

# The Road to New Street Station: Fact, Fiction and the Overriding Objective

JOHN SORABJI

## 1. Introduction: The Road to New Street Station<sup>1</sup>

The Civil Procedure Rules (CPR) was introduced on 26 April 1999 as a ‘new procedural code’<sup>2</sup> in order to implement recommendations for the reform of English civil procedure contained within the Interim and Final Woolf Reports.<sup>3</sup> Those recommendations sought to improve English civil procedure’s ability to achieve the just determination of litigation. This paper examines the most significant reform, the Overriding Objective,<sup>4</sup> which represents English civil procedure’s first explicit guiding principle, its first explicit ‘all controlling policy objective’.<sup>5</sup> Its introduction was, unlike the introduction of active case management, the one true innovation of the Woolf reforms.<sup>6</sup> While the case has been made for active case management by, for instance, Turner, it does not form a true innovation of the Woolf reforms.<sup>7</sup> First, a form of active case management was originally proposed by the Chancery Commissioners in 1824.<sup>8</sup> Secondly, active case management is a long established feature of other common law civil justice systems, from which Woolf drew his inspiration.

---

<sup>1</sup> This paper provides an overview of the main line of argument in Sorabji, *Paradigms of Justice and the Overriding Objective: Woolf’s Copernican Revolution* (2009) (unpublished). The views expressed here are the author’s own and neither represent, nor are intended to represent, the views of any other individual or body.

<sup>2</sup> Civil Procedure Act 1998; CPR 1.1 (SI 3132/1998); *Biguzzi v. Rank Leisure plc* [1999] 1 WLR 1926.

<sup>3</sup> Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO 1995); *Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO 1996).

<sup>4</sup> CPR 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 is practicable –(a) ensuring that 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.*

<sup>5</sup> Greenslade, ‘A Fresh Approach: Uniform Rules of Court’ in Zuckerman & Cranston (eds), *Reform of Civil Procedure: Essays on ‘Access to Justice’* (Clarendon Press 1995) 127; Jacob, *Civil Justice in the Age of Human Rights* (Ashgate 2007) at 31–32.

<sup>6</sup> Clarke, *Proportionate Costs from Woolf to Jackson*, (The Law Society, London) (10 July 2009) (<http://www.judiciary.gov.uk/docs/costs-review/mr-london-costs-seminar-100709.pdf>) at [8].

<sup>7</sup> R Turner, “‘Actively’”: The Word that Changed the Civil Courts’ in Dwyer (ed), *The Civil Procedure Rules Ten Years On* (Oxford: UP, 2009) at 77–88.

<sup>8</sup> Report by the Commissioners into the Practice of the Court of Chancery (No 143) (1826) at 12–20.

Most significantly though, active case management on its own simply effects a change to how the litigation process is carried out, namely, from party-control of the pace of litigation to court-control. It does not alter in any way the purpose for which the litigation process is carried out. Without something more, active case management simply enables the court to control how cases progress to final determination on their merits. It transfers the steering wheel to a new driver. In this, to a very large degree, it was historically foreshadowed both here and abroad. Active case management crucially says nothing, however, about the destination towards which the driver steers.

The Overriding Objective on the other hand is truly innovative because it provides active case management's new driver with a new destination, and one not historically foreshadowed by previous civil justice reform reports or other jurisdictions. It does so by giving litigation a new purpose; a new aim and one radically different from that which predated the Woolf reforms. It does so by introducing a new concept of justice into English civil procedure; a concept of justice committed to proportionality rather than, as was previously the case, an unalloyed commitment to the achievement of what Woolf described as substantive justice, that is, justice on the merits.<sup>9</sup> It is a concept of justice which not only influences, or perhaps rather ought to influence, the application of the individual civil procedure rules, but equally is continuing to influence latter-day procedural reform, as the Jackson Costs Review (2009–2010)<sup>10</sup> demonstrates.<sup>11</sup> The court must further this novel purpose or aim, as expressed by the Overriding Objective – see CPR 1.4(1) – by actively managing cases. As such it, rather than active case management, is the most significant aspect of the Woolf reforms.

The Overriding Objective might have been the fundamental innovation of the Woolf reforms, but it was not entirely without precedent. First, English civil procedure had been governed previously by a tacit overriding objective. It was tacit because it was not provided for in the Rules of the Supreme Court (RSC), although this idea guided the RSC's implementation. That implicit overriding objective was to achieve, as Zuckerman has recently put it, justice on the merits,<sup>12</sup> or substantive justice.<sup>13</sup> Sub-

---

<sup>9</sup> Woolf (1995) (n 3) at 216; H Genn, *Judging Civil Justice*, (Cambridge: UP, 2010) at 14–16; cf, Sorabji, 'B v. B: Forwards or Backwards for the Overriding Objective' (2005) 24 CQJ 414; Sorabji, *Paradigms of Justice and the Overriding Objective: Woolf's Copernican Revolution* (unpublished 2009); Zuckerman, 'A Reform of Civil Procedure – Rationing Procedure rather than Access to Justice' (1995) 22 *Journal of Law and Society* 155; Zuckerman, 'Litigation Management under the CPR: A Poorly-Used Management Infrastructure' in Dwyer (ed) (n 7) at 92.

<sup>10</sup> Jackson, *Review of Civil Litigation Costs: Final Report*, (TSO 2009) 30ff <<http://www.judiciary.gov.uk/NR/rdonlyres/8EB9F3F3-9C4A-4139-8A93-56F09672EB6A/0/jacksonfinalreport140110.pdf>> last accessed 7 December 2010.

<sup>11</sup> Neuberger, *Costs, Management, Proportionality and Insurance*, (PIBA Conference, 26 March 2010) at [18] to [25] (<http://www.judiciary.gov.uk/docs/speeches/mr-piba-conf-march-2010.pdf>).

