance. For jurists are pilgrims with us on the endless road to unattainable perfection; and we have it on the excellent authority of Geoffrey Chaucer that conversations among pilgrims can be most rewarding.Appeal allowed with costs. (C.T.B.)

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1. R.S.C., Ord. 11, r. 4(2): "No such leave shall be granted unless it shall be made sufficiently to appear to the court that the case is a proper one for service out of the jurisdiction under this Order."

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EXHIBIT 47

C.J.Q. 2005, 24(Jan), 40-68

Civil Justice Quarterly

2005

Some difficulties with group litigation orders - and why a class action is superior

Rachael Mulheron

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Subject: Civil procedure

Keywords: Australia; Canada; Case management; Class actions; Group litigation orders; Multi party disputes; Multiplicity of proceedings; Ontario; United States

Case cited: T (formerly H) v Nugent Care Society (formerly Catholic Social Services) [2004] EWCA Civ 51; [2004] 1 W.L.R. 1129 (CA (Civ Div))

***40** This article is the first of a twin-pillared critique upon the generic multi-party procedural devices presently available in England, *viz,* the group litigation order (GLO) regime, and the representative rule. The latter of these will be the subject of a forthcoming article in *Civil Justice Quarterly* in April 2005.

The position is put herein that the opt-in approach adopted by the GLO regime is less than satisfactory, is wasteful of litigants' resources, and is beset with problems, several of which notably manifested in the recent decision in *Taylor v Nugent Care Society* [2004] EWCA Civ 51. Moreover, the use of the test/lead action permitted by the GLO regime sits most uncomfortably with some other aspects of English civil procedure. In the alternative, the position is put that the formal class action which is favoured and adopted by the majority of common law jurisdictions elsewhere is a superior legal device which can overcome deficiencies in the GLO schema. The *Taylor* case is adverted to in illustration of this contention.

The article further argues that the reasons given (both judicially and academically) for the non-introduction of a class action into English law lack cogency and substance. In evaluating suitable multi-party litigation models, it seems that this jurisdiction has been overly influenced by the “extremes” of US-style class actions, and on that basis, has rejected the class action as being an unsuitable device. The author contends that greater regard should be paid to other Commonwealth jurisdictions, such as Australia and Canada, which share many of the features and philosophy of English civil procedure. These jurisdictions have in place maturing class action regimes which offer a wealth of jurisprudence that is both useful and relevant to any future debate about reform of English multi-party litigation.

***41** I. Introduction

The recent case of *Taylor v Nugent Care Society*1 involved a deceptively simple procedural problem. A claimant commenced proceedings in relation to alleged sexual abuse that he had suffered whilst resident at the defendant's institution. This same issue of alleged indecent assaults sustained by other young males whilst in residential care was covered by a

group litigation order (GLO).2 The claimant wished to join the GLO, and to that end, he commenced proceedings on December 17, 2001. The cut-off date for joining the GLO had expired over two years previously, and consequently, he was held to be out of time to join the group.3 The claimant pressed ahead, serving his individual proceedings in January 2002. The defendant, however, claimed that this individual claim, as parallel litigation, constituted an abuse of the court's process, and should be struck out pursuant to r.3.4(2)(b) of the Civil Procedure Rules (CPR) and/or the court's inherent jurisdiction.

Initially, the defendant's plea was upheld,4 but the Court of Appeal reversed that decision. It concluded that it was not an abuse for the claimant to bring individual proceedings, having failed in his application to join the group action, and further, even if it had constituted an abuse, it was not a proportionate response, and far too draconian a penalty, to strike out his claim and prevent him from seeking to vindicate his rights.5

The case raises several important issues for English multi-party litigation. First, the dilemma in which the claimant found himself arises directly as a result of the opt-in approach adopted by the GLO regime. Under this approach, litigants who wish to be class members must affirmatively take some steps to join the class. Under an opt-out regime, by contrast, the class is described, and parties who do not wish to remain part of that class must take an affirmative step to opt out of it. Were England to adopt an opt-out class action regime, the problem evident here, and the circular reasoning required to overcome the procedural difficulties faced by Mr Taylor, would not have arisen. In that regard, it is timely (in III) to explore the difficulties associated with the GLO's opt-in regime, many of which manifested in the decision of *Taylor v Nugent Care Society* ; and why an opt-out regime used in established class action statutes around the world (for example, the Australian federal jurisdiction, the Canadian provincial jurisdictions, and the US federal jurisdiction) is arguably the superior approach.

***42** Secondly, the article will consider (in IV) the several arguments which have been put forward in England for the decision to pursue the unique path of the group litigation order instead of a class action. It will, by drawing upon the experience of the jurisdictions of Australia and Ontario, seek to demonstrate that the reasons proffered in England for the anti-class action stance are less than convincing. Moreover, judging from responses to a 2001 Lord Chancellor's Department (LCD) reform proposal, it appears that many in this jurisdiction remain of the view that the present twin-pillars of the GLO6 and the representative rule7 provide inadequate avenues for generic multi-party litigation. This article will conclude that, in light of the difficulties associated with the opt-in approach and the lack of convincing attack upon the class action, the latter is a superior vehicle (to the GLO) for the determination of group disputes.

For the sake of clarity and explicitness, the term “class action”, as used throughout this article, is defined as follows:

“a legal procedure which enables the claims (or part of the claims) of a number of persons against the same defendant to be determined in the one suit. One or more persons (‘representative plaintiff ‘) may sue on his or her own behalf and on behalf of a number of other persons (‘the class members') who have a claim to a remedy for the same or a similar alleged wrong to that alleged by the representative plaintiff, and who have claims that share questions of law or fact in common with those of the representative plaintiff (‘common issues'). Only the representative plaintiff is a party to the action. The class members are not usually identified as individual parties, but are merely described. The class members are bound by the outcome of the litigation on the common issues, whether favourable or adverse to the class, although they do not, for the most part, take any active part in that litigation.”8

Before canvassing the particular difficulties and policy conundrums associated with the GLO, and the appellate decision in *Taylor v Nugent Care Society,* it is appropriate to describe briefly the GLO's implementation and criteria, and the procedural aspects of joining a group where such an order is made.

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***43** II. Precis of the Group Litigation Order[9]

(a) Background and criteria

Prior to the introduction of the Group Litigation Order on May 2, 2000[10] under Pt 19.III of the CPR, the phenomenon of English group litigation was conducted on an ad hoc and improvised basis. As Hodges explains, group actions in the United Kingdom emerged in several scenarios from the early 1980s,[11] whereby it was accepted that an understanding of the various management techniques for such litigation was developing case by case and over time.[12] Academically, it has been said of the practice at the time that much of the development occurred simply by agreement between the parties and the judge,[13] and that, "in the pragmatic spirit of the common law, here taken to extremes, the actors make up the rules as they go along".[14] Judicially too, Justice Clarke noted in 1997 that "methods developed ad hoc and by experience",[15] a view with which Lord Woolf agreed.[16]

Several factors preceded, and perhaps hastened, the introduction of the GLO. Undoubtedly, either singularly or in combination, these matters influenced both the decision to enact Pt 19.III and the eventual framework adopted for the GLO schema. Lord Woolf advocated, as part of his overview of civil procedure,[17] the introduction of a multi-party situation governed by court rules, which was ultimately reworked in both procedure and terminology.[18] Notably, other key judiciary also mooted the possibility of considering whether the "special procedures [in the United States] … should be looked at by the ***44** appropriate authorities with a view to seeing whether it has anything to offer and, if so, introducing the necessary procedural rules."[19] Academically, ongoing calls were made for the implementation of a defined basis for the conduct of these often complicated and unwieldy actions,[20] especially in circumstances where, as Mildred notes of one case, "such little attention was paid to the procedural framework at the formative stage that the main judgment in the action raised as many questions as it answered, thus setting in train the need for extensive subsequent hearings to determine outstanding issues".[21] The representative rule was perceived to lack real legal utility where group members allegedly affected by the defendant's conduct could not prove the elusive "same interest",[22] which rendered attractive an alternative rulebased regime.[23] Government compensation packages were introduced to compensate for certain specific widespread injuries,[24] embodying a statutory recognition of the pervasive harm that may arise from the consumption of products and services in modern society. Moreover, it was of potential concern (suggests Mildred) that the extent of the court's power, under its inherent jurisdiction, to make directions in the absence of consent by all parties remained unexplored in pre-GLO litigation.[25] Against this backdrop, the impetus for the group litigation orders enacted in Pt 19.III bore fruit in May 2000.

Under r.19.10, the court can make a Group Litigation Order for the "case management of claims which give rise to common or related issues of fact or law" Once these GLO issues are identified, then a register of group claims must be established[26] ; and a "management court" must be nominated which will oversee the claims.[27] Any judgment or order given on a GLO issue is binding upon other parties on the group register, and the court can also order the ***45** extent to which a judgment will bind parties to claims which are subsequently entered onto the register.[28]

There are essentially six stipulated criteria for the commencement of a GLO. First, there must be "a number of claims"[29] (the undemanding numerosity requirement).[30] Secondly, these must give rise to common or related issues of fact or law [31] (the commonality requirement), legally a wider phrase than the "same interest" of the representative rule in r.19.6. Thirdly, managing the litigation by means of a GLO must be consistent with the overriding objective of the CPR, which is to enable the court "to deal with cases justly".[32] In that respect, Pt 19.III is not a free-standing code, but must be read as complementary to the remainder of the CPR.[33] Fourthly, the consent of the Lord Chief Justice or the Vice-Chancellor is required before a GLO is possible (a preliminary merits, or screening, criterion).[34] Fifthly, a GLO will not be com-

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menced if consolidation of the claims,[35] or a representative proceeding under r.19.6, would be more appropriate (the superiority criterion).[36] Sixthly, the class needs to be defined by the number of already issued, and potential, claims.[37]

Notwithstanding the above-stipulated criteria, it has been said[38] that the loose and flexible framework provided in Pt 19.III for the conduct and management of multi-party actions is reflective of the ad hoc group litigation which preceded its implementation. In particular, the case management approach embodied in Pt 19.III[39] and supporting practice direction PD 19B[40] simply repeats the managerial control of multi-party litigation which, according to leading judicial opinion of the time[41] (including that of Lord Woolf[42]) ***46** governed pre-GLO litigation in any event.[43] In *Taylor v Nugent Care Society,* Lord Woolf had the recent opportunity to re-emphasise this fact:

“The provisions which are contained in the Civil Procedure Rules dealing with group litigation were an innovation which was introduced by an amendment to the rules made in 2000. It was the experience of the courts that if litigation involving a substantial number of claimants was to be managed in the appropriate way, it was essential that there should be some procedure which provided the courts with very wide powers to manage the proceedings. It was in the court's interest for the proper dispatch of other litigation that the court should have those powers. It was also in the interests of litigants that the courts should have those powers because it would enable the court to deal with this sort of litigation in a more efficient and economic manner than would otherwise be possible. It would enable the court to provide more expeditious justice.”[44]

The GLO which Mr Taylor sought to join, known as the *North-West Child Abuse Cases,* commenced in 1997 as a group action. That action was the subject of directions on December 16, 1998 where, amongst other things, the cut-off date for joining the group was established.[45] This was an example of a group action that preceded the implementation of the *formal* GLO schema in May 2000, but which was handled and managed, by judicial oversight and by practice direction, [46] in a manner similar to those group actions commenced after the GLO's formal introduction under the CPR.

There have been over 40 GLOs ordered under Pt 19.III to date.[47] As expected of any multi-party regime, the subject-matter of these disputes has differed widely. Apart from cases of alleged maltreatment and abuse of those in care institutions, [48] GLOs have covered issues from alleged nuisance from land fill[49] to the (ultimately unsuccessful[50]) allegation that it was negligent of McDonald's to serve hot drinks in drink cartons as constructed.[51] Since its ***47** introduction in 2000, the schema has received appellate consideration[52] and governmental review[53] on only a few occasions.

(b) Key differences between group litigation and the class action

There are numerous differences between a typical class action, defined in the introduction to this article, and the English group litigation order. Most importantly for the purposes of this commentary, the GLO schema is an opt-in regime. Litigants therefore have to choose affirmatively to litigate. In that regard, critical comment by Andrews[54] that the English multi-party schemas in Pt 19 of the CPR are still too faint-hearted to permit recovery of damages for an unknown mass of claimants appears true, given the opt-in requirement of the GLO and the usual identification of all litigants under the representative rule. These countenance an individual approach, a personal and proactive choice to litigate, which class action regimes do not.

A second significant difference is that the GLO schema has been drafted in a very light-handed manner, in comparison with the detailed legislative provisions governing the modern class action regimes of, say, the Australian federal and Canadian provincial jurisdictions. While Lord Bingham has been positively of the view that the conduct of group actions in England is now governed by “a tried and established framework of rules, practice directions, and subordinate legislation”,[55] the reality remains that the GLO is lightly detailed. It is certainly nothing like as detailed as its Commonwealth class action counterparts (a fact also noted by Mildred[56]). As a consequence, various important issues associated with

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the conduct of group litigation, such as judicial approval of settlement agreements, limitation periods, aggregate assessment of damages, and *cy-près* distribution of damages, are not covered by the terms of the GLO schema, in comparison with the class action regimes where such matters have received explicit attention by the drafters and legislators. As Mildred further notes,57 not only do such omissions in the governance of group actions contrast to the somewhat more exacting stipulations pertaining to the commencement of a GLO, but they also emphasise that the development ***48** of group actions in England has been "of an entirely practical rather than doctrinal nature".

A third marked contrast between the GLO and class action is the role assumed by the class members. In the former's case, each group member strongly resembles the usual unitary litigant. The claims which are to be managed as a GLO, as a group action, are "no more than a collection of individual cases where the issues and the defendant are the same, or substantially the same".58 As Andrews observes, group actions are different from class actions because, in the former, each group litigant is a member of the procedural class as a party, rather than as a represented non-party.59 The GLO schema is therefore not a representative action in the true sense, because it requires that class members actively join/participate in the action as parties, and hence, it (indeed, any opt-in arrangement) has been accurately described60 as nothing more than a "permissive joinder device".

A fourth difference arises in the manner in which claims of the class members are commenced. Class actions require no proactive conduct on the part of the class members at all, unless they wish to exclude themselves from the action prior to the opt-out date. Any pro-active indicia of interest will usually occur after the common issues trial, via some statement of proof or claim form, if individual participation is necessary in order for class members to recover (of course, where aggregate assessment and distribution are available, then no individual registration of interest may be necessary at all). In contrast, the participants in a group litigation order must take active steps to participate --which is where the first difficulty with the GLO regime arose.

Quite apart from other important criticisms which will be canvassed shortly, if an opt-in regime is to garner any degree of utility, the procedures for joining the register must be clearly defined, explicit and simple in their application. Unfortunately, such was not the case when the GLO schema was implemented. Essentially, two options were open to the drafters: to require each group member individually to issue a claim form in the usual way, followed by registration on the group register, and a stay of the individual claims while the GLO issues were litigated; or to require the group members individually to register their names on the group register without the necessity to plead and particularise their claims, registration constituting the legal commencement of the claim. Each approach had its advocates, with the LCD61 and significant judicial opinion62 favouring the former, and an earlier LCD opinion63 and ***49** Lord Woolf64 endorsing the latter. Unfortunately, Pt 19.III did not specify which approach was to apply, an omission that was academically critiqued at the time.65

Eventually, the GLO schema *was* clarified in 2002, by amendment,66 so as to prefer the first option. This requirement that "a claim must be issued before it can be entered on a Group Register" is subject to the primary criticism, of course, that it is arguably an unnecessary and expensive exercise if the class fails on the common issues. Furthermore, although the redrafting and "changes of heart" between earlier versions and the final GLO schema were by no means limited to the question of how to opt in validly,67 it demonstrates an evolving but inconsistent and perhaps uncertain attitude toward this vital aspect of English multi-party litigation.

III. The opt-in model: particular problems for England

Apart from the previously-discussed lack of explicit instruction about the procedures for opting-in, which has now been addressed by CPR amendment, it is evident from both the decision in *Taylor's* case and from other aspects of the Civil

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Procedure Rules that the opt-in arrangements under the GLO regime raise vexed and difficult-to-resolve issues. The position taken in this section is that the disadvantages concomitant upon an opt-in approach are several, and would be obviated by the introduction of a class action regime of the type that exists in the Commonwealth jurisdictions such as Australia (federal regime) and Canada (various provincial regimes).

Implementation without detailed policy consideration

It must be stated at the outset that, although this article contends that the GLO's opt-in approach should be discontinued because of its several drawbacks for both claimants who wish to be part of the group and for the defendant, this is not to suggest, however, that the arguments are all one-sided, far from it. Although there has never been detailed law reform consideration of the issue in England, a fact which must be lamented,68 law commissions in other ***50** jurisdictions have regularly acknowledged that the choice between an opt-in and an opt-out regime is possibly the most controversial issue in the design of a multi-party action regime.69 As these commissions make plain, whichever verdict is adopted inevitably raises a fundamental policy conundrum, that is, whether a person's legal rights should be determined without his/her express consent and mandate to participate in the litigation. Certainly, significant English commentary has supported the *choice* of an individual group member to join a group claim.70 A summary of the principal arguments for and against the opt-in approach appears in Table 1:71

TABLE 1 ***The opt-in approach: advantages and disadvantages***

AdvantagesDisadvantagesopting in preserves the liberty of the individual to choose whether to bring the action;the opting-in procedure is little more than a permissive joinder device, if the group action is onlya person who desires not to litigate should not find himself/available to people who choose to sue together;herself “roped in” to a class action as a result of mere silence, with the attendant disadvantages which litigation involves;the need to opt in is a barrier to participation in the litigation, for there may be cogent economic, psychological or social barriers preventingunder opting in, class members will be bound by the resultaffirmative action being taken to opt in;only if they intend to be, so that all class members who stand to benefit will have shown someopting in is undesirable, as it does not sufficiently promote access to justice;minimal interest in the litigation by affirmative action;it may be unworkable in practice since a person may not learn, untilopting in reduces the possibility of the litigation becoming unmanageable;too late, of this right to opt in which he/she would otherwise have exercised;the opt-in approach assists the defendant to know the size of the pool of potential claimants;establishing an opt-in register too early in the action can result in a rush to register, which can encouragethe opt-in approach can servemany weak/hopeless claims;to ameliorate difficulties associated with future claimants who emerge over time due to the latency of the damage);multiple proceedings are more likely, as the class may not be as widely formed, and multiplicity could cost more for defendants;opting in is consistent with ordinary procedures for commencing a legal proceeding.it can be very difficult to identify and name all class members allegedly affected by defendant's conduct whenthe register is closed, especially where identities of putative class members may be easily within defendant's knowledge but not within group's knowledge (especially if the register is closed prior to disclosure);the defendant may escape the full consequences of its conduct, simply because a number of putative class members, for whatever reas-

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on, do not opt in--an opt-out regime better fulfils the deterrent function of law.

***51** The reality is that, apart from the GLO regime in England, an opt-in regime is currently only exceptionally72 implemented around the world. On several occasions where the opt-in approach *has* been enacted elsewhere, it has been less han endorsed. For example, Australia's opt-out federal class action regime73 has been preferred by the Australian Competition and Consumer Commission (ACCC)74 to the opt-in regime provided by Australian consumer protection legislation75 in circumstances where the latter has been academically described ***52** as "far more burdensome" than Pt IVA,76 "too narrow",77 and "almost unworkable".78 In the state of Victoria79 and in the United States,80 opt-in regimes have ultimately, after implementation and practice, been replaced by opt-out regimes. In the unusual circumstance where a regime, such as that implemented in British Columbia,81 provides for both opt-out and opt-in approaches, the latter is employed as the exceptional scenario, for non-residents only,82 whereas in the usual course of class member residents, the opt-out approach applies.83 An absolute right to opt out has been conferred expressly under the long-standing Canadian class action regimes of Quebec84 and Ontario,85 as well as the more recent Canadian provincial class action regimes.86 In the most recent round of amendments to the United States' Federal Rules of Civil Procedure r.23 (FRCP 23), and despite industry suggestions that the position should be changed,87 an absolute opt-out right continues to be conferred implicitly88 under damages class actions instituted under FRCP 23(b)(3). Thus, an opt-out arrangement is the dominant approach in other common law jurisdictions.

Front-loading of legal resources and costs

One notable aspect of *Taylor's* case is the extent of litigation in which the claimant has been involved--prior to the determination of any question of liability. The claimant's proceedings were commenced by means of claim form, as required; an application to the court for permission to join the group after the cut-off date was made, which application was refused, and from which an ***53** appeal lodged by Mr Taylor was not proceeded with; the individual proceedings were then served on the defendant; the defendant applied to strike out Mr Taylor's claim as an abuse of process; that application was initially defended unsuccessfully by the claimant; but an appeal to the Court of Appeal finally restored legitimacy of the claimant's individual proceedings. All of this amounts to an expensive and time-consuming exercise for the litigant concerned, in comparison with the relatively light costs and burdens upon a class member under an opt-out regime at a similar stage of proceedings.

In that regard, opt-in procedures tend to stack the costs for those represented toward the beginning of the litigation (especially where individual proceedings have to be pleaded as under the GLO), and constitute one of the reasons why the procedure is generally considered to provide less favourable avenues for access to justice than an opt-out regime. A class action is both actually and potentially less cumbersome. A positive step to opt-in may well need to occur at some point under an opt-out regime, but that step will usually be deferred until either settlement or judgment has been approved or delivered, respectively (at which point, the class members may need to prove their entitlement to part of the sum payable by the defendant). Of course, no positive step will be required at all under an opt-out regime if the class members lose on one or more of the common issues crucial to making out the cause(s) of action alleged against the defendant.

Failure to opt in can stem from a variety of motivations

It cannot be suggested that, in *Taylor v Nugent Care Society,* the claimant's failure to join the group stemmed from any disinterest or wish to avoid a confrontation with the defendant. Rather, the claimant made a statement to police; and he subsequently made a claim to the Criminal Injuries Compensation Board in about February 1996, which was upheld in 2000.89 In any given fact scenario, there may be plausible reasons why a claimant does not participate in a group action

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by the cut-off date, reasons which have nothing to do with disinterest or a desire not to litigate.

Moreover, the Court of Appeal in *Taylor v Nugent Care Society* highlights, in the following passage of its judgment, problems for the court where the affirmative step of joining the action is left to individual claimants:

"The provisions contained in Pt 19 of the CPR dealing with group litigation have no requirement which would enable a court to make an order requiring a claimant to join a group action if the claimant chose not to do so. A claimant is perfectly entitled to decide to bring an action without taking that step. The fact that he has that right does not mean, however, that there are no good reasons why he should join a GLO which covers issues which will be involved in his litigation. If a claimant does not join such a GLO when it would cover his proceedings, then he is ***54** nonetheless subject to the management powers of the court. If he brings the proceedings in parallel to a GLO, the court is fully entitled to manage the proceedings which he brings in a way which takes account of the position of those who have joined the GLO. This is intended should generally happen in the case of proceedings which are suitable for the regime which the GLO creates. Those litigants who join the group action are entitled to have their interests (whether they are claimants or defendants) given higher priority than those of a [litigant] who does not take that course. This is because of the fact that they are likely to be large in number, but also because by joining the group action they are co-operating with the proper management of the proceedings, whereas the litigant who does not take that course is not so doing."90

In other words, it is all very well to say that one advantage of the opt-in schema is that any person who does not opt in, due to conscious decision or ignorance, can bring his or her own action; but how desirable does that course actually appear to be in reality? The Court of Appeal indicates in the above passage that such a litigant is "subject to the case management powers of the court"; is entitled to be given a lower priority than members of the class who *did* opt in; and may be viewed as "non-co-operative" That hardly seems to be consistent with the sentiment of providing (at the very least) an avenue to as many litigants as possible to have their claims against the defendant determined once and for all.

The passage reproduced above also seems to suggest that there will be a large number of class members who opt in, in comparison with non-class members, such that the former should be given priority on that basis too. However, that assumes a position that simply may not be the case in any given scenario --particularly where there are various barriers, whether they be economic (*e.g.* too poor to afford any legal assistance), psychological (*e.g.* afraid of backlash from the defendant if one is seen to join a group action) or social (*e.g.* immigrants with a poor knowledge of English or of English legal systems), that discourage or prevent affirmative action being taken to opt in.91

A multiplicity of litigation is not necessarily avoided

Further, a multiplicity of litigation where the class is not widely formed did occur in *Taylor's* case, for Mr Taylor was clearly intent upon pursuing civil proceedings against the defendant, whatever the result of his application to join the GLO. It is evident that, where putative members miss the cut-off date but nevertheless desire to litigate, an opt-in regime is not as economical for the defendant--nor for the courts--as an opt-out regime. The latter is, by nature, more inclusive. Furthermore, under an opt-in regime, the defendant loses some degree of comfort in knowing how many of these individual proceedings ***55** it is possible to face. An opt-out regime gives the defendant the precise maximum possible number: *i.e.* the number who opted out.

Ultimately, of course, Mr Taylor was able to keep his individual proceedings on foot, by means of reasoning that displays a further difficulty with the opt-in approach adopted under the GLO schema. Mr Taylor wished to join the GLO group; his earlier application for permission to join indicated that his own intention was not to burden the court (or the defendant) with a multiplicity of litigation. Much was made in earlier applications of the fact that, if Mr Taylor was joined to the group after the cut-off date, his joinder would be bound to have an adverse effect upon the group action, and

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upon the availability of judicial resources to deal with the other class members, and with other court users generally.92 Evidence was also adduced to indicate that there would be adverse effects upon the defendant's limited resources in meeting the claims of the class members, as a result of those resources having had to be diverted to deal with an individual parallel claim brought by Mr Taylor.93 However, by resolving the question on the basis that to dismiss the claimant's case would be a disproportionate reaction to his failure to join the group within time,94 it is hard to see how the so-called adverse effect upon the GLO litigation and upon other litigants could be any less (from his individual claim being allowed to continue at this late stage) than if Mr Taylor had been made part of the class when he first applied to join it.

Essentially, the entire process of setting a cut-off date, of requiring would-be class members to institute individual proceedings, of compelling a late litigant to apply formally to join the class, and if denied that opportunity, appealing therefrom, and then having to argue that individual proceedings are *not* an abuse of process, deprives the GLO schema from achieving the two objectives that multi-party litigation *should* address: the provision of access to justice, at least to provide litigants with their "day in court"; and judicial economy and efficiency. Ultimately, the Court of Appeal restored the claimant's claim, and imposed a stay in respect of that claim until an application for its future management could be considered by the managing judge.

As a final irony, the Court of Appeal mentioned (without expressing any opinion on the matter)95 that although the decision to deny Mr Taylor the chance to join the group may have been correct at the time that it was made, because of the delay that had taken place in the group action since that time, it might be sensible for the claimant's case now to become part of the group action. Were that course eventually to occur, then it would achieve for this claimant, after several hearings and great expense, that which an opt-out regime would have painlessly achieved in three lines of legislative drafting. 96

***56** Difficult relationship with limitation periods

As a further point, the Court of Appeal raised the prospect of what would have happened, had Mr Taylor been "out of time" when he wished to commence his individual proceedings, his application to join the GLO having been refused.97 As the court noted, there was no question on the facts of this case of the claimant having failed to comply with the requirements of the Limitation Acts and the periods prescribed for bringing proceedings.

The Court of Appeal's *obiter* query, however, highlights how problematical is the interrelationship between putative group members under a GLO who do not join the GLO by the cut-off date and the constant ticking of the limitation clock. This interrelationship has, by contrast, been elegantly handled by class action regimes elsewhere in the world, whether by case determination98 or by legislative provision.99 The limitation period running against each putative class member ceases running upon commencement of the class litigation, and resumes running upon various events, such as where a class member opts out, where the class action is decertified, or where the class action is struck out. This is one further significant reason why, in this author's opinion, the GLO schema is problematical, and should be discontinued in favour of a formal class action.

Test actions and opt-in model do not coalesce comfortably

Although not manifest in the judgment of the Court of Appeal in *Taylor's* case, it is evident that implementation of the GLO regime has wrought instances of an uncomfortable fit with some other aspects of English civil litigation. One of these instances is the use of the test or lead action. This approach, so favoured prior to the implementation of Pt 19.III, is again permitted (indeed, encouraged) under that regime.100 However, the procedure requires that the determination of other cases (which have opted in to the GLO) be stayed until the outcome of the test case/s. From October 2, 2000,

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Art.6(1) of the Convention on Human Rights101 applies to litigation under the CPR, and provides that everyone is entitled to have his or her case determined within a reasonable ***57** time.102 Thus, as Hodges points out,103 "[i]ndefinite or unreasonable postponement of the investigation or progress of cases [which are not treated as the test cases] might breach this principle." Stein has also cautioned104 that "any new representative claims rules need to be tested by compliance with access to court guarantees" in Art.105 .

In comparison, it is strongly arguable that the advancement of every class member's case by the determination of "common issues of law or fact" which, by definition, arise in the claims of every class member, and which is facilitated by a class action opt-out regime, would obviate any such concerns. Notwithstanding the uncertain interrelationship between Art.6(1) and group actions which use the test case approach, test cases have been featured in GLO litigation.106

Interrelationship with pre-action protocols

The pre-action protocols107 which apply under the CPR (and which have been applied in group litigation108) require that *all* claimants give "sufficient concise details" of their claims to enable the defendant to understand the case, before commencing proceedings. Although compliance with the protocols is not always mandated, depending upon all the circumstances,109 the fact remains that the selection of test or lead cases does not sit well with the protocol requirement. It does, as Oliphant notes, tend to propound an "individual case" approach to group litigation.110 In contrast, it is suggested that, were a class action schema to be introduced, either the pre-action protocol approach should be abandoned altogether (as some judges tended to prefer when the LCD raised its reform proposal in 2001111) or only the representative claimants ***58** should need to comply with the protocol requirements, not the represented non-parties. An opt-out class action, it is contended, would better conform with both Art.6(1) and the CPR-favoured pre-action protocols.

IV. Why England has not warmed to a class action112

(a) The arguments postulated against the implementation of a class action

The class action device, as practised elsewhere and as defined in the introduction to this article, seems to have been viewed with some trepidation by several senior English judiciary and academics alike, a reluctance which may be traced to three significant influences.

First, and perhaps of most influence, Lord Woolf did not endorse the introduction of a certification-based opt-out class action in his seminal work, *Access to Justice: Final Report.* This was his Lordship's assessment of the device's implementation in other jurisdictions:

"The earlier the court exercises control in a potential multi-party action the better chance of managing the case to a satisfactory resolution. Other jurisdictions have achieved this by requiring certification of a group or class action where there is an identifiable class or a specified number of persons, and the claims give rise to common issues of fact and law and where handling them together appears to the court to provide the best and most practicable approach. The disadvantage of the solution usually adopted in other jurisdictions is that there may be many claimants with similar complaints but their claims may be more satisfactorily dealt with, at least in part, in separate proceedings. In this situation, it is likely that a group action will not be certified even though the case would benefit from collective management by the court." 113

In other words, it was suggested that the greater the degree of disparity among the class members' claims, the more likely a class action would be denied. That proposition is true, insofar as each class action regime requires that any class dis-

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pute give rise to a common issue of law or of fact (and variously, that such common issues "predominate" 114 or are "substantial" 115). However, both legislators and courts in other jurisdictions have been sensitive to the benefits that "collective management" would provide to a group of plaintiffs similarly situated, and as discussed more fully in the following section, it is certainly not correct to suggest that the presence of individual issues will bar an effective class ***59** proceeding. In addition to Lord Woolf 's recent reiteration in *Taylor v Nugent Care Society* of the need for extremely wide case management under the GLO,116 the view of the class action as a device which does not yield the type of flexibility desired for English multi-party litigation has also been reflected in leading academic commentary, for example: that the GLO permits "a measure of procedural discipline and for each claim to be carefully pleaded … [which] allows the court to consider both common issues and individual divergences" 117 ; and that under the US class action model, "[s]ince decisions … bind all class members, flexibility is inappropriate and the certification criteria must be applied strictly … [whereas the English model of a multi-party action] is a management tool for efficient administration and the claims of individual group members may not be resolved in the same way, so flexibility and innovation are acceptable." 118

Secondly, the following statement of Lord Steyn, writing extra-judicially, emphasises a certain degree of suspicion with which the US class action is viewed, given the "cultural differences" that exist between the jurisdictions:

"The question is sometimes raised whether this system should be replaced by the far more comprehensive and far-reaching system of class actions as it is known in the United States. There are marked cultural differences. First, the United States tort claims are tried by juries. Subject to narrow exceptions that is not so in England. Secondly, the scale of jury awards in the United States are far higher than awards made by judges in England. Massive awards for injuries, which are not of the most serious kind, would rightly not be tolerated by English public opinion. Thirdly, it is a feature of class actions in the United States that firms of lawyers earn billions of dollars in cases which do not even come to trial and often result in meagre recoveries by individual claimants. This too would be unacceptable in England. Finally, I would say that in England there is a general perception among judges, in this respect reflecting public opinion, that the tort system is becoming too expansive and wasteful. There is also an unarticulated but nevertheless real conviction among judges that we must not allow our social welfare state to become a society bent on litigation. The introduction of United States style class actions cannot but contribute to such unwelcome developments in our legal system. In my view the newly referred '2000' model of Group Litigation Orders is at present adequate for our purposes."119

Lord Woolf earlier also appeared to view the US experience with some misgivings, noting in his *Final Report* that such experience "draws attention to problems which should be taken into account in developing new multi-party ***60** rules in England".120 Shortly prior to this, the Law Society of England and Wales had considered,121 but rejected, the US class action model, citing several of its aspects122 which it considered would be inappropriate for the English jurisdiction.

A third influence for the dismissal of the class action within the English jurisdiction seemingly stems from a concern about the financial consequences of its introduction upon corporate defendants. Early in the course of his inquiry, Lord Woolf flagged the prospect of greater judicial monitoring of settlements "to ensure that defendant corporations are able to continue trading so as to meet the majority of reasonable claims and any potential, as yet, unknown ones."123 Later, during the investigative stage of the inquiry, Lord Woolf referred with concern to the potential for adoption of a US-style class action to lead to possible bankrupting of British manufacturers as had been the experience in the United States.124 In his *Final Report,* Lord Woolf also proposed that the "likely viability of a sufficient number of individual cases cannot fairly be postponed until resolution of the generic [common] issues is completed", and that, "bearing in mind the adverse effects of a group action on defendants, it is necessary as a matter of basic justice to which they too are entitled".125 Such an individual approach is contrary to the usual course of a class action, wherein common issues are determined, and if necessary, bifurcation of the individual issues occurs subsequently.

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For reasons that will be canvassed in the following section, it will be argued that none of these grounds for dismissal of the class action is convincing, nor borne out by the combined experience of those Commonwealth jurisdictions which have introduced an opt-out class action regime.

(b) Rebutting the arguments

While the GLO undoubtedly provides "flexibility" in management and outcome, so too does a sophisticated class action regime. In response to suggestions that a class action does not allow for sufficient creativity or collective management of similar claims, or that "cultural differences" preclude the successful importation of the class action device into English civil procedure, several counter-arguments may be raised.

***61** Both diversity of procedures and judicial creativity are manifest

First, the enormous diversity of procedures which are available under a class action regime cannot be understated. For example, the statutes can accommodate a decision on preliminary issues that may, of themselves, dispose of the litigation, or of one common issue only126 ; the class may be sufficiently cohesive to be treated as one band of claimants, or the creation of sub-classes may be more appropriate127 ; the court has wide powers to determine individual issues within the class action if, and in the manner, it considers fit128 ; and the court has broad discretion to discontinue the class proceedings, particularly if it appears that some other method to resolve the dispute, such as unitary actions or administrative decision, is more appropriate.129 The statutes of both Ontario130 and Australia131 make specific provision for the determination of individual issues after disposition of the common issues, where separate proceedings may ultimately be required to resolve each class member's claim; whilst under FRCP 23, courts have frequently allowed class actions limited to particular issues, while separating out individual issues of the representative claimants or the class for later disposition.132

Further, judgment on the common issues in a class action does not require to be determinative of liability, or of the litigation, or produce finality of outcome for the litigants, and indeed, it often does not. Flexibility is imbued within the Commonwealth regimes. It is certainly not a prerequisite of class actions that all class members will receive the *same* determination after a full hearing of *all* aspects of their causes of action, any defences pleaded thereto, and quantum of damages. The resolution of individual issues in separate trials after the class proceeding may produce differing results for different class members (for example, reliance upon a misrepresentation may be proven by some class members and not by others). Defences such as contributory negligence, or damages quantification, are especially typical individual issues that have arisen in class action litigation across the jurisdictions and which can result in vastly different outcomes among the class members, after resolution of the common issues in the class's favour. Thus, Lord Woolf 's assertion that it is "likely" that the class action would not be permitted in those circumstances is neither supportable by the legislative framework nor by the case law which has been determined under other regimes to date.

