BEFORE LORD JUSTICES CLARKE LJ MANGE LJ DYSON LJ . CA on appeal from QBD Mrs Justice Steel. 19th November, 2001

JUDGMENT LORD JUSTICE CLARKE

Introduction :

1. This is an appeal by the appellant claimants against an order of Steel J dated 14th December 2000, in which she dismissed the claimants' appeal from the order of Master Eyre dated 1st June 2000 striking out the action. The appeal is brought by permission of Laws LJ, granted on 30th January 2001.

2. The claimants issued a writ against the defendant firm of solicitors on 19th June 1995. It was amended on 3rd October 1997, although the substance of the claim remained the same. The claim is for damages for breach of contract, negligence and negligent misrepresentation, and is brought against the defendants as the claimants' former solicitors. The defendants' firm no longer exists.

The claimants' case

3. The claimants' case, and in particular their case on quantum, has changed to some extent over the years, but it may now be summarised as follows:

   (1) The claimants retained the defendants as their solicitors in connection with the purchase of 7.87 acres of land ("the site") from Brent Council ("Brent") in 1992. The site is situated beside the A406 North Circular Road.

   (2) In about 1988 the Department of Transport ("the DoT") had served a Compulsory Purchase Order ("CPO") on Brent with a view to acquiring part of the site in connection with the North Circular Road Hanger Lane to Harrow Improvement Scheme ("the works"). The works were carried out for the DoT by Balfour Beatty.

   (3) Although none of the site was ever acquired by the DoT under the CPO, or at all, Brent had granted the DoT a licence to use part of the site to enable the works to be carried out.

   (4) The claimants wanted to buy the site in order to develop it into something called the "Asian Sky TV and Cultural Centre" ("the development"), with completion by the spring of 1994. The development was to comprise, among other things, a television centre, cinemas, discotheque, hotel complex, function halls, retail units and car park. Mr Sharad Patel was the chairman and chief executive of the first claimants, which was to be the developer. The second claimant was acquired by Mr Patel in August 1992 and was the purchaser of the site.

   (5) Part of the site had been used in the past as a waste tip, known as the Twyford Tip. As a result it was covered with waste of varying toxicity up to a depth of about 20 metres. One estimate suggested that some 338,000 cubic metres of waste had to be removed from the site before the construction of the development could begin.

   (6) In early March 1992 a purchase price of £1.6 million was agreed. The defendants acted for the claimants in connection with the purchase. Mr Patel gave various instructions to two partners of the firm, namely Mr Gavin Le Chat and Mr Sunil Sheth, both of whom have made witness statements. The price was reduced to £1.3 million in June 1992 because an additional 20,000 cubic metres of waste was deposited on the site. The reduction in price was made up of £200,000 as the extra cost of removal of the waste and £100,000 as a result of an agreement on the part of the claimants, known as a section 106 agreement, to construct an access road.

   (7) Contracts were exchanged on 19th October 1992 and completion was on 3rd November 1992.

   (8) The claimants' case depends almost entirely upon the alleged negligence or breach of contract on the part of the defendants before contracts were exchanged. At that stage everyone, including the claimants, knew about the CPO. The question arose whether the CPO could be withdrawn before exchange of contracts, but it was agreed that in practice it could not because it would take too long. The claimants expressly agreed to proceed in spite of the CPO, provided that they received a suitable letter of comfort from the DoT.

   (9) Mr Le Chat wrote to Brent on 30th September 1992 as follows:

"My clients' position is that they are prepared to proceed to an exchange of Contracts without any formal withdrawal of the Compulsory Purchase Order. However, they will require a letter of comfort from the Department of Transport confirming that it does not require any of the land which is being sold by the Council to Asian Sky Properties Limited and that it will withdraw the Compulsory Purchase Order insofar as it relates to the Council's site.

In addition my clients will require a letter from the Department of Transport acknowledging that the owner of Twyford Tip has a right of way over the access road leading to the site."

On 12th October 1992 Brent wrote to the defendants enclosing the letter of comfort from the DoT addressed to Brent, which included the statement that the DoT had no further interest in acquiring title to various plots which formed part of the site, but added:
"These plots are all within the contractors site boundary. He must therefore be assured continued access during the contract period presently due programmed to continue until Autumn 1994."

(10) It is the claimants' case that in the light of that letter the defendants should have expressly advised them that the reference in the letter to access should be explored, in order to ensure that they would in truth obtain vacant possession on completion and that the access given to the contractors, Balfour Beatty, would not make the claimants' proposed work impossible.

(11) If the defendants had given the contractors that advice, they would not have entered into the contract. In addition, they would not have entered into a further contract under which they agreed to buy the British Pavilion ("the Pavilion"), which had been exhibited at the 1992 International Exhibition in Seville from the Department of Trade and Industry. Contracts were exchanged in respect of the Pavilion on 25th February 1993.

(12) Some time after the claimants acquired the site, they discovered that Balfour Beatty had rights of access to part of it. As a result the claimants were not able to proceed with the development at a reasonable cost and no development has, in the event, taken place.

(13) As a result of the defendants' negligence and/or breach of contract, the claimants are entitled to be put in the position they would have been in if the contract had been performed. Since in that event they would not have purchased either the site or the Pavilion, they have suffered loss in the sum of about £6.4 million made up as follows:

(i) £4.55 million calculated by the addition of the purchase price of the site, namely £1.37 million, to what the claimants say was a negative value of -£3.25 million;

(ii) £1.358 million in respect of losses arising from the purchase of the Pavilion, made up of the purchase price of £350,000 and £1.123 million in dismantling and transport costs from Spain, less credit for the scrap value of the Pavilion and the value of the containers in which it is stored;

(iii) £495,000 in respect of wasted professional fees; and

(iv) £27,935 in respect of other wasted expenditure.

4. It was only in October 2000 that the claimants advanced a claim so calculated. They had originally put the claim much more widely, and even when the case was before Master Eyre they stated that they could not put it more accurately than between £5 and £10 million, which was far from satisfactory. The only alternative claims now advanced are these.

5. First, the claimants say that if it is not accepted that but for the breach of contract they would not have entered into the contracts but it is held that they would have renegotiated the contracts by reducing the price, the measure of damages would be the extent of that reduction. That would be a comparatively modest sum of, say, £200,000, by comparison with the claim in paragraph 1 of the latest schedule.

6. Secondly, the claimants say that when the defendants exchanged contracts on their behalf they had no authority to do so. However, the claimants have failed to particularise their loss under this head. I, for my part, would be willing to hear argument as to whether that part of the claim should be struck out,

provided that the argument is heard and determined today. I shall return to the defendants' defence in a moment.

The appeal

7. As indicated, this is an appeal from a decision of Steel J who dismissed an appeal from a decision of Master Eyre striking out the action. There was debate, both before the judge and before us, as to the nature of the appeal before the judge. CPR 52.11 provides, so far as material:

"(1) Every appeal will be limited to a review of the decision of the lower court unless

(a) a practice direction makes different provision for a particular category of appeal; or

(b) the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing.

(2) Unless it orders otherwise, the appeal court will not receive

(a) oral evidence; or

(b) evidence which was not before the lower court.

(3) The appeal court will allow an appeal where the decision of the lower court was

(a) wrong; or

(b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court.

(4) The appeal court may draw any inference of fact which it considers justified on the evidence."

Part 52 came into force on 2nd May 2000 and applies to appeals brought on and after that date.

8. The Master granted permission to appeal. In doing so he said:

"There being at least some prospects of persuading an appellate court to take a different view of the correct approach to Rule 3.4, ..."

The claimants subsequently applied on paper, without notice, to Gray J for an order that the appeal to the judge should be by way of rehearing. Gray J granted that application on paper, observing in a very short note that:

"... in the context of an appeal such as this, the distinction between a rehearing and a review may be illusory)."

9. The defendants immediately indicated a wish to challenge Gray J's decision, which they were entitled to do because they had not had an opportunity of making representations to him. It was subsequently agreed between the parties that the question whether the appeal should be by way of review or rehearing should be considered on the hearing of the appeal to the judge. As a result, Steel J considered that question and, as I read her judgment, she held that the appeal should proceed by way of review.

There was debate before us as to what criteria should be used to decide that question. However, for my part I do not think that it is desirable to fetter the wide discretion which Rule 52.11(1)(b) gives to the court. As I read the rule, it contemplates that in the ordinary case the appeal will be by way of review, but provides for the court to hold a rehearing if it "considers that in the circumstances of an individual case it would be in the interests of justice" to do so. Since the circumstances of individual cases may be almost infinitely variable, it is not in my judgment appropriate to lay down criteria to be satisfied before the appeal court holds a rehearing. All will depend on the particular circumstances of the case.

If the judge approached the question of review or rehearing narrowly, as the claimant suggests, I am unable to agree with her. However, I doubt whether she did, and in any event she was in my judgment entitled to hold that the interests of justice did not require a rehearing rather than a review.

I should perhaps note in passing that I do not agree with Gray J that the difference between a review and a rehearing in a case like this may be illusory. The difference was considered by Brooke LJ (with whom Lord Woolf MR and Peter Gibson LJ agreed) in **Tanfem Ltd v Cameron-MacDonald** [2000] 1 WLR 1311, which contains detailed guidance on a number of aspects of appeals under the CPR. Brooke LJ said, at paragraphs 30 to 32, at page 1317:

"30. As a general rule, every appeal will be limited to a review of the decision of the lower court. This general rule will be applied unless a practice direction makes different provision for a particular category of appeal, or the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a rehearing: CPR, r. 52.11(1). The appeal court will only allow an appeal where the decision of the lower court was wrong, or where it was unjust because of a serious procedural or other irregularity in the proceedings in the lower court: CPR, r. 52.11(3).

31. This marks a significant change in practice, in relation to what used to be called 'interlocutory appeals' from district judges or masters. Under the old practice, the appeal to a judge was a rehearing in the fullest sense of the word, and the judge exercised his/her discretion afresh, while giving appropriate weight to the way the lower court had exercised its discretion in the matter. Under the new practice, the decision of the lower court will attract much greater significance. The appeal court's duty is now limited to a review of that decision, and it may only interfere in the quite limited circumstances set out in CPR, r. 52.11(3).

32. The first ground for interference speaks for itself. the epithet 'wrong' is to be applied to the substance of the decision made by the lower court. If the appeal is against the exercise of a discretion by the lower court, the decision of the House of Lords in **G v G *(Minors: Custody Appeal)*** [1985] 1 WLR 647 warrants attention. In that case Lord Fraser of Tullybelton said, at p. 652:

'Certainly it would not be useful to inquire whether different shades of meaning are intended to be conveyed by words such as 'blatant error' used by the President in the present case, and words such as 'clearly wrong', 'plainly wrong', or simply 'wrong' used by other judges in other cases. All these various expressions were used in order to emphasise the point that the appellate court should only interfere when they consider that the judge of first instance has not merely preferred an imperfect solution which is different from an alternative imperfect solution which the Court of Appeal might or would have adopted, but has exceeded the generous ambit within which a reasonable disagreement is possible."`

Thus a review of an exercise of a discretion is different in principle from a rehearing, at any rate if the rehearing is (as Brooke LJ put it) a rehearing in the fullest sense of the word, as occurred under the old RSC Order 58, rule 1. It seems to me that CPR Rule 52.11(1) empowers the appeal court to hold a rehearing of that kind if the justice of the particular case requires. It may be that the nature of the rehearing which is appropriate will itself depend upon the particular circumstances; so that there may be a difference between an appeal from a decision of this kind, involving an exercise of a discretion, and an appeal after a trial of an action. It is not, however, necessary to explore that possibility further in this case.

On a review of a decision like that of Master Eyre which involved the exercise of a discretion, the appeal court, subject to one proviso, is limited to considering whether he took account of irrelevant considerations, or failed to take account of relevant considerations, or whether he was wrong in the sense described by Lord Fraser in **G v G** in the passage quoted by Brooke LJ.

The proviso is that where the appeal court receives evidence on a review (as it may do under Rule 52.11(2)) the review will take account of that evidence in deciding whether the exercise of the discretion by the court below was flawed. Such a review is very different from the kind of rehearing envisaged by Brooke LJ, in which the appeal court is exercising its own discretion and, because of the "generous ambit within which a reasonable disagreement is possible", might well legitimately arrive at a different conclusion from the Master or judge in the court below.

I should perhaps add that now that an appeal from a master will, for the most part, be a review and not a rehearing, it is important that the master should give reasons for his decision - which may be short and concise, but should be sufficient to enable the appeal court to know by what process of reasoning he reached his conclusion.

In the instant case Mr Moger QC submits, on behalf of the claimants, that the master was wrong, in Lord Fraser's sense, to exercise his discretion as he did. I shall consider that question first. In doing so I should say at the outset that in at least two respects there was important evidence before the judge (and thus before us) which was not before the master. That evidence was put before the judge without objection and was treated by the parties as relevant, both to any rehearing and to the review.

The action

In reaching his conclusions the Master expressed some firm views about the claimants' conduct of the action, to which I now turn. The problems with access to the site were ascertained by the claimants during 1993, and the extent of them was further considered in 1994. The claimants took advice from solicitors and the writ in this action, endorsed with a statement of claim, was issued and served on 19th June 1995. The defendants were able to serve a substantive defence on 24th September 1995. I accept Mr Moger's submission that they were able to investigate the matter sufficiently to do so before that date.

On 13th June 1996 the claimants served a request for further and better particulars of the defence, and on 25th September the court made an order that the defendants provide such particulars. On 24th October the court made an unless order that the defendants provide particulars of the defence. The further and better particulars of the defence were in the event served on 24th November 1996. On 26th November the claimants' application for split trials on liability and quantum was dismissed. On 6th December the defendants' first list of documents was served. On 14th January 1997 the claimants' appeal from the order refusing to order split trials was dismissed. On 20th February 1997 the claimants gave notice of change of solicitor. Their new solicitors were, and remain, Simmons & Simmons.