***62** There also exists both a legislative and judicial recognition in class actions jurisdictions that the courts presiding over class proceedings must have an overriding managerial function. Legislatively, there is a general power conferred upon the courts under the US,133 Australian134 and Ontario135 regimes to make appropriate orders at any stage for the purpose of ensuring that the litigation is conducted fairly and expeditiously. Respectively, it has been judicially observed in these jurisdictions that "[o]ne of the most significant insights that skilled trial judges have gained in recent years is the wisdom and necessity for early judicial intervention in the management of [class] litigation"136 ; that the provisions of a class action regime "were intended to confer on the Court the widest possible power to do whatever is appropriate or necessary in the interests of justice being achieved"137 ; and that the legislation "is replete with provisions or 'judicial tools', which enable the court to assume a pro-active and continuing role in the litigation, as it progresses to the final de-

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termination."[138] Such statements have been put into wide effect under the federal Australian[139] and provincial Canadian[140] regimes.

Indeed, the diversity of procedures which the courts have implemented to achieve an expeditious, proportionate and fair result have been illustrative of case management at its finest.

Fear of US-style litigation unwarranted

The various statements referred to in the previous section, which reflect the desire not to emulate the American class action model or introduce its "worst features" into English multi-party jurisprudence, warrant comment.

***63** For one thing, extensive jury trials, the frequent award of exemplary damages, and the availability of contingency fees by reference to a percentage of the verdict, all of which are adverted to in Lord Steyn's passage reproduced previously, are neither requirements nor outcomes of a class action regime. Neither Australia[141] nor the Canadian provinces [142] share these features. Yet, in their absence, both jurisdictions have implemented and developed statutory class actions, with criteria and features far more formalised than the GLO schema contained in Pt 19.III. The "cultural differences" referred to by Lord Steyn do not, under any circumstances, preclude a regulated class action in a jurisdiction, such as England, which does not share those same features. To the contrary, the comments of Cooper must be endorsed in this respect: there is "very little beyond the general idea of group litigation that can be borrowed [from the US] without thorough reconsideration and adaptation to local needs and practices."[143] That is precisely what has occurred in Canada and Australia, which share marked cultural and civil procedural similarities with England, and which have successfully implemented variants of the US class action without the extremes to which Lord Steyn has referred. Gidi argues the point most effectively:

"There is no reason to believe that the whole 'Yankee package' would invade a foreign system through the window opened by the class action device. Contrary to the traditional myth, class actions can succeed in the absence of discovery, contingent fees, the American cost rule, an entrepreneurial bar, and powerful and active judges, at least as effectively as can traditional individual litigation. It is revealing that the American Rule 23 does not even refer to discovery, attorney's fees, the right to jury trial, an entrepreneurial bar, or treble or punitive damages."[144]

Ultimately, it has been academically recognised that concerns[145] that Australia would proceed down the American torts path after the enactment of Pt IVA ***64** were exaggerated because of the different backdrop against which the class action schemas operate, a view with which Canadian[146] and even English[147] commentary has concurred.

Secondly, there is undoubtedly an element of distorted perspective about the US class action, as several commentators have endeavoured to point out. The danger of condemning a class action because of "[t]he perceived extremes to which Americans have taken things, with large contingent fees and entrepreneurial plaintiffs' lawyers and punitive damages" has been cautioned against by Rowe.[148] Connor, former head of the ALRC, despairs[149] that the same degree of sensationalised media coverage of the commencement of the more outrageous US class actions is not evident when such actions are struck out or unsuccessful. Taruffo notes[150] that the perceived evils of exemplary damages and contingency fees (when they are admitted) may apply to individual suits, and to many class actions not at all. Harlow and Rawlings remark[151] that it is the more daring of American class- action experiments, such as *cy-près* distributions, which tend to attract attention, rather than the run of conventional decisions. Spender also observes[152] that the reform of the interlocutory practices surrounding securities class actions in the United States[153] occurred in an environment where a high incidence of abusive litigation in securities suits was perceived, but never proven. Nevertheless, the perception of litigation abuse and extremes is easy to allege.

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Thirdly, to attribute the class action with an increase in court activity, “a society bent on litigation” (as Lord Steyn put it), actually undermines one of the purposes of *any* system of multi-party litigation: to increase the ability of numerous parties to seek redress for perceived wrongs which would otherwise be uneconomically feasible to litigate. Both a class action *and* the GLO regime share that particular characteristic. To decry the former because it allegedly increases the rate of litigation both ignores the potential for GLOs to do exactly the same; and undermines the aim of ensuring greater access to justice which both schemas seek to provide. In any event, the “floodgates of litigation” argument, that courts would be overwhelmed by sensational/frivolous/unmeritorious claims, certainly appears misconceived in those Commonwealth jurisdictions in which an opt-out class action has been implemented. There ***65** were similar concerns in Australia,154 Ontario,155 and British Columbia,156 but they have not been supported by an unconscionable volume of case law,157 and law reform review has been at particular pains to emphasise that the modest figures reflect the “more than adequate restraint and control” of courts overseeing the regimes.158

Punishment is only a by-product of the compensation awarded via a class action

The contention that class proceedings achieve, as a downside, overly punitive judgments against (especially corporate) defendants, gives rise to three counter arguments.

Primarily, the features that give rise to inordinately large damages claims against defendants under the US class action model are conspicuously absent in English jurisprudence. Exemplary damages for tortious conduct are extremely rare, as are jury trials that might otherwise award sympathetic damages.159 For these reasons (equally applicable in its jurisdiction), the Manitoba Law Reform Commission rejected a similar contention160 (oft-repeated elsewhere161) that a class action regime unfairly forces a defendant to settle as a blackmail suit because the stakes of going to trial are too onerous when confronted with the aggregation of many claims. In any event, there is an absence of empirical ***66** evidence to support such a claim162 ; the argument tends to ignore that parties settle frequently as well in *unitary* litigation because of the prospect of an unfavourable judgment or non-recoverable legal costs163 ; under the CPR (as in other jurisdictions), defendants have ample opportunity to institute proceedings to strike out164 or for summary judgment165 where frivolous or blackmail class action suits are suspected; and moreover, courts in Australia166 and Ontario167 have been willing to exercise said powers at the urging of defendants.

Further, the publicity attendant upon bankrupt US corporate defendants on the end of class action settlements tends to ignore two crucial factors relevant to the defendant's legal position. First, as the Manitoba Law Reform Commission pointed out, in the US asbestos, contraceptive and breast-implant class actions, the defendants faced bankruptcy following various *successful unitary suits,* where damaging jury findings and damages awards had already occurred and following which settlement appeared an attractive, and the only realistic, alternative.168 Secondly, as Armstrong and Tucker note, 169 companies in the United States who file for bankruptcy under Ch.11 of the Bankruptcy Code do not necessarily suffer “corporate death by class action”, but do so to contain their liability to creditors, and to rehabilitate the business as a going concern--and several companies emerge from the process in positive terms again.

Finally, class actions *per se* do not cause bankruptcies. However, a failure to adhere to the statutory or common law standards of conduct which the law demands may do so. As the ALRC was anxious to point out, if unlawful conduct causes defendants to become bankrupted, it is the right to compensation and/or the obligation to disgorge any benefit which the law already provides, and not the procedures for enforcing those rights and obligations, which impact financially upon defendants.170

Therefore, three arguments that have manifested in the English literature (judicial and academic) to date--that the class action is too didactic and inflexible to deal with similarly situated victims, that the US-style class action is not to be emu-

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lated, and that the class action is overly punitive to corporate defendants--are not substantiated when regard is had to the flexibility permitted under class action regimes and to the experience which has developed under the regimes of Australia and Canada, which have each been ***67** in place for over a decade. Not every class action emulates FRCP 23, and it would indeed be wrong to suggest that a "mirror version" of that device into English civil procedure should be transplanted *holus bolus.* Nevertheless, to advance the virtues of the GLO because of a fear of travelling down the US path fails to acknowledge the successful and mature class action regimes which exist elsewhere in Commonwealth jurisdictions.

(c) Response to recent reform proposals

The mooted introduction of a class action is one that generates strong and reasonably divided opinion. It certainly is not suggested herein that a class action is a problem-free device whereas the GLO schema is not. However, that there is room for ongoing debate about the efficacy of a class action's introduction was apparent from the LCD's 2001 proposal for a new-style "representative action".171 The particular proposal 3 read: "Representative Claims could be made on behalf of a group whose individuals may or may not be named but where a situation exists in which an individual would have a direct cause of action." Of course, a claim on behalf of unnamed individuals is a characteristic of an opt-out class action regime, rather than the presently operative opt-in GLO schema.

In the *Consultation Response* published by the LCD in 2002,172 eight judiciary responses were received. Of the judicial respondents, the Vice-Chancellor, Sir Andrew Morritt, was strongly opposed to proposal 3 (and also to the concept of pressure groups being used as representative claimants under rules of court)173 ; three responses did not show antipathy to the concept but considered (in accordance with the Vice-Chancellor's view) that the nature of such fundamental reforms would require primary legislation rather than amendment by rules of court174 ; and 4 indicated agreement with either all proposals in the Consultation Paper or with proposal 3 specifically (without comment upon the need for primary legislation to effect the proposals).175 Notwithstanding the important issue as to whether the CPR Committee does have the requisite rule-making powers to encompass all aspects of a class action,176 it is clear from the judicial responses in the *Consultation Response* that there is continuing judicial interest in the exploration of a class action regime for England.

In respect of *all* the responses received from judiciary, law firms, academics, government departments, and business and organisations (80 in all), the LCD noted that this proposal was "one of the most evenly balanced".177

***68** V. Conclusion

Several difficulties accompany the implementation of the GLO as a multi-party litigation device. The use of an opt-in approach is unattractive, from several perspectives: it hampers the objective of providing access to justice for claimants; it fails to provide certainty, and may increase the frequency of litigation, for the defendant; and it does not further the objectives of using court resources efficiently and fairly. Many of the particular disadvantages associated with use of the opt-in approach manifested in the (extensive) litigation between Mr Taylor and Nugent Care Society. By contrast, the optout approach favoured by the great majority of class action regimes provides innumerable advantages that would further the CPR's overriding objective. The possibility of introducing an opt-out class action into the CPR was briefly considered by Lord Woolf in the *Access to Justice* reports, but at a time when the US regime continued to attract negative publicity, and when alternative regimes in Australia and Canada were not mature enough to offer much jurisprudence.

Undoubtedly, the GLO schema deserves a period to "bed in" and prove itself.178 Nevertheless, in the author's opinion, the emerging jurisprudence from Australia and Canada provides impetus to the notion that it is never too early to consider other devices which seek to achieve the same goals as the CPR's overriding objective, and the recent initiative of

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the LCD is encouraging in this regard. Where widespread consumption of goods or services, or exposure to defendants' activities, are at issue, the demand for change can be swift and abrupt, and an on-going awareness by law reformers of other options is essential. Further, Lord Woolf himself stated in his *Final Report* :

“In this area of litigation more than any other my examination of the problems does not pretend to present the final answer but merely to try to be the next step forward in a lively debate within which parties and judges are hammering out better ways of managing the unmanageable.”179

Thus, even the architect of the revised English civil justice system contemplated that review would be on-going, and in circumstances in which reasonable differences of opinion would arise. Meanwhile, as the litigation in *Taylor v Nugent Care Society* demonstrates, litigants are facing unfortunate procedural obstacles under the GLO regime. A class action is not perfect; but it is a viable alternative which English law reform could do well to consider.

The author acknowledges and appreciates the helpful and constructive comments upon an earlier draft provided by both an anonymous referee and by General Editor, Adrian Zuckerman. Any errors remain solely the author's own.

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1. [2004] EWCA Civ 51, January 19, 2004 (Lord Woolf C.J., Tuckey and Wall L.JJ.). Judgment was delivered by the Lord Chief Justice, the other members concurring.r.19.13(b), and noted in Hodges, n.11 above, para.5.10, and Mildred, n.18 above, at p.432.
2. Named the *North-West Child Abuse Cases,* whereby group claimants alleged abuse, maltreatment and assaults whilst in the care of various defendants at children's homes in the North-west of England. The singular defendant will be used throughout this article for convenience.Contained in Sch.1, Pt 1, to the Human Rights Act 1998 (UK) c.42.
3. Fairclough D.C.J., February 21, 2002. An appeal to Poole J., set for July 18, 2002, was not proceeded with.Art.6(1) provides, in part: “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”
4. Moses J., May 5, 2003.Hodges, n.12, above, para.2.31; and see also, for further discussion of test case device under Pt 19.III, paras 5.09-5.23, 29.17-29.18.
5. *Taylor,* n.1 above, at [16].J. Stein (Submission to the LCD), cited in LCD, *Representative Claims: Proposed New Procedures: Consultation Response* (April 2002), para.4.
6. Pt 19.III, encompassing rr.19.10-19.15.See, *e.g.* the ACT (Advance Corporation Tax) GLO (at *www.courtservice.gov.uk/notices/queens/GLO.htm*), in which two test cases were proposed, and noted in: “Group Litigation Orders” [2002] *In-House Lawyer* 71.
7. r.19.6.PD Protocols, paras 1.4, 4.2, 4.3, and the requirements of the letters of claim referred to in each of the protocols for Personal Injury (December 1996), Clinical Disputes (December 1998), Construction and Engineering Disputes (October 2000), Defamation (October 2000), Judicial Review (March 2002) and Professional Negligence (July 2001). Only the last of these refers to multi-party disputes, at para.C4, but only states, without elucidation, that the parties should “act reasonably” in complying with the protocol.
8. This definition is drawn and composed from the following: Australian Law Reform Commission (ALRC), *Access to the Courts--Class Actions* (Discussion Paper No.11, 1979), para.4; South African Law Commission, *The Recognition of Class Actions and Public Interest Actions in South African Law* (Report No.88, 1998), paras 2.3.1, 5.3.1; Alberta Law Reform Institute, *Class Actions* (Report No.85, 2000) (*Alberta Report*), para.57; ALRC, *Grouped Proceedings in the Federal Court* (Report No.46, 1988) (*ALRC Report*), paras 2, 5, and cited in: R. Mulheron, *The Class Action in Common Law Legal Systems: a Comparative Perspective* (Hart, Oxford, 2004, forthcoming), p.3.*Sayers v SmithKline Beecham plc* (Master Ungley, September 3, 1999), extracted and discussed in the context of the protocols in Hodges, n.11 above, paras

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2.30, 4.04-4.08.

9. For further elucidation of the points raised herein, see: Mulheron, *op. cit.* , n.8, pp.94-102.The author gratefully acknowledges an anonymous referee's clarification of this procedural aspect.

10. Inserted by the Civil Procedure (Amendment) Rules 2000 (SI 2000/221), r.9, Sch.2.K. Oliphant, “Book Review” (2002) 65 M.L.R. 304 at p.305.

11. For an excellent and informative discussion of pre-GLO litigation in England by leading practitioner/academic Christopher Hodges, as well as for fascinating case studies of many of the prominent cases, see: C. Hodges, *Multi-Party Actions* (OUP, Oxford, 2001) (case studies contained in Chs 17-32). A couple of examples of pre-GLO group litigation are: *Davies (Joseph Owen) v Eli Lilly* [1987] 1 W.L.R. 1136, CA (the *Opren* litigation); *Hodgson v Imperial Tobacco Ltd,* unreported, February 4, 1999, QBD (tobacco litigation). Also discussed in: M. Day, P. Baker and G. McCool, *Multi-Party Actions: a Practitioners' Guide to Pursuing Group Claims* (Legal Action Group, London, 1995), pp.15-37.In response to the LCD's *Representative Claims: Proposed New Procedures: Consultation Paper* (2001), five of the eight judicial responses were against the use of a pre-action protocol for a representative claim (see the LCD's *Consultation Response* (2002) “Responses to Specific Questions”).

12. This developing experience is described in Hodges, *ibid.* , paras 1.07, 2.01-2.13, 2.21, 16.01.For expansion of the points, authorities and arguments relevant hereto, see: Mulheron, n.8 above, pp.68-77.

13. M. Mildred and R. Pannone, “Class Actions” in M. Powers and N. Harris (eds), *Medical Negligence* (Butterworth, London, 1990), p.236.*Final Woolf Report,* Ch.17, para.16.

14. C. Harlow and R. Rawlings, *Pressure through Law* (Routledge, London, 1992), p.129.As required in damages class actions under FRCP 23(b)(3), and under British Columbia's statute: Class Proceedings Act, RSBC 1996, c.50, s.4(2)(a).

15. *Ross v Owners of Bowbelle* [1997] 2 Lloyd's Rep. 196 at 196, 217, QBD.As required under Australia's statute: FCA (Aus), s.33C(1)(c).

16. Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996) (*Final Woolf Report*), Ch.17, para.13 (practice developed “pragmatically, making decisions on a creative and improvised basis”).See quote accompanying n.44 above.

17. Contained in the following: *Access to Justice Inquiry: Issues Paper (Multi-Party Actions)* (1996), para.1; *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1995); and *Final Woolf Report, ibid.*Andrews, n.54 above, at p.264.

18. See: LCD, *Multi-Party Situations: Consultation Paper (including Draft Rules and Practice Direction*) (1999), para.3 (its draft rule loosely comprised the basis of Pt 19.III). The draft, similarly to the *Final Woolf Report,* Ch.17, para.15, refers to “multi-party situations”, but that subsequently changed to the GLO. Discussed further by M. Mildred, “Group Actions” in G.G. Howells (ed.), *The Law of Product Liability* (Butterworth, London, 2001), pp.375, 410-11.Hodges, n.11 above, para.2.04, n.10 and also, para 3.24.

19. *Davies (Joseph Owen),* n.11 above, at 1139 (Lord Donaldson M.R.). For similar judicial comments flagging the possible introduction of detailed legislation/rules of court: *Nash v Eli Lilly & Co* [1993] 1 W.L.R. 782 at 810, CA (Purchas L.J.); *Foster v Roussel Laboratories Ltd* (the *Norplant* litigation), June 30, 1997, May J. 5, QBD.*ibid.,* “Foreword”, p.iii.

20. Note, “Class Actions and Access to Justice” [1979] N.L.J. 870; G. Bates, “A Case for the Introduction of Class Actions into English Law” [1980] N.L.J. 560; J. Jacob, “Safeguarding the Public Interest in English Civil Proceedings” (1982) 1 C.J.Q. 312 at p.346; Mildred and Pannone, n.13 above, at p.342; R. Campbell and W. Morrison, “Class Actions” (1987) 84 L.S.G. 2585 at p.2586; J.G. Fleming, “Mass Torts” (1994) 42 *American Journal of Comparative Law* 507 at p.522.*Final Woolf Report,* Ch.17, para.5.

21. Mildred, n.18 above, at p.378, referring to the decision in: *Creutzfeldt-Jakob Litigation, Plaintiffs v UK Medical Research Council* [1996] 7 Med.L.R. 309, QBD.*Group Actions Made Easier* (1995).

22. A discussion of how judicial efforts to overcome the problems with the representative rule have aligned the rule with a true class action will be undertaken in: R. Mulheron, “From Representative Rule to Class Action: Steps Rather Than

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Leaps" (C.J.Q., forthcoming, April 2005).Such as global damages, tolling of the limitation periods for absent class members, judicial examination of settlement agreements, and opting out arrangements: *ibid.* , para.5.2.7.

23. Hodges, n.11 above, para.9.08. Also: G. Carney and E. Morony, "Class Actions" [2002] *Global Counsel* 59 at p.63. *Access to Justice Inquiry: Issues Paper (Multi-Party Actions)* (1996), para.2(f).

24. *e.g.* the Vaccine Damage Payments Act 1979 (UK) c.17, and later, to raise the statutory sum: Vaccine Damage Payments Act 1979 Statutory Sum Order 2000 (SI 2000/1983), and to lower the minimum disability to 60 per cent: Regulatory Reform (Vaccine Damage Payments Act 1979) Order 2002 (SI 2002/1592).Raised in a meeting of the Multi-party Actions Special Interest Group of the Association of Personal Injury Lawyers in 1996, and cited in: M. Day, "Product Liability Actions: Sheep in Wolf 's Clothing" (1996) 42 *Legal Times* 10.

25. Mildred, n.18 above, at p.402.*Final Woolf Report,* Ch.17, para.34.

26. r.19.11(2)(a), PD 19B, para.6.FCA (Aus), s.33C(1); CPA (Ont), s.5(1)(c); FRCP, 23(a)(2).

27. r.19.11(2)(c).FCA (Aus), s.33Q(2); CPA (Ont), s.6(5); FRCP 23(c)(4)(B).

28. r.19.12(1).FCA (Aus), s.33Q(1); CPA (Ont), s.25; FRCP 23(c)(4)(A).

29. r.19.11(1).FCA (Aus), ss.33L, 33M and 33N; CPA (Ont), s.10. A superiority test is contained is FRCP 23(b)(3).

30. The figure of 10 has been oft-mentioned in English multi-party jurisprudence, *e.g.* LCD, *Multi-Party Situations: Consultation Paper (including Draft Rules and Practice Direction)* (1999), para.1.2; Law Society of England and Wales, *Group Actions Made Easier* (1995), draft r.1.1; Civil Legal Aid (General) Regulations 1989, reg.152(3); but Lord Woolf preferred no minimum, indicating that a lesser number such as five may sometimes be appropriate: *Final Woolf Report,* Ch.17, para.20.CPA (Ont), s.25.

31. rr.19.10 and 19.11(1).FCA (Aus), ss.33Q, 33R, or by entirely separate proceedings: s.33S.

32. r.1.1(1). What is meant by "justly" is elucidated in r.1.1(2).H.B. Newberg and A. Conte, *Newberg on Class Actions* (4th ed., West Group, St Paul Minn., 2002), para.9.47, p.422. For an excellent discussion of FRCP 23(c)(4)(A), its scope of application and its relationship with the predominance requirement, see: L.J. Hines, "Challenging the Issue Class Action End-Run" (2003) 52 Emory L.J. 709.

33. Noted in: Mildred, n.18 above, at p.410; I. Grainger and M. Fealy, *The Civil Procedure Rules in Action* (2nd ed., Cavendish Publishing, London, 2000), pp.15-16.FRCP 23(d)(1) and note the reference to FRCP r.16 therein, the latter of which makes provision for, *inter alia,* extensive case management and expedited disposition.

34. PD 19B, para.3.3.FCA (Aus), s.33ZF(1).

35. Under r.3.1(2)(g).CPA (Ont), s.12.

36. PD 19B, para.2.3.*Hoffmann-La Roche Inc v Sperling,* 493 U.S. 165, 171; 110 S. Ct. 482 (1989); *Gulf Oil Co v Bernard,* 452 U.S. 89, 100; 101 S. Ct. 2193 (1981) Academically: D.R. Hensler *et al.* , *Class Action Dilemmas: Pursuing Public Goals for Private Gain, Executive Summary* (RAND Institute for Civil Justice, Santa Monica, 1999), p.25 and, by the same authors: *Class Action Dilemmas: Pursuing Public Goals for Private Gain* (RAND Institute for Civil Justice, Santa Monica, 2000), p.445 ("how judges exercise [their] responsibilities determines the shape of class actions to come").

37. PD 19B, para.3.2(2), (3).*McMullin v ICI Aust Operations Pty Ltd (No.6)* (1998) 84 F.C.R. 1 at 4. Also see, for similar judicial comments upon the importance of managerial judging within this context, *e.g. Lopez v Star World Enterprises Pty Ltd,* April 18, 1997, 1, FCA; M. Wilcox (the Hon.), "Class Actions in Australia" (13th Commonwealth Law Conference, Melbourne, 2003), p.5.

38. Noted by *Supreme Court Practice* (*White Book Service 2001*) (digital ed., Sweet & Maxwell, London, 2001), para.19.13.1.*Smith v Canadian Tire Acceptance Ltd* (1995), 22 O.R. (3d) 433 (Gen Div) at [42] (Winkler J.). Also see W. Winkler (the Hon.), "Advocacy in Class Proceedings Litigation" (2000) 19 *Advocates' Society Journal* 6 at p.9.

39. r.19.13.*e.g. Williams v FAI Home Security Pty Ltd (No.3)* [2000] F.C.A. 1438 (correction notice sent to class members prior to opt-out deadline); *Courtney v Medtel Pty Ltd* [2002] F.C.A. 957 (court intervention with respect to proposed offer of settlement).

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40. Also relevant is r.1.4, which requires the court to "further the overriding objective by actively managing cases".*e.g. Webb v 3584747 Canada Inc* (2001), 54 O.R. (3rd) 587 (SCJ); reversed in part (2002), 24 C.P.C. (5th) 76 (Div Ct) (revision of the hearing process for the individual claims of class members); *Guglietti v Toronto Area Transit Operating Authority* (2000), 50 C.P.C. (4th) 355 (SCJ) (to extend time for class members to file claim forms under settlement agreement, where no evidence of bad faith or fault).

41. *Chapman v Chief Constable of South Yorkshire Police,* unreported, March 6, 1990, 6, QBD, Steyn J. See also comments by Lord Donaldson M.R. in *Horrocks v Ford Motor Company Ltd,* February 12 1990, 3, CA.*e.g.* trial by jury under the FCA (Aus) is only allowed by court order (s.39), and is rare, as are exemplary damages (for claims under the Trade Practices Act 1974 (Aus), the main sphere of claims within that jurisdiction, they have been judicially banned: *Nixon v Philip Morris (Aust) Ltd* (1999) 95 F.C.R. 453 at [103], that aspect not being overturned on appeal).

42. *Woolf Final Report,* Ch.1, para.1 ("Ultimate responsibility for the control of litigation must move from the litigants and their legal advisers to the court"), Ch.17, paras 14, 27 ("full hands-on judicial control"), and *Woolf Interim Report,* Ch.4, para.2, Ch.5.Both jury trials and exemplary damages awards are rare: J.Y. Obagi and E.A. Quigley, "Making a Claim for Punitive Damages" (2001) 24 Advocates' Q. 4; K. Roach and M. Trebilcock, "Private Enforcement of Competition Laws" (1996) 34 Osgoode Hall L.J. 461, at para.15; P. Jackson, "Abuses Described in Recent US Study Unlikely Here" (2000) *Lawyers' Weekly* 20(35) ("There is as yet no reason to think that the factors that constrain the use of juries and the availability of punitive damages will differ in a class proceeding").

43. As noted by, *e.g.* R. Cranston, "Social Research and Access to Justice" in R. Cranston and A. Zuckerman (eds), *Reform of Civil Procedure: Essays on Access to Justice* (Clarendon Press, Oxford, 1995), p.38; Hodges, n.11 above, para.2.03; M. Laughton, "More Group Actions in the UK?" [1997] *International Commercial Litigation* 39 at p.40; Grainger and Fealy, n.33 above, at p.8.E.H. Cooper, "Class Action Advice in the Form of Questions" (2001) 11 *Duke Journal of Comparative and International Law* 215 at p.247.

44. *Taylor,* n.1 above, at [9].A. Gidi, "Class Actions in Brazil--a Model for Civil Law Countries" (2003) 51 *American Journal of Comparative Law* 311 at pp.322-323.

45. See summary provided in *Taylor,* n.1 above, at [4].Noted in, *e.g.* H. Luntz, "Heart Valves, Class Actions and Remedies: Lessons for Australia?" in N.J. Mullany (ed.), *Tort in the Nineties* (LBC, North Ryde, 1997), pp.73-74. See also M. Bielecki, *Defending Class Actions* (Law Society Product Liability and Class Actions Seminar, Sydney, 1992), pp.3-4; V. Culkoff, "Representative Proceedings under Pt IVA" (1996) 7 *Australian Product Liability Reporter* 16 at p.19.

46. See, for the terms under which the GLO would be handled: "Queen's Bench Division Practice Direction: North- West Child Abuse Cases", Lord Chief Justice, May 7, 1999.J.R.S. Prichard, "Class Action Reform: Some General Comments" (1984) 9 Canadian Business L.J. 309 at pp.312-313 (noting especially the difference in substantive causes of actions available).

47. According to: *List of Current Group Litigation* Orders (Court Service website, as updated), available at *www.courtservice.gov.uk/cms/3570.htm* (last accessed October 31, 2004).Day, n.23 above, at p.10.

48. *e.g.* South Wales Children's Homes Litigation (Local Authority), GLO ordered November 28, 2002; St Leonard's Group Litigation, GLO ordered June 12, 2002; Longcare Group Litigation, GLO ordered November 21, 2001; West Kirby Residential School Group Litigation, GLO ordered June 27, 2001.T.D. Rowe, "Debates over Group Litigation in Comparative Perspective" (2001) 11 *Duke Journal of Comparative and International Law* 157 at p.159.

49. Nantygwyddon litigation, GLO ordered August 15, 2001.X. Connor, "Class Action" (1987) *Law Society Journal* 52 at p.57.

50. Trial of preliminary issues in: *B (A Child) v McDonald's Restaurants Ltd* [2002] EWHC 490 (QB).M. Taruffo, "Some Remarks on Group Litigation in Comparative Perspective" (2001) 11 *Duke Journal of Comparative and International Law* 405 at pp.414-415.

51. McDonalds Hot Drinks, GLO ordered May 22, 2001.Harlow and Rawlings, n.14 above, at p.125, citing the well-known taxi overcharge case of *Daar v Yellow Cab Co,* 63 Cal. 2d 695 (1967).

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52. Apart from *Taylor,* the most significant challenge has arisen in relation to cost-sharing orders: *Afrika v Cape plc* ; *X, Y, Z v Schering Health Care Ltd* ; *Sayers v SmithKline Beecham plc* [2001] EWCA Civ 2017.P. Spender, “Securities Class Actions: a View from the Land of the Great White Shareholder” (2002) 31 *Common Law World Review* 123 at p.128.
53. *e.g.* the LCD's report, *Emerging Findings: An Early Evaluation of the Civil Justice Reforms* (March 2001) does not devote any discussion to the GLO schema, nor does the follow-up report: *Further Findings: a Continuing Evaluation of the Civil Justice Reforms* (August 2002).Private Securities Litigation Reform Act 1995.
54. N. Andrews, “Multi-Party Proceedings in England” (2001) 11 *Duke Journal of Comparative and International Law* 249 at p.262.See, *e.g.* submissions 26, 73 referred to in *ALRC Report,* para.68; N. Francey, “A Class Act or the Spectre of Class Actions” (1992) 3 *Australian Product Liability Reporter* 52 at p.54.
55. *Lubbe v Cape plc* [2000] 1 W.L.R. 1545; [2000] 2 Lloyd's Rep. 383 at 393, HL. See also the positive comments contained in the response given by Sir Andrew Morritt to the LCD, reproduced in: *Representative Claims: Proposed New Procedures: Consultation Response* (April 2002), para.4.*e.g.* S.J. Simpson, “Class Action Reform: a New Accountability” (1991) 10 *Advocates' Society Journal* 19; R. Armstrong, “Litigation” [1994] 3 International Company and Commercial L.Rev. C-52. For the obverse concern (also unfounded) that the Ontario regime was so complex that it would be virtually unused, see A.J. Roman, “Class Actions in Canada: the Path to Reform?” (1988) 7 *Advocates' Society Journal* 28.
56. Mildred, n.18 above, at p.410.D.J. Mullan and N.J. Tuytel, “The British Columbia Class Proceedings Act: Will it Open the Floodgates?” (1996) 14 *Canadian Journal of Insurance Law* 30.
57. Mildred, *ibid.* , at p.462.In Australia, *e.g.* P. Cerexhe, “Phantom Floodgates of Public Interest Litigation” (1999) 10 *Australian Product Liability Reporter* 42 at p.43; A. Cornwall, “Representative Proceedings: Supplement” (Public Interest Advocacy Centre for Coalition for Class Actions, Sydney, 1997), p.12. In Ontario, *e.g.* G.D. Watson, “Class Actions: the Canadian Experience” (2001) 11 *Duke Journal of Comparative and International Law* 269 at p.278; G McKee, “Class Actions in Canada” (1997) 8 *Australian Product Liability Reporter* 84 at p.90; G. Mew and J. Servinis, “Class Proceedings in Canada” (13th Commonwealth Law Conference, Melbourne, 2003), p.6.
58. *Hansard* HL Deb., Vol.596, col.521 (January 19, 1999, Lord Irvine of Lairg L.C.), discussing the Access to Justice Bill, in particular cl.4(3), and indicating that “individual cases” in the context of that sub-clause included group actions.ALRC, *Managing Justice* (Report No.89, 1999), para.7.89, citing N. Francey, “Class Actions” (NSW Bar Association CLE Program, Sydney, 1998), para.20. See also *Manitoba Report,* p.33; Rules Committee of the Federal Court of Canada, *Class Proceedings in the Federal Court of Canada* (Discussion Paper, 2000), p.15.
59. Andrews, n.54 above, at p.249.As *per* Lord Devlin in *Rookes v Barnard* [1964] A.C. 1129 at 1228, HL, *i.e.* that exemplary damages may be properly awarded “if, and only if “ the sum that was in mind to award as compensation was inadequate to punish the defendant for his or her conduct.
60. *e.g.* Manitoba Law Reform Commission, *Class Proceedings* (1999) (*Manitoba Report*), p.64; *OLRC Report,* p.470; R.O. Faulk, “The International Class Action: Comments on the Geneva Group Action Debates” (International Briefing Paper, Gardere, Wynne, Sewell & Riggs, October 20, 2000); *Alberta Report,* para.240.*Manitoba Report,* pp.29-30.
61. LCD, *Multi-Party Situations: Consultation Paper (including Draft Rules and Practice Direction)* (1999), para.31, and see also: draft r.X.2(2)(b)(iii).See, *e.g.* the several submissions to this effect noted in *ALRC Report,* paras 151, 351; *OLRC Report,* p.313; and some significant US support, *e.g. Castano v American Tobacco Co,* 84 F. 3d 734, 746 (5th Cir. 1996); *In re Rhone-Poulenc Rorer Inc,* 51 F. 3d 1293, 1299 (7th Cir. 1995); *In re Agent Orange Product Liab Litig MDL No.381,* 818 F. 2d 145, 165-66 (2d Cir. 1987).
62. *AB v Liverpool CC,* June 15, 1998 at 3.*e.g.* Watson, n.156 above, at p.285.
63. LCD, *Proposed New Procedures for Multi-Party Situations: Consultation Paper* (1997), para.34.Note the similar dismissal of this argument in *ALRC Report,* para.337.
64. *Final Woolf Report,* Ch.17, para.23.r.3.4(2).
65. *The White Book,* n.38 above, para.19.11.1; Hodges, n.11 above, paras 4.32, 4.35; S. Burn, “Woolf Reforms: CPR Re-

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volution Rolls on" [2000] *Legal Action* 27; Mildred, n.18 above, pp.415-416. See also the comments by Irwin Mitchell, solicitors, in LCD, *Representative Claims: Proposed New Procedures: Consultation Response* (April 2002), para.4.r.24.2.

66. See PD 19B, para.6.1A, effective December 2, 2002, more than 18 months after the schema was implemented.Striking out, *e.g. Harrison v Lidoform Pty Ltd,* November 24, 1998, FCA; *Philip Morris (Aust) Ltd v Nixon* (2000) 170 A.L.R. 487, Full FCA.

67. See, *e.g.* similar comments in relation to the costs provisions by M. Mildred, "Procedure: *Afrika v Cape plc* " [2002] *Journal of Personal Injury Litigation* 215 at p.217.Striking out, *e.g. McCann v The Ottawa Sun* (1994), 16 O.R. (3d) 672 (Gen Div); *Haskett v Trans Union of Canada Inc,* December 13, 2001, SCJ; reversed (2003), 224 D.L.R. (4th) 419, 63 O.R. (3d) 577, CA, leave to appeal refused, November 27, 2003, SCC; for others, see: *Manitoba Report,* p.48.

68. Reform proposals have been instigated over the years, instead, by the Law Society Civil Litigation Committee, National Consumer Council, the Supreme Court Practice Committee, and the LCD. Respectively, *e.g. Group Actions Made Easier* (1995); *Group Actions: Learning From Opren* (1989); *Guide for Use in Group Actions* (1991); and *Representative Claims: Proposed New Procedures: Consultation Paper* (February 2001) and *Consultation Response* (April 2002).*Manitoba Report,* p.29.

69. The Ontario Law Reform Commission made this express observation: *Report on Class Actions* (1982) (*OLRC Report*), p.467; and the *Alberta Report,* para.236 referred to the "intense, protracted and essentially unresolved debate". Baxt notes that the ALRC eventually opted for the opt-out approach, for reasons that were "not convincing": B. Baxt, "Class Action Legislation--a Mirage for the Consumer?" (1992) 66 *Australian Law Journal* 223 at p.223.N. Armstrong and A. Tucker, "Class Struggles" [1996] *Journal of Personal Injury Litigation* 94 at p.104, citing: R. Sobol, *Bending the Law: the Story of the Dalkon Shield Bankruptcy* (Chicago University Press, Chicago, 1991).

70. *e.g. Group Actions Made Easier,* para.5.2.7(f) ("generally the Working Party were in favour of the claimant having to 'opt in' by issuing/joining the group"); N. Andrews, *Principles of Civil Procedure* (Sweet & Maxwell, London, 1994), p.158 ("the process of 'opting out' by positive decision will not confer upon a represented party an effective right to remain aloof. Such a system depends for its fairness upon the 'Exit' sign being easily spotted and reached").*ALRC Report,* para.349.