20. On 3rd October 1997 an order for directions was made. The order included a direction that the action be set down for trial by 1st December 1997. However, that date was subsequently varied by agreement to a date, I think, in May 1998. The claimants were given leave to amend their statement of claim and the defendants were given leave to amend the defence. The amended statement of claim was served on 3rd October and the defendants were given leave to amend the defence on or before 10th November 1997. The claimants were ordered to serve a schedule of loss by 31st October. As I have indicated, the substance of the amended statement of claim was no different from the original document.

A schedule of loss was served on 21st November. On 24th November further and better particulars of the amended statement of claim were served. On 18th December the defendants served an amended defence. The claimants served a reply on 30th January 1998. The claimants' first list of documents was served on the same day. A second set of further and better particulars of the amended statement of claim was served on 13th March 1998. On 23rd April a further order for directions was made, this time ordering the action to be set down by 1st August 1998. Detailed directions were given as to witness statements and expert reports and the like. For example, the parties were given leave to adduce expert evidence on valuation of land, accountancy, waste removal and quantity surveying.

22. On 15th May the date by which the defendants were to serve their witness statements was extended to 29th May. On 28th May the claimants' appeal from a Master's order of 28th April refusing their application for the expert evidence to include evidence on conveyancing practice was allowed, although, as I understand it, it was left to the trial judge finally to decide whether to admit it. On 29th May the date by which the defendants were to serve witness statements was extended to 31st July. On 18th June the claimants served their first supplemental list. On 24th June further and better particulars of amended defence were served and in July the defendants' first supplemental list of documents was served.

23. On 20th July the claimants were ordered to serve a supplemental list of documents and to verify it by affidavit. Witness statements were exchanged on 31st July and on 14th September the claimants served a second supplemental list. On 5th October the defendants' application for security for costs was adjourned. Before turning to the order of 1st December 1998 upon which the defendants particularly rely, I should refer briefly to the correspondence in the autumn of 1998 in respect of which the Master was particularly critical of the claimants.

24. Throughout the autumn of 1998 the defendants were seeking clarification of the claimants' case on quantum, which was undoubtedly a complicated aspect of the case. Thus, in response to one such request, on 24th August 1998 Simmons & Simmons wrote to Reynolds Porter Chamberlain saying that they were presently reviewing quantum with leading counsel. At that time they said that they were instructed to advise that the claim for £350,000 would be withdrawn for commercial not legal reasons. It appears that that must be the same £350,000, or at any rate relate to the same £350,000, as was paid for the purchase of the Pavilion. However that may be, Reynolds Porter Chamberlain wrote again on 17th August and on 26th August Simmons & Simmons again said that the claimants were reviewing quantum with leading counsel. There was further correspondence and on 28th September Simmons & Simmons again said that they were still awaiting leading counsel's advice as regards quantum and that they anticipated being able to discuss the position by the end of October.

25. On 6th October Reynolds Porter Chamberlain asked them to clarify what amendments they intended to make to the quantum of the claim, to which the reply was that Simmons & Simmons were still taking leading counsel's advice. On 27th October Reynolds Porter Chamberlain wrote another letter showing

some frustration with the claimants' failure to particularise their claim on quantum. On 30th October Simmons & Simmons wrote to Reynolds Porter Chamberlain saying that they would not be in a position to confirm whether or not there would be amendments to the statement of claim until such time as they had the final reports of their experts.

26. That was essentially how the matter was left in the autumn of 1998, which the master thought, with some justification in my judgment, was far from satisfactory. The position at the end of the correspondence was that the claimants did not return to the issue of quantum in the correspondence, although it is fair to say that the defendants did not press further for a further schedule at that time. It is also fair to say, however, that the claimants' experts' reports, upon which they still rely, were served on 18th December 1999 and it may be that it was because the defendants' solicitors received those reports that they did not press for a further schedule of loss in early 1999. Nevertheless, the criticisms of the claimants in this regard were, in my judgment, justified.

27. I return to the chronology. On 1st December 1998 the court made a further order for directions. The order provided for exchange of expert valuation and conveyancing reports, and for the claimants to serve reports on other matters by 15th December 1998. The defendants were to serve their experts' reports by 15th February 1999. The experts were to meet by 31st March 1999. The claimants were to set the action down for trial on or before 15th January 1999.

28. On 18th December 1998, as I have indicated, the claimants served their expert evidence and the parties exchanged valuation evidence. On 19th January the claimants paid £150,000 into court as security for costs. On 1st February the defendants served their second supplemental list of documents, which was of course their third list of documents. On 9th February the date by which the defendants were to serve their expert evidence was extended to 8th March. On 8th March it was extended to 29th March, and on 29th March the defendants served their expert evidence.

29. The CPR came into force on 26th April 1999. On 20th May 1999 the parties' solicitors had a without prejudice telephone conversation. It is important to note that evidence relating to the contents of that telephone conversation was not before the master. The reason why it is important is that the contents of the conversation seem to me to put some of the conduct of the claimants which the master criticised in a somewhat different light. Mr Simon Huxford of the defendants' solicitors, Reynolds Porter Chamberlain, said that the defendants were prepared to offer £100,000 on the basis that if the claimants had been told of the presence of the road contractors on the site they would have sought a further reduction of £50,000 in the price. He said that the claim plus interest to date thus amounted to about £100,000, and that the defendants were prepared to offer £100,000 in full and final satisfaction of the claimants' claims, together with standard costs.

30. Miss Zoe Morrison of the claimants' solicitors, Simmons & Simmons, said that their clients would not accept that amount because if they had been properly advised they would not have bought the land at all and had lost at least £6 million. She said that an offer much nearer that figure would have to be made if it was to be seriously considered. Miss Morrison also said that she had not yet considered the defendants' experts' reports, but that she was in the process of preparing a letter suggesting that proceedings be stayed pending mediation. Mr Huxford said that he would speak to his clients, but did not expect to get back to her before the next week, when he would in any event be contacting her in order to inspect the documents in the claimants' third supplemental list. A draft of that list had been sent to the defendants' solicitors under cover of letter dated 19th May. It was of course their fourth list of documents.

There was no hint in that conversation of a concern on the part of the defendants that a fair trial might not be possible, or a concern that the claimants had not set the action down for trial. On the contrary, both solicitors contemplated the possibility of a stay pending mediation. In that regard Mr Huxford said that he would have no problem with mediation, although he doubted the benefit of mediation in the light of their discussion since the parties were miles apart on settlement figures.

32. On 14th June 1999 the defendants paid £200,000 into court. However, so far as I am aware from the documents before us, there were no further communications between the parties after the without

prejudice conversation of 20th May until 30th July when the defendants' solicitors wrote asking for confirmation that the claimants' solicitors had obtained certain documents which had been referred to in earlier correspondent, and saying that they looked forward to receiving service of a third supplemental list in the near future. The claimants' solicitors replied on 5th August enclosing the final version of the third supplemental list and saying that no further documents were listed. Reynolds Porter Chamberlain acknowledged receipt and said that they would be in contact to arrange a mutually convenient date to inspect the documents, although in the event Reynolds Porter Chamberlain did not make an appointment to inspect the documents.