71. These arguments, extensive and divided, are derived from a variety of sources (such sources also consider, by corollary, the opt-out dilemma): Scottish Law Commission, *Multi-Party Actions* (1996), paras 4.49-4.53; *Final Woolf Report,* Ch.17, paras 42-44; *ALRC Report,* paras 101-108; *OLRC Report,* pp.478-85; Rules Committee of the Federal Court of Canada, *Class Proceedings in the Federal Court of Canada* (Discussion Paper, 2000), pp.57-58; *Alberta Report,* paras 237-240; *Manitoba Report,* pp.63-64; British Columbia, Ministry of the Attorney-General, *Class Action Legislation for British Columbia* (Consultation Document, 1994), p.8; and for excellent and thorough discussion of both the opt-out and opt-in approaches, see: V. Morabito, "Class Actions: the Right to Opt out" (1994) 19 Melbourne U.L.Rev. 615, Pt III. *Representative Claims: Proposed New Procedures: Consultation Paper* (February 2001).

72. Recently, *e.g.* Sweden's Group Proceedings Act 2002, s.14.*Representative Claims: Proposed New Procedures: Consultation Response* (April 2002).

73. Federal Court of Australia Act 1976 (Aus) (FCA (Aus)), s.33J."The extension of the right to bring or defend representative proceedings beyond what is now permitted by CPR Part 19 and the EC Directives … is not justified; and if such an extension is to be considered then it is a matter for parliament."

74. *ACCC v Chats House Investments Pty Ltd* (1996) 71 F.C.R. 250; *ACCC v Giraffe World Aust Pty Ltd (No.2)* (1999) 95 F.C.R. 302; *ACCC v Golden Sphere Int Inc* (1998) 83 F.C.R. 424; *ACCC v Internic Technology Pty Ltd* (1998) A.T.P.R. para.41-646.Lord Phillips M.R.; May L.J.; Association of District Judges.

75. Trade Practices Act 1974 (Aus), s.87(1B) (where a person is found to have engaged in conduct in breach of the consumer protection provisions, the ACCC may make application for compensation orders on behalf of consumers, provided they have given written consent).Judge Hurst; Judge Evans, Q.C.; Judge Coningsby, Q.C.; District Judge Dabezies.

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76. C. Wood, "Class Actions and the Internet" (1998) 21 U. of New South Wales L.J. 632 at p.633.Discussed in Mulheron, n.8 above, pp.38-42.
77. Note, "Class Actions--Opt in or Opt out?" [1988] *Reform* 77 at p.78.LCD, *Representative Claims: Proposed New Procedures: Consultation Response* (April 2002) "Responses to Specific Questions", p.3.
78. A. Asher, "Representative Actions and the Trade Practices Commission" (1993) 4 *Australian Product Liability Reporter* 94.Andrews, n.54 above, at p.266.
79. *e.g.* Supreme Court Act 1986 (Vic), ss.34, 35, ultimately replaced in 2000 by Pt 4A (opt-out rights conferred by s.33J), in almost identical terms as the opt-out federal Pt IVA regime.*Final Woolf Report,* Ch.17, para.6.
80. The previous version of FRCP 23 was replaced in 1966 by the present opt-out regime.
81. Class Proceedings Act, RSBC 1996, c.50.
82. See s.16(2), ostensibly so that, by opting in, the non-resident accepted the jurisdiction of the court: *Alberta Report,* para.232; Alberta Law Reform Institute, *Class Actions* (Consultation Memorandum No.9, 2000) [75], cited with approval in *Harrington v Dow Corning Corp* (2000), 193 D.L.R. (4th) 67; 82 B.C.L.R. (3d) 1 (CA), para.74.
83. See s.16(1).
84. Code of Civil Procedure (Quebec), arts 1006(e), 1007.
85. Class Proceedings Act, SO 1992, c.6, s.9.
86. Class Actions Act (Sask), s.18(1); Class Proceedings Act (Man), s.16; Class Actions Act (SNL), s.17(1); Class Proceedings Act (Alta), s.17(1).
87. A push by insurance and business to change FRCP 23 to an opt-in regime was noted by E.F. Sherman, "Export/Import: American Civil Justice in a Global Context" (2002) 52 DePaul L.Rev. 401 at p.411, citing testimony of A.W. Cortese on behalf of Lawyers for Civil Justice to the Advisory Committee on Civil Rules (February 13, 2002), p.3.
88. Prior to December 1, 2003, see: FRCP 23(c)(2), and the same implicit recognition of opting-out can be seen from the wording in FRCP 23(c)(2)(B) (revised in December 2003) that the notice must state "that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded".
89. Noted in *Taylor,* n.1 above, at [4].
90. *ibid.* , [15].
91. These factors, and their manifestations, are discussed, *e.g.* in: *OLRC Report,* pp.127-129; *Alberta Report,* para.101; *ALRC Report,* para.15.
92. *ibid.* , para.11, citing Moses J. at [17] of his earlier judgment.
93. *ibid.*
94. *ibid.* , para. 16.
95. *ibid,* para. 19.
96. *e.g.* FCA (Aus), s.33E(1): "The consent of a person to be a group member in a representative proceeding is not required unless subsection (2) applies to the person [Government Minister, etc.]" and s.33J(2): "A group member may opt out of a representative proceeding by written notice given under the Rules of Court before the date so fixed."
97. *ibid.* , para.16.
98. As in the US: *American Pipe and Construction Co v Utah,* 414 U.S. 538; 94 S. Ct. 756 (1974); *Chardon v Fumero Soto,* 462 U.S. 650, 659-61; 103 S. Ct. 2611 (1983); *Eisen v Carlisle and Jacquelin,* 417 U.S. 156, 176 n.13 (1974).
99. See, *e.g.* FCA (Aus), s.33ZE; CPA (Ont), s.28.
100. [2004] EWCA Civ 51, January 19, 2004 (Lord Woolf C.J., Tuckey and Wall L.JJ.). Judgment was delivered by the Lord Chief Justice, the other members concurring.r.19.13(b), and noted in Hodges, n.11 above, para.5.10, and Mildred, n.18 above, at p.432.
101. Named the *North-West Child Abuse Cases,* whereby group claimants alleged abuse, maltreatment and assaults whilst in the care of various defendants at children's homes in the North-west of England. The singular defendant will be used throughout this article for convenience.Contained in Sch.1, Pt 1, to the Human Rights Act 1998 (UK) c.42.

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102. Fairclough D.C.J., February 21, 2002. An appeal to Poole J., set for July 18, 2002, was not proceeded with.Art.6(1) provides, in part: “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

103. Moses J., May 5, 2003.Hodges, n.12, above, para.2.31; and see also, for further discussion of test case device under Pt 19.III, paras 5.09-5.23, 29.17-29.18.

104. *Taylor,* n.1 above, at [16].J. Stein (Submission to the LCD), cited in LCD, *Representative Claims: Proposed New Procedures: Consultation Response* (April 2002), para.4.

105. Pt 19.III, encompassing rr.19.10-19.15.See, *e.g.* the ACT (Advance Corporation Tax) GLO (at *www.courtservice.gov.uk/notices/queens/GLO.htm*), in which two test cases were proposed, and noted in: “Group Litigation Orders” [2002] *In-House Lawyer* 71.

106. Pt 19.III, encompassing rr.19.10-19.15.See, *e.g.* the ACT (Advance Corporation Tax) GLO (at *www.courtservice.gov.uk/notices/queens/GLO.htm*), in which two test cases were proposed, and noted in: “Group Litigation Orders” [2002] *In-House Lawyer* 71.

107. r.19.6.PD Protocols, paras 1.4, 4.2, 4.3, and the requirements of the letters of claim referred to in each of the protocols for Personal Injury (December 1996), Clinical Disputes (December 1998), Construction and Engineering Disputes (October 2000), Defamation (October 2000), Judicial Review (March 2002) and Professional Negligence (July 2001). Only the last of these refers to multi-party disputes, at para.C4, but only states, without elucidation, that the parties should “act reasonably” in complying with the protocol.

108. This definition is drawn and composed from the following: Australian Law Reform Commission (ALRC), *Access to the Courts--Class Actions* (Discussion Paper No.11, 1979), para.4; South African Law Commission, *The Recognition of Class Actions and Public Interest Actions in South African Law* (Report No.88, 1998), paras 2.3.1, 5.3.1; Alberta Law Reform Institute, *Class Actions* (Report No.85, 2000) (*Alberta Report*), para.57; ALRC, *Grouped Proceedings in the Federal Court* (Report No.46, 1988) (*ALRC Report*), paras 2, 5, and cited in: R. Mulheron, *The Class Action in Common Law Legal Systems: a Comparative Perspective* (Hart, Oxford, 2004, forthcoming), p.3.*Sayers v SmithKline Beecham plc* (Master Ungley, September 3, 1999), extracted and discussed in the context of the protocols in Hodges, n.11 above, paras 2.30, 4.04-4.08.

109. For further elucidation of the points raised herein, see: Mulheron, *op. cit.* , n.8, pp.94-102.The author gratefully acknowledges an anonymous referee's clarification of this procedural aspect.

110. Inserted by the Civil Procedure (Amendment) Rules 2000 (SI 2000/221), r.9, Sch.2.K. Oliphant, “Book Review” (2002) 65 M.L.R. 304 at p.305.

111. For an excellent and informative discussion of pre-GLO litigation in England by leading practitioner/academic Christopher Hodges, as well as for fascinating case studies of many of the prominent cases, see: C. Hodges, *Multi-Party Actions* (OUP, Oxford, 2001) (case studies contained in Chs 17-32). A couple of examples of pre-GLO group litigation are: *Davies (Joseph Owen) v Eli Lilly* [1987] 1 W.L.R. 1136, CA (the *Opren* litigation); *Hodgson v Imperial Tobacco Ltd,* unreported, February 4, 1999, QBD (tobacco litigation). Also discussed in: M. Day, P. Baker and G. McCool, *Multi-Party Actions: a Practitioners' Guide to Pursuing Group Claims* (Legal Action Group, London, 1995), pp.15-37.In response to the LCD's *Representative Claims: Proposed New Procedures: Consultation Paper* (2001), five of the eight judicial responses were against the use of a pre-action protocol for a representative claim (see the LCD's *Consultation Response* (2002) “Responses to Specific Questions”).

112. This developing experience is described in Hodges, *ibid.* , paras 1.07, 2.01-2.13, 2.21, 16.01.For expansion of the points, authorities and arguments relevant hereto, see: Mulheron, n.8 above, pp.68-77.

113. M. Mildred and R. Pannone, “Class Actions” in M. Powers and N. Harris (eds), *Medical Negligence* (Butterworth, London, 1990), p.236.*Final Woolf Report,* Ch.17, para.16.

114. C. Harlow and R. Rawlings, *Pressure through Law* (Routledge, London, 1992), p.129.As required in damages class

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actions under FRCP 23(b)(3), and under British Columbia's statute: Class Proceedings Act, RSBC 1996, c.50, s.4(2)(a).

115. *Ross v Owners of Bowbelle* [1997] 2 Lloyd's Rep. 196 at 196, 217, QBD.As required under Australia's statute: FCA (Aus), s.33C(1)(c).

116. Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996) (*Final Woolf Report*), Ch.17, para.13 (practice developed “pragmatically, making decisions on a creative and improvised basis”).See quote accompanying n.44 above.

117. Contained in the following: *Access to Justice Inquiry: Issues Paper (Multi-Party Actions)* (1996), para.1; *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1995); and *Final Woolf Report, ibid.*Andrews, n.54 above, at p.264.

118. See: LCD, *Multi-Party Situations: Consultation Paper (including Draft Rules and Practice Direction*) (1999), para.3 (its draft rule loosely comprised the basis of Pt 19.III). The draft, similarly to the *Final Woolf Report,* Ch.17, para.15, refers to “multi-party situations”, but that subsequently changed to the GLO. Discussed further by M. Mildred, “Group Actions” in G.G. Howells (ed.), *The Law of Product Liability* (Butterworth, London, 2001), pp.375, 410-11.Hodges, n.11 above, para.2.04, n.10 and also, para 3.24.

119. *Davies (Joseph Owen),* n.11 above, at 1139 (Lord Donaldson M.R.). For similar judicial comments flagging the possible introduction of detailed legislation/rules of court: *Nash v Eli Lilly & Co* [1993] 1 W.L.R. 782 at 810, CA (Purchas L.J.); *Foster v Roussel Laboratories Ltd* (the *Norplant* litigation), June 30, 1997, May J. 5, QBD.*ibid.,* “Foreword”, p.iii.

120. Note, “Class Actions and Access to Justice” [1979] N.L.J. 870; G. Bates, “A Case for the Introduction of Class Actions into English Law” [1980] N.L.J. 560; J. Jacob, “Safeguarding the Public Interest in English Civil Proceedings” (1982) 1 C.J.Q. 312 at p.346; Mildred and Pannone, n.13 above, at p.342; R. Campbell and W. Morrison, “Class Actions” (1987) 84 L.S.G. 2585 at p.2586; J.G. Fleming, “Mass Torts” (1994) 42 *American Journal of Comparative Law* 507 at p.522.*Final Woolf Report,* Ch.17, para.5.

121. Mildred, n.18 above, at p.378, referring to the decision in: *Creutzfeldt-Jakob Litigation, Plaintiffs v UK Medical Research Council* [1996] 7 Med.L.R. 309, QBD.*Group Actions Made Easier* (1995).

122. A discussion of how judicial efforts to overcome the problems with the representative rule have aligned the rule with a true class action will be undertaken in: R. Mulheron, “From Representative Rule to Class Action: Steps Rather Than Leaps” (C.J.Q., forthcoming, April 2005).Such as global damages, tolling of the limitation periods for absent class members, judicial examination of settlement agreements, and opting out arrangements: *ibid.* , para.5.2.7.

123. Hodges, n.11 above, para.9.08. Also: G. Carney and E. Morony, “Class Actions” [2002] *Global Counsel* 59 at p.63. *Access to Justice Inquiry: Issues Paper (Multi-Party Actions)* (1996), para.2(f).

124. *e.g.* the Vaccine Damage Payments Act 1979 (UK) c.17, and later, to raise the statutory sum: Vaccine Damage Payments Act 1979 Statutory Sum Order 2000 (SI 2000/1983), and to lower the minimum disability to 60 per cent: Regulatory Reform (Vaccine Damage Payments Act 1979) Order 2002 (SI 2002/1592).Raised in a meeting of the Multi-party Actions Special Interest Group of the Association of Personal Injury Lawyers in 1996, and cited in: M. Day, “Product Liability Actions: Sheep in Wolf ‘s Clothing” (1996) 42 *Legal Times* 10.

125. Mildred, n.18 above, at p.402.*Final Woolf Report,* Ch.17, para.34.

126. r.19.11(2)(a), PD 19B, para.6.FCA (Aus), s.33C(1); CPA (Ont), s.5(1)(c); FRCP, 23(a)(2).

127. r.19.11(2)(c).FCA (Aus), s.33Q(2); CPA (Ont), s.6(5); FRCP 23(c)(4)(B).

128. r.19.12(1).FCA (Aus), s.33Q(1); CPA (Ont), s.25; FRCP 23(c)(4)(A).

129. r.19.11(1).FCA (Aus), ss.33L, 33M and 33N; CPA (Ont), s.10. A superiority test is contained is FRCP 23(b)(3).

130. The figure of 10 has been oft-mentioned in English multi-party jurisprudence, *e.g.* LCD, *Multi-Party Situations: Consultation Paper (including Draft Rules and Practice Direction)* (1999), para.1.2; Law Society of England and Wales, *Group Actions Made Easier* (1995), draft r.1.1; Civil Legal Aid (General) Regulations 1989, reg.152(3); but Lord Woolf preferred no minimum, indicating that a lesser number such as five may sometimes be appropriate: *Final Woolf Report,* Ch.17, para.20.CPA (Ont), s.25.

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131. rr.19.10 and 19.11(1).FCA (Aus), ss.33Q, 33R, or by entirely separate proceedings: s.33S.
132. r.1.1(1). What is meant by "justly" is elucidated in r.1.1(2).H.B. Newberg and A. Conte, *Newberg on Class Actions* (4th ed., West Group, St Paul Minn., 2002), para.9.47, p.422. For an excellent discussion of FRCP 23(c)(4)(A), its scope of application and its relationship with the predominance requirement, see: L.J. Hines, "Challenging the Issue Class Action End-Run" (2003) 52 Emory L.J. 709.
133. Noted in: Mildred, n.18 above, at p.410; I. Grainger and M. Fealy, *The Civil Procedure Rules in Action* (2nd ed., Cavendish Publishing, London, 2000), pp.15-16.FRCP 23(d)(1) and note the reference to FRCP r.16 therein, the latter of which makes provision for, *inter alia,* extensive case management and expedited disposition.
134. PD 19B, para.3.3.FCA (Aus), s.33ZF(1).
135. Under r.3.1(2)(g).CPA (Ont), s.12.
136. PD 19B, para.2.3.*Hoffmann-La Roche Inc v Sperling,* 493 U.S. 165, 171; 110 S. Ct. 482 (1989); *Gulf Oil Co v Bernard,* 452 U.S. 89, 100; 101 S. Ct. 2193 (1981) Academically: D.R. Hensler *et al.* , *Class Action Dilemmas: Pursuing Public Goals for Private Gain, Executive Summary* (RAND Institute for Civil Justice, Santa Monica, 1999), p.25 and, by the same authors: *Class Action Dilemmas: Pursuing Public Goals for Private Gain* (RAND Institute for Civil Justice, Santa Monica, 2000), p.445 ("how judges exercise [their] responsibilities determines the shape of class actions to come").
137. PD 19B, para.3.2(2), (3).*McMullin v ICI Aust Operations Pty Ltd (No.6)* (1998) 84 F.C.R. 1 at 4. Also see, for similar judicial comments upon the importance of managerial judging within this context, *e.g. Lopez v Star World Enterprises Pty Ltd,* April 18, 1997, 1, FCA; M. Wilcox (the Hon.), "Class Actions in Australia" (13th Commonwealth Law Conference, Melbourne, 2003), p.5.
138. Noted by *Supreme Court Practice* (*White Book Service 2001*) (digital ed., Sweet & Maxwell, London, 2001), para.19.13.1.*Smith v Canadian Tire Acceptance Ltd* (1995), 22 O.R. (3d) 433 (Gen Div) at [42] (Winkler J.). Also see W. Winkler (the Hon.), "Advocacy in Class Proceedings Litigation" (2000) 19 *Advocates' Society Journal* 6 at p.9.
139. r.19.13.*e.g. Williams v FAI Home Security Pty Ltd (No.3)* [2000] F.C.A. 1438 (correction notice sent to class members prior to opt-out deadline); *Courtney v Medtel Pty Ltd* [2002] F.C.A. 957 (court intervention with respect to proposed offer of settlement).
140. Also relevant is r.1.4, which requires the court to "further the overriding objective by actively managing cases".*e.g. Webb v 3584747 Canada Inc* (2001), 54 O.R. (3rd) 587 (SCJ); reversed in part (2002), 24 C.P.C. (5th) 76 (Div Ct) (revision of the hearing process for the individual claims of class members); *Guglietti v Toronto Area Transit Operating Authority* (2000), 50 C.P.C. (4th) 355 (SCJ) (to extend time for class members to file claim forms under settlement agreement, where no evidence of bad faith or fault).
141. *Chapman v Chief Constable of South Yorkshire Police,* unreported, March 6, 1990, 6, QBD, Steyn J. See also comments by Lord Donaldson M.R. in *Horrocks v Ford Motor Company Ltd,* February 12 1990, 3, CA.*e.g.* trial by jury under the FCA (Aus) is only allowed by court order (s.39), and is rare, as are exemplary damages (for claims under the Trade Practices Act 1974 (Aus), the main sphere of claims within that jurisdiction, they have been judicially banned: *Nixon v Philip Morris (Aust) Ltd* (1999) 95 F.C.R. 453 at [103], that aspect not being overturned on appeal).
142. *Woolf Final Report,* Ch.1, para.1 ("Ultimate responsibility for the control of litigation must move from the litigants and their legal advisers to the court"), Ch.17, paras 14, 27 ("full hands-on judicial control"), and *Woolf Interim Report,* Ch.4, para.2, Ch.5.Both jury trials and exemplary damages awards are rare: J.Y. Obagi and E.A. Quigley, "Making a Claim for Punitive Damages" (2001) 24 Advocates' Q. 4; K. Roach and M. Trebilcock, "Private Enforcement of Competition Laws" (1996) 34 Osgoode Hall L.J. 461, at para.15; P. Jackson, "Abuses Described in Recent US Study Unlikely Here" (2000) *Lawyers' Weekly* 20(35) ("There is as yet no reason to think that the factors that constrain the use of juries and the availability of punitive damages will differ in a class proceeding").
143. As noted by, *e.g.* R. Cranston, "Social Research and Access to Justice" in R. Cranston and A. Zuckerman (eds), *Reform of Civil Procedure: Essays on Access to Justice* (Clarendon Press, Oxford, 1995), p.38; Hodges, n.11 above,

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para.2.03; M. Laughton, “More Group Actions in the UK?” [1997] *International Commercial Litigation* 39 at p.40; Grainger and Fealy, n.33 above, at p.8.E.H. Cooper, “Class Action Advice in the Form of Questions” (2001) 11 *Duke Journal of Comparative and International Law* 215 at p.247.

144. *Taylor,* n.1 above, at [9].A. Gidi, “Class Actions in Brazil--a Model for Civil Law Countries” (2003) 51 *American Journal of Comparative Law* 311 at pp.322-323.

145. See summary provided in *Taylor,* n.1 above, at [4].Noted in, *e.g.* H. Luntz, “Heart Valves, Class Actions and Remedies: Lessons for Australia?” in N.J. Mullany (ed.), *Tort in the Nineties* (LBC, North Ryde, 1997), pp.73-74. See also M. Bielecki, *Defending Class Actions* (Law Society Product Liability and Class Actions Seminar, Sydney, 1992), pp.3-4; V. Culkoff, “Representative Proceedings under Pt IVA” (1996) 7 *Australian Product Liability Reporter* 16 at p.19.

146. See, for the terms under which the GLO would be handled: “Queen's Bench Division Practice Direction: North-West Child Abuse Cases”, Lord Chief Justice, May 7, 1999.J.R.S. Prichard, “Class Action Reform: Some General Comments” (1984) 9 Canadian Business L.J. 309 at pp.312-313 (noting especially the difference in substantive causes of actions available).

147. According to: *List of Current Group Litigation* Orders (Court Service website, as updated), available at *www.courtservice.gov.uk/cms/3570.htm* (last accessed October 31, 2004).Day, n.23 above, at p.10.

148. *e.g.* South Wales Children's Homes Litigation (Local Authority), GLO ordered November 28, 2002; St Leonard's Group Litigation, GLO ordered June 12, 2002; Longcare Group Litigation, GLO ordered November 21, 2001; West Kirby Residential School Group Litigation, GLO ordered June 27, 2001.T.D. Rowe, “Debates over Group Litigation in Comparative Perspective” (2001) 11 *Duke Journal of Comparative and International Law* 157 at p.159.

149. Nantygwyddon litigation, GLO ordered August 15, 2001.X. Connor, “Class Action” (1987) *Law Society Journal* 52 at p.57.

150. Trial of preliminary issues in: *B (A Child) v McDonald's Restaurants Ltd* [2002] EWHC 490 (QB).M. Taruffo, “Some Remarks on Group Litigation in Comparative Perspective” (2001) 11 *Duke Journal of Comparative and International Law* 405 at pp.414-415.

151. McDonalds Hot Drinks, GLO ordered May 22, 2001.Harlow and Rawlings, n.14 above, at p.125, citing the well-known taxi overcharge case of *Daar v Yellow Cab Co,* 63 Cal. 2d 695 (1967).

152. Apart from *Taylor,* the most significant challenge has arisen in relation to cost-sharing orders: *Afrika v Cape plc* ; *X, Y, Z v Schering Health Care Ltd* ; *Sayers v SmithKline Beecham plc* [2001] EWCA Civ 2017.P. Spender, “Securities Class Actions: a View from the Land of the Great White Shareholder” (2002) 31 *Common Law World Review* 123 at p.128.

153. *e.g.* the LCD's report, *Emerging Findings: An Early Evaluation of the Civil Justice Reforms* (March 2001) does not devote any discussion to the GLO schema, nor does the follow-up report: *Further Findings: a Continuing Evaluation of the Civil Justice Reforms* (August 2002).Private Securities Litigation Reform Act 1995.

154. N. Andrews, “Multi-Party Proceedings in England” (2001) 11 *Duke Journal of Comparative and International Law* 249 at p.262.See, *e.g.* submissions 26, 73 referred to in *ALRC Report,* para.68; N. Francey, “A Class Act or the Spectre of Class Actions” (1992) 3 *Australian Product Liability Reporter* 52 at p.54.

155. *Lubbe v Cape plc* [2000] 1 W.L.R. 1545; [2000] 2 Lloyd's Rep. 383 at 393, HL. See also the positive comments contained in the response given by Sir Andrew Morritt to the LCD, reproduced in: *Representative Claims: Proposed New Procedures: Consultation Response* (April 2002), para.4.*e.g.* S.J. Simpson, “Class Action Reform: a New Accountability” (1991) 10 *Advocates' Society Journal* 19; R. Armstrong, “Litigation” [1994] 3 International Company and Commercial L.Rev. C-52. For the obverse concern (also unfounded) that the Ontario regime was so complex that it would be virtually unused, see A.J. Roman, “Class Actions in Canada: the Path to Reform?” (1988) 7 *Advocates' Society Journal* 28.

156. Mildred, n.18 above, at p.410.D.J. Mullan and N.J. Tuytel, “The British Columbia Class Proceedings Act: Will it Open the Floodgates?” (1996) 14 *Canadian Journal of Insurance Law* 30.

157. Mildred, *ibid.* , at p.462.In Australia, *e.g.* P. Cerexhe, “Phantom Floodgates of Public Interest Litigation” (1999) 10

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Australian Product Liability Reporter 42 at p.43; A. Cornwall, "Representative Proceedings: Supplement" (Public Interest Advocacy Centre for Coalition for Class Actions, Sydney, 1997), p.12. In Ontario, *e.g.* G.D. Watson, "Class Actions: the Canadian Experience" (2001) 11 *Duke Journal of Comparative and International Law* 269 at p.278; G McKee, "Class Actions in Canada" (1997) 8 *Australian Product Liability Reporter* 84 at p.90; G. Mew and J. Servinis, "Class Proceedings in Canada" (13th Commonwealth Law Conference, Melbourne, 2003), p.6.

158. *Hansard* HL Deb., Vol.596, col.521 (January 19, 1999, Lord Irvine of Lairg L.C.), discussing the Access to Justice Bill, in particular cl.4(3), and indicating that "individual cases" in the context of that sub-clause included group actions.ALRC, *Managing Justice* (Report No.89, 1999), para.7.89, citing N. Francey, "Class Actions" (NSW Bar Association CLE Program, Sydney, 1998), para.20. See also *Manitoba Report,* p.33; Rules Committee of the Federal Court of Canada, *Class Proceedings in the Federal Court of Canada* (Discussion Paper, 2000), p.15.

159. Andrews, n.54 above, at p.249.As *per* Lord Devlin in *Rookes v Barnard* [1964] A.C. 1129 at 1228, HL, *i.e.* that exemplary damages may be properly awarded "if, and only if " the sum that was in mind to award as compensation was inadequate to punish the defendant for his or her conduct.

160. *e.g.* Manitoba Law Reform Commission, *Class Proceedings* (1999) (*Manitoba Report*), p.64; *OLRC Report,* p.470; R.O. Faulk, "The International Class Action: Comments on the Geneva Group Action Debates" (International Briefing Paper, Gardere, Wynne, Sewell & Riggs, October 20, 2000); *Alberta Report,* para.240.*Manitoba Report,* pp.29-30.

161. LCD, *Multi-Party Situations: Consultation Paper (including Draft Rules and Practice Direction)* (1999), para.31, and see also: draft r.X.2(2)(b)(iii).See, *e.g.* the several submissions to this effect noted in *ALRC Report,* paras 151, 351; *OLRC Report,* p.313; and some significant US support, *e.g. Castano v American Tobacco Co,* 84 F. 3d 734, 746 (5th Cir. 1996); *In re Rhone-Poulenc Rorer Inc,* 51 F. 3d 1293, 1299 (7th Cir. 1995); *In re Agent Orange Product Liab Litig MDL No.381,* 818 F. 2d 145, 165-66 (2d Cir. 1987).

162. *AB v Liverpool CC,* June 15, 1998 at 3.*e.g.* Watson, n.156 above, at p.285.

163. LCD, *Proposed New Procedures for Multi-Party Situations: Consultation Paper* (1997), para.34.Note the similar dismissal of this argument in *ALRC Report,* para.337.

164. *Final Woolf Report,* Ch.17, para.23.r.3.4(2).

165. *The White Book,* n.38 above, para.19.11.1; Hodges, n.11 above, paras 4.32, 4.35; S. Burn, "Woolf Reforms: CPR Revolution Rolls on" [2000] *Legal Action* 27; Mildred, n.18 above, pp.415-416. See also the comments by Irwin Mitchell, solicitors, in LCD, *Representative Claims: Proposed New Procedures: Consultation Response* (April 2002), para.4.r.24.2.

166. See PD 19B, para.6.1A, effective December 2, 2002, more than 18 months after the schema was implemented.Striking out, *e.g. Harrison v Lidoform Pty Ltd,* November 24, 1998, FCA; *Philip Morris (Aust) Ltd v Nixon* (2000) 170 A.L.R. 487, Full FCA.

167. See, *e.g.* similar comments in relation to the costs provisions by M. Mildred, "Procedure: *Afrika v Cape plc* " [2002] *Journal of Personal Injury Litigation* 215 at p.217.Striking out, *e.g. McCann v The Ottawa Sun* (1994), 16 O.R. (3d) 672 (Gen Div); *Haskett v Trans Union of Canada Inc,* December 13, 2001, SCJ; reversed (2003), 224 D.L.R. (4th) 419, 63 O.R. (3d) 577, CA, leave to appeal refused, November 27, 2003, SCC; for others, see: *Manitoba Report,* p.48.

168. Reform proposals have been instigated over the years, instead, by the Law Society Civil Litigation Committee, National Consumer Council, the Supreme Court Practice Committee, and the LCD. Respectively, *e.g. Group Actions Made Easier* (1995); *Group Actions: Learning From Opren* (1989); *Guide for Use in Group Actions* (1991); and *Representative Claims: Proposed New Procedures: Consultation Paper* (February 2001) and *Consultation Response* (April 2002).*Manitoba Report,* p.29.

169. The Ontario Law Reform Commission made this express observation: *Report on Class Actions* (1982) (*OLRC Report*), p.467; and the *Alberta Report,* para.236 referred to the "intense, protracted and essentially unresolved debate". Baxt notes that the ALRC eventually opted for the opt-out approach, for reasons that were "not convincing": B. Baxt, "Class Action Legislation--a Mirage for the Consumer?" (1992) 66 *Australian Law Journal* 223 at p.223.N. Armstrong

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and A. Tucker, "Class Struggles" [1996] *Journal of Personal Injury Litigation* 94 at p.104, citing: R. Sobol, *Bending the Law: the Story of the Dalkon Shield Bankruptcy* (Chicago University Press, Chicago, 1991).

170. *e.g. Group Actions Made Easier,* para.5.2.7(f) ("generally the Working Party were in favour of the claimant having to 'opt in' by issuing/joining the group"); N. Andrews, *Principles of Civil Procedure* (Sweet & Maxwell, London, 1994), p.158 ("the process of 'opting out' by positive decision will not confer upon a represented party an effective right to remain aloof. Such a system depends for its fairness upon the 'Exit' sign being easily spotted and reached").*ALRC Report,* para.349.

171. These arguments, extensive and divided, are derived from a variety of sources (such sources also consider, by corollary, the opt-out dilemma): Scottish Law Commission, *Multi-Party Actions* (1996), paras 4.49-4.53; *Final Woolf Report,* Ch.17, paras 42-44; *ALRC Report,* paras 101-108; *OLRC Report,* pp.478-85; Rules Committee of the Federal Court of Canada, *Class Proceedings in the Federal Court of Canada* (Discussion Paper, 2000), pp.57-58; *Alberta Report,* paras 237-240; *Manitoba Report,* pp.63-64; British Columbia, Ministry of the Attorney-General, *Class Action Legislation for British Columbia* (Consultation Document, 1994), p.8; and for excellent and thorough discussion of both the opt-out and opt-in approaches, see: V. Morabito, "Class Actions: the Right to Opt out" (1994) 19 Melbourne U.L.Rev. 615, Pt III. *Representative Claims: Proposed New Procedures: Consultation Paper* (February 2001).

172. Recently, *e.g.* Sweden's Group Proceedings Act 2002, s.14.*Representative Claims: Proposed New Procedures: Consultation Response* (April 2002).

173. Federal Court of Australia Act 1976 (Aus) (FCA (Aus)), s.33J."The extension of the right to bring or defend representative proceedings beyond what is now permitted by CPR Part 19 and the EC Directives … is not justified; and if such an extension is to be considered then it is a matter for parliament."

174. *ACCC v Chats House Investments Pty Ltd* (1996) 71 F.C.R. 250; *ACCC v Giraffe World Aust Pty Ltd (No.2)* (1999) 95 F.C.R. 302; *ACCC v Golden Sphere Int Inc* (1998) 83 F.C.R. 424; *ACCC v Internic Technology Pty Ltd* (1998) A.T.P.R. para.41-646.Lord Phillips M.R.; May L.J.; Association of District Judges.

175. Trade Practices Act 1974 (Aus), s.87(1B) (where a person is found to have engaged in conduct in breach of the consumer protection provisions, the ACCC may make application for compensation orders on behalf of consumers, provided they have given written consent).Judge Hurst; Judge Evans, Q.C.; Judge Coningsby, Q.C.; District Judge Dabezies.

176. C. Wood, "Class Actions and the Internet" (1998) 21 U. of New South Wales L.J. 632 at p.633.Discussed in Mulheron, n.8 above, pp.38-42.

177. Note, "Class Actions--Opt in or Opt out?" [1988] *Reform* 77 at p.78.LCD, *Representative Claims: Proposed New Procedures: Consultation Response* (April 2002) "Responses to Specific Questions", p.3.

178. A. Asher, "Representative Actions and the Trade Practices Commission" (1993) 4 *Australian Product Liability Reporter* 94.Andrews, n.54 above, at p.266.

179. *e.g.* Supreme Court Act 1986 (Vic), ss.34, 35, ultimately replaced in 2000 by Pt 4A (opt-out rights conferred by s.33J), in almost identical terms as the opt-out federal Pt IVA regime.*Final Woolf Report,* Ch.17, para.6.

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EXHIBIT 48

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From representative rule to class action: steps rather than leaps

Rachael Mulheron

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Subject: Civil procedure. **Other Related Subject:** Legal systems

Keywords: Class actions; Comparative law; Remedies; Representative actions

Legislation cited: Civil Procedure Rules 1998 (SI 1998 3132) Part 19r.19.6
Federal Court of Australia Act 1976 (Australia)
Federal Rules of Civil Procedure (United States) r.23
Class Proceedings Act 1992 (Ontario)
Class Proceedings Act 1995 (British Columbia)

Cases cited: Independiente Ltd v Music Trading On-Line (HK) Ltd [2003] EWHC 470 (Ch) (Ch D)
Markt & Co Ltd v Knight Steamship Co Ltd [1910] 2 K.B. 1021 (CA)
Irish Shipping Ltd v Commercial Union Assurance Co Plc (The Irish Rowan) [1991] 2 Q.B. 206 (CA (Civ Div))
Prudential Assurance Co Ltd v Newman Industries Ltd (No.1) [1981] Ch. 229 (Ch D)

***424** Introduction

The recent decision in *Independiente Ltd v Music Trading On-Line (HK) Ltd*[1] is unremarkable insofar as it applies the English representative rule (as perceived in modern civil procedure) to an alleged copyright infringement scenario. Yet, it is that very unremarkability which raises the question which English rule-makers and the Law Commission have consistently refused to address in any comprehensive manner to date: why no opt-out class action for this jurisdiction?

Several of the paths of reasoning invoked to make effective use of the English representative rule, and which weremanifest in this decision, strain the language of the rule and yet are permitted as commonplace features within a developed class action regime. Further, and notwithstanding the chorus of disapproving comments that usually greets mention of the United States' federal class action rule[2] and its more sensationally reported applications, there are other established class action regimes in existence, most notably in the federal jurisdiction of Australia[3] and the provincial jurisdictions of Ontario[4] and British Columbia,[5] which are highly relevant. These Commonwealth jurisdictions share many of the traditional characteristics of English civil procedure. Certainly, they ***425** do not generally embrace the extensive use of jury trials, no-way costs rules,[6] exemplary damages awards, and causes of action such as strike suits, which are often associated with the excesses and/or difficulties of the United States class action. Furthermore, in these Commonwealth jurisdictions, the representative rule has been successfully supplemented by a class action schema deliberately drafted so as to

avoid the worst impediments and restrictions of the representative rule which emerged from twentieth century English case law.7

Following a summary of the strict interpretation of the representative rule's language and of the various relaxations that have thereby occurred (particularly by reference to the decision in *Independiente Ltd v Music Trading On-Line (HK) Ltd*) in section II, this article argues (in section III) that several of the features of the English representative rule currently embodied in r.19.6 of the Civil Procedure Rules ("CPR") truly reflect elements of a developed class action regime. It would not be such a large step from the former to the latter, were the legislature to "bite the bullet" and explicitly recognise judicial attempts to provide the representative rule with greater utility for those claimants who are similarly situated with a grievance that raises common issues of law or fact. Section IV discusses the further benefits and protections that would flow as of right from a contemporary class action regime, and which are presently unavailable under the representative rule.