33. It appears that on 30th July Reynolds Porter Chamberlain wrote to Simmons & Simmons making reference to the possibility of further negotiations, because although we not have not seen that letter, we have seen a reply dated 4th August 1999 in which Simmons & Simmons said that their client was overseas and that they would be contacting Reynolds Porter Chamberlain when they had further instructions, but did not anticipate that it would be before early September.

34. Further without prejudice correspondence ensued. On 30th September Reynolds Porter Chamberlain wrote asking whether it was possible to progress the matter through negotiations. They added that if the claimants were not prepared to negotiate, the defendants might be prepared to seek a settlement through mediation and asked whether the claimants would be willing to follow that course. On 6th October Simmons & Simmons replied saying simply that they would reply when they had instructions, which they anticipated having by mid-October. On 18th October Reynolds Porter Chamberlain wrote again asking what the position was. They received no reply, so they wrote again on 2nd November. They again received no reply, so they wrote yet again on 12th November. On 26th November Simmons & Simmons replied saying the same thing, namely that they still did not have their clients' instructions on mediation and would contact them when they did. In the event they never did.

35. The master was critical of the claimants' attitude to mediation as demonstrated in that correspondence. He was in my judgment entitled to be critical, although he would I think have taken a somewhat different view of the claimants' attitude to mediation if he had the evidence of the earlier telephone conversation before him, which he did not. I shall return to this point in a moment.

36. The defendants' thinking in the autumn of 1999 is summarised in paragraph 5 of Mr Huxford's second statement as follows:

"By the autumn of 1999 I was concerned about the lack of progress to compromise or litigate the claim and the prejudice of the delay to the Defendant. Had the Claimants responded to my letter of 12 November 1999 with proposals for settlement or mediation at a figure close to the sum of £200,000 paid into Court, however, serious consideration would have been given even then to such proposals. On the other hand, had they sought mediation, asserting a claim for £6 million or more, or applied to set down the claim for trial, I would have advised my client to apply to strike out the claim. An application to strike out was considered in late 1999, when it was decided to wait, not least because there appeared to be a good prospect that the claim would in any event be stayed under CPR Part 51.19 in April 2000. No intimation whatever was given to my firm that any 'debate concerning damages' was being conducted. No explanation is given even now as to when that debate, commenced it is now said in May 1999, was concluded. At the hearing before Master Eyre on 1 June 2000 the Claimants had not revised their schedule of loss, and were able to quantify their claim no more exactly than 'between £5 million and £10 million'. Only on 12th October 2000 was a draft revised schedule of loss served."

That statement was made on 24th October 2000 in response to a draft of the third statement of Mr Bacon of Simmons & Simmons which was ultimately dated 30th October 2000. It follows that neither of those statements was before the master.

37. The claimants took no further steps in the action until 4th April 2000. Mr Bacon says in his third statement that the review of the quantum of the claimants' claim began in the summer of 1999, and that conferences took place with leading counsel in June and July 1999, but there is no satisfactory explanation for why it was that nothing was done thereafter until April 2000. On 4th April 2000 the claimants' solicitors wrote enclosing a draft application notice containing an application for a significant number of directions, including an application relating to mediation. The letter made it clear that its timing was prompted by CPR Rule 51.19, which provided that any action which had not come before the court between 26th April 1999 and 25th April 2000 would be the subject of an automatic stay. I am

bound to say that the letter does not have the appearance of having been written by someone who was entirely au fait with the previous exchanges in the action.

38. In any event, the defendants' solicitors replied, saying that the action was still governed by the RSC and asking for a notice of intention to proceed. Such a notice was served under cover of a letter of 10th April. But on 11th April the defendants' solicitors wrote saying that they would issue an application to strike out, and on 13th April the application notice which led to the order of Master Eyre was issued. The application was based on CPR 3.4 and specified two grounds:

    (a) that the claimants were in breach of the order of Master Eyre dated 1st December 1998 in that they had failed to set the action down to trial by 15th January 1999 and

    (b) the claimants' inordinate and inexcusable delay in the prosecution of the action had resulted in a fair trial no longer being possible and/or had prejudiced the defendant.

    The application was based on the provisions of the CPR, and it is I think right to say that no one has suggested that it was appropriate to apply the provisions of the RSC.

CPR: the correct approach

39. The relevant part of Rule 3.4 provides:

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

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

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

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

    (5) Paragraph (2) does not limit any other power of the court to strike out a statement of case."

    It is common ground that the claimants were in breach of the order dated 1st December 1998 that they set the action down for trial on or before 15th January 1999, which they failed to do. It follows that the court had power to strike out the statement of case, and thus the action, under Rule 3.4(2)(c). It was not, however, bound to do so.

40. Thus in **Bijzuzzi v Rank Leisure Plc** [1999] 1 WLR 1926 Lord Woolf said, at page 1932:
    "There is no fear in this case that this court is going to suggest that the judge should 'adjust his wing mirrors'. He had to make a decision applying the principles under the CPR, not under the previous regime, in deciding whether this claim should be allowed to proceed. He could not, and should not, ignore the fact that the parties previously had been acting under a different regime. The fact that they were acting under a different regime does not mean that the judge is constrained to make the same sort of decision as would be made under the previous regime.

41 The courts have learnt, in consequence of the periods of excessive delay which took place before April 1999, that the ability of the courts to control delay was unduly restricted by such decisions as ***Birkett v James*** [1978] AC 297. In more recent decisions the courts sought to introduce a degree of flexibility into the situation because otherwise the approach which was being adopted by litigants generally of disregarding time limits for taking certain actions under the rules would continue.

    Under the CPR the position is fundamentally different. As rule 1.1 makes clear the CPR are 'a new procedural code with the overriding objective of enabling the court to deal with cases justly.' the problem prior to the introduction of the CPR was that often the courts had to take draconian steps, such as striking out the proceedings, in order to stop a general culture of failing to prosecute proceedings expeditiously. The prime example of that was contained in Ord 17, r 11(9) of the County Court Rules 1981 (SI 1981 No 1687 (L.20)) which involved the automatic striking out of cases where the appropriate step of seeking a hearing date was not taken by the strike out date. That led to litigation which was fought furiously on both sides: on behalf of the claimants to preserve their claim, and on behalf of defendants to bring the litigation to an end irrespective of the justice of the case because of a failure to comply with the rules of court."

    Lord Woolf then set out CPR Rule 3.4(2) and added, at page 1933:

"Under rule 3.4(2) (c) a judge has an unqualified discretion to strike out a case such as this where there has been a failure to comply with a rule. The fact that a judge has that power does not mean that in applying the overriding objectives the initial approach will be to strike out the statement of case. The advantage of the CPR over the previous rules is that the court's powers are much broader than they were. In many cases there will be alternatives which enable a case to be dealt with justly without taking the draconian step of striking the case out.

Under the court's duty to manage cases, such as have occurred in this case, should, it is, hoped, no longer happen. The court's management powers should ensure that this does not occur. But of the court exercises those powers with circumspection, it is also essential that parties do not disregard timetables laid down. If they do so, then the court must make sure that the default does not go unmarked. If the court were to ignore delays which occur, then undoubtedly there will be a return to the previous culture of regarding time limits as being unimportant.

There are alternative powers which the courts have which they can exercise to make it clear that the courts will not tolerate delays other than striking out cases. In a great many situations those other powers will be the appropriate ones to adopt because they produce a more just result. In considering whether a result is just, the courts are not confined to considering the relative positions of the parties. They have to take into account the effect of what has happened on the administration of justice generally. That involves taking into account the effect of the court's ability to her other cases if such defaults are allowed to occur. It will also involve taking into account the need for the courts to show by their conduct that they will not tolerate the parties not complying with dates for the reasons I have indicated."

Every application must be determined in accordance with the overriding objective. The CPR further provide:

"1.1(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.

(2) Dealing with a case justly includes, so far as practicable
(a) ensuring the parties are on an equal footing;
(b) saving expense;
(c) dealing with the case in ways which are proportionate
(i) to the amount of money involved;
(ii) to the importance of the case;
(iii) to the complexity of the issues; and
(iv) to the financial position of each party;
(d) ensuring that it is dealt with expeditiously and fairly; and
(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

1.2 The court must seek to give to give effect to the overriding objective when it
(a) exercises any power given to it by the Rules; or ...

1.3 The parties are required to help the court to further the overriding objective.

1.4(1) The court must further the overriding objective by actively managing cases.

(2) Active case management includes
(a) encouraging the parties to co-operate with each other in the conduct of the proceedings;
(g) fixing timetables or otherwise controlling the progress of the case;

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

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

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

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

(3) When the court makes an order, it may

(a) make it subject to conditions, including a condition to pay a sum of money into court; and

(b) specify the consequence of failure to comply with the order or a condition.

(5) The court may order a party to pay a sum of money into court if that party has, without good reason, failed to comply with a rule, practice direction or a relevant pre-action protocol.

(6) When exercising its power under paragraph (5) the court must have regard to

(a) the amount in dispute; and

(b) the costs which the parties have incurred or which they may incur."

42. In **UCB Corporate Services Ltd v Halifax SW Ltd** CAT 6th December 1999 (Ward LJ and Lord Lloyd) Lord Lloyd (with whom Ward LJ agreed) said:

"It would indeed be ironic if as a result of the new rules coming into force, and the judgment of this court in the Biguzzi case, judges were required to treat cases of delay with greater leniency than they would have done under the old procedure. I feel sure that that cannot have been the intention of the Master of the Rolls in giving judgment in the Biguzzi case. What he was concerned to point out was that there are now additional powers which the court may and should use in the less serious cases. But in the more serious cases, striking out remains the appropriate remedy where that is what justice requires."

43. In **Purdy v Cambran** [2000] CP Rep 67, May LJ said this:

"45. Under the Civil Procedure Rules, the court has ample power in an appropriate case to strike out a claim for delay. The power is to be found, if nowhere else, in rule 3.4(2)(c), which provides that the court may strike out a statement of case if it appears to the court that there has been a failure to comply with a rule, practice direction or court order; or in rule 3.1(2)(m), which provides that the court may take any step or make any other order for the purpose of managing the case and furthering the overriding objective; or under the court's inherent jurisdiction, expressly preserved by rule 3.1(a); each of these to be exercised and interpreted in accordance with rule 1.2(a) and (b) to give effect to the overriding objective.

46. The Civil Procedure Rules are a new procedural code with an overriding objective enabling the court to deal with cases justly in accordance with considerations which include those to be found in rule 1.1(2). One element expressly included in rule 1.1(2) as guiding the court towards dealing with cases justly is that the court should ensure, so far as is practical, that cases are dealt with expeditiously and fairly. Delay is, and always has been, the enemy of justice. The court has to seek to give effect to the overriding objective when it exercises any powers given to it by the rules. This applies to applications to strike out a claim. When the court is considering, in a case to be decided under the Civil Procedure Rules, whether or not it is just in accordance with the overriding objective to strike out a claim, it is not necessary or appropriate to analyse that question by reference to the rigid and overloaded structure which a large body of decision under the former rules had constructed. Mr Lewis QC, for the claimant in this case, has correctly not sought to do so.

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

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

44. *In **Walsh v Misseldine** CAT 29th February 2000 (Stuart-Smith and Brooke LJJ), which is an important case which in my opinion should be reported, Brooke LJ set out the relevant rules and added:*

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

To my mind that paragraph is important because it stresses the fact that the court should approach the problems of the kind that have arisen here through the CPR, which, as Lord Woolf observes, are much more flexible than the old rules, i.e. the RSC. Thus the passage from Lord Lloyd's judgment in the **UCB** case quoted above must be read subject to the fact that the new rules give the courts valuable powers to deal with delay short of striking out. See also to the same effect **Axa Insurance Co Ltd v Swire Fraser Ltd** CAT 9th December 1999 (Auld and Tuckey LJJ) per Tuckey LJ at paragraph 20.

45. In **Walsh v Misseldine** Brooke LJ then referred to **Biguzzi, UCB** and **Purdy,** and quoted paragraph 45, 46, 50 and 51 of May U's judgment in **Purdy** which I have set out above. He added:

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

46. Stuart-Smith LJ agreed with Brooke LJ and, like others before him, stressed the much more flexible approach which is appropriate under the CPR. He said:

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

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

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

47. I would also draw attention to one aspect of the CPR which has not, so far as I am aware, received consideration in the cases decided so far. Part 23 contains general rules about applications for court orders. Paragraph 2.7 of the Part 23 Practice Direction provides:

"Every application should be made as soon as it becomes apparent that it is necessary or desirable to make it."

In my judgment that includes applications to strike out for breach of an order.

48. It is no longer appropriate for defendants to let sleeping dogs lie: cf. **Allen v McAlpine (Sir Alfred) & Sons [**1968] 2 QB 229. Thus a defendant cannot let time go by without taking action and then later rely upon the subsequent delay as amounting to prejudice and say that the prejudice caused by the delay is entirely the fault of the claimant. Such an approach would in my judgment be contrary to the ethos underlying the CPR, quite apart from being contrary to paragraph 2.7 of the Part 23 Practice Direction. One of the principles underlying the CPR is co-operation between the parties.

49. However that may be, I recognise that in this case the CPR did not come into force until 26th April 1999, some three months after the claimants should have set the action down for trial pursuant to the order of 1st December 1998. The essential question in every case is: what is the just order to make, having regard to all the circumstances of the case? As May LJ put it, it is necessary to concentrate on the intrinsic justice of a particular case in the light of the overriding objective. The cases to which I have referred emphasise the flexible nature of the CPR and the fact that they provide a number of sanctions short of the draconian remedy of striking out the action. It is to my mind important that the master or judge exercising his discretion should consider alternative possibilities short of striking out.