Moreover, any "step" from representative rule to class action requires that careful attention be given to the question of how such a regime should be implemented, whether by legislation or by regulation. There are, of course, significant limitations upon the power of procedural rule-makers.8 This was adverted to by senior members of the English judiciary9 in response to a 2001 Consultation Paper10 which had mooted the possible introduction of a generic representative proceeding wider than that currently encompassed within r.19.6 (a reform proposal that has not been pursued to date). Were a class action to be adopted for England, implementation via the CPR would be fraught with substantive legal difficulties. Experience elsewhere offers valuable lessons on the point. It will hence be suggested that introduction via legislation would be the preferable (more robust, but more time-consuming) alternative.

The representative rule presently enacted in r.19.6 was part of the revamped structure for multi-party litigation which came into effect on May 2, 2000. The twin pillar of this multi-party regime was the group litigation order.11 As part of his far-reaching review of civil procedure within the English jurisdiction,12 Lord Woolf had earlier observed that procedures were required ***426** which provided expeditious, effective and proportionate methods of resolving complex multi-party litigation.13 The class action regimes of Ontario and Australia had only been operative for a few years, and British Columbia's had not quite commenced, when LordWoolf conducted that review. At that time, the class action case law was neither frequent nor well-defined within any of these jurisdictions. Consequently and understandably, the law committee14 whose work on multi-party actions Lord Woolf refers to in his *Final Report*15 were not able to examine extensively these class action regimes, nor was the Woolf Enquiry able to do so.16 Since then, only rarely has academic commentary within this jurisdiction supported a detailed consideration of class action jurisprudence existing elsewhere. 17 Even more significantly, none of the copied responses to the 2001 Consultation Paper, nor the LCD's own commentary to that paper, mentions the class action regimes of Australia or Ontario (although the US schema is referred to in less-than-positive terms).18

Yet, after more than a decade, a very useful body of jurisprudence has developed in the aforementioned Commonwealth jurisdictions. A closer consideration of those regimes, in comparison with decisions such as *Independiente,* indicates that the gap between the representative rule and a true class action can be measured in steps rather than leaps.

Revisiting the representative rule19

The various versions of the representative rules enacted in England (now drafted as r.19.6)20 are little different from that first introduced in 1873.21 In *Independiente Ltd v Music Trading On-Line (HK) Ltd,* it was stated to be "common ground"22 that the general principles applicable under the old rules are also applicable under r.19.6--although, as will be seen shortly, some earlier ***427** authorities are decidedly less than helpful and can no longer be considered instructive of

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the rule's ambit.

The representative rule contains two prerequisites: the very undemanding numerosity requirement of “more than one person”,23 and a very demanding “same interest” in the claim.24 This latter requirement of “same interest” has undoubtedly proven to be the most legally difficult aspect of the rule, and it was once again attacked as being unfulfilled in *Independiente.* The claimants in this case were owners/exclusive licensees of the UK copyright in various sound recordings. From early 2000, the defendants operated a website at *www.cdwow. com* in the trading name CD-WOW, advertising for sale a large number of CDs containing sound recordings of well known popular artists. CD-WOW was an internet business involving the sourcing and sale of, primarily, current UK Top 75 chart CDs. For all orders placed on the website, the defendants satisfied them with CDs imported from Hong Kong. The claimants objected to this practice as allegedly constituting parallel importation. They sought an injunction, damages or an account of profits, and delivery up of infringing copies, in respect of all CDs embodying sound recordings in which they owned or were the exclusive licensees of the UK copyright. The claimants sued on behalf of themselves and for all other owners/exclusive licensees of the British Phonographic Industry Ltd (“BPI”) and Phonographic Performance Ltd (“PPL”), whose names were set out in the schedules to the claim form. The defendants objected to the representative action. They alleged that the representative claimants had not demonstrated that they were authorised by the persons they claimed to represent to bring the action, and moreover, that they did not have the “same interest” as those persons. Ultimately, the court held that the “same interest” requirement was satisfied on the facts, and the representative action was permitted to proceed.

Strictures upon use of the representative rule

Whilst high hopes may once have been held for the utility of the predecessor rule, Ord.16, r.9,25 such hopes were effectively dashed by the seminal case of *Markt & Co Ltd v Knight Steamship Co Ltd,*26 in which a class of 45 shippers, each of whom had cargo aboard the defendant's vessel, were held (by majority27) not to have the “same interest” as required by the rule.

In *Markt,* Fletcher Moulton L.J. described an earlier definition expounded by Lord Macnaghten in *Duke of Bedford v Ellis* as “the most authoritative ***428** statement”28 of the meaning of “same interest”: “[g]iven a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent.”29 This has since been cited frequently in English decisions30 (most recently in *Independiente*31), and as academically noted, has been accorded almost the status of a statutory formula.32 However, the test has proven unhelpful and obfuscating.33 With limited exception,34 the general academic view35 is that the representative rule has not been successful in facilitating multi-party litigation in England, and is of extremely limited utility. The multitude of problems that have been generated by the representative rule may be summarised thus:

- Application of the “same interest” criterion in *Markt* meant that separate contracts between the defendant and each of the classmembers, even if the contracts were in identical terms, did not satisfy the terms of the representative rule. In strict legal terms, separate contracts meant that the sources of the law underpinning each member's rights were different; and that the representative claimant could create an estoppel in respect of a contract to which he or she was not a party and in ***429** which he or she had no interest (which was to be regarded as “an impermissible interference with another man's contract”).36

- From a practical perspective, the existence of separate contracts gave rise to a judicial tendency to assume (*e.g.* about the terms of the separate contracts,37 or that a defendant might plead different defences against various class members if each class member had a separate contract) in the absence of direct evidence.38

- As many have remarked, this unhelpful interpretation of the “same interest” requirement coincided with the emergence

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of the standard form contract between manufacturers and consumers,39 and with the mass provision of goods and the mass provision of services where separate but similar contracts underpinned multiple legal relationships.40 The representative rule had little utility in those circumstances where it could have provided a significant avenue by which to have a legal dispute tried, at the very least.

- Where factual scenarios between each of the class members and the defendant differed, even slightly, the prospect of different defences arose. The perceived difficulty was that if the defendant did raise separate defences as were potentially available against different claimants, then a number of individual trials might be required, and liability would not be determined in the one proceeding. Alternatively, if the defendant was not permitted to raise them, then it would be unjust to bar a defence which might otherwise have been available in a unitary action.41

- The prospect of different defences gave rise to two ancillary but significant concerns. Not only was the *theoretical* possibility of different defences sufficient to dissuade any finding of the “same interest”,42 but even the availability of a defence against *one* member of a claimant class has been sufficient to deny the class the “same interest” in the proceedings.43

- As a further feature of the “same interest” criterion, no representative action was possible where the relief sought by the representative claimant was damages on behalf of all class members severally.44 In *Markt,* each of the consignors had a several measure of damages--*i.e.* the value of their lost cargos--with none having any interest in the damages recoverable by the representative claimants. Proof of damages ***430** was personal to each member of the class (and had to be proven individually), and the facts underlying the measure of damages would differ.

- The fact that the relief must be “beneficial to all” was also susceptible to the interpretation that claims for damages were necessarily restricted to those which would enhance some collective fund for the claimants, rather than the individual endowment of the represented parties.45 Given the rarity of this scenario, it imposed a further considerable restraint upon the utility of the representative procedure.

- Where an act or omission on the part of the defendant gave rise to tort personal injury litigation, the representative rule was largely ineffective. As Fleming pointed out, whilst a large number of claimants may have a tortfeasor and cause of injury in common, they will almost always have suffered differently, and will be required to prove damage as a necessary ingredient of the cause of action, severely compromising the device.46 Consequently, there was a long-held view47 that if the cause of action of each member of the class whom the claimant purported to represent was founded in tort and would, if established, be a separate cause of action and not a joint cause of action belonging to the class as a whole, no representative action could be brought.

- Instead of pursuing damages, it was acknowledged by Vinelott J. that equitable relief, such as an injunction or declaration, was for a long time “[n]ormally, therefore, if not invariably”48 the only form of relief awarded in English representative actions. Even that, however, drew the caveat from his Lordship that injunctive relief posed the “separate defences” problem, whereby class members had to establish (individually) an apprehension of injury and were susceptible to individual defences of laches or acquiescence.

- The restrictiveness caused by the same relief requirement also lead to difficulties where some class members did not have a claim for relief identical to those of all other members, even though their claims had the same factual basis (for example, where, following the sinking of a ship, passengers could claim personal injury or property damage or both49). In such cases, a representative proceeding could not be used to claim damages.

***431** Many attempted representative actions since, both in England50 and in other jurisdictions which reproduced the

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English representative rule,51 have proven remarkably unsuccessful, due to one or a combination of these factors.

Overcoming the strictures of the representative rule

Even prior to the introduction of the CPR and the ubiquitous overriding objective, the legal landscape had shifted somewhat. By means of judicial relaxations and "inventiveness", the representative rule was tentatively able to resume some shadow of the utility that was foreshadowed for it prior to *Markt.*

The "common ingredient" test: In the extremely important case of *Prudential Assurance Co Ltd v Newman Industries Ltd,*52 Vinelott J. postulated that "there must be a *common ingredient* in the cause of action of each member of the class",53 or "some element common to the claims of all members of the class"54 which the representative claimant purported to represent. Then, if the common element was proven, his Lordship considered that any member of the class would be entitled to rely on the judgment as *res judicata,* and prove the remainder of the elements of the cause of action in separate proceedings.55

This liberal modification--from "same interest" to "common ingredient" --was a significant step in representative rule jurisprudence. It certainly mirrors the law of class actions, which typically requires "a common issue of fact or law".56 Just as Vinelott J. proposed that any judgment on the "common ingredients" would be binding upon the members of the represented class, it is a central tenet of all opt-out class action regimes that a judgment on common issues binds every class member who has not opted out of the class proceeding.57 Moreover, the possibility of separate hearings outlined by ***432** Vinelott J. is a reality in class action suits, because when the court determines common issues in favour of a class and considers that the participation of individual class members is required to determine individual issues, a bifurcated hearing or other arrangement by which to determine the individual issues will be so ordered. Numerous examples of this process have occurred in Canada and Australia.58 It follows that, whilst the outcome for all class members on the common issues will be the same, the ultimate resolution of the class suit may well differ from one class member to the other.

Indeed, the decision in *Independiente* is an example of where *Prudential* was not cited, but where its broad interpretation was clearly manifest, for the court was prepared there to acknowledge the possibility of separate defences, and to allow claims for separate damages or account of profits, as discussed in later sections. In a further twist of terminology, the High Court has recently used the phrase, "community of interest" among class members, to indicate the required threshold of commonality under CPR r.19.6, effectively seeking to again distance the old strictures of the "same interest" criterion.59

Separate contracts: In more recent times, English courts have particularly considered the representative action, in circumstances involving separate and individual contracts, in the context of *defendant* representative actions. In *Irish Shipping Ltd v Commercial Union Assurance Co plc (The Irish Rowan),*60 the claimant shipowners issued a writ against the representative defendants, who were sued "on their own behalf and on behalf of all other liability insurers". Each of these was bound by a separate contract of insurance. The defendant class members were held to have the "same interest". In light of a common contractual provision inserted into each contract of insurance (a leading underwriter clause, which provided that all settlements of claims undertaken by the representative defendant would be binding upon all other class members), then "[f]or all practical purposes this is one claim upon one contract, which … the insurers all have the same interest in resisting".61 Even in the absence of a leading underwriter clause in *Bank of America National Trust and Savings Association v Taylor (The Kyriaki),*62 a defendant representative proceeding was allowed to proceed. Any alternative finding would have posed ***433** the inconvenience of having to sue the separate underwriters,63 a view which has been subsequently endorsed.64

Academic commentary has tended to downplay the extent to which the strictness of the "same interest" requirement has

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been relaxed in England, such that the existence of separate contracts does not preclude a finding of “same interest”, noting that any relaxation has occurred in fairly infrequent circumstances,65 and principally in the context of a defendant representative action.66 The drafters of the Australian and Canadian class action regimes were particularly keen to nullify this aspect of the representative rule for claimant classes, and unanimously did so by inclusion of an express provision that the existence of separate contracts does not preclude a class action.67 Many decisions since have proceeded by means of class action suit where the class members' rights were sourced from different contracts, but where a common issue of fact or law warranted class action treatment.68

Separate defences: Another significant aspect of the decision in *The Irish Rowan*69 was that, notwithstanding the theoretical possibility of the class members in a defendant class raising separate defences in proceedings brought by the claimant, the “same interest” criterion could nevertheless be satisfied. As a result, there has been a shift from the hypothetical or abstract possibility for class members to raise separate defences to examining whether there is a realistic possibility that such defences would be raised70 (something which, as noted previously, the court in *Markt* was unwilling to undertake).

In *Independiente Ltd v Music Trading On-Line (HK) Ltd,* the prospect of separate defences being raised against different *claimant* class members did not faze the court at all, and certainly represented no bar to the commencement and continuation of the representative action:

***434** “The common interest arises from the fact that the claim as pleaded is made in respect of the UK copyright in a sound recording to which any Relevant Member is entitled as owner or exclusive licensee. The common grievance arises from the facts pleaded regarding the operation of the CD-WOW site. ... *Unless and to the extent that the defendants seek to put in issue the subsistence or ownership of the UK copyright contrary to the presumptions for which s 105 CDPA provides or the consent of a Relevant Member to the acts complained of, the issues of fact and law will be identical however many sound recordings or Relevant Members are involved.* ”71

Sir Andrew Morritt V.C. continued, in what is a most divergent attitude to that adopted by the majority of the Court of Appeal almost 100 years earlier in *Markt* :

“It would be absurd and contrary to the propositions expressed byMegarry J in *John v Rees* and CPR r 1 if there had to be a separate claim in respect of each Relevant Member at least until it is seen if the issues in relation to that Relevant Member are substantially different from those relating to the generality of the Relevant Members.”72

Given the CPR's overriding objective of dealing with cases justly (and consistently too with its mandate of case management73), it would appear, then, that it is the similarities rather than the differences between class members that warrant greater recognition now under the representative rule. The above mentioned decisions have certainly diluted the “same interest” requirement,74 and consistently with the obligation to deal with cases justly under r.1.1, there are various options available to a court to deal with the possibility of separate defences in a claimant representative action: such as adding further representative claimants so as to evaluate the defences properly, splitting the original action into two or more smaller representative proceedings to deal with individual defences separately, or subclassing.75 Precisely these same mechanisms are practised in class action regimes where the defendant may wish to raise different defences against some or all of the class members (such as limitation periods, lack of reliance, laches or acquiescence).76

***435** *Representative actions for damages:* Particularly innovative efforts have been made in some English decisions to overcome the dogma that damages are not an appropriate remedy in a representative action.

First, as the seminal case of *Prudential Assurance Co Ltd v Newman Industries Ltd*77 demonstrated, the relief sought on

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behalf of the class was not damages, but rather, a declaration of the class members' entitlement to damages as a result of the alleged conspiracy by the company officers. Each of the class members could then base a claim for damages on that declaration.78 Whilst the *Prudential* approach was considered a promising development,79 this tactic has since attracted both judicial disfavour,80 and judicial81 (and academic82) concurrence. Secondly, certain decisions have confirmed83 that, where the full liability of the defendant (if established) would be owed to the class as a lump sum, or at least "recovered for the collective fund"84 without resort to individual proceedings, that equates to the same relief, and complies with the *Markt* interpretation of "same interest". This split procedure has been particularly successful, for example, where the class members consented to the payment of global damages to a body representing them,85 or the representative was obliged to distribute the fund pro rata.86 Thirdly, as per the suggestion of Sir Denys Buckley in *CBS Songs Ltd v Amstrad Consumer Electronics plc,*87 an action in which damages are claimed can be properly brought as a representative action where the relief which is *primarily* sought is injunctive, that is, where the pursuit of damages in different measure by class members is an adjunct to the major injunctive relief common to all claimants. Notably, the views of Sir Denys Buckley were expressly followed in *Independiente*88 where, similarly, both injunctive and pecuniary relief were claimed. This case is a recent example ***436** of the erosion of the "no-damages" principle which is becoming evident under the representative rule.

Reconciling the representative rule and the class action

Directly overcoming the strictures

The narrow and problematical jurisprudence under the representative rule has assumed particular importance for class actions in two respects. First, some of these requirements which judges considered mandatory to satisfy the requirement of "same interest" have prompted the enactment in some class action regimes of express "no-bar factors", matters which do not preclude a class action.89 The drafters of the Australian and Canadian class action regimes were cognisant of the strictures upon damages claims by class members under the representative rule, and in that regard, were careful to ensure that those obstacles were removed by explicit statutory language.

Secondly, in the light of these strictures, and in order to provide the rule with more utility, various English cases (of which *Independiente* is an example) have sought to interpret the representative rule as containing elements of the class action, a wider device than the strict representative action, under which (for example) a commonality, rather than identicality, of interest is sufficient. The aforementioned no-bar factors derive from efforts to nullify *Markt,* but can now be seen to flow from a more liberal interpretation of the representative rule in any event. In other words, such judicial interpretations may stretch the boundaries of the representative rule's language, but reflect the more fully-developed and sanctioned features of a class action regime. These broader interpretations are also consistent with the general ethos of the CPR, for as Sir Andrew Morritt V.C. exhorted in the *Independiente* case, "[t]he provisions of the Civil Procedure Rules, particularly r.1.2, emphasise the need to interpret the phrase 'the same interest' and to apply the provisions of r.19.6 both flexibly and in conformity with the overriding objective."90

TABLE 1Relaxations of the representative rule reflected in class action regimes-Restrictive interpretation of MarktRelaxation evident in subsequent English case lawClass action provision which expressly reflects that relaxationseparate contracts between class members and opponent disallowedthe relief claimed can relate to separate contracts involving different class membersFCA (Aus), s.33C(2)(b)(i) CPA (Ont), s.6(2) CPA (BC), s.7(b)different measure of damages amongst class members disallowedactions for damages (and subsequent and individual assessment for each class member) allowedFCA (Aus), s.33C(2)(a)(ii) CPA (Ont), s.6(1) CPA (BC),

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s.7(a)entirety of proceedings to be disposed of in representative action (one con-
sequence: if different defences available against different class members, action
disallowed)individual issues can be determined and assessed subsequently by other
means (one consequence: separate defences against some class members and not oth-
ers permissible)FCA (Aus), ss.33Q, 33R, 33S CPA (Ont), s.25 CPA (BC), s.27 FRCP
23(c)(4)(A)entirely the same issues of law and fact required among class member-
sclaims of class members may raise "common ingredients", instead of identical is-
sues, of fact or lawFCA (Aus), s.33C(1)(c) CPA (Ont), s.5(1)(c) CPA (BC),
s.4(1)(c) FRCP 23(a)(2)the relief claimed by all class members must be identical,
the same reliefcomplete identity of relief between class members is not a pre-
requisite to maintaining a representative actionFCA (Aus), s.33C(2)(a)(iv) CPA
(Ont), s.6(3) CPA (BC), s.7(c)
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***437** Table 1 summarises this section by illustrating how several judiciallydeveloped criteria pertinent to a representative action are now expressly included in class action regimes elsewhere:

***438 Other similarities with class actions**

Numerous features have arisen under the English representative rule (quite independently from the strictures outlined above) which, when compared to the hallmarks of an opt-out class action, bear more than a passing resemblance. Indeed, the decision in *Independiente Ltd v Music Trading On-Line (HK) Ltd* demonstrates many of these features, as explored in the following discussion. For ease of reference, the class action provisions relevant to each point are noted in Table 2 at the end of the section.

Numerosity and identification: The treatment of class numerosity and identity under both representative and class action regimes has not been particularly onerous. Incarnations of the representative rule in England prior to r.19.6 required that "numerous persons" have the same interest. This has now been reduced to "more than one person" in r.19.6(1).91 The amendment has effectively removed a minimum numerosity requirement, which accords with certain class action statutes elsewhere.92 Of course, a class action may not be preferable or appropriate if there are too few within the represented class, although in England, having too few for a representative action has not been a particular matter for judicial concern.93

The English representative rule says nothing about whether the identities of the represented persons are required to be known or capable of ascertainment at commencement of the litigation. Although it has been academically suggested94 that it is a procedural requirement that "in cases of doubt the names of members of a class should be annexed to the writ", a defendant class in which the members were not identified but merely described has been permitted under the representative rule where injunctive relief was sought against that class.95 In *Independiente Ltd v Music Trading On-Line (HK) Ltd,* and as a further challenge to the validity of the representative action, it was alleged that a "same interest" was difficult to import when the class of members who were owners/exclusive licensees of UK copyright in sound recordings fluctuated from day to day.96 However, that purported difficulty in identifying the precise number of class members (and their identities) at any given point in the litigation was not a bar to the commencement and continuance of the action.

These particular features--minimal numerosity, possible class description rather than identification, and the non-necessity of knowing the precise ***439** number and identities of class members (at least until any judgment sum is required to be distributed)--are hallmarks of a mature class action regime.97

The preferability test: The predecessor of the English representative rule which was applied in the courts of Chancery

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was intended for the sake of convenience and judicial economy--"when the parties were so numerous that you never could 'come at justice"', as Lord Macnaghten explained in *Duke of Bedford v Ellis*.98 Although the lack of judicial economy and the inconvenience of having the 45 consignors sue the defendant separately did not sway the majority of the Court of Appeal in *Markt,* there have been more recent judicial statements to the effect that the court should have regard to judicial economy and the convenient administration of justice when deciding whether a representative action should proceed.99

That amounts, in the terminology of class actions law, to a superiority or preferability test. In the modern parlance of the CPR, an order that the representative action should be discontinued will be appropriate if that accords with the overriding objective of dealing with cases justly.

The *Independiente* decision is a recent example of the express application of a superiority assessment. The defendants argued that, bearing in mind the requests for disclosure and further information which purported to reveal the extent of the defendants' allegedly infringing activities, a fair trial of the issues between the defendants and the representative claimants would be made longer and more expensive if the court permitted the claimants to sue in a representative capacity. The court dismissed that argument:

"It is true that the representative element of the claim is likely to make the proceedings longer and more expensive than would be the case if they were confined to the claims of the individual claimants. But that is not the only comparison to be made. The other is to compare the aggregate time and cost involved if there were separate claims brought by these claimants and each and every Relevant Member. Plainly the saving of time and expense by permitting the representative element of the claim to be pursued in conjunction with the individual claims of the claimants is considerable. If the claim succeeds then the defendants can hardly complain. If it fails they will get their costs of the claim as a whole or of the representative part of it as the case may be."100

Sometimes the preferability assessment shows that the procedural convenience arising from use of the representative procedure is paramount. For example, in *The Irish Rowan,*101 a representative action enabled the claimant to by-pass the procedural difficulty of serving 77 different insurers in different parts of the world. Purchas L.J. held:

***440** "The benefits of a representative action, of course, in a multiple contractual arrangement of this kind are too obvious to require statement and on balance the convenience and expedition of litigation is far better served with a wide interpretation of the rule."102

Alternatively, a comparison may demonstrate that the relief that would flow from a unitary action would render the burdens associated with the increased complexity of a representative action simply unjustifiable. Nowhere was the application of this preferability test better illustrated than in *Smith v Cardiff Corporation,*103 where the court observed that it made little practical difference that a representative action was refused when one claimant's personal action against the defendant was allowed to proceed. If successful (which it was not104), then that would mean that the defendant's differential rent scheme would not be implemented. The outcome would then enure to the benefit of the entire claimant class. 105

A superiority assessment is similarly explicitly required under each of the class action regimes in Australia, British Columbia, Ontario and the United States,106 and case law demonstrates that each of the factors outlined above--the impact upon judicial economy, providing better access to justice by overcoming procedural hurdles, and whether there is a *need* for a class action to obtain the relief sought--are equally as relevant to the superiority criterion operative under those regimes.

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Adequate representation: An additional caveat under the representative rule is that, although it is silent about the capacity of the representative,107 it is a judicially stated108 requirement of the English rule (and is a feature of the class action regimes109) that the representative will adequately protect the interests of absent class members. This means that the representative must have no conflict of interest with those whom he or she purports to represent. It also means, as Lord Macnaghten stipulated in *Duke of Bedford v Ellis,*110 that the relief claimed must be "beneficial to all whom the plaintiff proposed to represent" in order for the representative rule to apply. Therefore, where there are divided views ***441** between members of the representative class as to what outcome they are hoping to achieve in the litigation, or about the desirability of seeking the particular remedy, then a representative action cannot be maintained.111

In that respect, it was argued by the defendants in *Independiente Ltd v Music Trading On-Line (HK) Ltd* that the representative claimants and class members were divided about the desirability of seeking any damages against the defendants, because BPI had written a letter to the class member claimants pointing out that any sums recovered in the action were to be accounted for to BPI. This, it was alleged, showed that the class members would derive no benefit from the claim to damages, an argument which the court also rejected:

"As far as pecuniary relief is concerned it is in its nature equally beneficial to Relevant Members as to the individual claimants. What they do with any money recovered in the action is a matter for them, not the defendants. The letter of 4 October 2002 from BPI to the claimants is not of itself binding on the claimants, let alone any Relevant Members. If the Relevant Members are content that the money should go to BPI that is a matter for them. Their wishes in that regard do not prevent the pecuniary relief being in its nature equally beneficial to all."112

One of the further similarities between the representative rule and a class action is the formation of sub-classes in circumstances where groups of two or more class members have a particular question in common which is not common to other class members (thus requiring the selection of separate representative claimants for each sub-class). Such a course has been permitted under the representative rule--both in respect of defendant classes113 and claimant classes114 --although in other instances where the creation of subclasses may possibly have assisted to save the representative action, 115 the action failed as invalidly commenced. Notwithstanding, the ability to divide a class into sub-classes for which *some* of the common issues are different is a striking resemblance between the representative rule and the class action, 116 and has saved the commencement of many a class action where, otherwise, ***442** the representative claimant would be incapable of representing all members of the class in respect of those common issues which the representative does not share.117

Express mandate not required: Express consent of the class members would appear to be unnecessary for the validity of a representative action.118 In *Gaspet Ltd v Ellis (Inspector of Taxes),*119 it was considered that the phrase which no longer appears in the rule, that the representative sued "for the benefit of" the other persons, carried no great significance, because the nature of representative proceedings is such that others with like interests may not know, or approve, of the actions taken by the representative claimant.

In the *Independiente* decision, the defendants pointed out that there was no evidence that either the claimants or PPL or BPI had the authority of the class members to bring the proceedings on their behalf. Neither PPL nor BPI had asked any of their members if they wished to complain about the operation of the CD-WOW website, nor was there any evidence to suggest that they did object. Even if the copyright owners/licensees and individual claimants had a common grievance because each of their copyrights in sound recordings had been infringed by the defendants' course of dealings, the defendants contended that it should not be assumed that all class members wished to sue, and that it was not self-evident that the owner of the UK copyright in a sound recording who had consented to that sound recording being put on one market would want to protect its position in a different market by preventing parallel imports.120 The court indeed ac-

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cepted that these representative proceedings had not been specifically authorised by all class members.121 However, Sir Andrew Morritt V.C. noted that the lack of express authority was "irrelevant as a matter of law",122 citing both *Markt & Co Ltd v Knight Steamship Co Ltd*123 and *John v Rees*124 as authority for that proposition. His Lordship commented that, "[i]t appears to me that in cases falling within r.19.6 the rule itself provides the authority of the person who is represented."125 It certainly could not be inferred that the class members were content that the parallel importation of sound recordings in respect of which they were owners/exclusive licensees of the UK copyright should continue.126

***443** This decision has been followed and applied recently by the High Court in *Howells v Dominion Insurance Co Ltd,* 127 wherein a football club's premises were badly damaged by fire. After interim insurance payments were made to the club, the insurers then sought to avoid the policy on the grounds of nondisclosure of material facts. The chairman and secretary of the club instituted a representative action (on behalf of themselves and all other club members) to have the insurance claim paid in full, whilst the insurer counter-claimed against these persons (as a defendant representative action) seeking the return of the interim payments. Judgment was given for the insurers at trial. It was subsequently held by Master Foster128 that each individual member of the club could not be liable as a matter of law to satisfy the judgment because the members' lack of consent to the representative proceedings was a defence to liability for the return of the insurance payouts. Clearly, this view was inconsistent with *Independiente,* and unsurprisingly, the High Court overturned this aspect of Master Foster's decision, holding that "the authority of the members to the bringing and continuing of proceedings was irrelevant, such authority being clearly provided in the circumstances by the provisions of the [representative rule]."129

Thus, the *Independiente* and *Howells* decisions affirm that silence cannot be taken to infer disagreement with the representative action instituted. This is precisely the same situation as occurs in class action regimes elsewhere. Mere silence cannot be taken to constitute opposition to the class action suit because the opt-out regimes that have been implemented in each of the class actions in Australia, the Canadian provinces, and the United States, are predicated on the fact that a positive step is only required in order for a class member to exclude himself or herself from the suit and from a binding judgment against the class; otherwise, silence indicates acceptance of one's membership of the suit.130

By way of summary, Table 2 outlines how various express provisions of class action regimes mirror the features and requirements of the English representative rule, as it has been interpreted by courts in this jurisdiction.

Further advantages offered by a contemporary class action regime which the representative rules does not

Of class actions, it has been judicially said: "Much of the conventional wisdom that traditionally is associated with civil litigation has been turned on its head and brought into the twentieth century, and hopefully beyond."131 Yet, would such an overturn be necessary within the English jurisdiction? Arguably not, on the basis of the case law canvassed thus far in this article. The development ***444** of the English representative rule into a "true class action" could seemingly be accomplished (as one commentator notes) "without anything like the revolutionary change commonly supposed to be necessary to that end, and indeed, as noted elsewhere, there would have been no need for it to be separately established at all but for the shaky authority of *Markt* ".132 The statutory embodiment of a class action in England would simply reflect judicial developments that have already occurred, sporadically, within the jurisdiction to combat the restrictions of *Markt.*133

TABLE 2Further reflections of the representative rule in class action regimesMiscellaneous features of representative rule (evident in case law)Class action provision which reflects that featureclass may include the formation of sub-classes for which the common issues are differentFCA (Aus), s.33Q(2) CPA (Ont), s.6(5); CPA (BC), s.6 FRCP 23(c)(4)(B)minimum numerosity requirement: "more than one per-

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son"CPA (Ont), s.5(1)(b); CPA (BC), s.4(1)(b)names, number, and identity of class members need not be ascertainable at commencement of litigationFCA (Aus), s.33H(2) CPA (Ont), s.6(4); CPA (BC), s.7(d) FRCP 23(c)(3)representative proceeding should be preferable to individual proceedings or to other available methods for resolution of the disputeFCA (Aus), s.33N CPA (Ont), s.5(1)(d); CPA (BC), s.4(1)(d) FRCP 23(b)(3)representative claimant must adequately represent the class or subclass (one consequence: no conflict between representative and class as to outcome desired)FCA (Aus), s.33T CPA (Ont), s.5(1)(e); CPA (BC), s.4(1)(e) FRCP 23(a)(4)Express consent and mandate (or some positive step) by the class members is not requiredFCA (Aus), ss.33E(1), 33J CPA (Ont), s.9; CPA (BC), s.16(1) FRCP 23(c)(2)(B)

Yet, the developments (indeed, straining) of the representative rule described in the previous section should not be taken tomean that England can dowithout a class action because the representative rule "does the procedural job". In the multi-party context, one cannot hope to rely upon even a broad and liberal ***445** interpretation of the representative rule for efficient, well-defined and workable access to justice--the statutory class action device provides further innumerable benefits, advantages and statutory protections that the representative procedure simply does not afford. These express provisions typically (but not uniformly) include:

- permitting settlement or discontinuance of the class suit *only* with the approval of the court;

- requiring court-approved notice to be disseminated to the class members following key events, such as withdrawal or settlement by the representative claimant of his or her claim, commencement of the class suit, judgment, or where either a settlement proposal or an application for discontinuance of the class suit is made by the defendant;

- a power in the court to award damages by specifying a sum in respect of each class member, or alternatively, in an aggregate amount without needing to specify amounts awarded in respect of individual class members;

- the proviso that the potentially burdensome effects of discovery against individual class members is only available with the leave of the court, not as of right;

- a power in the court to order the constitution of a fund (controlled by the court or by a party nominated by the court) from which payments to class members are to be made;

- the admissibility of statistical evidence under strict, statutorilydescribed, conditions;

- permitting by statutory mandate a cy-pres distribution where distribution of a judgment sum to class members is impossible or impracticable;

- suspending the limitation period from running against individual class members, upon the commencement of the class suit;

- whilst permitting applications for security for costs against the representative claimant, judicially treating these more generously than in the case of unitary actions;

- allowing the representative claimant by statutory mandate to claim the costs of any successful action as a first charge upon the judgment sum paid by the defendant, thereby protecting the costs exposure of the representative claimant in the event of success;

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- special costs provisions, or the availability of public funding, to ameliorate the burdens of instituting class suits, otherwise unavailable to unitary claimants;

- staying any counterclaim against a class member by the defendant until the common issues have been resolved; and

- judicial monitoring and approval of solicitor-client fee agreements (particularly fee agreements contingent upon success), which offers protection for both the successful class (which wishes to protect the judgment sum from incursions from high legal fees) and for claimant ***446** solicitors who have carried the risk of an expensive, burdensome and ultimately successful class suit.

Amodern class action regime offers this wide array of benefits and protections which the representative rule's few lines cannot. These express provisions, of course, are additional to the inherent power vested in the court to manage its own proceedings and make any order that the court thinks just in respect of the class proceedings.134

The above discussion should not be taken to suggest that the English representative procedure has remained solely a creature of judicial inventiveness without more active attempts at reform of multi-party litigation generally. In fact, there have been various proposals in England over the years to introduce a reasonably detailed multi-party schema. These include135 : recommendations for a pilot study by the Lord Chancellor's Department in 1988136 ; a proposal by the National Consumer Council that drew upon the American class action137 ; a guide for practitioners produced by the Supreme Court Practice Committee in 1991138 ; a “group action” prepared by the Law Society of England and Wales in 1995139 ; and in 1997, a draft regime for “multi-party situations” developed by the LCD.140 The introduction of the group litigation order regime in May 2000141 is testament to ongoing efforts to provide greater access to justice for those similarly situated, although in the view of this author, the GLO regime falls short of the mark.142

The most recent reform proposal was that put forward by the LCD143 in 2001, whereby responses were sought upon “the desirability of introducing a generic procedure for representative actions into civil law in England and Wales”.144 The proposal was intended to supplement rather than replace the representative rule and the group litigation order. For the purposes of the proposal, the term “representative claims” was defined as: “claims made by, ***447** or defended by, a representative or representative organisation on behalf of a group of individuals who may, or may not, be individually named in a situation where an individual would have a direct cause of action.”145

Given the breadth of this definition, the range of responses to the proposal (which has not to date been pursued by the LCD146) was very mixed--some respondents dealt with the concept of the ideological representative claimant which the above mentioned definition sought to include, whilst other respondents considered the desirability of an opt-out class action regime which is also encompassed by the definition. Whilst the predominant view of those who responded to the proposal was that *some* form of generic provision in the CPR to permit representative groups to commence proceedings would facilitate greater access to justice, there were considerable concerns expressed that primary legislation would be required to implement any such proposal. In this author's view, given the experiences of other jurisdictions which have grappled with the “legislation versus regulation” conundrum, enactment of primary class actions legislation would be far preferable to any attempt to introduce a class action by further amendment of the CPR.147

As further examples of reform developments, the government has suggested allowing representative bodies to bring claims for damages in anti-competitive cases on behalf of groups of identifiable consumers,148 whilst certain European Union initiatives either require, permit or advocate the use of representative claims instituted by appropriate entities such as public enforcement authorities and designated consumer organisations on a piecemeal basis.149

None of these reforms, however, matches the generic nature, clear definition or the proven practicality of a class action

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regime. Yet, as stated in the introduction, it would take steps rather than leaps to expand the representative rule accordingly.

Conclusion

It is understandable that any hesitancy to expand the wording and impact of the English representative rule when CPR Pt 19 was redrafted and implemented in May 2000 may have arisen because of the restrictions upon the Committee's powers that limit its rule-making tomatters of procedural rather than substantive law. Be that as it may, the undeniable position is that the mere re-enactment ***448** of the representative rule in r.19.6 as a pillar of multi-party litigation, in the absence of a statutory class action, suffers from many deficiencies.

First, several prerequisites have been judicially pronounced in order to institute representative proceedings, apart from the numerosity and "same interest" requirements which appear on the face of the rule.Whereas decisions such as that of *Markt & Co Ltd v Knight Steamship Co Ltd*150 displayed a high degree of resistance to the notion of representative actions, several subsequent attempts by courts to remove these barriers when interpreting the predecessors of r.19.6, and more recently in the case of *Independiente Ltd v Music Trading On-Line (HK) Ltd,* have not been incorporated within the rule. Various judicial statements have sought to interpret the English representative rule as containing elements of a class action, a wider device than the strict representative action, under which a commonality, rather than identicality, of interest is sufficient, and where separate contracts, separate defences and different claims for damages are easily tolerated. It is highly arguable that the less restrictive class action criteria which the English judiciary have struggled to fit over the rubric of the representative action should be expressly implemented in this jurisdiction. This would serve to lessen the artificiality of judicial interpretations which strain the boundaries of the language used in r.19.6. Secondly, it is not a huge leap from the representative rule, as judicially interpreted, to the class action as legislatively drafted. Somewhat similar superiority assessments, numerosity tests, attitudes toward class description and members' identities, adequacy of representation, recognition of sub-classes, and the absence of any requirement for an express mandate from class members, are evident under both representative rule and class action.