50. In this connection in **Grundy v Nagvi**_CAT 1 st February 2001 (Simon Brown and Longmore LJJ) Longmore LJ pointed to the fact that neither the district judge nor the judge gave any substantial consideration to the question whether striking out the defence would be disproportionate. In my judgment, consideration should be given to that question in every case, and except perhaps where striking out the statement of case or defence would be plainly proportionate, should give reasons why it

was proportionate in the particular case: see also **Annodeus Ltd v Gibson**, unreported, 2nd February 2000 per Neuberger J at pages 6-7 and **Walsh v Misseldine** per Brooke LJ at paragraph 82 quoted above.

Finally, I revert to the view of Brooke LJ in paragraph 69 of **Walsh v Misseldine** that the power to strike out for abuse of process is a long-stop. The power was exercised by this court in **Arrow Nominees Inc v Blackledge** [2000] 2 BCLC 187. That was a case of flagrant abuse: see per Chadwick LJ at paragraphs 54-55 and Ward LJ at paragraphs 71-75. I accept Mr Moger's submission that only in such a case would the court be likely to strike out an action on the ground of abuse where a fair trial is still possible.

The master's discretion

52. Mr Moger submits that the master was plainly wrong to exercise his discretion as he did because the order striking out the action was disproportionate and unjust. I should say at once that in my judgment the master was entitled to be critical of the claimants' conduct of the litigation in some respects. Thus he was concerned about the fact that even when the case was before him, the claimants were unable to state precisely the quantum of their claim and merely said, as I indicated earlier, that it was "approximately £5 to £10 million". I agree that that was most unsatisfactory.

53. The master also observed that in the latter part of 1998 the defendants wrote a long series of letters seeking information as to how the claimants put their case on quantum, and received, as he put it, "absolutely no substantive answer". I entirely agree with the master that the correspondence is far from satisfactory.

54. However, it is also right to say that the claimants subsequently served their experts' reports and so did the defendants; and by the time the matter came before the judge, the claimants had produced a new schedule of loss. That is the document to which I referred earlier, which to my mind clearly sets out the case which the claimants wished to advance, at any rate when read with the claimants' experts' reports. No one suggested that that document was not admissible or relevant to the judge's review of the master's decision. It is important because if the master had had it, although he would no doubt still have been critical of the claimants' failure to respond to queries in the correspondence, he should, and no doubt would, have concluded that the case was reasonably clear, even though it may well face substantial difficulties at the trial.

55. The master said this with regard to directions:

"The directions which were given in the early years of this action culminated in directions given to set the matter down, under the procedure that then applied, by 15 January 1999, and to complete the exercise in respect of the expert evidence by obtaining a 'without prejudice' meeting and a joint report as to the areas of agreement or disagreement by 31 March 1999.

Those directions have quite simply been ignored along with every later one, even the latest direction were due to have been completed something like 14 months ago. So that is the first matter of which the Defendant complains, this being an application to strike out the Claimants' claim on the grounds of culpable delay and prejudice. Quite apart from the delay, the Defendant also alleges that it has suffered prejudice and that the conduct of the action amounts to an abuse of process."

It is not absolutely clear to me what criticism the master is making in those paragraphs. It is true that the claimants did not set the action down, in spite of two orders that they should do so. But I do not think that a more general conclusion that directions had quite simply been ignored is justified. It is true that the defendants complain from time to time about the claimants' discovery and that by the end the claimants had served four lists of documents. But the defendants themselves had served three list of documents, the last of which was served on 1st February 1999. There had been slippage on both sides with regard both to the exchange of witness statements and the service of experts' reports.

56. Although this is not a complicated case on liability or causation, it is certainly a complicated or potentially complicated case on quantum. In my judgment, the picture which for the most part emerges from the correspondence is one of sensible co-operation between the parties, albeit with the defendants from time to time pressing for more discovery and better particulars of quantum. The defendants themselves needed slightly more time to produce their experts' reports in early 1999, with the result that instead of serving them by 15th February 1990, as the order of 1st December 1998 provided, they were served by agreement on 29th March 1999, which had the effect that the experts could not meet on the date set out on the order, namely 31st March 1999. Save for the important point that it had not been set

down for trial, the action thereafter continued to move forward in a sensible way. There was the without prejudice telephone conversation to which I have referred.

57. As I indicated earlier, the master was justifiably critical of the claimants' attitude to mediation in the correspondence in the autumn of 1999. He formed the view, on the basis of that correspondence, that the claimants were not willing to engage in mediation and thus said this, with regard to the suggestion of mediation in Simmons & Simmons' letter of April 2000:
"I think that the stance taken by the Claimants in respect of mediating the dispute is utterly unconvincing, and their stance in respect of the directions is equally unconvincing."

By "unconvincing" I think that the master must have meant that the claimants did not genuinely want either mediation or directions.

58. The master had earlier said that the application for an order for mediation:
"... has every appearance of - I am not going to say a death-bed conversion - but an attempt to grasp at a prospect in the hope of rescuing the action."

He also referred to the claimants' "sudden change" by comparison with their attitude to mediation in the autumn of 1999. Further, with regard to the payment in of £200,000, the master said this:
"The Claimants did not respond to the payment into Court, whether by saying the payment was not appropriate or why it was not appropriate, nor was there any suggestion of an alternative amount. Substantively, there was complete silence."

In my judgment, the master would have been likely to have put his conclusions differently if he had had the evidence about the without prejudice telephone conversation, to which I referred earlier and which was before the judge, before him.

59. In his statement in support of the application to strike out, which was his first statement dated 28th April 2000, Mr Huxford did not refer to the fact that it was Miss Morrison who first raised the possibility of mediation in the telephone conversation of 20th May. However, in his second statement, dated 24th October, he accepted that that was in fact the case and that he had said that he was doubtful whether mediation would be productive while the parties were so far apart, although he added that the claimants did not write proposing mediation, and that had they done so he would not have been willing to see the proceedings stayed for such a purpose unless they indicated that there was a serious prospect of their accepting a figure broadly in line with the defendants' offer.

60. Thus the later correspondence has to be read in the light of the fact that it was Miss Morrison of Simmons & Simmons who first suggested mediation. It seems to me that in the light of that fact it cannot fairly be held that the suggestion of mediation in April 2000 was "unconvincing" or not genuine, even though the claimants' attitude in the autumn of 1999 is open to criticism. Equally, the telephone conversation seems to me to explain why the claimants did not respond to the payment into court. Miss Morrison had made it clear to Mr Huxford that an offer of £100,000 would not be acceptable, and that the defendants would have to offer £6 million or something very much nearer that figure. She also observed that the way in which the claim was calculated could be seen from the report of Mr Bunnett, who was one of the claimants' experts. The telephone conversation shows that both solicitors appreciated the differences between the parties, viz. that the claimants' claim was calculated on the basis that, but for the negligence or breach of contact - i.e. if the defendants had given proper advice - the claimants would not have entered into the contract; whereas the defendants' offer was calculated on the basis that the claimants would in any event have entered into the contract, but that they would have renegotiated the price.

In these circumstances, the failure of the claimants to respond to the payment in, or to say why it was not appropriate, is not a matter for comment, let alone adverse comment. I feel sure that the master would not have made the comment he did if he had been aware of the telephone conversation, which he was not. That is not to say that the conduct of the claimants was not open to criticism. They took no step in the action after August 1999 until April 2000, during a period when they should have set it down for trial. Moreover, they gave no satisfactory explanation.

62. In his second statement, which was dated 26th May 2000 and was the first statement resisting the defendants' application to strike out, Mr Bacon gives no explanation either for the delay or for the failure

to set down. He plainly should have done so. He simply says that steps were taken in April 2000 to avoid the automatic stay. That statement was before the master. In his third statement he exhibited a note of the telephone conversation and said that damages were being reviewed in the summer of 1999. He did not support the reason given in the correspondence for not responding on mediation, but referred to a conference with leading counsel in July 1999 and simply said that the review continued for some time thereafter. He added:

"I am not in a position to provide details of the review, for reasons of legal privilege. However, the debate was a difficult one, involving the analysis of a considerable number of factual and legal issues. The review of the Claimants' position on damages has now been completed, as can be seen from the Draft Amended Schedule of Loss which has been sent to the Defendants' solicitors."

63. Before the master, Miss Allan, who appeared for the claimants, stated that:

(1) the schedule of loss required amendment;
(2) leading counsel had advised on quantum in June and July 1999;
(3) in September 1999 the claimants' solicitors gave further advice by partner;
(4) the claimants requested that another partner review that advice, and this exercise was not finished until March 2000;
(5) the schedule of loss had been "on junior counsel's word processor" since June/July 1999.

The clear inference from that account, read with Mr Bacon's third statement, is that both counsel and Simmons & Simmons gave the claimants advice about quantum, but that the claimants asked for more and more advice. Not content it appears with leading counsel's advice, they sought further advice first from one partner of Simmons & Simmons and then from another. Although I recognise that this is a complicated case on quantum, that was not a good or sufficient reason for the delay between the summer of 1999 and April 2000.

64. Nevertheless, I do not think that the master's conclusion that the claimants were not in earnest when they sought to avoid the automatic stay was justified. Mr Gibson QC submits that they did not intend to bring the action to trial until their case on quantum was sorted out. However, I read the master's judgment as going rather further than that.

65. In my judgment, there are a number of powerful factors which lead to the conclusion that the claimants intended to proceed with the action notwithstanding the delay, which I agree probably related to the sorting out of quantum. They included the following. The claim is a very large one, which the claimants have pursued at least since 1995. They must have incurred substantial expenditure in doing so, including the cost of a firm of city solicitors, junior and leading counsel and a number of experts. They paid £150,000 into court by way of security for costs, and they declined to take a payment into court of £200,000. Moreover, in April 2000 they took a positive step and did not allow the action simply to be stayed.

66. In these circumstances, whatever the position might have been on the materials before the master, on the materials before the judge - which, as I indicated, it was common ground could be referred to in this case on a review to the judge, even though they were not all before the master - there is no justification for holding that the claimants were not in earnest when they issued their application for directions in April 2000, or that their stance with regard to mediation at that time was unconvincing.

In my judgment, although, as I have indicated, there is room for criticism of some of the claimants' conduct of the action, the master's conclusion that their conduct was "utterly irresponsible and contrary to all principles of fairness" and "utterly objectionable" was unjustified. Although they were in breach of the rules of court, their conduct did not, to my mind, amount to an abuse of process. In all these circumstances, on the basis of the materials before the judge, the master's reasoning can, in my judgment, be seen to be flawed.

67. I observe in passing that the defendants themselves did not take action based on the claimants' breach of the order of 1st December 1998 for some 14 months after the claimants' failure to set down the action in January 1999. The CPR came into force on 26th April 1999. Whatever the position before, thereafter it became the defendants' duty to make their application "as soon as it became necessary or desirable to make it" under paragraph 2.7 of the Part 23 Practice Direction. However, they did not make an application, as for example for an unless order based on the claimants' failure to set the action down for

trial. Even though on the defendants' case the delay was prejudicing or would prejudice a fair trial they did nothing. As Mr Huxford's second statement shows, in the autumn of 1999 they deliberately waited to see what happened. If there was a risk of prejudice they should certainly have applied for a suitable order under the CPR as soon as they came into force.

68. I turn finally to prejudice. The master held that there was a serious risk of prejudice, but he did not identify what it was. In this court we have had the benefit of an analysis of the issues at the trial, which neither the master nor the judge discusses in their judgment.

69. As to liability, the claimants' essential case is simple. As described earlier it is that the defendants should have given express advice to the claimants to investigate the references to access in the letter of comfort. In that regard they rely upon the evidence of a conveyancing expert, Mr Louis Manches, who says that in the light of the notice to enter, which he describes in his report, and in particular in the light of the reference to access in the letter of comfort, a reasonably competent solicitor would have specifically advised the claimants to investigate the reference to access further. The defendants admit that they did not give such specific advice. Moreover, the defendants do not rely upon an expert to contradict the views of Mr Manches.

70. In these circumstances, Mr Moger submits that the issue of liability will not depend upon oral evidence. There is in my judgment much force in that submission. Although there are some issues of fact which will depend upon oral evidence, they do not seem to me to be crucial to the central question which I have identified. Such advice as was given was given not to Mr Patel but to Dr Patel, who authorised exchange of contracts. There are issues as to what was said and as to Dr Patel's authority, but I am confident that they can be resolved, given that the defendants' original file relating to Twyford Tip is still in existence. In these circumstances, I do not think that there is a risk that the central issue on liability cannot be fairly tried.

The second issue is the question of causation, namely whether Mr Patel would have entered into the contract at a lower price, as the defendants say, or not have contracted at all, as Mr Patel says, if he had been advised correctly. Mr Gibson submits that that issue involves a number of collateral questions. I certainly accept that the court will have to consider whether Mr Patel's evidence can be accepted if the position is, as the defendants say, that the absence of finance and of planning consent shows that he was so keen to contract that he would have done so whatever advice he had received. Mr Patel's evidence will have to be judged against the contemporary documents and the probabilities. The question is a hypothetical one of the kind which is rarely resolved simply on the say so of a witness a long time after the event. The burden of proof is on the claimants, so that any lack of recollection will redound to the benefit of the defendants. I can see no basis for holding that the issue of causation cannot be fairly tried.

72. Some of the issues of quantum are complicated, but their resolution depends entirely or almost entirely upon the documents and upon expert evidence. I am confident that they can be fairly tried. There is an issue between the parties as to whether the prospects of success of the original development are relevant. I have not fully understood why they are relevant, but if they are they will depend on the documents.