However, and notwithstanding the aforementioned similarities of application, the representative rule is lacking in crucial respects as a procedural tool. A detailed and contemporary class action regime includes various protections and benefits for class members and defendants alike (such as compulsory judicial approval of settlement agreements, the aggregate assessment of damages, and cy-pres distributions) which are simply not required or permitted under the representative rule. It is highly unlikely, however, that implementation of a class action by means of court rules would be a satisfactory course. The Victorian experience is not one that would wish to be repeated.

The possibility of extending the representative rule, however, by incorporation of some of the liberal interpretations which have been described in this article, was not canvassed at all by Lord Woolf in the *Access to Justice* reports. The rule was briefly dismissed as "difficult to use",151 and that "there are definite limits to the weight the rule can bear."152 The Commonwealth class action regimes were referred to therein in only the briefest of terms. The 2001-02 LCD's consideration of a new version of a representative proceeding was also notable insofar as there was a complete absence of any discussion of the Canadian and Australian class action regimes in either its *Consultation Paper****449** or *Consultation Response.* Moreover, possible class action reform has failed, to date, to make it onto the agenda of the Law Commission whatsoever. Yet, as the prevalence of class action regimes in other Commonwealth jurisdictions illustrates, the representative rule is being overtaken by other efforts to attain more workable access to justice (and the opt-in regime encompassed within the alternative group litigation order has met with general disfavour elsewhere too).

Significant twin-pillared critiques can be mounted against the principal multi-party devices presently contained within

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the Civil Procedure Rules. The implementation of a formal class action in English civil procedure, which draws from the representative rule in key respects but which offers greater protections and benefits for litigants (class members and defendants), is arguably worthy of detailed law reform consideration.

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1. [2003] EWHC 470 (Ch), judgment delivered March 13, 2003.*Independiente,* n.1 above, at [38].
2. Federal Rules of Civil Procedure (FRCP), r.23.[1991] 2 Q.B. 206, CA.
3. Federal Court of Australia Act 1976 (FCA (Aus)), Pt.IVA, ss.33A-33ZJ (commenced March 4, 1992), and closely reproduced in Victoria: Pt.4A of the Supreme Court Act 1986 (Vic.) (commenced January 1, 2000).*ibid.* , 241.
4. Class Proceedings Act, 1992, S.O. 1992, c.6 (CPA (Ont)) (commenced January 1, 1993).[1954] 1 Q.B. 210, CA.
5. Class Proceedings Act, 1995, S.B.C. 1995, c.50 (CPA (BC)) (commenced August 1, 1995), and see also: Newfoundland and Labrador's Class Actions Act 2001, S.N.L. 2001, c.C-18.1 (commenced April 1, 2002); Saskatchewan's Class Actions Act 2001, S.S. 2001, c.C-12.01 (commenced January 1, 2002); Manitoba's Class Proceedings Act 2002, S.M. 2002, c.14 (commenced January 1, 2003); and Alberta's Class Proceedings Act, S.A. 2003, c.C-16.5 (commenced April 1, 2004).*Smith v Cardiff Corp (No 2)* [1955] Ch. 159.
6. With the exception of British Columbia, which has enacted a no-way costs rule specifically for class action litigation: CPA (BC), s.37(1).Also noted in J.A. Jolowicz, "Protection of Diffuse, Fragmented and Collective Interests in Civil Litigation: English Law" (1983) 42 C.L.J. 222 at p.234; Harlow and Rawlings, n.39 above, p.128.
7. Especially *Markt & Co Ltd v Knight Steamship Co Ltd* [1910] 2 K.B. 1021, CA, discussed *infra.e.g.* under the US rule, F.R.C.P. 23(b), it is provided that: "An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition …(3) the court finds that … a class action is superior to other available methods for the fair and efficient adjudication of the controversy".
8. Civil Procedure Act 1997 (UK) c.12, ss.1(1), (3).Except to provide, in r.19.6(2), that the court may direct that a person not act as a representative.
9. Lord Chancellor's Department (LCD), *Representative Claims: Proposed New Procedures: Consultation Response* (April 2002), "Conclusions", at para.10.*e.g. The Irish Rowan* [1991] 2 Q.B. 206, CA at 223; *M Michaels (Furriers) Ltd v Askew* CA (June 23, 1983) 16-17; and much earlier: *Taff Vale Rwy Co v Amalgamated Soc of Rwy Servants* [1901] A.C. 426, HL at 443.
10. LCD, *Representative Claims: Proposed New Procedures: Consultation Paper* (February 2001).*e.g.* F.C.A. (Aus), s.33T(1) provides that: "If, on an application by a group member, it appears to the Court that a representative party is not able adequately to represent the interests of the group members, the Court may substitute another group member as representative party and may make such other orders as it thinks fit."
11. Contained in Pt.19.III, as supplemented by PD 19B, and discussed further in R. Mulheron, "Some Difficulties with Group Litigation Orders--And Why a Class Action is Superior" (2005) 24 C.J.Q. 40.[1901] 1 A.C. 1, HL at 8.
12. Although the English jurisdiction will be referred to throughout the article, this should be taken to also include the jurisdiction of Wales, to which the Civil Procedure Rules also apply.*Smith v Cardiff Corp.* [1954] 1 Q.B. 210, CA 221, 226-27, 227 (representative action that council's rent control schema be declared *ultra vires* ; was in the interests of one part of the tenancy class for the action to fail because they would not then sustain rental increases to subsidise the remainder of the class, which naturally enough, wished the action to succeed to obtain the said subsidy); *Haarhaus v Law Debenture Trust Corp* [1988] B.C.L.C. 640 (representative action by all holders of promissory notes issued by a Nigerian Bank to restrain defendant from publishing details of voting patterns; different voting patterns indicated that noteholders would have different views about importance of voting confidentiality, which precluded a common grievance and relief

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beneficial to all noteholders; action discontinued in representative capacity).

13. Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996) ("Final Woolf Report"), ch.17, para.2.*Independiente,* n.1 above, at [28].

14. Law Society Civil Litigation Committee, *Group Actions Made Easier* (1995).*The Kyriaki* [1992] 1 Lloyd's Rep. 484, QB (if sub-classes of insurers pleaded different defence relating to assignment of the insurances, necessary to appoint representative from each sub-class with that defence).

15. Final Woolf Report, ch.17, para.4.*Duke of Bedford* [1901] A.C. 1, HL (three classes of growers represented).

16. *e.g.* reference is made in Final Woolf Report, ch.17, para.5, to a study of overseas regimes, with particular reference to the US The opt-out approach of other jurisdictions is briefly referred to in para.42.*e.g.* it is suggested that the voters in *Haarhaus,* n.11 above, may have been capable of proceeding in a representative action as two separate sub-classes, given that they had a common interest in preserving confidentiality of the voting procedures.

17. M. Mildred, "Group Actions" in G. Howells, *The Law of Product Liability* (Butterworths, London, 2001) pp.375, 379 ("The treatment of the jurisprudence in each of these foreign jurisdictions outweighs in detail and volume of reported cases that in our domestic jurisdiction. It is predominantly from those jurisdictions that principles emerge: in the domestic jurisdiction considerations of litigation expense appear to predominate").*e.g.* C.P.A. (Ont), s.6(5).

18. See *e.g.* the responses from Lovells Solicitors and Christopher Hodges, *cf.* J Stein, all reproduced in: LCD, *Representative Claims: Proposed New Procedures: Consultation Response* (April 2002), para.4.*e.g.* in Ontario: *Cotter v Levy* (S.C.J., March 24, 2000) (allegations that defendants caused and continued fire that consumed stored plastic waste materials and which allegedly caused poisonous smoke plume, causing property damage and personal injury; one sub-class was designated as a group of jail inmates, for whom a particular common issue was whether there was an obligation to evacuate them; another sub-class of persons allegedly suffered pure economic loss only). Also: *Bendall v McGhan Medical Corp* (1994), 106 D.L.R. (4th) 339, 14 O.R. (3d) 734, Gen Div, para.71 (different sub-classes, dependent upon manufacturer of breast implants).

19. For further elucidation of the matters discussed herein, see: R. Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) ch.4, pp.77-94Also see Kell, n.38 above, p.97.

20. r.19.6 was inserted by the Civil Procedure (Amendment) Rules 2000, SI 2000/221, r.9, sch.2.[1985] 1 W.L.R. 1214, Ch 1220-1221, and discussed by J. Winter, "Acting for Classes: Strategies for Representing Group Interests" (1993) 44 *Northern Ireland Legal Q.* 276 at pp.286-287.

21. See r.10 of the Rules of Procedure scheduled to the Supreme Court of Judicature Act 1873 (Eng.) 36 and 37 Vic. c.66, later reproduced almost precisely in RSC 1883, Ord.16, r.9, and then replaced by RSC 1965, Ord.15, r.12.*Independiente,* n.1 above, at [35].

22. *Independiente,* n.1 above at [21].*ibid.* , at [37].

23. Previously the rule required "numerous persons".*ibid.* , [32].

24. r.19.6(1) reads: "Where more than one person has the same interest in a claim (a) the claim may be begun; or (b) the court may order that the claim be continued by or against one or more of the persons who have the same interest as representatives of any other persons who have that interest." Small changes of wording between earlier and later versions of the rule have not had significant effect. Note, *e.g.* : *National Bank of Greece SA v RM Outhwaite 317 Syndicate at Lloyds* Q.B. (January 16, 2001) at [30].See n.7 above, p.1039.

25. *e.g. Duke of Bedford v Ellis* [1901] A.C. 1, HL; *Taff Vale Railway Co v Amalgamated Society of Railway Servants* [1901] A.C. 426, HL at 443 (Lord Lindley).[1970] Ch. 345, 371-372.

26. [1910] 2 K.B. 1021, CA.*Independiente,* n.1 above, at [32].

27. Vaughan Williams and Fletcher Moulton L.JJ., Buckley L.J. dissenting.*ibid.* , at [37].

28. *Markt,* n.7 above at 1035.[2005] EWHC 552 (QB).

29. *Duke of Bedford* [1901] A.C. 1, HL at 8.Master Foster, November 9, 2004.

30. *e.g. Smith v Cardiff Corp.* [1954] 1 Q.B. 210, CA at 220-221; *John v Rees* [1970] Ch. 345 at 373; *Bollinger SA v*

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Goldwell Ltd [1971] F.S.R. 405, Ch. at 408; *Prudential Ass Co Ltd v Newman Industries Ltd* [1981] Ch. 229 at 245; *CBS Songs Ltd v Amstrad Consumer Electronics plc* [1987] R.P.C. 429, Ch. at 444-445, and on appeals: [1988] Ch. 61, CA at 85; *Pan Atlantic Insurance Co Ltd v Pine Top Ins Co Ltd* [1988] 2 Lloyd's Rep. 505, QB at 509, and on appeal: [1989] 1 Lloyd's Rep. 568, CA at 571; *Haarhaus & Co GmbH v Law Debenture Trust Corp* [1988] B.C.L.C. 640, QB at 647.*ibid.* , at [26].

31. *Independiente,* n.1 above at [22].*e.g.* C.P.A. (Ont), s.9, provides that: “Any member of a class involved in a class proceeding may opt out of the proceeding in the manner and within the time specified in the certification order.”

32. N.J. Williams, *Consumer Class Actions in Canada* (Consumers' Assn of Canada, Toronto, 1974) at p.13; K. Uff, “Class, Representative and Shareholders' Derivative Actions in English Law” (1986) 5 C.J.Q. 50 at p.52.*Lopez v Star World Enterprises Pty Ltd,* F.C.A. (April 18, 1997) 1.

33. Ontario Law Reform Commission, *Report on Class Actions* (1982) (OLRC Report), pp.19-20; J. Seymour, “Representative Procedures and the Future of Multi-Party Actions” (1999) 62 M.L.R. 564 at pp.569-70, and by the same author: “*Independiente Ltd v Music Trading On-Line (HK) Ltd* : A Little Knowledge is a Dangerous Thing?” (2005) 22 C.J.Q. 16 at pp.17-18, 22.Note, “Class Actions and Access to Justice” [1979] N.L.J. 870 at p.870.

34. J.A. Jolowicz, “Representative Actions, Class Actions and Damages--A Compromise Solution?” (1980) 39 C.L.J. 237 at pp.238-239; D Kell ‘Evolution of Representative Actions' (1993) 3 L.M.C.L.Q. 306 at p.307.Kell, n.73 above, p.534.

35. *e.g.* Law Society Civil Litigation Committee, *Group Actions Made Easier* (1995), at para.3.1; *OLRC Report,* p.19; R.H.S. Tur, “Litigation and the Consumer Interest: The Class Action and Beyond” (1982) 2 L.S. 135 at p.154; J. Jacob, “Safeguarding the Public Interest in English Civil Proceedings” (1982) 1 C.J.Q. 312 at p.345; H.P. Glenn, “The Dilemma of Class Action Reform” (1986) 6 O.J.L.S. 262 at pp.264-265; R. Campbell and W. Morrison, “Class Actions” (1987) 84 L.S.G. 2585 at p.2585; K. Uff, “Recent Developments in Representative Actions” (1987) 6 C.J.Q. 15 at p.18; A. Lockley, “Regulating Group Actions” [1989] N.L.J. 798 at p.799; S. Hedley, “Group Personal Injury Litigation and Public Opinion” (1994) 14 L.S. 70 at p.75; M. Day, P. Baker and G. McCool, *Multi-Party Actions: Practitioners' Guide to Pursuing Group Claims* (Legal Action Group, London, 1995), pp.11-12; G.R. Hickinbottom, “Multi-Party Actions in England and Scotland” [1995] *Litigator* 190 at p.192; N. Armstrong and A. Tucker, “Class Struggles” [1996] *J. of Personal Injury Litigation* 94 at p.96; M. Laughton, “More Group Actions in the UK?” [1997] *Intl. Commercial Litigation* 39 at p.39; A. Lindley, “Group Actions” [1997] *Information and Technology Law* 177 at p.179; M. Irvine, “Class Actions” [1998] *Intl. Insurance L. Rev.* 257 at p.257; G. Carney and E. Morony, “Class Actions” [2002] *Global Counsel* 59 at p.62.*e.g.* F.C.A. (Aus), s.33ZF(1), provides that: “In any proceeding (including an appeal) conducted under this Part, the Court may, of its own motion or on application by a party or a group member, make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding.”

36. *Markt,* n.7 above, p.1040 (Fletcher Moulton L.J.); also: Evershed M.R. in *Smith v Cardiff Corp.* [1954] 1 Q.B. 210, CA at 222.For other relevant papers and discussion, see C. Hodges, *Multi-Party Actions* (OUP, Oxford, 2001), para.2.20.

37. Uff, n.32 above, p.55.*Report of the Review Body on Civil Justice (Hodgson Report)* (Cm 394, 1988), para.270.

38. D. Kell, “Renewed Life for the Representative Action” (1995) 13 *Australian Bar Rev.* 95 at p.95.National Consumer Council, *Group Actions: Learning from Opren* (1989). For commentary, see: Howells, n.94 above, p.615.

39. C. Harlow and R. Rawlings, *Pressure Through Law* (Routledge, London, 1992), p.127.Supreme Court Practice Committee, *Guide for Use in Group Actions* (1991).

40. *Esanda Finance Corp. Ltd v Carnie* (1992) 29 N.S.W.L.R. 382, CA at 395 (Kirby P.).Law Society Civil Litigation Committee, *Group Actions Made Easier* (1995), which proposed a rule of 14 parts.

41. *Prudential Ass Co Ltd v Newman Industries Ltd* [1981] Ch. 229 at pp.254, 255.LCD, *Proposed New Procedures for Multi-Party Situations: Consultation Paper* (1997), proposing a regime for “multi-party situations” (MPSs) which Lord Woolf had envisaged in *Woolf Final Report,* Ch.17, para.15(a). In *Access to Justice: Draft Civil Procedure Rules* (1996), Lord Woolf did not present a draft of rules for group litigation, but foreshadowed that these would be forthcoming from the LCD after appropriate consultation.

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42. *Markt,* n.7 above, p.1040 (Fletcher Moulton L.J.), p.1030 (Vaughan Williams L.J.).Contained in Pt 19.III, rr.19.10-19.15
43. *Consorzio del Prosciutto di Parma v Marks & Spencer plc* [1990] F.S.R. 530, Ch., affirmed: [1991] R.P.C. 351, CA.See Mulheron, n.11 above.
44. *Markt,* n.7 above, pp.1040-1041.LCD, *Representative Claims: ProposedNew Procedures: Consultation Paper* (2001).Mildred, n.17 above, p.378, notes that debate in England has been largely driven by practitioners, legislative committees, and the LCD, and that the Law Commission has declined to consider reform of multi-party procedures.
45. See, especially, Buckley L.J. at *ibid.* , p.1045 ("the plaintiff must be in a position to claim some relief which is common to all, but it is no objection that he claims also relief personal to himself"), and similar comments in Uff, n.32 above, p.53.LCD, *Consultation Response* (2002), para.4.
46. J.G. Fleming, "Mass Torts" (1994) 42 *American J. of Comparative Law* 507 at p.523. Also: Ryan J., writing extra-curially, in "Development of Representative Proceedings in the Federal Court" (1994) 11 *Australian Bar Rev.* 131 at p.132; Armstrong and Tucker, n.35 above, p.96; I.J. Jacob, "Access to Justice in England" in M. Cappelletti and B. Garth (eds), *Access to Justice: A World Survey* (Siftoff and Noordoft, London, 1978) vol.1, p.470.LCD, *Consultation Paper* (2001), para.13.
47. *e.g. Temperton v Russell* [1893] 1 Q.B. 435, CA; *Lord Aberconway v Whetnall* (1918) 87 L.J. Ch. 524, CA.LCD, *Consultation Response* (April 2002), "Conclusions", para.10.
48. *Prudential,* n.41 above, p.255.Discussed in greater detail in Mulheron, n.19 above, pp.38-42.
49. *Dillon v Charter Travel Co Ltd* (1988) A.T.P.R. at para.40-872 (SCNSW).*Productivity and Enterprise--A World Class Competition Regime, Government's Response to Consultation* (White Paper, December 2001) 26.
50. *e.g. Lord Aberconway v Whetnall* (1918) 87 L.J. Ch. 524; *Smith v Cardiff Corp.* [1954] 1 Q.B. 210, CA at 220-221; *Pan Atlantic Insurance Co Ltd v Pine Top Ins Co Ltd* [1989] 1 Lloyd's Rep. 568, CA at 571; *Haarhaus & Co GmbH v Law Debenture Trust Corp.* [1988] B.C.L.C. 640, QB at 647; *Drozdowski v Watch Tower Bible & Tract Society of Pennsylvania,* C.A. (December 4, 1997).Principally arising from EU Employment Directive 2000/78 [2000] L303/16, EC Late Payment Directive 2000/35 [2000] O.J. L200/35, EC Injunctions Directive 98/27 [1988] O.J. L166/51 on injunctions for the protection of consumers' interests. For further detail, see C. Hodges, n.36 (2nd ser.) above, paras 9.09-9.26; also referred to in LCD, *Consultation Paper* (2001), paras 7-10, endnote 4 and Annexure D, para.6; and in the *Consultation Response* (2002), "Conclusions", paras 8, 9.
51. *e.g. Payne v Young* (1981) 145 C.L.R. 609, HCA (Ord.16, r.1 of the High Court Rules); *Naken v General Motors of Canada Ltd* [1983] S.C.R. 72, 144 D.L.R. (3d) 385 (r.75 Supreme Court of Ontario Rules of Practice); *Dillon,* n.49 above (F.C.R. Ord.6, r.13(1)); *Kerrigan and Meat Industry Employees Superannuation Fund Pty Ltd v Dawson* (Vic. S.C., December 17, 1992) (Ord.18, r.2 Rules of Supreme Court (Vic.)); *Cameron v National Mutual Life Association of Australasia Ltd* [1992] 1 Qd.R. 133 (Full Ct S.C.) (Ord.3, r.10 Rules of the Supreme Court (Qld.)).[1910] 2 K.B. 1021, CA.
52. [1981] Ch. 229.Woolf Final Report, Ch.17, para.2.
53. *ibid.* , p.255 (emphasis added).*Ibid.,* Ch.17, para.7.
54. *ibid.* , p.252.
55. *ibid.* , p.255, and also citing: *Jones v Cory Brothers & Co Ltd* (1921) 56 L.Jo. 302, CA, another action in tort, to support the contention that a common ingredient was sufficient.
56. *e.g.* C.P.A. (Ont), s.5(1)(c) which provides: "The court shall certify a class proceeding on a motion under section 2, 3 or 4 if … (c) the claims or defences of the class members raise common issues"; "common issues" are defined in s.1 to mean "(a) common but not necessarily identical issues of fact, or (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts".
57. *e.g.* F.C.A. (Aus), s.33ZB provides: "A judgment given in a representative proceeding:(a) must describe or otherwise identify the group members who will be affected by it; and(b) binds all such persons other than any person who has opted

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out of the proceeding …".

58. In Australia, *e.g. McMullin v ICI Aust Operations Pty Ltd (No 6)* (1998) 84 F.C.R. 1 at p.2 (judgment on liability delivered; following that, some damages claims heard and determined; some settled; for those claims under $100,000, orders made under s.33Q(2) for 16 sub-classes and to delegate those to a judicial registrar, with larger claims to be heard by judges). In British Columbia, *e.g. Harrington v Dow Corning Corp.* (2000), 193 D.L.R. (4th) 67, 82 B.C.L.R. (3d) 1, CA at [26] (endorsing "provision for multi-staged proceedings"). In Ontario, *e.g. Gagne v Silcorp Ltd* (1998), 167 D.L.R. (4th) 325, 41 O.R. (3d) 417, CA (wrongful dismissal case settled; reference to determine quantum of damages for each class member via mini-hearing process, with mediation and arbitration stages; each class member permitted personal lawyer in mini-hearing; all claims eventually settled for about $2 million).

59. *Howells v Dominion Insurance Co Ltd* [2005] EWHC 552, QB, at [35].

60. [1991] 2 Q.B. 206, CA, further discussed in: Note, "Representative Actions Against Insurers" (1989) 1 *Insurance Law Monthly* 5.

61. *Ibid.* , 227 (Staughton L.J.).

62. [1992] 1 Lloyd's Rep. 484, QB.

63. *The Irish Rowan* [1991] 2 Q.B. 206, CA at 231, 236 (Sir John Megaw).

64. *National Bank of Greece SA v RM Outhwaite 317 Syndicate at Lloyds* Q.B. (January 16, 2001), at [31]; and see, for more recent endorsement: *Howells v Dominion Insurance Co Ltd* [2005] EWHC 552 (QB), at [33].

65. There has indeed not been a marked relaxation in this criterion under the English representative rule, as Wilkin notes: J. Wilkin, "Representative Proceedings in Victoria: No Change in Contract Cases?" (1996) 70 *Law Institute J.* 36 at p.39.

66. Tur, n.35 above, p.160.

67. See n.89 below.

68. In Australia, *e.g. Finance Sector Union of Aust v Commonwealth Bank of Aust* (1999) 94 F.C.R. 179 (Full F.C.A.) (standard form employment contracts); *Wong v Silkfield Pty Ltd* (1999) 199 C.L.R. 255, HCA (standard contracts to purchase lots in a residential building). In Ontario, *e.g.* : *Cheung v Kings Land Development Inc* (2002) 55 O.R. (3d) 747, SCJ (standard form agreements of purchase and sale).

69. *The Irish Rowan* [1991] 2 Q.B. 206, CA 222-223; also 232 (Sir John Megaw) (in actuality, all defendants were seeking to rely on an identical defence, namely, no transfer of benefit of policy from original policy-holders to claimants, hence this is not a particularly strong case for "separate defences"). Similarly in *The Kyriaki* [1992] 1 Lloyd's Rep. 484, QB, all defendant insurers had common defence of want of due diligence on part of owners of insured vessel, with some insurers possibly pleading a different defence relating to assignment of the insurances: Note, "Representative Actions" (1991) 3 *Insurance Law Monthly* 10, 12. Also: *M Michaels (Furriers) Ltd v Askew* C.A. (June 23, 1983).

70. J. Seymour, "Substantive Problems for the Representative Procedure" (1997) 16 C.J.Q. 196 at p.202. Further support is to be found in: *Monsanto plc v Tilly* [2000] Env.L.R. 313, CA where separate defences unlikely, no conflict between class members was evident, and a representative action against defendant association permitted. *Cf. UK Nirex v Barton* Q.B. (October 13, 1986).

71. *Independiente,* n.1 above, at [29] (emphasis added).

72. *ibid.*

73. r.3.4(2). For earlier comment about the importance of case management under the representative rule, see: D. Kell, "Representative Actions: Continued Evolution or a Classless Society?" (1993) 15 *Sydney L. Rev.* 527, 532, 534-535; P. Radich and R. Best, "Class Actions" [1997] N.Z.L.J. 265 at p.266.

74. B. Hough, "'Standing' for Pressure Groups and the Representative Plaintiff" [1991] Denning L.J. 86 at p.88.

75. For articulation of some of these in the context of the representative rule, as discussed in Hough, *ibid.,* see: *RJ Flowers Ltd v Burns* [1987] 1 N.Z.L.R. 260, HC.

76. In Ontario, *e.g. Maxwell v MLG Ventures Ltd* (1995), 7 C.C.L.S. 155 (Gen Div), at [8] (possibility of individual defences of actual knowledge and limitation periods did not prevent certification of misrepresentation claim). In Australia,

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e.g. McMullin v ICI Aust Operations Pty Ltd (1997) 72 F.C.R. 1, 10 (class action permitted, notwithstanding individual issues of causation, contributory negligence and damages).
77. [1981] Ch. 229.
78. *ibid.* , 256.
79. Note positive academic comment at the time of the *Prudential* decision: Jolowicz, n.34 above, 238-239; R.I. Barrett, "Representative Action for Damages: Towards a Judge-made Class Action System?" (1980) 54 *Australian Law Journal* 688 at p.688; Tur, n.35 above, pp.153-156.
80. *Chrzanowska v Glaxo Laboratories Ltd* Q.B. (March 12, 1990) 3; *Drozdowski v Watch Tower Bible & Tract Society of Pennsylvania* C.A. (December 4, 1997); *Electrical, Electronic, Telecommunication and Plumbing Union v Times Newspapers Ltd* [1980] Q.B. 585 at 601.
81. *The Irish Rowan* [1991] 2 Q.B. 206, CA, citing earlier decisions permitting pecuniary recovery: *Wood v McCarthy* [1893] 1 Q.B. 775, Div Ct); *Taff Vale Railway Co v Amalgamated Society of Railway Servants* [1901] A.C. 426, HL; *Moon v Atherton* [1972] 2 Q.B. 435, CA.
82. N. Andrews, "Representative Actions Against Numerous Defendants" (1990) 49 C.L.J. 230 at p.231; Harlow and Rawlings, n.39 above, p.128; Day, Baker and McCool, n.35 above, p.12.
83. *Walker v Murphy* [1915] 1 Ch. 71, CA at 85 (Kennedy L.J.), 90 (Swinfen Eady L.J.); *EMI Records Ltd v Riley* [1981] 1 W.L.R. 923, Ch. at 926 (Dillon J.).
84. A. Lockley, "Regulating Group Actions" [1989] N.L.J. 798 at p.799; M. Mildred and R. Pannone, "Group Actions" in M. Powers and N. Harris (eds.), *Medical Negligence* (2nd edn, Butterworths, London, 1994) 343.
85. *EMI Records* [1981] 1 W.L.R. 923, Ch. at 926.
86. *Morrison Steamship Co Ltd v Greystoke Castle (Cargo Owners)* [1947] A.C. 265, HL, *sub nom Owners of Cargo Lately Laden on Board The Greystoke Castle v Owners of The Cheldale* [1945] 1 All E.R. 177, CA at 179.
87. [1988] 1 Ch. 61, CA 86 (Sir Denys Buckley), drawing similarities with the earlier decision in *Duke of Bedford v Ellis* [1901] A.C. 1, HL.
88. *Independiente,* n.1 above, at [30].
89. *e.g.* in F.C.A. (Aus), s.33C(2) provides that:"A representative proceeding may be commenced:(a) whether or not the relief sought:(i) is, or includes, equitable relief; or(ii) consists of, or includes, damages; or(iii) includes claims for damages that would require individual assessment; or(iv) is the same for each person represented; and(b) whether or not the proceeding:(i) is concerned with separate contracts or transactions between the respondent in the proceeding and individual group members; or(ii) involves separate acts or omissions of the respondent done or omitted to be done in relation to individual group members."See also: CPA (Ont), s.6.
90. *Independiente,* n.1 above, at [23].
91. One person is not sufficient because he or she "cannot be a representative without a constituency": *Wilson v Church* (1878) 9 Ch. 552, 559.
92. *e.g.* C.P.A. (Ont), s.5(1)(b) provides that: "The court shall certify a class proceeding on a motion under section 2, 3 or 4 if … (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant".
93. Although in *Re Braybrook* [1916] W.N. 74, Sol.Jo. 307, Ch., five persons not regarded as "numerous". See discussion, and non-English case law, referred to in *OLRC Report,* p.326, n.3.
94. G.G. Howells, "Mass Tort Litigation in the English Legal System" in J. Bridge *et al* (eds.), *United Kingdom Law in the Mid 1990s* (UK National Committee of Comparative Law, London, 1994) p.609.
95. *EMI Records Ltd v Kudhail* [1985] F.S.R. 36, CA (activities of defendant class so secret that claimants unable to find out identity of all members; however, representative action against defendant successfully commenced).
96. See n.1 above, at [23].
97. See Table 2.

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98. [1901] A.C. 1, HL at 8.

99. *M Michaels (Furriers) Ltd v Askew* C.A. (June 23, 1983) 16-17 (Purchas L.J.), cited on this point in: *Huntingdon Life Sciences Group Plc v Stop Huntingdon Animal Cruelty (No.1)* [2004] EWHC 1231, [48]; *National Bank of Greece SA v RM Outhwaite 317 Syndicate at Lloyds* Q.B. (January 16, 2001), at [31].

100. [2003] EWHC 470 (Ch), judgment delivered March 13, 2003.*Independiente,* n.1 above, at [38].

101. Federal Rules of Civil Procedure (FRCP), r.23.[1991] 2 Q.B. 206, CA.

102. Federal Court of Australia Act 1976 (FCA (Aus)), Pt.IVA, ss.33A-33ZJ (commenced March 4, 1992), and closely reproduced in Victoria: Pt.4A of the Supreme Court Act 1986 (Vic.) (commenced January 1, 2000).*ibid.* , 241.

103. Class Proceedings Act, 1992, S.O. 1992, c.6 (CPA (Ont)) (commenced January 1, 1993).[1954] 1 Q.B. 210, CA.

104. Class Proceedings Act, 1995, S.B.C. 1995, c.50 (CPA (BC)) (commenced August 1, 1995), and see also: Newfoundland and Labrador's Class Actions Act 2001, S.N.L. 2001, c.C-18.1 (commenced April 1, 2002); Saskatchewan's Class Actions Act 2001, S.S. 2001, c.C-12.01 (commenced January 1, 2002); Manitoba's Class Proceedings Act 2002, S.M. 2002, c.14 (commenced January 1, 2003); and Alberta's Class Proceedings Act, S.A. 2003, c.C-16.5 (commenced April 1, 2004).*Smith v Cardiff Corp (No 2)* [1955] Ch. 159.

105. With the exception of British Columbia, which has enacted a no-way costs rule specifically for class action litigation: CPA (BC), s.37(1).Also noted in J.A. Jolowicz, "Protection of Diffuse, Fragmented and Collective Interests in Civil Litigation: English Law" (1983) 42 C.L.J. 222 at p.234; Harlow and Rawlings, n.39 above, p.128.

106. Especially *Markt & Co Ltd v Knight Steamship Co Ltd* [1910] 2 K.B. 1021, CA, discussed *infra.e.g.* under the US rule, F.R.C.P. 23(b), it is provided that: "An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition …(3) the court finds that … a class action is superior to other available methods for the fair and efficient adjudication of the controversy".

107. Civil Procedure Act 1997 (UK) c.12, ss.1(1), (3).Except to provide, in r.19.6(2), that the court may direct that a person not act as a representative.

108. Lord Chancellor's Department (LCD), *Representative Claims: Proposed New Procedures: Consultation Response* (April 2002), "Conclusions", at para.10.*e.g. The Irish Rowan* [1991] 2 Q.B. 206, CA at 223; *M Michaels (Furriers) Ltd v Askew* CA (June 23, 1983) 16-17; and much earlier: *Taff Vale Rwy Co v Amalgamated Soc of Rwy Servants* [1901] A.C. 426, HL at 443.

109. LCD, *Representative Claims: Proposed New Procedures: Consultation Paper* (February 2001).*e.g.* F.C.A. (Aus), s.33T(1) provides that: "If, on an application by a group member, it appears to the Court that a representative party is not able adequately to represent the interests of the group members, the Court may substitute another group member as representative party and may make such other orders as it thinks fit."

110. Contained in Pt.19.III, as supplemented by PD 19B, and discussed further in R. Mulheron, "Some Difficulties with Group Litigation Orders--And Why a Class Action is Superior" (2005) 24 C.J.Q. 40.[1901] 1 A.C. 1, HL at 8.

111. Although the English jurisdiction will be referred to throughout the article, this should be taken to also include the jurisdiction of Wales, to which the Civil Procedure Rules also apply.*Smith v Cardiff Corp.* [1954] 1 Q.B. 210, CA 221, 226-27, 227 (representative action that council's rent control schema be declared *ultra vires* ; was in the interests of one part of the tenancy class for the action to fail because they would not then sustain rental increases to subsidise the remainder of the class, which naturally enough, wished the action to succeed to obtain the said subsidy); *Haarhaus v Law Debenture Trust Corp* [1988] B.C.L.C. 640 (representative action by all holders of promissory notes issued by a Nigerian Bank to restrain defendant from publishing details of voting patterns; different voting patterns indicated that noteholders would have different views about importance of voting confidentiality, which precluded a common grievance and relief beneficial to all noteholders; action discontinued in representative capacity).

112. Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996) ("Final Woolf Report"), ch.17, para.2.*Independiente,* n.1 above, at [28].

113. Law Society Civil Litigation Committee, *Group Actions Made Easier* (1995).*The Kyriaki* [1992] 1 Lloyd's Rep.

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484, QB (if sub-classes of insurers pleaded different defence relating to assignment of the insurances, necessary to appoint representative from each sub-class with that defence).

114. Final Woolf Report, ch.17, para.4.*Duke of Bedford* [1901] A.C. 1, HL (three classes of growers represented).

115. *e.g.* reference is made in Final Woolf Report, ch.17, para.5, to a study of overseas regimes, with particular reference to the US The opt-out approach of other jurisdictions is briefly referred to in para.42.*e.g.* it is suggested that the voters in *Haarhaus,* n.11 above, may have been capable of proceeding in a representative action as two separate sub-classes, given that they had a common interest in preserving confidentiality of the voting procedures.

116. M. Mildred, "Group Actions" in G. Howells, *The Law of Product Liability* (Butterworths, London, 2001) pp.375, 379 ("The treatment of the jurisprudence in each of these foreign jurisdictions outweighs in detail and volume of reported cases that in our domestic jurisdiction. It is predominantly from those jurisdictions that principles emerge: in the domestic jurisdiction considerations of litigation expense appear to predominate").*e.g.* C.P.A. (Ont), s.6(5).

117. See *e.g.* the responses from Lovells Solicitors and Christopher Hodges, *cf.* J Stein, all reproduced in: LCD, *Representative Claims: Proposed New Procedures: Consultation Response* (April 2002), para.4.*e.g.* in Ontario: *Cotter v Levy* (S.C.J., March 24, 2000) (allegations that defendants caused and continued fire that consumed stored plastic waste materials and which allegedly caused poisonous smoke plume, causing property damage and personal injury; one sub-class was designated as a group of jail inmates, for whom a particular common issue was whether there was an obligation to evacuate them; another sub-class of persons allegedly suffered pure economic loss only). Also: *Bendall v McGhan Medical Corp* (1994), 106 D.L.R. (4th) 339, 14 O.R. (3d) 734, Gen Div, para.71 (different sub-classes, dependent upon manufacturer of breast implants).

118. For further elucidation of the matters discussed herein, see: R. Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) ch.4, pp.77-94Also see Kell, n.38 above, p.97.

119. r.19.6 was inserted by the Civil Procedure (Amendment) Rules 2000, SI 2000/221, r.9, sch.2.[1985] 1 W.L.R. 1214, Ch 1220-1221, and discussed by J. Winter, "Acting for Classes: Strategies for Representing Group Interests" (1993) 44 *Northern Ireland Legal Q.* 276 at pp.286-287.

120. See r.10 of the Rules of Procedure scheduled to the Supreme Court of Judicature Act 1873 (Eng.) 36 and 37 Vic. c.66, later reproduced almost precisely in RSC 1883, Ord.16, r.9, and then replaced by RSC 1965, Ord.15, r.12.*Independiente,* n.1 above, at [35].

121. *Independiente,* n.1 above at [21].*ibid.* , at [37].

122. Previously the rule required "numerous persons".*ibid.* , [32].

123. r.19.6(1) reads: "Where more than one person has the same interest in a claim (a) the claim may be begun; or (b) the court may order that the claim be continued by or against one or more of the persons who have the same interest as representatives of any other persons who have that interest." Small changes of wording between earlier and later versions of the rule have not had significant effect. Note, *e.g.* : *National Bank of Greece SA v RM Outhwaite 317 Syndicate at Lloyds* Q.B. (January 16, 2001) at [30].See n.7 above, p.1039.

124. *e.g. Duke of Bedford v Ellis* [1901] A.C. 1, HL; *Taff Vale Railway Co v Amalgamated Society of Railway Servants* [1901] A.C. 426, HL at 443 (Lord Lindley).[1970] Ch. 345, 371-372.

125. [1910] 2 K.B. 1021, CA.*Independiente,* n.1 above, at [32].

126. Vaughan Williams and Fletcher Moulton L.JJ., Buckley L.J. dissenting.*ibid.* , at [37].

127. *Markt,* n.7 above at 1035.[2005] EWHC 552 (QB).

128. *Duke of Bedford* [1901] A.C. 1, HL at 8.Master Foster, November 9, 2004.

129. *e.g. Smith v Cardiff Corp.* [1954] 1 Q.B. 210, CA at 220-221; *John v Rees* [1970] Ch. 345 at 373; *Bollinger SA v Goldwell Ltd* [1971] F.S.R. 405, Ch. at 408; *Prudential Ass Co Ltd v Newman Industries Ltd* [1981] Ch. 229 at 245; *CBS Songs Ltd v Amstrad Consumer Electronics plc* [1987] R.P.C. 429, Ch. at 444-445, and on appeals: [1988] Ch. 61, CA at 85; *Pan Atlantic Insurance Co Ltd v Pine Top Ins Co Ltd* [1988] 2 Lloyd's Rep. 505, QB at 509, and on appeal: [1989] 1 Lloyd's Rep. 568, CA at 571; *Haarhaus & Co GmbH v Law Debenture Trust Corp* [1988] B.C.L.C. 640, QB at 647.*ibid.*

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, at [26].

130. *Independiente,* n.1 above at [22].*e.g.* C.P.A. (Ont), s.9, provides that: “Any member of a class involved in a class proceeding may opt out of the proceeding in the manner and within the time specified in the certification order.”

131. N.J. Williams, *Consumer Class Actions in Canada* (Consumers' Assn of Canada, Toronto, 1974) at p.13; K. Uff, “Class, Representative and Shareholders' Derivative Actions in English Law” (1986) 5 C.J.Q. 50 at p.52.*Lopez v Star World Enterprises Pty Ltd,* F.C.A. (April 18, 1997) 1.

132. Ontario Law Reform Commission, *Report on Class Actions* (1982) (OLRC Report), pp.19-20; J. Seymour, “Representative Procedures and the Future of Multi-Party Actions” (1999) 62 M.L.R. 564 at pp.569-70, and by the same author: “*Independiente Ltd v Music Trading On-Line (HK) Ltd* : A Little Knowledge is a Dangerous Thing?” (2005) 22 C.J.Q. 16 at pp.17-18, 22.Note, “Class Actions and Access to Justice” [1979] N.L.J. 870 at p.870.

133. J.A. Jolowicz, “Representative Actions, Class Actions and Damages--A Compromise Solution?” (1980) 39 C.L.J. 237 at pp.238-239; D Kell ‘Evolution of Representative Actions' (1993) 3 L.M.C.L.Q. 306 at p.307.Kell, n.73 above, p.534.

134. *e.g.* Law Society Civil Litigation Committee, *Group Actions Made Easier* (1995), at para.3.1; *OLRC Report,* p.19; R.H.S. Tur, “Litigation and the Consumer Interest: The Class Action and Beyond” (1982) 2 L.S. 135 at p.154; J. Jacob, “Safeguarding the Public Interest in English Civil Proceedings” (1982) 1 C.J.Q. 312 at p.345; H.P. Glenn, “The Dilemma of Class Action Reform” (1986) 6 O.J.L.S. 262 at pp.264-265; R. Campbell and W. Morrison, “Class Actions” (1987) 84 L.S.G. 2585 at p.2585; K. Uff, “Recent Developments in Representative Actions” (1987) 6 C.J.Q. 15 at p.18; A. Lockley, “Regulating Group Actions” [1989] N.L.J. 798 at p.799; S. Hedley, “Group Personal Injury Litigation and Public Opinion” (1994) 14 L.S. 70 at p.75; M. Day, P. Baker and G. McCool, *Multi-Party Actions: Practitioners' Guide to Pursuing Group Claims* (Legal Action Group, London, 1995), pp.11-12; G.R. Hickinbottom, “Multi-Party Actions in England and Scotland” [1995] *Litigator* 190 at p.192; N. Armstrong and A. Tucker, “Class Struggles” [1996] *J. of Personal Injury Litigation* 94 at p.96; M. Laughton, “More Group Actions in the UK?” [1997] *Intl. Commercial Litigation* 39 at p.39; A. Lindley, “Group Actions” [1997] *Information and Technology Law* 177 at p.179; M. Irvine, “Class Actions” [1998] *Intl. Insurance L. Rev.* 257 at p.257; G. Carney and E. Morony, “Class Actions” [2002] *Global Counsel* 59 at p.62.*e.g.* F.C.A. (Aus), s.33ZF(1), provides that: “In any proceeding (including an appeal) conducted under this Part, the Court may, of its own motion or on application by a party or a group member, make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding.”

135. *Markt,* n.7 above, p.1040 (Fletcher Moulton L.J.); also: Evershed M.R. in *Smith v Cardiff Corp.* [1954] 1 Q.B. 210, CA at 222.For other relevant papers and discussion, see C. Hodges, *Multi-Party Actions* (OUP, Oxford, 2001), para.2.20.

136. Uff, n.32 above, p.55.*Report of the Review Body on Civil Justice (Hodgson Report)* (Cm 394, 1988), para.270.

137. D. Kell, “Renewed Life for the Representative Action” (1995) 13 *Australian Bar Rev.* 95 at p.95.National Consumer Council, *Group Actions: Learning from Opren* (1989). For commentary, see: Howells, n.94 above, p.615.

138. C. Harlow and R. Rawlings, *Pressure Through Law* (Routledge, London, 1992), p.127.Supreme Court Practice Committee, *Guide for Use in Group Actions* (1991).

139. *Esanda Finance Corp. Ltd v Carnie* (1992) 29 N.S.W.L.R. 382, CA at 395 (Kirby P.).Law Society Civil Litigation Committee, *Group Actions Made Easier* (1995), which proposed a rule of 14 parts.

140. *Prudential Ass Co Ltd v Newman Industries Ltd* [1981] Ch. 229 at pp.254, 255.LCD, *Proposed New Procedures for Multi-Party Situations: Consultation Paper* (1997), proposing a regime for “multi-party situations” (MPSs) which Lord Woolf had envisaged in *Woolf Final Report,* Ch.17, para.15(a). In *Access to Justice: Draft Civil Procedure Rules* (1996), Lord Woolf did not present a draft of rules for group litigation, but foreshadowed that these would be forthcoming from the LCD after appropriate consultation.

141. *Markt,* n.7 above, p.1040 (Fletcher Moulton L.J.), p.1030 (Vaughan Williams L.J.).Contained in Pt 19.III, rr.19.10-19.15

142. *Consorzio del Prosciutto di Parma v Marks & Spencer plc* [1990] F.S.R. 530, Ch., affirmed: [1991] R.P.C. 351,

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(Cite as:)

CA.See Mulheron, n.11 above.

143. *Markt,* n.7 above, pp.1040-1041.LCD, *Representative Claims: ProposedNew Procedures: Consultation Paper* (2001).Mildred, n.17 above, p.378, notes that debate in England has been largely driven by practitioners, legislative committees, and the LCD, and that the Law Commission has declined to consider reform of multi-party procedures.

144. See, especially, Buckley L.J. at *ibid.* , p.1045 ("the plaintiff must be in a position to claim some relief which is common to all, but it is no objection that he claims also relief personal to himself"), and similar comments in Uff, n.32 above, p.53.LCD, *Consultation Response* (2002), para.4.

145. J.G. Fleming, "Mass Torts" (1994) 42 *American J. of Comparative Law* 507 at p.523. Also: Ryan J., writing extra-curially, in "Development of Representative Proceedings in the Federal Court" (1994) 11 *Australian Bar Rev.* 131 at p.132; Armstrong and Tucker, n.35 above, p.96; I.J. Jacob, "Access to Justice in England" in M. Cappelletti and B. Garth (eds), *Access to Justice: A World Survey* (Siftoff and Noordoft, London, 1978) vol.1, p.470.LCD, *Consultation Paper* (2001), para.13.

146. *e.g. Temperton v Russell* [1893] 1 Q.B. 435, CA; *Lord Aberconway v Whetnall* (1918) 87 L.J. Ch. 524, CA.LCD, *Consultation Response* (April 2002), "Conclusions", para.10.

147. *Prudential,* n.41 above, p.255.Discussed in greater detail in Mulheron, n.19 above, pp.38-42.

148. *Dillon v Charter Travel Co Ltd* (1988) A.T.P.R. at para.40-872 (SCNSW).*Productivity and Enterprise--A World Class Competition Regime, Government's Response to Consultation* (White Paper, December 2001) 26.

149. *e.g. Lord Aberconway v Whetnall* (1918) 87 L.J. Ch. 524; *Smith v Cardiff Corp.* [1954] 1 Q.B. 210, CA at 220-221; *Pan Atlantic Insurance Co Ltd v Pine Top Ins Co Ltd* [1989] 1 Lloyd's Rep. 568, CA at 571; *Haarhaus & Co GmbH v Law Debenture Trust Corp.* [1988] B.C.L.C. 640, QB at 647; *Drozdowski v Watch Tower Bible & Tract Society of Pennsylvania,* C.A. (December 4, 1997).Principally arising from EU Employment Directive 2000/78 [2000] L303/16, EC Late Payment Directive 2000/35 [2000] O.J. L200/35, EC Injunctions Directive 98/27 [1988] O.J. L166/51 on injunctions for the protection of consumers' interests. For further detail, see C. Hodges, n.36 (2nd ser.) above, paras 9.09-9.26; also referred to in LCD, *Consultation Paper* (2001), paras 7-10, endnote 4 and Annexure D, para.6; and in the *Consultation Response* (2002), "Conclusions", paras 8, 9.

150. *e.g. Payne v Young* (1981) 145 C.L.R. 609, HCA (Ord.16, r.1 of the High Court Rules); *Naken v General Motors of Canada Ltd* [1983] S.C.R. 72, 144 D.L.R. (3d) 385 (r.75 Supreme Court of Ontario Rules of Practice); *Dillon,* n.49 above (F.C.R. Ord.6, r.13(1)); *Kerrigan and Meat Industry Employees Superannuation Fund Pty Ltd v Dawson* (Vic. S.C., December 17, 1992) (Ord.18, r.2 Rules of Supreme Court (Vic.)); *Cameron v National Mutual Life Association of Australasia Ltd* [1992] 1 Qd.R. 133 (Full Ct S.C.) (Ord.3, r.10 Rules of the Supreme Court (Qld.)).[1910] 2 K.B. 1021, CA.

151. [1981] Ch. 229.Woolf Final Report, Ch.17, para.2.

152. *ibid.* , p.255 (emphasis added).*Ibid.,* Ch.17, para.7.

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EXHIBIT 49

Neutral Citation Number : [2003] EWHC 470 (Ch)

Independiente Ltd and Others v Music Trading On-Line (HK) Ltd and Others

Case No: HC 02C02413

High Court of Justice Chancery Division

Vice-Chancellor

Thursday 13th March, 2003, Hearing date : 4th March 2003.

Representation

- Mr. Henry Carr QC and Mr. Mark Vanhegan (instructed by Wiggin & Co) for the Claimants.
- Mr. Jeffery Onions QC and Mr. Philip Roberts (instructed by Messrs Nicholson Graham & Jones) for the First to Third and Fifth Defendants.

JUDGMENT

Introduction

1. The claimants are the owners or the exclusive licensees of the UK copyright in various sound recordings. The fifth defendant ("Mr Robinson") is a substantial shareholder in the second defendant ("BVI"), the beneficial owner of the shares in the third defendant ("UPI") and a director of the first defendant ("HK") and of UPI. The first defendant ("HK") is a wholly owned subsidiary of BVI. (Proceedings against the fourth defendant have been discontinued.)

2. Since early 2000 the defendants or one of them have operated a website at www.cd-wow.com in the **trading** name CD-WOW at which they advertise for sale a large number of CDs containing sound recordings of well known popular artists. Orders placed on that website are supplied by HK with CDs from Hong Kong. Such CDs are genuine in that they were made and released on the market outside the European Economic Area with the knowledge and approval of the owners of the UK copyright or their exclusive licensees.

3. On 23rd August 2002 the claim form in these proceedings was issued by the claimants seeking an injunction, damages or an account of profits and delivery up of infringing copies. The claim is made in relation to CDs embodying sound recordings in which they own or are the exclusive licensees of the UK copyright which had been released on the market outside EEA and subsequently supplied by HK to buyers in the UK. The infringements relied on are the importation of such CDs into the United Kingdom and their subsequent possession in the course of business and issue to the public as provided in ss.18, 22 and 23 Copyright, Designs and Patents Act 1988 ("CDPA"). The claim form states that the claimants are

"suing on behalf of themselves and for and as representing all other members of the British Phonographic Industry Ltd ["BPI"] and Phonographic Performance Ltd ["PPL"]". In the particulars of claim served the same day it is alleged that the claimants are members of BPI and/or PPL and sue on behalf of all other members whose names are set out in Schedule 1 thereto. It is claimed that nearly all sound recordings produced in the UK are produced, manufactured or distributed by such members each of whom is a qualifying person for the purposes of s.154 CDPA.

4. In response to an objection made by solicitors for the defendants, by a letter dated 4th October 2002 the claimants' solicitors indicated that the represent-

ative claim would be limited to those members of BPI and PPL as are “owners and/or exclusive licensees of UK sound recordings”. The defendants were not satisfied with this assurance and on 23rd December 2002 issued the first of the applications now before me seeking an order in accordance with CPR Rule 19.6(2) preventing the claimants from acting in the representative capacity claimed on the grounds that (1) the claimants have not demonstrated that they are authorised by the persons they claim to represent to bring the action as presently constituted and (2) they do not have the same interest as those persons.

5. Following further correspondence between the parties' respective solicitors the second application now before me was issued by the claimants on 5th February 2003. By that application the claimants seek, amongst other things, to add as the sixth and seventh claimants Sony **Music** Entertainment (UK) Ltd and Sony **Music** Entertainment Inc, and to amend the particulars of claim. If permission to amend as sought is granted then the title to the claim will still aver that the first six claimants “sue on behalf of themselves and for and as representing all other members of [BPI and PPL]”. Paragraphs 3 to 7 will be in the following terms:

3.The First to Sixth Claimants are and have at all material times been members of the British Phonographic Industry Limited (“the BPI”) and/or Phonographic Performance Limited (“PPL”). The BPI is a company limited by guarantee established (amongst other things) to represent the interests and to protect the rights of its members and, in particular, the sound recording copyrights owned by or exclusively licensed to its members together with the rights in performances owned by such members. PPL is a company limited by guarantee. Its objects include (among other things) the power to authorise the BPI to take action in the interest of any member or members of PPL with a view to protecting the interests or rights of any member or members of PPL with particular regard to infringement of copyright in sound recordings. The members of the BPI have given it a mandate to authorize third parties to act on their behalf to prosecute proceedings in the High Court. The BPI has authorized the First to Sixth Claimants on behalf of its members and on behalf of the members of the PPL to commence and prosecute these proceedings.

3A.The Seventh Claimant is incorporated under the laws of the State of Delaware and is (along with the Sixth Claimant) a company within the Sony Group of companies.

4.The First to Sixth Claimants each sue on their own behalf and for and on behalf of and as representing all other members of the BPI and PPL that own or are the exclusive licensees of United Kingdom sound recording copyrights. (“the Relevant Members”).

5.The Relevant Membersmembers of the BPI and PPL are continually and frequently producing, manufacturing and/or distributing records embodying new sound recordings, and nearly all reproductions of sound recordings (namely compact discs, vinyl records and cassette tapes) that are produced, made or distributed within the United Kingdom are produced, manufactured and/or distributed by the Relevant Membersmembers of the BPI and/or PPL.

6.The Relevant Membermember of the BPI and/or PPL responsible for the making of each sound recording owns the United Kingdom sound recording copyright therein or is the exclusive licensee thereof. Lists of the current members of the:

- BPI that are Relevant Members are set out in Schedule 1 annexed hereto; and
- PPL that are Relevant Members but not also members of the BPI are set out in Schedule 1A annexed hereto.

7.Each of the Relevant Membersmembers of the

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BPI and PPL is and has at all material times been a qualifying person within the meaning of section 154 of the 1988 Act.

6. CPR Rule 19.6, so far as relevant, provides that (1)Where more than one person has the same interest in a claim —(a)the claim may be begun; or(b)the court may order that the claim be continued,by or against one or more of the persons who have the same interest as representatives of any other persons who have that interest.(2)The court may direct that a person may not act as a representative.(3)Any party may apply to the court for an order under paragraph (2).(4)Unless the court otherwise directs any judgment or order given in a claim in which a party is acting as a representative under this rule —(a)is binding on all persons represented in the claim; but(b)may only be enforced by or against a person who is not a party to the claim with the permission of the court.

7. The issues for my determination are (1) whether the claim comes within the provisions of CPR Rule 19.6(1), and if so (2) whether I should make a direction under Rule 19.6(2) that the claimants may not act as representatives. The extent to which I should grant permission to amend the particulars of claim or make the further directions sought depend on my answers to those questions.

The Facts

8. BPI was incorporated in 1972. The objects for which it was established include:

- [(a)…]
- (b)to promote and protect the welfare and interest of the British record industry and in this respect to take such action on behalf of its members or individual members of the Association as may be considered necessary;
- [(c) to (j)]
- (k)to make representations and to institute and to prosecute and defend proceedings before the Copyright Tribunal and any other Court or Tribunal; and
- (l)to do all such other things as are incidental or conducive to the attainment of the above objects or any of them."

9. An aspiring member is required to sign an application form. It summarises the objects of BPI and contains an acknowledgement that if the application is accepted the applicant agrees to abide by the rules and regulations of BPI as contained in its memorandum and articles of association or otherwise decided on by the Council of Management of BPI. The Articles of Association, adopted on 22nd September 1999, contain the usual provisions for regulating the conduct of a company's business through a board of directors. It was submitted by counsel for the claimants that the operation of the objects clause of the memorandum of association and the application form signed by all members conferred on BPI, without more, the authority to institute proceedings in the name or on behalf of a member. I do not agree. The memorandum confers on BPI the corporate ability to sue on behalf of others. The member acknowledges that that is so. Such acknowledgement does not, without more, authorise BPI to institute any particular action in the name or on behalf of a member.

10. PPL adopted a new memorandum of association in June 1996. By clause 4 it is empowered to enforce on behalf of its members or third parties, being producers of sound recordings, the performing rights and dubbing rights arising under the Copyright Acts 1911, 1956 and CDPA and for that purpose to take assignments and other assurances of performers' rights from its members and others. On

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14th November 2001 PPL adopted new articles of association. Art.1 defined "Dubbing Right", "Performing Right" and "Sound Recordings" by reference to the relevant provisions of CDPA and Copyright Acts 1911 and 1956. Art.7 provides that every member grants to PPL

"acting by itself or through duly authorised agents for and during the period of his membership …[(i)authority to collect fees and to sue for infringement of Performing or Dubbing Rights.](ii)the power and authority, to the extent the directors deem necessary, to protect generally the Member's interests in the Sound Recordings.[(iii) and (iv)](v)the power and authority to authorise any person, body, organisation acting on behalf of copyright owners or performers (or any of them) as and on such terms as the Directors may deem necessary or expedient to institute or prosecute proceedings before any court, tribunal or other body and to take any other action or steps on behalf of the Company and/or any member or members and/or in the interests (directly or indirectly) of any Member or Members or performers designed or intended or undertaken to prevent or discourage the piracy or counterfeiting of, or the infringement of the copyright in, Sound Recordings provided always that neither the Company nor any other person, body or organisation so authorised by the Company shall be under any obligation to take any such action on behalf of any individual Member or Members or performer."

11. The nature of the business carried on by the various defendants is described in the first witness statement of Mr Robinson and the defences of those defendants. CD-WOW is an internet business involving the sourcing and sale of, primarily, current UK Top 75 chart CDs together with new releases and old favourites. They are made available for sale to the public on the website at www.cd-wow.com and elsewhere. That domain name was originally registered in the name of UPI, transferred to HK on 30th November 2000 and to BVI on 22nd June 2001. A person placing an order on the website contracts with HK. CDs so ordered are posted in HK addressed to the customer. Replacements are supplied in the same manner but faulty or unwanted CDs are returned to an address in the UK until sufficient quantities have accumulated to make their return to Hong Kong economic. The conditions of sale prescribe that property in the goods passes on delivery.

12. The operation of the website came to the attention of BPI shortly after the business commenced. Their then solicitors, Hamlins, wrote to UPI on 5th April 2000 expressing concern at the allegedly illegal parallel importation of CDs from South East Asia by UPI. They sought suitable undertakings. That round of correspondence came to an end on 23rd May 2000. On 27th November 2000 Hamlins wrote again to the solicitors for UPI asking for further information. That exchange came to an end with a letter dated 24th January 2001 from the solicitors for UPI to Hamlins.

13. On 11th March 2002 an agreement between PPL and BPI was executed. Clause 2 provided, so far as relevant, that

"PPL will mandate the BPI through its Anti-Piracy Unit ("the APU") to act on behalf of all PPL members ….

….

PPL will use its reasonable endeavours to procure that individual members execute such additional deeds or documents as may reasonably be required to confirm or support BPI's authority to act for the purposes of any court or other proceedings."

14. On 29th May 2002 Wiggin & Co wrote a letter before action to HK, the solicitors previously acting for UPI, and the directors of HK. They stated that they had been instructed by BPI "and for this purpose we are also instructed on behalf of the members of BPI". That and other allegations were challenged by the solicitors for HK, UPI and the directors personally in subsequent correspondence. On

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21st August 2002 the chairman and chief executive of PPL wrote to the Director-General of BPI referring to proposed proceedings against HK, BVI, UPI and Mr Robinson. He wrote:

“In accordance with our agreement with you dated 11th March 2002 I write to confirm that the BPI is mandated to act on behalf of PPL in the Proceedings to the extent permitted by the Memorandum and Articles of PPL.”

15. As I have already indicated the claim form with particulars of claim was issued by the five claimants on 23rd August 2002. They claimed the representative capacity, qualified by the letter of 4th October 2002, to which I have referred. The defences of the various defendants were served in October or November 2002 and claim, amongst other things, that the claimants are not entitled to sue in the representative capacity claimed. This led to a letter dated 3rd February 2003 from the Director-General of BPI to each of the claimants stating that:

“I am writing to you formally to confirm our previous discussions concerning the above proceedings and to confirm your authority to bring these proceedings as claimant for and on behalf of the relevant members of BPI and PPL, namely those who own or are exclusive licensees of United Kingdom sound recording copyright.

The claim is brought by you for your own benefit and for and on behalf of all relevant members of BPI and PPL. I confirm that the claimants in the action remain ultimately responsible for costs in the proceedings but that the BPI will instruct solicitors to act on your behalf and will pay the costs incurred by those solicitors. The claim includes a claim for damages and/or an account of profits. You have agreed that any such monies recovered shall be accounted by you to BPI.” The writer then explained the basis for the representative nature of the proceedings by reference to the Memorandum and Articles of both BPI and PPL, the agreement of 11th March 2002 and the letter of 21st August 2002 which I have already quoted. The writer concluded:

“Please therefore accept this letter as formal confirmation of your authority to bring these representative proceedings for and on behalf of the members of BPI and PPL who are owners of United Kingdom sound recording copyrights and/or exclusive licensees thereof.”

16. Counsel for the defendants now accept that a representative claimant may sue in a representative capacity without the authority of those he claims to represent provided only that the claim satisfies the conditions prescribed by CPR Rule 19.6.(1). Accordingly the relevance of the issue of authority has been reduced if not extinguished altogether. Nevertheless and notwithstanding the submissions of counsel for the claimants to the contrary I do not accept that the individual claimants had actual authority from the members of either PPL or BPI to commence these proceedings on their behalf. In the case of the members of PPL both the agreement of 11th March 2002 and the letter of 21st August 2002 purported to do no more than mandate BPI. PPL did not purport to mandate the claimants and had no authority from its members to confer the benefit of their pecuniary remedies on BPI. Nor, for the reasons I have given in paragraph 9 above, did BPI have the authority of its members to sue on their behalf or to authorise the individual claimants to do so either.

The issues in the action

17. The applicability of CPR Rule 19.6 depends, in part, on the nature of the issues raised by the particulars of claim. I will describe them by reference to the proposed amended particulars of claim. I have already quoted paragraphs 3 to 7 dealing with the representative nature of the claim. Paragraph 8 alleges that the individual claimants are the owners of the copyright in eight specific sound recordings therein specified. Paragraph 9 alleges that each of those eight sound recordings has been issued to the public bearing labels or other marks sufficient to attract the presumptions as to the subsistence and ownership of the copyright prescribed by s.105 CDPA. Thus the subsistence and ownership of the

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copyright will not be in issue unless the defendants seek to displace the presumption.

18. Paragraphs 10 to 24 contain the relevant allegations concerning the defendants, the existence and mode of operation of the CD-WOW site and the terms and manner on and in which CDs are supplied to those who order them. It is only necessary specifically to mention paragraph 15 in which it is alleged that

"The CD-WOW site advertises for sale a large number of CDs containing sound recordings by well-known popular artists, the United Kingdom sound recording copyright in all or most of which is owned by or exclusively licensed to Relevant Members of BPI." In that context there is no specific allegation of issue to the public with the labels or other marks referred to in s.105 CDPA. If an implication to that effect is not enough then the allegation could be simply introduced by amendment.

19. Paragraphs 25 to 50 contain allegations relevant to the alleged infringements and the role played therein by the respective defendants. In each case the allegations of infringement are made expressly in relation to "sound recordings the United Kingdom sound recording copyright in each of which is owned by or exclusively licensed to one or more of the Relevant Members" (See paragraphs 25.1 and 37). It is true that the particulars relied on, set out in schedules 3 and 4, deal only with one or more of the eight specific sound recordings, but those are stated to be the best particulars available until after disclosure and the provision of further information. The point is clearly made in paragraph 50 in which it is stated that

"The Claimants do not at present know of all the acts of primary and secondary infringements of the Claimants and the other Relevant Members United Kingdom sound recording copyrights committed by the Defendants and each of them, but will at the trial of this Claim seek to rely upon and seek relief in respect of each and every such act." The remaining paragraphs contain the usual allegations to justify the grant of injunctions and the award of damages, including additional damages under s.97(2) CDPA.

20. It is clear, therefore, that the claimants sue and seek relief in respect of the infringement of the United Kingdom copyright in sound recordings owned by or exclusively licensed to any individual claimant or any Relevant Member, as defined in paragraph 4.

Right to represent

21. The right of a claimant to represent another person in the sense of suing on his behalf arises if, in the terms of CPR Rule 19.6, both have "the same interest in [the] claim". The requirement that both should have "the same interest" is the same as that previously contained in RSC Ord 15 r.12. It is common ground that the general principles applicable under the old rule are also applicable under the new. In that connection it is helpful to refer to two authorities.

22. The first is Duke of Bedford v Ellis [1901] AC 1. Ellis and five others sued on behalf of themselves and all other growers of fruit, flowers, vegetables, roots or herbs within the meaning of the Covent Garden Act 1828 to enforce rights conferred on them by that Act against the Duke of Bedford as the owner of the market in which they were exercisable. The Duke of Bedford applied to strike out the writ. He was successful before Romer J. The Court of Appeal discharged that order on the undertaking of the plaintiffs to join the Attorney-General as a defendant. The Duke of Bedford appealed to the House of Lords. His appeal was dismissed. Lord Macnaghten referred to the argument to the effect that the rule only applied to claims to some beneficial right of property and said (p.8):

"But it seems to me that there is no reason whatever for so restricting the rule, which was only meant to apply the practice of the Court of Chancery to all divisions of the High Court. The old rule in the Court of Chancery was very simple and perfectly well understood. Under the old practice the Court

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required the presence of all parties interested in the matter in suit, in order that a final end might be made of the controversy. But when the parties were so numerous that you could never "come at justice", to use an expression in one of the older cases, if everybody interested was made a party, the rule was not allowed to stand in the way. It was originally a rule of convenience: for the sake of convenience it was relaxed. Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent. To limit the rule to persons having a beneficial proprietary interest would be opposed to precedent, and not, I think, in accordance with common sense."

23. In John v Rees [1970] 1 Ch.345, 370 Megarry J, having quoted the same passage, commented that the rule is to be treated as being not a rigid matter of principle but a flexible tool of convenience in the administration of justice. The provisions of the civil procedure rules, particularly CPR Rule 1.2, emphasise the need to interpret the phrase "the same interest" and to apply the provisions of CPR Rule 19.6 both flexibly and in conformity with the overriding objective. Accordingly there are three questions: do the individual claimants on the one hand and the Relevant Members as defined on the other have (1) a common interest, (2) a common grievance and (3) is the relief sought by the claimants in its nature beneficial to the Relevant Members? Counsel for the defendants submits that the answer to each of those questions is in the negative.

24. With regard to the question of common interest counsel for the defendants points out that neither PPL nor BPI has asked any of their members if they wish to complain about the operation of the CD-WOW website nor is there any evidence to suggest that they do. He suggests that the only interest or grievance is that of PPL and BPI but points out that neither of them could have any cause of action in the absence of an assignment of copyright in their favour. He submits that the amended paragraphs 3 to 7 of the particulars of claim do not cure the problem of interest because the Relevant Members are competitors in the global market place for sound recordings and the class of Relevant Member fluctuates from day to day.

25. With regard to the second question counsel for the defendants contends that there is no evidence that any of the Relevant Members are in fact aggrieved by the activities of the defendants. The alleged infringements arise from the parallel importation of genuine CDs not counterfeit goods. He accepts that it may be inferred that all Relevant Members would wish to suppress counterfeit goods (EMI v Riley [1981] 1 WLR 923) but submits that no such inference can be drawn in the case of parallel importation.

26. With regard to the benefits to be derived by the Relevant Members from the relief sought counsel for the defendants contends that the injunctions go beyond what the court will grant, as demonstrated by Scott J in Columbia Picture Industries v Robinson [1986] FSR 367. He relies on the letter dated 4th October 2002 from BPI to the individual claimants pointing out that any sums recovered in the action are to be accounted for to BPI as showing that they will derive no benefit from the claim to damages either.

27. I do not accept these submissions. The common interest arises from the fact that the claim as pleaded is made in respect of the UK copyright in a sound recording to which any Relevant Member is entitled as owner or exclusive licensee. The common grievance arises from the facts pleaded regarding the operation of the CD-WOW site. There is at least a threat to supply a CD embodying a sound recording to which a Relevant Member is so entitled in response to an order placed on the website. The question whether that method of supply constitutes an infringement of the UK copyright in the sound recording is common to all Relevant Members because the same method is used for all supplies. Unless and to the extent that the defendants seek to put in issue the subsistence or ownership of the UK

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copyright contrary to the presumptions for which s.105 CDPA provides or the consent of a Relevant Member to the acts complained of the issues of fact and law will be identical however many sound recordings or Relevant Members are involved. It would be absurd and contrary to the propositions expressed by Megarry J in John v Rees and CPR Rule 1 if there had to be a separate claim in respect of each Relevant Member at least until it is seen if the issues in relation to that Relevant Member are substantially different from those relating to the generality of the Relevant Members.

28. The relevant relief is injunctive or pecuniary. As far as pecuniary relief is concerned it is in its nature equally beneficial to Relevant Members as to the individual claimants. What they do with any money recovered in the action is a matter for them, not the defendants. The letter of 4th October 2002 from BPI to the claimants is not of itself binding on the claimants, let alone any Relevant Members. If the Relevant Members are content that the money should go to BPI that is a matter for them. Their wishes in that regard do not prevent the pecuniary relief being in its nature equally beneficial to all.

29. In Columbia Picture Industries v Robinson [1986] FSR 367, 430 Scott J pointed out that the injunction sought by the plaintiffs was of very great breadth because it aimed to restrain the defendants from knowingly infringing copyright in any film for the time being belonging to the plaintiffs or of which they were exclusive licensees. He considered that it would be wrong in principle to grant an injunction the scope of which the defendants could not know and could not discover. That proposition, which is not challenged, was stated in relation to films of which the copyright was regulated by the Copyright Act 1956. But, as counsel for the claimants points out, there was no provision in the Copyright Act 1956 for presumptions as to the subsistence of copyright and its ownership to arise from labels or marks fixed to films. In a case to which s.105 CDPA applies the use of the requisite labels or marks gives rise to a presumption of ownership readily apparent to the defendants. In any event, as counsel for the claimants pointed out, Scott J did grant injunctions in relation to copyrights to which it had been established in the action that existing members were entitled. Given the presumptions prescribed in s.105 CDPA I see no reason why it should be assumed now that Relevant Members cannot benefit from the injunctive relief sought by the claimants.

30. For these reasons I conclude that the claimants and the Relevant Members, as defined in the particulars of claim, all have the same interest in the claim. My conclusion is supported by the views of Sir Denys Buckley expressed, obiter, in CBS v Amstrad [1988] 1 Ch.61. In that case Amstrad sold recording machines with which a sound recording on one tape might be duplicated onto another, blank, tape. The plaintiff, CBS, was the owner or exclusive licensee of a substantial number of sound recording copyrights. It sued for injunctions to restrain the sale of such machines without taking such precautions as might be necessary to protect the copyrights of which it or any member of the BPI was the owner or exclusive licensee. The basis of the claim was the unlawful incitement of the public to commit offences under s.21(3) Copyright Act 1956. The majority of the Court of Appeal concluded that such unlawful activity could not give rise to a civil claim and struck it out.

31. Sir Denys Buckley took the contrary view. Consequently he, unlike the other two members of the court, had to consider whether CBS could sue in respect of copyrights owned or licensed to members of BPI. He referred to the speech of Lord Macnaghten in Duke of Bedford v Ellis and continued:

“Similarly, in the instant case the plaintiffs, and all the persons whom they purport to represent, have statutory rights under the Copyright Act 1956, which the action is designed to protect from infringement resulting from the conduct of the defendants which is complained of. They share, in my judgment, a common interest and a common griev-

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ance, such as Lord Macnaghten had in mind. The relief which is primarily claimed is injunctive in form which would benefit the plaintiffs and all whom they purport to represent in the same way, that is to say, by protecting them from the risk of infringements incited by the defendants.” In relation to the claim for damages he added (p.86):

“In the instant action, the claims of the plaintiffs and those of the persons whom they purport to represent, all have a common basis: damages are not the sole relief claimed and can, in my opinion, be regarded as a quite subsidiary form of relief, capable of being pursued by any individual claimant …”

32. It follows that in my judgment the claim is capable of being brought in a representative capacity because the claimants and the Relevant Members have the same interest in the claim. In their written argument counsel for the defendants emphasised that there was no evidence that either the claimants or PPL or BPI had the authority of the Relevant Members to bring these proceedings on their behalf. This is true as a matter of fact but it is irrelevant as a matter of law. Markt & Co Ltd v Knight Steamship Co.Ltd [1910] 2 KB 1021, 1039 and John v Rees [ibid] at p. 371. It appears to me that in cases falling within CPR Rule 19.6 the rule itself provides the authority of the person who is represented.

Should a direction be made under CPR Rule 19.6(2)?

33. Counsel for the defendants submits that if CPR Rule 19.6(1) does apply I should, nevertheless, make a direction under Rule 19.6(2) that the claimants may not act as representatives of the Relevant Members or any of them. Whether or not such a direction should be made is within the discretion of the court to be exercised in accordance with the overriding objective.

34. The defendants rely on a letter from the solicitors for the claimants dated 20th November 2002 in which they indicate that they expect documents produced on disclosure to reveal the extent of the defendants' allegedly infringing activities. By a request for further information served on 5th February 2003 the claimants seek details of the CDs purchased by the defendants for resale through the CD-WOW site including titles, quantities and whether or not such CDs had been put into circulation in EEA by or with the consent of the owner or exclusive licensee of the UK copyright. In these circumstances the defendants claim that the fair trial of the issues between them and the individual claimants will be made longer and more expensive if the court permits the claimants to sue in the representative capacity they claim.

35. The defendants also maintain that even if the Relevant Members and the individual claimants have a common grievance because each of their copyrights will have been infringed by the same course of the defendant's dealing it should not be assumed that all Relevant Members wish to sue. It is not, the defendants submit, self-evident that the owner of the UK copyright in a sound recording who has consented to that sound recording being put on the market outside EEA wishes to protect his position in the market in EEA by preventing parallel imports.