73. For these reasons, I have reached the conclusion that the master was wrong to hold that there was a risk of prejudice. Moreover, I am confident that both the master and the judge would not have so held if they had considered the issues in this way. In all these circumstances, the judge should have held that the exercise of the master's discretion was flawed and should have exercised her own discretion.

74. I do not think that a fair reading of her judgment suggests that she did so. She concluded as follows:

"I am satisfied that the Master was right to conclude that this was not a case where sanctions or orders in costs would do justice. The delays and failure to respond to requests for particularisation of loss, since 1998, for discovery, mediation, payment in and to set the matter down for trial, without justification or explanation are here such that the order made by the Master was appropriate and clearly within the generous ambit within which reasonable disagreement is possible.

Having considered the history and the likely issues of strongly contested fact in relation to matters which took place in early 1992 I conclude that, despite the fact that witness statements have been exchanged, the Respondent would be severely prejudiced by the delays in bringing this matter to trial and that there is a real risk that a fair trial may not now be possible. Article 6 [of the

European Convention] is not breached on the facts of this case. The Master was not wrong. The appeal is dismissed and the Order of the Master will stand."

The judge does not appear to me to have given separate consideration to the case as she would have done of exercising her own discretion. If she did, she was in my judgment wrong for the same reasons as was the master.

75. Finally, I should say a word about proportionality. I have reached the conclusion that despite the criticisms that can justifiably be levelled at the claimants, the order striking out the claim was disproportionate. It is a large claim. Large sums of money have been spent on it. The claimants have paid £150,000 into court by way of security for costs. The defendants have paid £200,000 into court, based on their view of causation, and importantly the action can, in my judgment, be fairly tried. In these circumstances, the failings on the part of the claimants can be met by orders for costs and perhaps other measures upon which I would be willing to hear submissions, but on the footing that it is open to us to exercise our discretion, I would exercise it in favour of allowing the appeal.

LORD JUSTICE MANCE:

76. I agree with Lord Justice Clarke's reasoning and conclusions.

LORD JUSTICE DYSON:

77. I agree that this appeal should be allowed for the reasons given by Lord Justice Clarke. I add a few observations of my own on the principles to be applied in deciding whether there should be a review or a rehearing.

78. I agree that the circumstances of an individual case are infinitely variable, and that it is not therefore appropriate to lay down fixed criteria that are to be satisfied before the appeal court holds a rehearing. Nevertheless, the instant case has shown that it may be difficult to determine whether a particular appeal should be by way of review or rehearing. For that reason it may be helpful to make a few comments on that issue.

79. The starting point is that, as Brooke LJ said in **Tanfern Ltd v Cameron-MacDonald** [2000] 1 WLR 1311, 1317, the general rule is that every appeal from a lower court will be limited to a review of the decision of that court. It is for the party who wishes the appeal to be by way of rehearing to persuade the appeal court to adopt that course; viz. *"every appeal will be limited to a review of the decision of the lower court unless ..."* (CPR 52.11(1)).

80. There must, however, be some feature of the case that unusually makes it unjust for the appeal to be limited to one of review. The fact that the appellant wishes to rely on evidence that was not before the lower court is not often likely by itself to be a sufficient reason for holding a rehearing rather than a review. That is because the power given by CPR 52.11(2) to receive such evidence is exercisable whether the appeal is by way of rehearing or review.

But there may be cases where it is difficult or impossible to decide an appeal justly without a rehearing: for example, if the judgment of the lower court is so inadequately reasoned that it is not possible for the appeal court to determine the appeal justly without a rehearing; or if there was a serious procedural irregularity in the court below so that, for example, the appellant was prevented from developing his case properly. But where the decision of the lower court is adequately reasoned and there has been no such procedural irregularity, it should usually be possible for the appeal court to determine the appeal by review and not rehearing.

82. In the present case the skeleton argument submitted on behalf of the appellants argued that the following factors were relevant to the question whether it was in the interests of justice that there should be a rehearing:

"General considerations

(1) the importance of the case to the appellant;
(2) the importance of the case to the respondent;
(3) the nature and extent of the master's consideration of the issues in the case;

(4) the nature of the master's judgment, including whether he had an opportunity to give and had given a fully reasoned judgment or whether it was delivered ex tempore;
(5) if permission to appeal was given by the master, his or her reasons for doing so;

Specific considerations

(6) whether or not a party has provided security for costs - here, the Claimants had provided £150,000 by way of security for the Defendant's costs;
(7) whether or not a party has made a payment into court - here, the Defendant has paid in the sum of £200,000;
(8) the readiness of the action for trial;
(9) the strength of the Claimants' case;
(10) the relatively short period of actual delay;
(11) the claimants' willingness to consider mediation."

83. In my judgment, with the exception of (3) and (4) - and possibly (1) and (2) - it is difficult to see how any of these factors may be relevant to the question of whether it is in the interests of justice that there should be a rehearing rather than a review.

84. Moreover, as regards factor (4) 1 do not see how the mere fact that the judgment of the lower court was *ex tempore* can of itself reasonably justify a decision to conduct a rehearing.

85. But in my view there are no circumstances in the present case that the interests of justice required the appeal to the judge to be by way of rehearing rather than review.

ORDER: Appeal allowed.

Paragraph 10 of the amended statement of claim will be struck out; paragraph 45.1(4) will be struck out; paragraph 47 will be struck out; paragraph 53 will be struck out; paragraph 55 and 56 will be struck out and paragraph 58 will be amended as stated on the document which was handed in on Friday.

Leave to make the amendments to the schedule of loss and damage; addition to paragraph 58.1, in the third line, where it says "see revised schedule loss and damage section 1" and pages 25 to 26 of the report of John Bunnett dated 17th December 1998.

The parties as soon as reasonable practical and in any event within 14 days to attend before the Clerk of the Lists; case management conference to be listed during January 2002 at which both parties are to make whatever applications are appropriate; the date changed in paragraph 3 for a meeting of the experts to "the end of February", so paragraph 4 will read:

"Claimants to serve re-amended statement of claim and schedule of loss in accordance with our directions."

A direction that the defendants be permitted to inspect the claimants' third supplementary list of documents within 14 days; both parties to serve or indicate that they do not wish to serve a final supplementary list of documents on or before 10th January 2002.

The order as to the statement of claim is without prejudice to the claimants' right to seek leave to further amend their schedule of loss to claim damages on the assumption that the defendants' case is correct. Any such application to be made at the case management conference.

The claimants to pay the defendants' costs before the Master. No order for costs before the judge. The defendants will be ordered to pay the claimants' costs in the Court of Appeal.

Provided the defendants pay the payment in monies into court within 28 days, they will be in the same position as they would have been if the monies had remained in court. But the monies to be paid in to be the £200,000 together with interest which accrued up to the date of withdrawal.

The claimants to be deprived of interest for the period between 5th August 1999 and 4th April 2000.

(Order not part of approved judgment)