36. The defendants rely on the decision of Hirst J in Haarhaus v Law Debenture Trust Corpn [1988] BCLC 640. In that case the plaintiffs brought an action on behalf of themselves and all other holders of promissory notes issued by a Nigerian Bank to restrain the defendant, the trustee of the noteholders trust deed, from publishing details as to the votes cast at a meeting of noteholders. Hirst J referred to the obvious conclusion that the figures themselves indicated such a difference of opinion as would preclude a common grievance and relief beneficial to all noteholders. In his discretion he ordered that the action might not be continued in a representative capacity. The defendants also draw attention to the course Laddie J took in Russell-Cooke Trust Co. v Elliott (26th March 2001 unreported). In that case

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the judge was concerned with the administration of certain investment schemes set up by a solicitor into whose practice the Law Society had intervened. Laddie J directed that a circular be sent to all investors to determine their views. It is suggested that I should do likewise in this case so that it may be determined whether or not Relevant Members do wish proceedings to be taken on their behalf to restrain parallel imports.

37. In my view it would not be right to make the direction sought under CPR Rule 19.6(2) or any lesser order requiring any questionnaire to be sent to Relevant Members. For the reasons I have already given I accept the submission of the defendants that these proceedings have not been specifically authorised by the Relevant Members. But I am not prepared to infer from that that the Relevant Members do not know of them. Nor in the absence of any evidence to that effect am I prepared to infer that any Relevant Member is content that the parallel importation of sound recordings in respect of which he is the owner or exclusive licensee of the UK copyright should continue. If he did then such parallel importation would cease to give rise to infringements of that copyright.

38. It is true that the representative element of the claim is likely to make the proceedings longer and more expensive than would be the case if they were confined to the claims of the individual claimants. But that is not the only comparison to be made. The other is to compare the aggregate time and cost involved if there were separate claims brought by these claimants and each and every Relevant Member. Plainly the saving of time and expense by permitting the representative element of the claim to be pursued in conjunction with the individual claims of the claimants is considerable. If the claim succeeds then the defendants can hardly complain. If it fails they will get their costs of the claim as a whole or of the representative part of it as the case may be.

39. As I have already pointed out the terms on which the proceedings are brought, as between PPL, BPI, the individual claimants or their solicitors on the one hand and the Relevant Members on the other are issues between them, not between them and the defendants. A Relevant Member will not be liable for any costs unless he has specifically authorised the proceedings brought on his behalf. Nor, as against him, will BPI be entitled to retain any damages or profits recovered from the defendants on his behalf unless he agrees.

Conclusion

40. For all these reasons I consider that the claim is properly brought by the individual claimants on behalf of the Relevant Members as defined in the particulars of claim as proposed to be amended as well as on their own behalf. Similarly I see no reason to make any order under CPR Rule 19.6(2). In those circumstances I dismiss the application of the defendants issued on 23rd December 2002. I will hear argument on any consequential issues as to costs and on the application of the claimants issued on 5th February 2003 for directions if and to the extent that it has not been resolved by agreement.

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EXHIBIT 50

Neutral Citation Number: [2005] EWHC 552 (QB)

David Roy Howells and James Kelly (On behalf of themselves and all other Members of the Hemel Hempstead Football & Sports Club) v The Dominion Insurance Company Limited

QB/2004/PTA/0757HQ99X02699

High Court of Justice Queens Bench Division

Mrs. Justice Cox DBE

7th April, 2005, Hearing dates: 14th February 2005

Representation

- Edward Knight (instructed by Elborne Mitchell, Solicitors, One America Square, Crosswall, London, EC3N 2PR) for the Claimants/Respondents.
- Nicholas Baldock (instructed by Sherrards, Solicitors, 45 Grosvenor Road, St. Albans, Hertfordshire, AL1 3AW) for the Defendants/Appellants.

JUDGMENT

1. This is an appeal by the Defendant insurance company (the Appellants) from the Order of Master Foster dated 6th November 2004, setting aside his previous Order of 14th April 2004, in which he had granted permission to the Appellants to enforce a judgment and a final costs certificate against certain named members of the Hemel Hempstead Football and Sports Club ("the Club"). The central issues raised, Master Foster having himself granted permission to appeal, are whether, as a matter of law, (a) the judgment and (b) the Costs Certificate can be enforced against named, individual members of the Club as an unincorporated association.

2.

The Relevant Background The following facts are not in dispute. The Club is and was at the material times an unincorporated members' club. The Club's football ground was hired out for school matches or local team fixtures; and various functions were held in the Club House. On payment of an annual membership fee, members of the Club were entitled to use the facilities (for example a bar, dance floor, pool table and darts board); and they enjoyed both the social aspects of the Club and the advantageous prices of the drinks available.

3. The Club Rules provided for the election of Officers and for the creation of a General or Management Committee. Rule 10 provided that:

"… the Committee as elected shall have the power to act for and on behalf of the Club in all contracts and … their decision in all matters shall be deemed final." There was provision in the Rules for Management Committee meetings, for minutes to be taken by the Secretary and for an Annual General Meeting of the membership. It appears that in around 1989 a Board of Directors was set up, in anticipation of the formation of a limited company, to which the assets of the Club would be transferred. However, the "company", although incorporated in June 1991, remained inactive and was eventually struck off the Register of Companies. The assets of the Club were never transferred to the company and the Club therefore continued to function at all times as an unincorporated members' Club.

4. On 8th June 1990 an insurance policy was taken out with the Appellants, which described the insured as "the Members for the time being of Hemel Hempstead Football and Sports Club". The proposal form was signed by Mr. Hamblin as Secretary of

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the Club and the insurance was in respect of various contingencies, including loss and damage arising as a result of fire. The policy was renewed on 8th June 1991 and again in 1992.

5. On 10th November 1992 a fire occurred at the Club, which severely damaged the Club premises and was the subject of a claim made on the Policy. The Appellants in response made interim payments to the Club, by cheque payments in December 1992 and January 1993, totalling £52,550. However, the Appellants then repudiated liability and sought to avoid the Policy on the grounds that there had been non-disclosure of material facts when the Policy was renewed in 1992, or alternatively misrepresentations or breach of warranty. The Appellants relied, in this respect, on the previous convictions for offences of dishonesty of a Mr. Evans who was, in June 1992, the General Manager of the Club.

6. On 11th June 1993 the then Chairman and Secretary of the Club (David **Howells** and James Kelly respectively) issued representative proceedings against the Appellants by way of Writ of Summons, in which the Claimants were described as “1. David **Howells** and 2. James Kelly (on behalf of themselves and all other members of the Hemel Hempstead Football and Sports Club)”. The Writ issued on behalf of all the Club members, as provided for then by the Rules of the Supreme Court Order 15, Rule 12, sought a declaration that the insurance policy was valid; and that the Club's claim on the policy arising from the fire damage should therefore be paid in full, in the sum of £367,305.79 plus interest.

7. The Appellants resisted the claim, asserting that they were entitled to avoid the Policy. They also counterclaimed against the Claimants, as representatives of the Club members as a whole, seeking return of the sum of £52,550, which had already been paid out.

8. In approximately September 1993 the litigation stalled, because insufficient funds were available to the Club to progress the claim. However, in the summer of 1997, a new Chairman, David Boggins, arrived on the scene and injected further cash into the Club. The Claimants' solicitors then served a Notice of Intention to Proceed in July 1997; and no changes were made at that time to the names of the Claimants, or to their description as representatives of all the members.

9. In 1999 the action subsequently came before Richard Fernyhough QC, sitting as a deputy judge of the Queen's Bench Division, and the trial lasted approximately four days, both sides being legally represented. On 24th November 1999 he upheld the Appellants' contentions and ordered that judgment be entered for the Appellants on both the claim and the counterclaim. The Claimants were ordered to pay to the Appellants the sum of £75,740; and, further, to pay to the Appellants the costs of the claim and counterclaim, to be assessed on the standard basis if not agreed. There was no appeal from this decision.

10. The costs were not agreed and a contested hearing took place before the Deputy Costs Judge on 24th April 2001, at which both parties were again legally represented. A final costs certificate was issued on 28th June 2001. Total costs were assessed in favour of the Appellants at £65,543.72 and, once again, there was no appeal from this costs decision.

11. The Appellants have received nothing in respect of either of these sums. There therefore remain due and outstanding to them both the judgment sum of £75,740, together with statutory interest from 24th November 1999, accruing at the relevant daily rate; and, further, the total costs assessed, also with statutory interest accruing.

12. The Appellants have, since 2001, been endeavouring without success to secure by various means payment by the Claimants of these sums. The Club not being a legal entity, the Appellants have had to look to the represented members for satisfaction. This has been time-consuming and unrewarding. They have orally examined both Mr. **Howells** and Mr. Kelly, in order to obtain documents and in-

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formation for the purpose of enforcing the judgment. Relevant membership lists were eventually obtained only as a result of applications made by the Appellants to the Court. Despite the Club's solicitors appealing for funds from the membership in order to pay the judgment debt and costs (see for example page 133 of the appeal bundle), no progress was made.

13. Eventually, on 8th April 2004, the Appellants applied to the Court for an Order granting them permission, pursuant to CPR Part 19 Rule 6(4), to enforce the judgment and costs certificate against 32 named, individual members of the Club. In order to avoid any disputes relating to the correct date of membership for enforcement purposes, the Appellants sought permission to enforce against only those members who were members both at the date of issue of the writ (11th June 1993), and as at the date of judgment (24th November 1999). No issue has arisen below, at any stage, as to the individual members on this list being club members at the relevant times, although a few individuals have, by consent, since been withdrawn from this list for various reasons which are irrelevant to these proceedings.

14. In his Affidavit filed in support of this application, Mr. Goodger of the Appellants' solicitors referred to the fact that Mr. Kelly and Mr. **Howells**, and/or the Claimants' solicitors, had had every opportunity since 1999 to contact those members identified and to make arrangements for contributions, so as to enable full settlement of the judgment debt and costs, the liability of each member being joint and/or several. He also observed that these were in any event matters arising as between the members themselves, and were not matters with which the Appellants as judgment creditors were concerned.

15. On 14th April 2004 Master Foster granted permission to the Appellants as requested on the papers but, since their application and his Order had been made without notice to the Claimants, he ordered that the named members should have 14 days following service to apply to set aside the Order. On 12th May solicitors acting for 17 Club members applied for the Order to be set aside; and on 28th June Master Foster gave directions for a hearing of the following issue; "whether an individual member of the [Club] can be liable as a matter of law to satisfy the judgment and/or costs Order in this matter". That hearing took place on 9th November 2004, both parties being represented by counsel.

16.

Master Foster's Decision The Master held, first, at paragraphs 5 to 6 of his judgment that, although there was no doubt that the judgment of 24th November "… is binding on the Club and all its members, none of whom can challenge that judgment now", that did not mean "… that payment of the sums can necessarily be enforced against each member". The individual Applicants were therefore not precluded from arguing that they were not liable to pay. He held that it was not clear from the judgment of 24th November whether, in referring to "the Claimants" the judge was referring to the two named people (that is Messrs. **Howells** and Kelly) or to the Club; and, further, that there was nothing in the judgment to indicate that the judge was deciding the issue as to whether individual members of the Club should pay the judgment sum and the costs. He therefore concluded that it remained open to him to decide that issue; and he rejected the Appellants' submission that the objections now raised by the Applicant members should have been taken at the trial, and that it was too late for them to seek to argue them now. He made it clear, in paragraph 9 of his judgment, that he was deciding at this stage only the question whether the appellants could enforce against the individual members as a matter of law; and he did not go on to consider, if they could, whether as a matter of his discretion enforcement was appropriate in each case.

17. He dealt firstly with the enforcement of the judgment. He dealt shortly with the Applicants' contention that the members' liability was in any

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event limited to the amount of their subscriptions, rejecting it on the basis that none of the authorities cited to him was sufficient to support such a contention.

18. The Applicants succeeded, however, on their submission that the Club members, as principals, did not give the committee, as agents, sufficient authority to commence or pursue the litigation. His reasoning was expressed as follows, at paragraphs 7 to 10 of his judgment:

“The basis for that submission is a passage in **Chitty** in respect of which, of course, a number of authorities are cited in that work, but the passage in **Chitty**, paragraph 9/077, reads as follows:

‘No member of a members club is liable for the debts of the club, except to the extent that he has expressly or impliedly authorised some official of the club to pledge his personal credit. Clubs are not partnerships, and the law which was at one time uncertain is now settled that no member of a club is liable to a creditor except so far as he has assented to the contract in respect of which liability has arisen.’ Now, for ‘contract’ here I think has to be read the word ‘litigation’, because, in my judgment, although the rules of the club clearly gave the committee the power to act on behalf of the members in entering into the contract of insurance, the rules, in my judgment, did not give the committee permission or authority to commence or pursue the litigation and thereby to put, of course, individual members' finances at risk.

8.It may be that some members did authorise the committee to act in that way, but, on the evidence before me, that is far from certain. And, even if some members did, there is certainly no evidence as to which members they were, and it would be quite wrong for a judgment to be enforced on the ground of speculation. So I have concluded that there is insufficient evidence that specific authority was given by the members to the committee or to the two representatives who became claimants to commence or pursue the litigation. Equally, I am satisfied that there is quite insufficient evidence from which authority could be implied. Certainly it is true to say that merely by bringing a representative action, which did not need consent of course of the members, the mere fact of that representative action being brought is insufficient to imply that authority had been given by the members to the committee.

9.Therefore, I find that the point that has been made on behalf of the members is a good one and is quite sufficient to disposes of the issue as to whether the judgment should be enforced or can be enforced against the individual members. That being the case, it seems to me that it is unnecessary for me to consider the issue as to whether or not there are any facts or matters upon which I can exercise my discretion in favour of the members and I decline to do so.

10.I should just add this, for the sake of completeness. It is right to say that, towards the end of his judgment, the learned Deputy Judge did express the view that it was unfortunate that the decision would cause hardship to the claimants. That, in my judgment, is not an expression of opinion by the judge that the members were individually liable. It can be read equally consistently with the judge simply saying that clearly there would be damage to the finances of the club and that therefore, of course, all the members of that club would suffer as a result. I cannot construe the words of the judge in the judgment as indicating that he had decided or even expressed a view that the members were individually liable for the sums.”

19. In relation to the costs, the Master expressed himself entirely satisfied that the matter was covered by the decision of the Court of Appeal in the case of Moon v. Atherton [1972] 2 QB 435 and in particular the dicta of Lord Denning that:

“In a representative action, the one who is named as a Plaintiff is, of course, a full party to the action. The others who are not named, but whom she represents are also parties to the action. They are all bound by the eventual decision in the case. They

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are not full parties because they are not liable individually for costs. That was held by Eve J. in Price v. Rhondda Urban District Council but they are parties because they are bound by the result.” He rejected the Appellants' submission that CPR 19.6(4) and in particular 19.6(4)(a) mean that that decision is no longer good law, holding at paragraph 12 as follows:

“First of all, I cannot accept that the drafting of the CPR was intended to, or indeed had the effect of, overturning decisions of the Court of Appeal on substantive law. Secondly, I think that, read properly, CPR 19.6(4) simply says that a judgment is binding, in other words that it cannot be challenged by anyone who is represented in the claim. The reason I say that is because in (b) of 19.6(4) there is specific provision in relation to enforcement, and it is not, in my judgment, intended by that rule, as I say, to overturn the long established law that an application has to be made against a non-party in order for an Order for costs to be enforced. I am certainly not prepared to say that I am not bound by the decision in the Court of Appeal in Moon v. Atherton, nor am I prepared to say that it was decided per incuriam because nobody took the point about enforcing costs against a non-party.”

20.

This AppealI heard submissions from counsel on both questions relating to the enforcement of the judgment. Mr. Baldock for the Applicants had prepared his skeleton argument without the benefit of the transcript of the Master's judgment and he had therefore not fully appreciated, until very late in the day, the need for service of a Respondent's Answer containing a cross appeal against the Master's rejection of his contention that the members' liability is limited, in law, to the amount of their subscriptions. Despite Mr. Knight's objections, due to the lateness of Mr. Baldock's application to cross appeal, Mr. Baldock had addressed all the issues in his skeleton argument, dated 5th January 2005, there was no real prejudice caused to the Appellants by my granting the application; and Mr. Knight was able to deal with both issues before me on the day of the hearing. I therefore decided in the interests of justice to determine both issues, which are in any event linked and are sensibly dealt with together.

21.

Enforcement of the Judgment Mr. Knight's first and main ground of appeal is that the Master erred in law in holding that the committee's lack of sufficient authority to conduct litigation on behalf of the individual members in representative proceedings is a defence to liability for the return of monies paid under a void contract. The Master found that lack of consent to representative proceedings was a defence to liability itself, not to enforcement. This, he submits, was misconceived and the question of authority to litigate was wholly irrelevant to the contract of insurance, which the Master correctly held was entered into by the officers of the Club, acting on behalf of, and authorised by, the members in accordance with the Rules. The finances of the individual members were not put at risk by the commencement and continuance of the litigation but, rather, by the failure to disclose material matters to the Appellants, entitling them to avoid the Policy and to recover the sums paid under it.

22. Relying on the case of Moon v. Atherton and in particular the dicta of Lord Denning referred to above, Mr. Baldock submits in response essentially that, under RSC O.15 r.12, the individual Club members were not parties for the purposes of enforcement, because those who are represented by others are not full parties to the action. The advent of the CPR, he contends, has not altered that position as a matter of substantive law. Thus the only parties to the action were Messrs. Howells and Kelly who were, as a matter of law, “the Claimants” for the purposes of enforcement proceedings; and the judgment can be enforced only against the Club assets, as opposed to the assets of the individual members. There is no evidence that the individual members ever consented to the litigation being brought in their name; and the Appellants never applied, as they could have done, to join

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as defendants to the counterclaim other Club members who were capable of meeting both the judgment sum and costs, in the event that the Appellants were successful in the litigation.

23. The starting point, in considering the parties' submissions, is to consider the relevant provisions of the CPR 19.6, which are as follows: “(1)Where more than one person has the same interest in a claim —(a)The claim may be begun; or(b)The Court may order that the claim be continued, by or against one or more of the persons who have the same interest as representatives of any other persons who have that interest.(2)The Court may direct that a person may not act as a representative.(3)Any party may apply to the Court for an Order under paragraph (2).(4)Unless the Court otherwise directs any judgment or Order given in a claim in which a party is acting as a representative under this rule —(a)Is binding on all persons represented in the claim; but(b)May only be enforced by or against a person who is not a party to the claim with the permission of the Court.” These rules replaced those contained in the RSC O.15 r.12, which provided as follows:

“12. —(1)Where numerous persons have the same interest in any proceedings, not being such proceedings as are mentioned in rule 13, the proceedings may be begun, and, unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.(2)At any stage of proceedings under this rule the Court may, on the application of the plaintiff, and on such terms, if any, as it thinks fit, appoint any one or more of the defendants or other persons as representing whom the defendants are sued to represent all, or all except one or more, of those persons in the proceedings; and where, in exercise of the power conferred by this paragraph, the Court appoints a person not named as a defendant, it shall make an order under rule 6 adding that person as a defendant.(3)A judgment or order given in proceedings under this rule shall be binding on all the persons as representing whom the plaintiffs sue or, as the case may be, the defendants are sued, but shall not be enforced against any person not a party to the proceedings except with the leave of the Court.(4)An application for the grant of leave under paragraph (3) must be made by summons which must be served personally on the person against whom it is sought to enforce the judgment or order.(5)Notwithstanding that a judgment or order to which any such application relates is binding on the person against whom the application is made, that person may dispute liability to have the judgment or order enforced against him on the ground that by reason of facts and matters particular to his case he is entitled to be exempted from such liability.(6)The Court hearing an application for the grant of leave under paragraph (3) may order the question whether the judgment or order is enforceable against the person against whom the application is made to be tried and determined in any manner in which any issue or question in an action may be tried and determined.”

24. It is clear, and indeed Mr. Baldock does not dispute it, that the proceedings brought by Messrs. Howells and Kelly were representative proceedings and that the members of the Club were therefore “represented persons”, within both RSC O.15 r.12 and CPR 19.6, all of them having the same interest in the proceedings. The Master found, correctly, that the judgment of 24th November 1999 is binding on the Club and all the members, and that no member could now seek to challenge the judgment (CPR 19.6(4)(a) and RSC O.15 r.12(3)). The Master also found that the Club Rules (Rule 10) gave the committee the power and the authority to act on behalf of the members in entering into the contract of insurance. Not surprisingly, given that the Club themselves brought the claim relying on the Policy, that is also accepted as correct by Mr. Baldock.

25. In these circumstances I agree that the Master erred in apparently conflating the authority to contract with the authority to litigate; and in seeking to read the extract from Chitty, to which he refers, as if the word “litigation” could simply be substituted

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for the word "contract". The contractual analysis set out in Chitty and relied upon by the Master is based entirely, as it seems to me, on privity of contract. Neither the CPR nor the RSC require permission to be given for proceedings to be begun or continued by or against any one or more persons, as representing all or any persons with the same interest in the proceedings. As a matter of law, in representative proceedings,

"The Plaintiff is the self-elected representative of the others. He has not to obtain their consent. It is true that, consequently, they are not liable for costs, but they will be bound by the estoppel created by the decision." (Fletcher Moulton L.J. in Markt and Co. Limited v. Knight Steamship Company Limited (CA) [1910] 2 QB 1021 at 1039). This was emphasised more recently by the Vice-Chancellor in the case of Independiente Ltd & Ors v. Music Trading On-Line (HK) & Ors [2003] EWHC 470. Having held that the claim in that case was capable of being brought in a representative capacity, he said as follows at paragraph 32:

"In their written argument counsel for the defendants emphasised that there was no evidence that either the claimants or PPL or BPI had the authority of the Relevant Members to bring these proceedings on their behalf. This is true as a matter of fact but it is irrelevant as a matter of law Markt & Co Ltd v Knight Steamship Co. Ltd [1910] 2 KB 1021, 1039 and John v Rees [ibid] at p. 371. It appears to me that in cases falling within CPR Rule 19.6 the rule itself provides the authority of the person who is represented."

26. It is unclear on the evidence in this case whether, as a matter of fact, the individual members expressly or impliedly authorised the committee to commence or pursue the litigation. There was certainly no opposition voiced to its continuance at the AGM on 20th August 1998 when the litigation was actively discussed (see the minutes at page 116 of the appeal bundle). However, as a matter of law, the Club itself not having any legal identity, the authority of the members to the bringing and continuing of proceedings was irrelevant, such authority being clearly provided in the circumstances by the provisions of the RSC; and the litigation being effectively the mechanism used to determine the questions of validity and liability arising under the contract of insurance. In reality the Appellants were already entitled to avoid the Policy and to the return of the monies advanced prior to the commencement of litigation, as a result of the material non-disclosure. Their counterclaim against the Club in representative proceedings was therefore clearly an administratively convenient and appropriate procedure in the circumstances.

27. No defence was advanced in response to the counterclaim that the committee did not have authority to enter into the contract of insurance on the members' behalf; and no such defence was relied upon before Master Foster. Nor did counsel seek to argue at the trial in 1999 that the represented members of the Club were not liable on the counterclaim because the Club committee had failed to obtain sufficient authority to commence or pursue litigation; a submission which would clearly not have been open to him on the authorities, and one which he could not sensibly have made when Club members had themselves instigated representative litigation. Messrs. Howells and Kelly were not at any stage suggested to be personally liable on the contract, as opposed to being Defendants to a counterclaim against them as representatives of all the members of the Club.

28. Thus in my judgment the Master erred in concluding, as a matter of law, that for the reasons he gave the judgment could not be enforced against the named, individual members. It is correct that a represented person may be able to avoid a judgment being enforced against him personally, by reason of special facts or matters which are particular to his case. Such facts would include, for example, facts relating to the person's membership of the class of persons represented; or, as in the case of Commissioners of Sewers of the City of London v. Gellatly [1871] 3 Ch.D. 610, facts from which it can be

shown that there was an element of fraud or collusion in the original action. There would therefore have to be some special reason why the judgment could not be enforced against a particular member of the class of persons represented. No such ground appears to have been advanced so far in the present case.

29. In the light of my conclusion in favour of the Appellants on this main challenge, there is no necessity for me to deal with Mr. Knight's second ground of appeal, namely that the Master erred in finding that the members' liability had not been established at trial, and in finding that he was therefore entitled to decide whether individual members of the Club should pay the judgment sum and costs. In deference to both counsel's submissions on the issue, however, the judgment of the 24th November was in my view clear. The deputy judge referred to the Club as “the Claimants”, as did the Court Order. He found expressly that the Club Secretary signed the proposal form on behalf of the insured “… i.e. the members of the Club”, and that the sum of £52,550 had been advanced to “the Claimants”, which can only mean the Club members in the circumstances. He also expressed himself to be mindful of the hardship which would be caused to “the Claimants and its many members” by his decision. No inference could in my view reasonably be drawn from the judgment that only the two named Claimants were liable personally for the judgment sum, or that some of the individual members represented in the proceedings were not liable for the return of that sum. Further, as the Master found, the judgment was binding on all the represented members. Whilst no permission is required to enforce a judgment against named Claimants under CPR 19.6, the named Claimants in this case were no more and no less liable for the judgment debt than any other Club member. I accept Mr. Knight's submission that it cannot now be suggested that the judgment is not enforceable against the individual members, or that the Appellants should have applied to join other members as Defendants to the counterclaim. Had the Claimants won the action in 1999 Messrs. Howells and Kelly would not have benefited personally from an Order for payment in accordance with the insurance policy, rather than receiving it as representatives of all the Club members whom, as the judge found, were the insured under the contract. The Appellants would therefore succeed on this ground of appeal in addition.

30.

The Cross Appeal Mr. Baldock refers to the note to be found in the White Book at RSC O.15/12/27, namely: “An action cannot be maintained against certain members of an unincorporated association on behalf of the others to enforce a strictly personal liability against members of the association”. He submits that this Club, as an unincorporated association, is no more than a group of individuals and that members of such an association cannot be individually liable for its debts. He relies for this submission on the extract from Chitty referred to by Master Foster and on observations at page 86 of **Warburton on Unincorporated Associations** (second edition) that:

“Just as an unincorporated association cannot be liable in tort, so it cannot be liable in contract; it has no separate legal persona to acquire liability. It is also impossible to make a contract to bind all persons who are from time to time members of an association. Thus the Chairman of Tunbridge Wells Benefit Society's Medical Association could not enforce an agreement made by a medical practitioner with the association as opposed to one made with the Chairman personally.” He contends, therefore, that a money judgment can only be given against parties to the action and cannot, therefore, be given against a group of individual members, relying on the decision of the Court of Appeal in Walker v. Sur [1914] 2 KB 930 and the following dicta of Kennedy LJ at page 937:

“When I consider the nature of a money claim, I think the case for this purpose becomes reasonably clear, because day by day, if this is a large body, one member is going out and another is coming in.

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The body is continually changing, and to give a judgment against all the members for debt would be to include the case of an incoming member, who would be made liable though he was not a member at the date of the contract, and in the case of an outgoing member you would have to take the state of things at the date of the judgment. A judgment could not very well be given against one who had ceased to be a member, and yet they are all supposed to be the persons who are said to be represented." He has also referred me to the decision of the Privy Council in the case of Wise v. Perpetual Trustee Company Limited [1903] AC 139 and to the following dicta of Lord Lindley at page 149:

"Clubs are an association of a peculiar nature. They are societies the members of which are perpetually changing. They are not partnerships; they are not associations for gain; and the feature which distinguishes them from other societies is that no member as such becomes liable to pay to the funds of the society or to anyone else any money beyond the subscriptions required by the rules of the Club to be paid so long as he becomes a member. It is upon this fundamental condition, not usually expressed but understood by everyone, that clubs are formed." Whilst acknowledging that a representative action was appropriate in this case, Mr. Baldock submits that that cannot affect the substantive law; and that it does not mean that the individual club members were thereby rendered personally liable for the judgment sum and costs. Their liability, he submits, did not extend beyond the sums paid by way of their subscriptions.

31. I find these submissions, on analysis, unpersuasive. I accept — and it is not in dispute — that the CPR do not and cannot affect the substantive law. A members' club cannot, therefore, as opposed to individual members, be liable for its debts. Further, it is undoubtedly correct that, as O.15 r.12 made clear, an action cannot be brought against certain members of a club, on behalf of the others, to enforce what is a strictly personal liability against those club members. That, however, was not the position in the present case. The trial judge found, at paragraph 3 of his judgment, that the insured under the Policy were the members for the time being of the Club. The original proposal form was signed by the Club Secretary and "… plainly he signed on behalf of the insured, i.e. the members of the Club". Clearly, therefore, the Club members were all parties to that contract. There was no suggestion at trial that the committee or Mr. Hamblin had no authority to enter the insurance contract on their behalf; and the agency of Mr. Hamblin and of any other officer of the Club who signed the insurance renewal application forms in 1991 and 1992 was never in dispute. The Appellants are, therefore, not seeking to establish the liability of named individual members for the personal debt of another or other Club members.

32. That, in my judgment, is what distinguishes this case from the authorities on which Mr. Baldock relies. In Wise it was held that the landlord of club premises, to whom trustees of the club owed rent and other monies pursuant to onerous covenants in the lease, could not recover those sums from other club members, where there was no rule imposing personal liability on the members to indemnify the trustees. As between the landlord and the members there was no privity of contract. In the present case the Appellants are seeking to enforce the personal liability of all the members to them, arising from the fact that they were all parties to the contract of insurance entered into.

33. In Walker the Plaintiff agreed with four members of an unincorporated religious society that he would provide his professional services as an architect. When he was not paid he sued these four members. After a defence had been delivered the Plaintiff, with a view to binding the society and its property took out a summons asking that the writ be amended by describing the four Defendants as being "sued on their own behalf and on behalf of all other members of" the society. The Court of Appeal held, on the trial of a preliminary issue, that the Plaintiff was not entitled to a representative Order

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under what was then Order XVI, Rule 9. In his affidavit sworn in opposition to the summons the Defendant had stated: "The only members of the said brotherhood who have any interest in this cause or matter are the [four] brothers or members who gave the Plaintiff some instructions … the other members of the said brotherhood have no interest in this cause or matter and have no common interest with the Defendants in this action …" (page 931 to 932)At page 936 Buckley LJ said:

"We have to determine whether this action ought to go on so as that execution could be maintained against all the persons represented. In my judgment that would be impossible. It is simply an action of debt against a large number of individuals, and no judgment could be obtained which would be representative against all of them; there could only be a judgment individually against each of them." At page 936 Kennedy LJ said as follows:

"I will confine myself to saying that this is an action of debt, and that such an action, where the person or persons sought to be sued are, as here, members of an unincorporated body which cannot itself be sued, will not lie, framed as this action is sought to be under the authority given by the learned judge." The Court of Appeal therefore decided that the Plaintiff lost, firstly because there could be no representative action brought in debt. That decision has however, as Mr. Baldock accepts, since been overruled in the case of Irish Shipping Limited v. Commercial Union Assurance Co. Plc and Another [1991] 2 QB 206. In that case there were numerous Plaintiffs having the same interest in the proceedings. At pages 227B to G, having reviewed the authorities, Staughton LJ said:

"In that state of the authorities it is not, in my judgment, the law that claims for debt or damages are automatically to be excluded from a representative action, merely because they are made by numerous Plaintiffs severally or resisted by numerous Defendants severally. The rule is more flexible than that … For all practical purposes this is one claim upon one contract, which the ship owners have an interest in pursuing and the insurers all have the same interest in resisting …"

34. The second reason that the Plaintiff lost in that case was because the Court held that he was seeking to sue in representative proceedings, when the contract sued upon was a strictly personal contract between the Plaintiff and the four members of the brotherhood. This is to be contrasted with the present case, where the insurance contract was held to be one made with all the Club members, through the agency of the Club Secretary, and the litigation proceeded from the outset as a representative action on that basis.

35. In the case of Hardie and Lane Limited v. Chiltern and Others [1928] 1 KB 663 the Plaintiffs, who were members of an association of motor dealers and manufacturers (an unregistered trade union certified under the Trade Union Act of 1913), brought an action against three of the other members who were named as Defendants twice over and were sued "on their own behalf and on behalf of all other members of the association" for damage allegedly caused to the Plaintiffs by the conspiracy and fraud of the Defendants, who were not trustees of the association. The Court of Appeal upheld the decision of the trial judge that the Plaintiffs were not entitled under Order XVI Rule 9 or otherwise to maintain the action against the Defendants as being representative of the other members, there being no grounds for saying that the members had the same interest in the action or in the defence to it. By contrast, it was not suggested in the present case that there was no community of interest between all the Club members in relation to the contract of insurance. Nor had it ever been suggested that one or more of the individual members fell outside the class of persons represented or that for some other reason particular to that individual, for example fraud, he or she was to be exempt from enforcement proceedings. No such defences having been raised below at trial before the deputy judge there would seem to be no evidence of special circumstances applying to any of the individual members with

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whom we are concerned in the present case.

36. For these reasons I agree with the Master's decision on this point. Just as any named, individual member could have taken steps on behalf of the Club's other members to enforce the judgment against the Appellants, if the Claimants had succeeded on their claim, and to secure payment of the sum due under the Policy into the Club's bank account, so can the Appellants as a matter of law now seek to enforce the judgment sum against the named members of the Club in these proceedings, I therefore dismiss the cross appeal.

Costs

37. Mr. Knight acknowledges that, in respect of costs, however, the case law is currently against him and that represented persons are not liable individually for the costs. In 1972 the Court of Appeal so held in Moon v. Atherton (see above). The same point had been made earlier in the case of Markt & Co. Ltd v. Knight Steamship Company Ltd. (see above) where, as referred to above, it was held at page 1039:

“The Plaintiff is the self-elected representative of the others. He has not to obtain their consent. It is true that consequently they are not liable for costs, but they will be bound by the estoppel created by the decision.”

38. Mr. Knight submits, however, that these authorities were dealing with very different circumstances and that they were not cases involving members' clubs. In the present case there is only one contract, one cause of action and one defence in relation to all the Club members. The claim was instituted by the Club, not by the Appellants. In such circumstances he submits that it is entirely unjust that those who would have benefited from the litigation, had the Club won, should now avoid liability for costs owing to their representation by impecunious or insolvent individuals. Costs, he submits, should prima facie have been paid from the assets of the Club. The named Applicants were not suing or being sued in respect of any personal liability. It cannot therefore be right that the Appellants could protect themselves in costs only by joining every member of the Club as a party to the action. To have done so would fly in the face of the proper administration of justice and would have caused an enormous increase in costs. The interests of justice which underpin the CPR mean that CPR 19.6.4 applying to any judgment or Order, therefore includes an Order for costs.

39. Whilst I recognise the force of these arguments, Mr. Knight's difficulty is that the words on which he relies in CPR 19.6.4 also appeared previously in the RSC at 15.12(3). The editors also pointed out at 15/12/47 that: “the represented parties are not liable for costs”. The authorities on which Mr. Baldock relies appear therefore still to be good law and binding on this Court. It seems to me that any application for the costs to be paid by any individual members could and should have been made on the basis of an application for costs to be paid by a non-party, where the Court has a discretion in exceptional cases. However, no such application has been made in this case and there would appear to be no grounds for making any such exceptional order.

40. I therefore dismiss the appeal against the Master's decision on this point.

41. In relation to enforcement of the judgment the matter must now, therefore, be remitted to the Master in order for him to consider whether or not, in the exercise of his discretion, to grant permission to enforce against the individual members, having regard to whatever special circumstances may be shown to exist, if any, in relation to each of them.

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EXHIBIT 51

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The hidden class action in English civil procedure

John Sorabji

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Markt & Co Ltd v Knight Steamship Co Ltd [1910] 2 K.B. 1021 (CA)
Independiente Ltd v Music Trading On-Line (HK) Ltd [2003] EWHC 470 (Ch) (Ch D)
Temperton v Russell (No.1) [1893] 1 Q.B. 435 (CA)
Irish Shipping Ltd v Commercial Union Assurance Co Plc (The Irish Rowan) [1991] 2 Q.B. 206 (CA (Civ Div))
Taff Vale Railway Co v Amalgamated Society of Railway Servants [1901] A.C. 426 (HL)
Moon v Atherton [1972] 2 Q.B. 435 (CA (Civ Div))
Prudential Assurance Co Ltd v Newman Industries Ltd (No.1) [1981] Ch. 229 (Ch D)

498 Abstract:While the existence of class actions is a commonplace throughout US and commonwealth jurisdictions it has often been said that such an action is unknown to English procedural law. In this article the author examines the validity of the claim that English civil procedure does not at the present time contain a class action procedure. The issue is examined by reference to CPR r.19.6 and, through its predecessors in the Rules of the Supreme Court and County Court Rules, the rules of equity from which it originated. It is argued that rather than being unknown to English procedural law, class actions originated from it. It is argued that the English representative action, now embodied in CPR r.19.6, when properly understood is akin to r.23 of the US Federal Court's Rules of Procedure. In this sense, English procedural law contains within it not only a class action rule, but the ultimate descendant of the original class action rule; the rule from which the US r.23 class action was born.*

Introduction--No class actions in English civil procedure

It is a truism that class actions are unknown in English procedural law, notwithstanding the longstanding existence of the representative action under CPR r.19.6 and its statutory predecessors; RSC Ord.15 r.12 and CCR Ord.5 r.5 (the representative rule). For present purposes class actions are as defined by Mulheron in her definitive study of their presence in common law jurisdictions, i.e. legal procedures which permit,

"the claims (or parts of the claims) of a number of persons against the same defendant to be determined in one suit. In a class action, one or more persons ('the representative plaintiff') may sue on his or her own behalf and

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on behalf of a number of other persons ('the class') who have a claim to a remedy for the same or a similar alleged wrong to that alleged by the representative plaintiff, and who have claims that share questions of law or fact in common with those of the representative plaintiff ('common ***499** issues'). Only the representative plaintiff is party to the action. The class members are bound by the outcome of the litigation on the common issues, whether favourable or adverse to the class, although they do not, for the most part, take any active part in that litigation."1

Donaldson M.R. acknowledged the class action's lack of presence in English civil procedure in *Davies v Eli Lilly* in 1986 when he suggested that it was perhaps about time that England looked into the question of whether such a procedure could be properly introduced into it.2 Purchas L.J. reiterated the point six years later in *Nash v Eli Lilly & Co,* when he too noted that:

"There may well be a strong case for legislative action to provide a jurisdictional structure for the collation and resolution of mass product liability claims, particularly in the pharmaceutical field, but this court cannot devise such rules. In this sense we echo the remarks made by Lord Donaldson MR in *Davies (Joseph Owen) v Eli Lilly & Co* [1987] 3 All ER 94 at 96, [1987] 1 WLR 1136 at 1139 under the heading 'The concept of the "class action" as yet unknown to the English courts'."3

A further eight years later the, then, Lord Chancellor's Department (the LCD) impliedly accepted as true Donaldson M.R.'s and Purchas L.J.'s assessment. It took up the challenge, in its 2001 consultation, *Representative Actions: Proposed New Procedures,* of examining the question posed by the Court of Appeal in *Davies* and *Nash* : should a generic representative, i.e. class, action be introduced into English civil procedure?4 In doing so it accepted as true the contention that the class action was and is unknown to English civil procedure. But as Oscar Wilde might have reminded the LCD and the Court of Appeal before it, "the truth is rarely pure and never simple".5

In applying his witticism to the question of whether the class action is unknown to English procedural law Wilde may well have asked for two points to be considered. The first point is something Uff noted in 1986: the remarkable similarity between the US class action, as provided for in r.23 of the Federal Court's Rules of Procedure ("r.23"), and the English representative rule.6 The second is something that goes to explain that similarity and in ***500** doing so leads us to an explanation as to why the claim that the class action is unknown to English civil procedure is a truth lacking in veracity. The second point was one made by Snow, the then editor of the *Annual Practice* (the White Book's ultimate predecessor), in 1904. Discussing CPR r.19.6's then predecessor, RSC (1875) Ord.16 r.9 in its notes the *Annual Practice* read as follows:

"Intervention by persons and parties--If a person not a party to a class action desires to intervene in any way he should apply to be made a party, *Watson v Cave* (1881) LR 17 ChD 19 [CA]."7

That Snow referred to the representative rule in these terms is, at the very least, suggestive of the fact that at that time English civil procedure took a different view about the class action's presence to the one Donaldson M.R. and Purchas L.J. would take at the end of the 20th century. That it did so perhaps also explains why r.23 is referred to as a class action rule. The reason for this being that r.23, and its predecessor, US Federal Equity Rules r.48, and the English representative rule both have a common origin: pre-1873 Court of Chancery representative action.8 Rule 23 is the paradigmatic form of class action. It is because it took its form from the same rule, the same class action rule, which was incorporated into the RSC from equity procedure in 1873 as RSC Ord.10 and became RSC (1875) Ord.16 r.9. If r.23 is a class action, is not the English procedural device it originated from

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also a class action? And if that is the case is it not also correct to say that the original English device's successor is a class action too? In this article I trace CPR r.19.6's origins, origins which show that it is, and that English civil procedure has always contained within it, class actions as Mulheron defines them, Snow referred to them and r.23 encapsulates.

Justice between man and man or complete justice: The birth of the English class action

The starting point is to acknowledge that English procedural law, just like its substantive law, is a product of two parents: the common law and equity. Its common law parent understood its purpose to be, in Lord Brougham L.C.'s often repeated words, “to do justice between man and man”.9 It focuses on litigation between named, known individuals as well as between named known individuals and the state. It required individual litigants to bring proceedings to enforce and vindicate their rights and obligations. That it did is undoubtedly right. That it did, and that the RSC and the CPR after it were and are inherently committed to this idea, might explain the class action's perceived ***501** absence from English civil procedure. It might equally be seen as a justification for the continuing reticence with which English civil procedure has treated the class action.

English procedural law's other parent took a different and equally valid approach. It took an approach, derived from canon law, which was the absolute opposite of the common law's.10 Equity's aim was in the words of Talbot L.C. in *Knight v Knight* to do, “complete justice and not by halves”.11 What did he mean by this? Talbot L.C. was adverting here to the practice in equity of ensuring that finality of litigation was reached within one set of proceedings by requiring the joinder of all interested parties. Equity did not simply do justice between man and man but between all those who had an interest in the litigation. As Eldon L.C. explained the rule in *Cockburn v Thompson* :

“The strict rule is, that all persons materially interested in the suit, however numerous, ought to be parties: that there be a complete Decree between all parties, having material interests.”12

Lord Redesdale L.C. elaborated this point said:

“It is the constant aim of a court of equity to do complete justice by deciding upon and settling the rights of all persons interested in the subject of the suit, to make performance of the order of the court perfectly safe to those who are compelled to obey it, and to prevent litigation. For this purpose all persons materially interested in the subject ought generally to be parties to the suit, … however numerous they may be, so that the court may be enabled to do complete justice by deciding upon and settling the rights of all persons interested.”13

Rather than concentrate on determining the rights of individuals *inter se* or individuals and the state, equity procedure sought to adjudicate on the rights and obligations of all who those who had a material interest in one set of proceedings. It did so be examining each and every relevant issue; thereby obviating the need for any future or further proceedings. In order to do so it required, through what was known as the complete joinder rule, all those who could potentially be affected by the determination to be joined to the suit.14 This requirement brought with it a number of procedural disadvantages. It often resulted in the joinder of large numbers of essentially passive parties, which increased litigation time and expense unnecessarily and thereby undermined ***502** the equity court's ability to achieve timely and cost-effective justice. This was especially problematic when a party died and proceedings had to be stayed pending joinder of the deceased's heir or heirs. It was equally problematic where an individual who ought to have been joined was, for whatever reason, not joined to the proceedings as they could appeal by way of rehearing at any time after judgment.

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To obviate the procedural disadvantages of the complete joinder rule while maintaining its advantages equity developed the representative rule: it developed the class action. By this mechanism the complete joinder rule was relaxed so that a single party, for instance the plaintiff, was deemed to represent all other potential plaintiffs, who would thereby be bound by the decision. It created the class action. The basis on which this relaxation of the joinder rule, and creation of the class action, was made was explained in 1722 in *Chancey v May* as arising where,

“it would be impracticable to make them all parties by name, and there would be continual abatements by death and otherwise, and no coming to justice if all were to be made parties”.15

The complete joinder rule gave way when it would be inconvenient if it was strictly applied.16 It could be relaxed so that there were either representative plaintiffs17 or defendants, who properly represented a class of either plaintiffs or defendants.18 It did so because as Cottenham L.C. put it in *Wallworth v Holt,*

“it is the duty of this Court to adapt its practice and course of proceedings to the existing state of society, and not by too strict an adherence to forms and rules, established under different circumstances, to decline to administer justice, and to enforce rights for which there is no other remedy”.19

There was however a second procedural basis for the representative rule, which was again consistent with equity's aim of achieving complete justice. It was a basis more obviously contrary to the common law's aim of doing Broughamian justice between man and man. US Supreme Court Associate Story J. described it in this way in his magisterial guide to equity proceedings in England and the United States:

“The general doctrine of public policy which in some form or other may be found in the jurisprudence of every civilized country is, that an end ought to be put to litigation, and above all to fruitless litigation … If suits might be perpetually brought to litigate the same questions between the same parties or their privies as often as either should choose, it is obvious that remedial justice would soon become a mere mockery; for ***503** the termination of one suit would become the signal for the institution of a new one, and the expenses might become ruinous to all parties. The obvious ground of the jurisdiction of Courts of Equity in cases of this sort is to suppress useless litigation and to prevent multiplicity of suits.

One class of cases to which this remedial process [by way of a bill of peace] is properly applied *is where there is one general right to be established against a great number of persons.* And it may be resorted to where one person claims or defends a right against many or where many claim or defend a right against one. In such cases Courts of Equity interpose in order to prevent multiplicity of suits; for as each separate party may sue or be sued in a separate action at law [that is to say in a common law action between man and man], and each suit would only decide the particular right in question between the plaintiff and the defendant in that action, litigation might be interminable. Courts of Equity therefore, having a power to bring all the parties before them, will at once proceed to the ascertainment of the general right; and if necessary, they will ascertain it by an action of issue at law, and then make a decree finally binding upon all the parties.”20

All the parties did not need to be before the court. Complete joinder could again be relaxed under the bill of peace as long as, “there was a right claimed that affects many persons, and that a suitable number of parties in interest are brought before the court”.21 It could be relaxed where there was as Mulheron put it, a class of who had a claim to a remedy for the same or similar alleged wrong: the same interest.22

The contours of the early class action can already begin to be seen. It was a procedural mechanism aimed at effi-

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ciently and economically dealing with disputes involving a large number of parties all of whom had a common dispute. It obviated as Plumer M.R. put it in *Meux v Maltby* the “great inconvenience” of bringing all those various and numerous parties before the court.23 But for the representative mechanism those claims would either not be litigated at all or would be litigated individually at great cost and expense for the common party and the court. Absent such a procedure there would be, again in Plumer M.R.'s words, “an absolute failure of justice”.24 Rather than allow either of those eventualities to occur, and undermine what it termed complete justice's achievement, the Chancery Court permitted a single representative plaintiff or defendant to bring or defend proceedings on behalf of those others. It permitted class actions to be brought and defended.

What other features did this nascent class action have? First of all, the representative party prosecuted the claim at his own expense.25 It ran the costs risk. It also ran the risk of a security for costs order.26 The court would ***504** require sufficient representative parties were joined to the proceedings to ensure that the disputed issue or issues were justly and fairly tried.27 It lay to the court to assess whether the representative could properly and fairly represent the represented class.28 The represented class could be as wide as the whole world.29 The court's decision in the action would bind all the rights of those represented, i.e. it would operate as a res judicata in respect of the matter decided, i.e. the common issue.30 It would do so however only in respect of the matter decided.31 Where a represented party wished to assert that he did not have an interest in common with the representative and the represented class he could and should apply to be joined as a defendant to the action.32 In order to bring such proceedings the representative party must seek a remedy that was, “in its nature beneficial to all those whom he [undertook] to represent”.33 To be beneficial to all, the representative and the represented parties had to have a “common interest” or “general right”,34 i.e. one common to all. As Lord Hatherley L.C. put it in *Warrick v The Queen's College, Oxford,* a decision of the Court of Appeal in Chancery:

“I take it that the view of this Court is, that all persons having a common right, which is invaded by a common enemy, although they may have different rights inter se, are entitled to join in attacking the common enemy in respect of that common right … although after the common right is established they may have a considerable litigation among themselves as to who are the persons entitled to the gains obtained through that suit.”35

Hatherley L.C. also makes it clear that the common rights did not need to arise through the same document. All that the represented class need demonstrate was that their rights, “all depend(ed) upon the same question”.36 Where however the representative action was brought by bill of peace the common rights did have to arise out of a single document.

20th century developments: decline and fall

So matters stood at the turn of the twentieth century, when consideration of the representative action came before Lindley M.R., Rigby and Vaughan ***505** Williams L.JJ. in the Court of Appeal in *Ellis v Duke of Bedford.* The question before the Court was whether a group of fruit and vegetable growers could maintain an action both on their own behalf and on behalf of other such growers against the Duke of Bedford in respect of rights to stalls at Covent Garden Market. Lindley M.R., who was in all likelihood the leading authority on the use of the representative action, and Rigby L.J. held that they could bring the action in a representative capacity. They could do so because, despite the fact that there were differences between the represented parties *inter se,* they had a common claim against a common defendant.

While Vaughan Williams L.J. agreed on the principles, he dissented as to their application, holding that as the plaintiffs had no individual property rights they could have no rights in common. In essence he based his judg-

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ment on an earlier decision of the Court of Appeal in *Temperton v Russell* (albeit he did so without reference to it) in which Lindley L.J. giving the judgment of the court appeared to hold that representative actions could only be brought where the class held beneficial property rights.37 That decision had already been explained by Wills J. in *Wood v McCarthy* as not going that far, but as simply holding that following the 1873 Judicature Act reforms this aspect of Chancery procedure was available in all Divisions of the High Court but only on the same basis as it had been in the Court of Chancery. As Wills J. put it, *Temperton* simply held that as representative actions could not be used in actions for tort prior to the Judicature Act reforms they could not be used to prosecute such actions post-1873.38 Lindley, by then M.R., had felt no need to advert to his previous decision in *Temperton* when giving his judgment in *Ellis.*

The Court of Appeal's decision was upheld by a majority of the Lords in *Duke of Bedford v Ellis,* in which Lord Macnaghten gave the leading judgment.39 In doing so he provides the most authoritative discussion of the representative rule. Within that discussion he held that:

• Representative actions are available where the class has a common interest, a common grievance and the relief sought was in its nature beneficial to all. No requirement as to the basis of the common interest was identified.

• The basis of the common interest and grievance did not have to be the same for each class member.

• That other factors, such as distinct rights between the class members, may serve to differentiate the class members was irrelevant. The basis of a representative action is what the class has in common, “not what differentiates the cases of individual members”.

• If *Temperton* held that representative actions were only available where a beneficial property right was in issue it was wrongly decided; the rule was not so limited.

***506** • It did not matter that the represented class was “fluctuating and indefinite”, the description of the class was sufficient to properly define it.40

Lords Morris and Shand delivered concurring judgments. All three emphasised how Vaughan Williams L.J. erred in placing any weight on the principle said to be established in *Temperton.* That was a principle which, as both Lord Macnaghten and Lord Shand pointed, out was contrary to the precedent established by the Court of Appeal in Chancery in *Warrick v Queen's College* that was as binding upon the court in *Temperton* as it was on the Court of Appeal in *Ellis* and, insofar as pre-CPR authorities remain authoritative now, continues to bind the courts today.

Following that decision the representative action returned to the Lords in *The Taff Vale Railway Co v The Amalgamated Society of Railway Servants.* Lindley, by then Lord Lindley, in that case disavowed *Temperton* expressly. He did so holding that:

“The principle on which the rule is based forbids its restriction to cases for which an exact precedent can be found in the reports. The principle is as applicable to new cases as to old, and ought to be applied to the exigencies of modern life as occasion requires. The rule itself has been embodied and made applicable to the various Divisions of the High Court by the Judicature Act, 1873, ss 16 and 23-25 … and the unfortunate observations made on that rule in *Temperton ...* have been happily corrected in this House in … *Ellis.* ”41

In this he did not simply disavow *Temperton,* he made it clear that the representative action was one which the

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law understood to be a flexible one. It was one not fixed, or limited by, its history but could be adapted as society changed. It was a form of action, to misapply a common law term to a creature of equity, that the House of Lords accepted contained within it the vires to adapt itself to the needs of the times. It was a form of action however that by 1901 was, as Snow in the Annual Practice in 1904 would shortly after acknowledge, well established in English civil procedure.

That was not the end of the story though. The English class action would shortly after *The Vale* decision suffer a crushing blow. It would do so at the hands of Vaughan Williams L.J., who had perhaps not accepted the Lords' sharp rebukes to his interpretation of the representative action in *Ellis.* In *Markt & Co Ltd v Knight Steamship* he gave the lead judgment, with which Fletcher Moulton L.J. agreed (Buckley L.J. dissenting) which explained the House of Lord's decision in *Ellis* in as restrictive a fashion as possible.42 This judgment set back the development and application of the representative action throughout the twentieth century. It did much to effectively banish the class action from the collective memory of English civil procedure. The claim arose out of the wreck of a steamship. The representative action was brought by ***507** various shippers and was an action for breach of contract and duty in and about the carriage of goods by sea. The contracts were the respective bills of lading. Vaughan Williams L.J. held as follows:

• There was nothing on the writ to show that the bills of lading and the exceptions within them were identical or that the goods shipped were of the same class or kind.

• There was no common purpose or connection amongst the shippers to justify a representative action either under the old chancery practice or under r.16 Ord.9. The only bond between the class members was that they all had goods on the ship.

• While the shippers suffered a common wrong in that their goods were all lost, they had no common right or common purpose and as each class members claim could be defeated by facts and matters unique to them it could not be said that they had the same rights as required per *Ellis.*

• Whether or not, and the implication was not, Lord Macnaghten was right in his summary of the pre-1873 Chancery practice the court had now to construe the rule consistently insofar as the common law and chancery was concerned, “notwithstanding any prior practice in the Court of Chancery”.

Fletcher Moulton L.J. held that the claim was not properly brought as a representative action as:

• The class had not properly been defined. Simply listing the class members did not define the class.

• Whatever the practice had been in equity, that was now immaterial as the Court was now governed by the language of Ord.16 r.9. That rule is now definitive of the court's practice and it is irrelevant whether the rule narrows or expands the pre-1873 practice. The rule is the rule.

• The rule required as an essential condition,

“that the persons who are to be represented have the same interest as the plaintiff in one and the same cause of action or matter”.

This is what Lord Macnaghten meant in *Ellis* when he adverted to common interest.

• The same interest could not arise where different defences could be raised against the class members.

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• The same interest could not arise where the class members entered into separate contracts with the defendant, even if the contracts were identical, as this would an impermissible infringement of privity of contract.43

• Damages were not an available remedy to representative actions, nor could a declaratory judgment be given declaring a right to damages.

***508** Buckley L.J. dissented and did so in Lindleyan terms. He held that:

• Ord.16 r.9 was intended to apply equity's approach, which was more flexible than the rigid common law approach to all High Court Divisions (per Lord Macnaghten in *Ellis*);

• it was no objection to a representative action that the rights between the parties arose under separate contracts. In this he drew the distinction correctly, and which Vaughan Williams and Fletcher Moulton L.JJ. missed, between the representative action under equity and the representative action brought by way of bill of peace;

• a representative plaintiff must be in a position to claim a benefit common to all the class, but he could also claim a benefit personal to himself;

• the class could have the same interest against a defendant notwithstanding the fact that it could result in different measures of relief to its members;

• the shippers had a common right against a common enemy, per *Warrick* and *Ellis,* i.e. that the ship owner should consign their goods to a ship not also carrying contraband, as such they could seek a declaration that the ship owner was in breach of contract. Once liability was established in the class action, applying *Warrick* and *Gellatly,* further proceedings could be brought by the individual class members for damages, in which proceedings individual defences could be run by the ship owner as to why that particular plaintiff ought not to recover.

Vaughan Williams and Fletcher Moulton L.JJ. won the day and effectively put and end to the representative action's utility. In doing so they produced the high point of the court's narrow interpretation of the representative rule jurisdiction. It might perhaps better be put that their judgments marked the high point of the common law's attempt to emasculate improperly an equitable jurisdiction.

Post-*Markt* : late 20th century attempts to revivify the English class action

After *Markt* the representative rule's utility was severely restricted as the combination of Vaughan Williams L.J.'s and FletcherMoulton L.J.'s judgments meant that in order to fall within its ambit a representative plaintiff had to show: (i) a common interest arising under a common document; (ii) a common grievance; and (iii) a remedy beneficial to all, but not damages.44 As a consequence it was little used and its utility was lost to English civil procedure. On its own merits though, the decision in *Markt* doesn’t stand up to scrutiny. Both judges ignored binding precedent from *Warrick* and *Ellis,* to the effect that: (i) the rule could be used when there were separate contracts, the basis of ***509** the common interest need not be the same for all; (ii) the differences which existed between the representatives and the defendant were irrelevant, the key issue was the common element unless the action was brought by, the by then long abolished Bill of Peace; and (iii) as *Temperton, Ellis,* and *Taff Vale* had all established, and which the Court of Appeal in *Markt* was also required to follow, the representative rule was one which had to be interpreted consistently with the old equity practice, i.e. the RSC was not to be interpreted without reference to the Chancery Court's practice.

The representative rule continued to suffer post-*Markt* until a number of decisions in the early 1970s and then

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again in the 1990s tried to breathe new life into it. Vinelott J. in *Prudential Assurance Co Ltd v Newman Industries Ltd* held that: the effect of *Ellis* and *Taff Vale* was to make representative actions available for claims in tort; that *Temperton* was simply a case where non-representative plaintiffs had been chosen, whereas if proper representatives had been chosen the representative action would have been permitted to proceed notwithstanding it was an action in tort.45 Insofar as damages were concerned, Vinelott J., in *Prudential* at [257], held that while individual damages claims could not be pursued by a representative plaintiff, a declaration that class members were entitled to damages could be granted, which individual class members would then be entitled to rely on in future individual damages claims. In other words he adopted Buckley L.J.'s approach from *Markt* consistently with *Warrick* and *Gellatly* that the representative action would give a prima facie right to damages, which could be defeated in secondary proceedings where and if there were any special circumstances or defences.

In *EMI Records Ltd v Riley* Dillon J. held that damages were recoverable in a representative action.46 They were recoverable because the global quantum to the entire class was ascertainable. Without reference to it Dillon J. also applied Lord Hatherley's point from *Warrick,* that once a common right was established there might well be considerable litigation between the class members to ascertain their individual right to a share of the common gain. In *Moon v Atherton,* Denning M.R. affirmed the position established in *Handforth v Storie,*47 that only the representative plaintiff was liable for costs and that, as established in *Meux v Maltby,*48 the represented parties would be bound by the decision. He went on to hold that as limitation continued to run for represented parties the court had sufficient power to substitute one of them for the representative, if the representative wished to discontinue or settle the claim.49 In an obiter dictum he stated that the action, for negligence, could properly be brought as a representative action. He thus confirmed, without reference to it, Vinelott J.'s conclusion in *Prudential Assurance* that, contra *Markt, Ellis* and *Taff Vale* established that the representative action was available ***510** for tortious claims. In doing so he impliedly accepted Lord Lindley's statement, again from *Taff Vale,* that the action was not limited by its equity roots, but could be developed positively and flexibly to meet the changing needs of society.

Subsequently the Court of Appeal in *The Irish Rowan,* per Purchas L.J. explained that it had erred in *Markt* when it, that is Vaughan Williams and Fletcher Moulton L.JJ., although the latter was not referred to, held that the rule had to be interpreted without reference to pre-1873 Chancery practice.50 It went on to outline how: the rule as then drafted had safeguards, consistent with the old practice, for class members who wished to disassociate themselves from the class (at [239]); that the rule permitted class members to opt-out of the class (at [241], per Ord.15 r.12(1)); and that even though the class members entered into identical contracts there was sufficient commonality. Relying on *EMI Records* and *Moon v Atherton,* amongst others, it went on to affirm, at [227], that damages claims were not to be automatically excluded from representative actions. In essence, it held that the representative action had to be applied, as Andrews put it, echoing Lord Lindley, “within the spirit of flexibility” which imbued the nineteenth century case law.51 That flexibility acknowledged by the House of Lords in *Taff Vale* in 1901 and applied once more by the Court of Appeal in 1990 is a flexibility which cannot but continue to exist today.

More recently Morritt V.C. in *Independiente Ltd v Music Trading On-Line (HK) Ltd* examined the scope of the rule in its CPR guise: CPR r.19.6.52 He noted that the principles governing the rule were the same post-CPR as they were pre-CPR, albeit the rule had to be interpreted and applied consistently with the overriding objective.53 In particular he stated that the definition of “same interest” in the rule had to be interpreted flexibly and in conformity with the overriding objective. It is of course the case that *Markt* is no longer necessarily binding given the CPR's introduction as a new procedural code. The test to establish whether the rule was appropriate for the case was that laid down by *Ellis* : common interest, common grievance and relief beneficial to all. There was a

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common interest despite the presence of different defences contrary to *Markt* but fully in line with *Temperton, Ellis,* and *Taff Vale.* Pecuniary relief was available as it was beneficial to all.

The future of the English class action?

Where does this leave the English class action now? It might be said, quite reasonably that, following the High Court's decision in *Emerald Supplies Ltd v British Airways Plc* [2009] EWHC 741 (Ch) that it remains in the position that *Markt* left it in, despite the attempts to return it to its pre-*Markt* flexibility during the 1980s, 1990s and early years of the twenty-first century. It might be ***511** said that as an English class action, the representative rule remains hidebound by restrictive authorities and remains a well-hidden part of English civil procedure. This need not remain the case. It remains, for instance, a possibility that *Emerald Supplies* at [34] interpretation of the commonality requirement could be challenged successfully; not least by reference to pre-*Ellis* authorities that might well show that it need not, as perhaps *Meux* shows, be so restricted. That is a matter for the future.

At the present time it is arguable that the authorities provide the basis for a principled, rule-based, reformulation of the representative rule and that such a reformulation could transform it into a rule akin to r.23 of the Federal Court's Rules of Procedure. What is hidden could in this way be brought into the light. This can perhaps best be seen by contrasting r.23, the paradigmatic class action rule, with the principles established by the case law on the English representative rule. Rule 23(a) sets out four conditions which have to be satisfied in order to certify an action as a class action: (i) numerosity, i.e. that there are so many class members that joinder of them all is impracticable; (ii) commonality, i.e. there must be a common question of law or fact; (iii) typicality; the claims or defences of the representative parties are typical of the class, i.e. that the representative's complaint is typical of the classes complaint, in other words that the representative is a member of the represented class; and (iv) the representative parties fairly and adequately protect the interests of the class.

Each of these four conditions already form part of the English representative rule's jurisprudence. The minimum numerosity requirement forms part of it, and was established in *Chancey v May.* The commonality requirement forms part of it, and notwithstanding *Markt's* improper attempt to sidestep binding authority set out in *Warrick* and *Ellis* as to the nature of common interest and grievance. The typicality requirement forms part of it, and was established in *Adair v New River Co.* Finally, the representative adequacy requirement is present, following *Gellatly,* which established that a representative plaintiff, now claimant, must properly and adequately represent the interests of the represented class. Equally the representative rule's justification and the basis of its jurisdiction is the same as that of the US class action rule and class action rules throughout the common law world: to increase access to justice, to enable claims that it would not otherwise be possible to litigate to come before the courts and to prosecute others with greater procedural efficiency and economy than would otherwise be possible. All the essential features of a class action regime are therefore already present in English law; just as Snow in 1904 would have maintained. The difference between the United States and England is that what is patent within the US rule is latent within the English rule.

Further essential features of class action regimes can also be seen from Federal Court r.23(b), which was introduced following the 1966 US class action reforms and which introduced into the United States the damages class action (r.23(b)(3)). When introduced additional procedural safeguards were also introduced. In order to bring such an action it must be superior to other forms of procedure. The representative rule incorporates the same requirement: see *Meux.* Equally, the US damages class action must satisfy a common benefit requirement (r.23(b)(3)). This is already a prerequisite of the ***512** English representative rule: see *Warrick, Glasse* and *Ellis.* Further commonalities between the US class action and the representative action are: that the class has to be

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capable of proper definition, see r.23(c) and *Ellis* ; and they bind the represented class in respect of the common issue, see r.23(c) and *Meux*.54 While damages are to varying degrees available under both systems, there is a greater practical acceptance and application of aggregate damages claims in the United States in contrast to the arguably theoretical basis upon which the English action might embrace them through further developments akin to those acknowledged by Purchas L.J. in *The Irish Rowan*.55 Having accepted in principle that global damages awards are available in some circumstances and that the basis of the representative action is a flexible one not limited to past precedent, that it is in Lord Lindley's words a flexible action which, "ought to be applied to the exigencies of modern life as occasion requires", is it *or* perhaps it is reasonable, to conclude that the English jurisdiction could well accommodate damage aggregation, through perhaps treating the class as a single entity which has suffered damage and then leave it for the class members to ascertain their rights *inter se,* as per *Warrick.*

The central feature of the US class action is that it is an opt-out action: members of the represented class automatically form part of that class unless and until the positively elect not to be. The Woolf Reforms introduced into English procedure an opt-in form of action via the Group Litigation Order (CPR r.19.10). This is not however a representative or class action but a case management tool. It was introduced on the assumption that opt-out representative actions did not exist in English procedural law, which if true would undermine the argument that the representative rule is akin to r.23. That assumption fails however to take account of the true nature of the representative rule, which like the US class action is, in some circumstances, a mandatory class action whilst in others it is an opt-out class action. In the United States, r.23 is, in its basic form, a mandatory class action. It is mandatory, with no notice of certification requirement, where injunctive or declaratory relief is sought. The same is the position under the representative rule. It is in both cases because the relief sought is indivisible for all class members. There is however a power to order notice in the United States.56 Insofar as r.23(b)(3) damages class actions are concerned an opt-out mechanism operates. The same is true, both as to it being a mandatory action and in some circumstances an opt-out action, under the representative rule as the court has the power to permit an opt-out under CPR r.19.6(4); cf. *The Irish Rowan.* The requirement to permit class members to opt-out is further bolstered now as a consequence of the introduction of art.6 of the European Convention on Human Rights (ECHR), through the Human Rights Act 1998, into English law and the requirement that the courts interpret and apply legislation consistently with the Convention right. It is inconceivable that CPR r.19.6 (4) could not but be interpreted now as providing an opt-out power per the interpretative approach exemplified by *Cachia v Faluyi* [2001] ***513** EWCA Civ 998; [2001] 1W.L.R. 1966 and *Goode v Martin* [2001] EWCA Civ 1899; [2002] 1 W.L.R. 1828. Such an art.6 ECHR compliant interpretation of the jurisdiction could not but require the court to operate a sufficient notice requirement prior to certification here as in the United States.

It appears readily apparent that the representative rule's jurisprudential history provides a strong basis for redrafting CPR r.19.6 in a fashion similar to that embodied by r.23 in order to render patent that which remains latent. That is not to say that the Civil Procedure Rule Committee (the CPRC) should do so. It might well be the case that any attempt to do so, as the Civil Justice Council in its December 2008 report noted, would give rise to vires challenges, not least because of the (mis)perception that opt-out class actions are not yet properly present in English civil procedure.57 Whether such a vires challenge would or could succeed must be questionable given the representative rule's history and true nature. The CPRC has the power to make rules where such rules existed prior to the enactment of the Civil Procedure Act 1997: see Sch.1 para.1 to the 1997 Act. The representative rule is one that has since the eighteenth century formed part of the rules of court. It has since its inception been a mandatory class action. From 1873 to 1999 the RSC contained a power to make such a rule; a rule which forms an a fortiori case. Given the power to create such a fortiori case surely it follows by necessary implication that

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there is now a power to create the lesser case, the opt-out class action. Given this, and the case law, old as it may be (and it must be remembered that jurisdiction does not, as *Cinpres Gas Injection Ltd v Melea Ltd* [2008] EWCA Civ 9; [2008] Bus. L.R. 1157 at [95] put it, "fade with time") it seems to me that a vires challenge would fail if the rule committee did no more than codify the jurisdiction. A vires challenge would only succeed if the rule committee went beyond the ambit of its jurisdiction, through for instance attempting to introduce a cy-près power to distribute unallocated damages or to provide a means to suspend the running of limitation periods for class member. The real question then is to identify the bounds of the extant jurisdiction. Of itself this could lead to substantial litigation, which would not itself be an attractive option for reform. In principle though, and absent legislative intervention, the possibility remains that codification could occur and that either the rule committee or the courts could, using as the Canadian Supreme Court has held in *West Canadian Shopping Centres Inc v Dutton* [2001] 2 S.C.R. 534, exercise its inherent jurisdiction to fashion, or codify, the representative rule into a modern class action.

That this remains a possibility does not however mean that such a step is one that should be taken. Parliamentary intervention should be the first step for any reform of the English class action; not least because such action would militate against vires challenges and could take full and proper account of the English civil justice system's present needs. It could do so whilst considering the optimum means, which may not necessarily be court-based, to enforce the rights of individuals whose claims might otherwise be accommodated within a modern, US or commonwealth-style class action. The Canadian Supreme ***514** Court favoured statutory intervention rather than court-based reformulation of procedural law in this area; in an area where Canadian representative rules were based on the English representative rule. In that it was surely right. Codification and revivication remain options. But statutory intervention remains the preferred option for reform. But in being so it should be borne in mind that such intervention, if it is to come, has a long history of jurisprudence to build on. Such intervention would not create an English class action, but simply introduce a new form of class action into English procedural law: a new form which might either sit alongside or replace the representative rule, England's original albeit latterly unacknowledged and so-far hidden class action.

Any views expressed in this article are those of the author and are neither intended to nor do they represent the views of any other individual or body.

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1. Mulheron, *The Class Action in Common Law Legal Systems* (Hart Publishing, 2004), p.3.

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3. *Nash v Eli Lilly & Co* [1993] 1 W.L.R. 782; [1993] 4 All E.R. 383 at [409].

4. Lord Chancellor's Department, *Representative Claims: Proposed New Procedures* (February 2001), para.13, (*http://www.dca.gov.uk/consult/general/repclaims.htm* [Accessed July 22, 2009]). The Woolf Reports had also accepted the Davies and Nash position, see Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (London: HMSO, 1996), Ch.17.

5. Wilde, *The Importance of Being Earnest,* Act I.

6. Uff, "Class, Representative and Shareholders' Derivative Actions in English Law" (1986) C.J.Q. 50, 56; cf. Sorabji et al., *"Improving Access to Justice through Collective Actions": Developing a More Efficient and Effective Procedure for Collective Actions* (*http://www.civiljusticecouncil.gov.uk/files/Improving_Access_to_Justice_through_Collective_Actions.pdf* [Accessed July 22, 2009]), p.80; Pace, *Class Actions in the United States of America: An Overview of the Process and the Empirical Literature* (Santa Monica, California, US: RAND Institute for Civil Justice, 2007), p.2.

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15. *Chancey v May* 24 E.R. 265; (1722) Prec. Ch. 592; and see *City of London v Richmond* 23 E.R. 870; (1701) 2 Vern. 421.
16. *Adair v New River Plate Co* 2 E.R. 1153; (1805) 11 Ves. Jr. 429.
17. *Cockburn v Thompson* 33 E.R. 1005; (1809) 16 Ves. Jr. 321.
18. *Mayor of York v Pilkington* 26 E.R. 180; (1737) 1 Atk. 282.
19. *Wallworth v Holt* 41 E.R. 238; (1841) 4 My. & C. 619 at 635.
20. Story, *Commentaries on Equity Jurisprudence,* 1886, Vol.II, pp.853-854. My emphasis.
21. Story, *Commentaries on Equity Jurisprudence,* 1886, Vol.II, p.857.
22. Mulheron, *The Class Action in Common Law Legal Systems,* 2004.
23. *Meux v Maltby* 36 E.R. 621; (1818) 2 Swans. 277 at 281.
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26. *De Hart v Stevenson* (1875-76) L.R. 1 Q.B.D. 313 (Div Court).
27. *Adair v New River Co* 2 E.R. 1153; (1805) 11 Ves. Jr. 429 at 433.
28. *Commissioners of Sewers of the City of London v Gellatly* (1876) L.R. 3 Ch. D. 610 at 615, per Jessel M.R.
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33. *Gray v Chaplin* 57 E.R. 348; (1825) 2 Sim. & St. 267 at 272.
34. *Commissioner of Sewers of the City of London v Glasse* (1871-72) L.R. 7 Ch. App. 456 at 646, per James L.J.
35. *Warrick v The Queen's College, Oxford* (1870) L.R. 6 Ch. App. 716 at 726.
36. The question was whether a representative action could be brought to determine the validity of numerous identical certificates individually held by the claimants: *Sheffield Waterworks v Yeomans* (1866-67) L.R. 2 Ch. App. 8 at 11.
37. *Temperton v Russell* [1893] 1 Q.B. 435.
38. *Wood v McCarthy* [1893] 1 Q.B. 775 at 778.
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40. *Duke of Bedford v Ellis* [1901] A.C. 1 at 7-12.
41. *The Taff Vale Railway Co v The Amalgamated Society of Railway Servants* [1901] A.C. 426 at 443.

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43. A point reiterated by Evershed M.R. in *Smith v Cardiff Corp* [1954] 1 Q.B. 210; [1953] 3 W.L.R. 994 at 226.
44. Andrews (2003).
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46. *EMI Records Ltd v Riley* [1981] 1 W.L.R. 923.
47. *Handforth v Storie* (1825) 2 Sim & St. 196 at 198.
48. *Meux v Maltby* 36 E.R. 621; (1818) 2 Swans. 277 at [281].
49. *Moon v Atherton* [1972] 2 Q.B. 435; [1972] 3 W.L.R. 57 CA at 442.
50. *Irish Shipping Ltd v Commercial Union Assurance Co Plc (The Irish Rowan)* [1990] 2 Q.B. 206; [1990] 2 W.L.R. 117 at 237-239.
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53. *Independiente Ltd* [2003] EWHC 470 (Ch) at [21], [23].
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