<sup>12</sup> Zuckerman *on Civil Procedure: Principles of Practice*, (2nd edn, Thomson 2006) at 25–28.

<sup>13</sup> The term 'substantive justice' has a number of different meanings. Both Woolf and Genn use the term to refer to justice on the merits. It is that sense in which it is used throughout this paper. Woolf (1995) (n 3) at 214ff; Genn (n 9).

stantive justice, in this context, is achieved through the court arriving at the right decision by applying the right facts to the right law.<sup>14</sup> The creation of an overriding objective was not itself, therefore, an innovation. Secondly, the creation of an *explicit* overriding objective was also no real innovation. Other common law jurisdictions had taken this bold step before Woolf. Explicit overriding objectives pre-dating Woolf can be found in, for instance, the United States of America, Canada and Australia.<sup>15</sup> However, these three precedents apparently played no part in the English Overriding Objective's invention. This point is emphasised by Turner, who observed as follows:

*Many have sought to suggest that Lord Woolf borrowed or adapted the doctrine of the overriding objective from one or more sets of civil procedure rules, a favourite contender being the United States Federal Rules of 1938. He has denied doing so. I can vouch for the occasion when Lord Woolf showed the Access to Justice team his first draft. It was written on the back of the proverbial envelope and shown to us in the reception area in Birmingham on the night before one of the Inquiry's 'road shows' in the Spring of 1995. I wish I had kept the envelope.*<sup>16</sup>

It would appear then, assuming Woolf travelled by train that Spring day, that the Overriding Objective was born on the road (or rather the rails) to Birmingham's New Street train station. That Woolf was not influenced by other jurisdictions' overriding objectives is remarkable, given his inquiry's study of other jurisdictions. Strange as it may seem, given those circumstances, it would appear to be true that there was no such influence. As Byron put it, '*Tis strange – but true; for truth is always strange; Stranger than fiction*'.<sup>17</sup>

The position is therefore this: pre-Woolf an implicit overriding objective guided the RSC's operation (the procedural code applicable to the High Court and Court of Appeal from 1873 to 1999) and explicit overriding objectives guided the operation of a number of foreign common law civil justice systems. The creation of an explicit English overriding objective would not, therefore, appear to be any great innovation; even if it can properly be said that Woolf's Overriding Objective was created without conscious reference to, or awareness of, the explicit overriding objectives contained

---

<sup>14</sup> Bentham, 'Rationale of Judicial Evidence' in Bowring (ed), *The Works of Jeremy Bentham*, vol 6 (William Tait, Edinburgh, 1843) at 212–213; Bentham, 'Letters on Scotch Reform' in *Ibid.* vol 5, at 5, 10–11; Bentham 'Principles of Judicial Procedure, with the outlines of a Procedure Code' in *Ibid.* vol 2, at 6–8, 15, 20, 29ff & 174 & 178; Bentham, 'An Introductory View of the Rationale of Judicial Evidence; For the use of Non-lawyers as well as Lawyers' in *Ibid.* vol 6, at 88–89; and Bentham 'The Constitutional Code' in *Ibid.* vol 9, at 25; also see *Indyka v. Indyka* [1967] 1 AC 33, at 66; *Bruff v. Cobbold* (1871–1872) LR 7 Ch. App 217, 219.

<sup>15</sup> A point not lost on commentators, cf, Sorabji, *Paradigms of Justice and the Overriding Objective: Woolf's Copernican Revolution* (2009) (unpublished) at 203–204; Dwyer, 'What is the Meaning of CPR 1.1(1)?' in Dwyer (ed) (n 7), at 70; Turner, (n 7) at 81; Neuberger, 'A New Approach to Justice: From Woolf to Jackson' in Meggitt (ed), *Civil Justice Reform – What has it Achieved* (Sweet & Maxwell, 2010).

<sup>16</sup> Turner (n 7) at 81.

<sup>17</sup> Byron, Don Juan, Canto XIV at CI in *Poetical Works* (Oxford 1989) at 832.

in the procedural codes within the USA, Canada or Australia. Instead the innovative nature of Woolf's Overriding Objective lies in its substantive character. That character differs fundamentally from that of both the RSC's implicit overriding objective and the common law jurisdictions' overriding objectives. It does so because it rests on a rejection of the RSC's implicit overriding objective, and by necessary implication its explicit common law predecessors.

In this paper I examine a number of aspects of the Overriding Objective Woolf created on his journey to New Street station. First, I examine the Overriding Objective's common law predecessors. I will then proceed to examine how it differs fundamentally from them and as such is a truly innovatory, revolutionary – in the Kuhnian sense of the term – feature of English civil justice.<sup>18</sup>

## 2. 'The Overriding Objective' and (other) Overriding Objectives

The RSC was a product of the 1873 Judicature Act reforms.<sup>19</sup> Those reforms, like those they followed and built upon,<sup>20</sup> were intended to render the civil justice system better able to achieve substantive justice. They were, like earlier reforms, intended to enable the English and Welsh courts to be better able, as Best CJ had put it in 1830, to 'secure decisions on the merits',<sup>21</sup> or as the 1868 Judicature Commissioners put it, echoing his language, better able to render a 'decision upon the merits'.<sup>22</sup> While the 1873 reforms were committed to ensuring that civil procedure operated consistently with the aim of attaining substantive justice, the Judicature

---

<sup>18</sup> Kuhn, *The Structure of Scientific Revolutions*, (3rd edn, The University of Chicago Press 1996) at 66ff. A detailed account is set out in Sorabji (n 15).

<sup>19</sup> Judicature Act 1873, schedule (never in force); Judicature Act 1875, Schedule 1; SI unnumbered of 1883; SI 2145 of 1962; and SI 1776 of 1965.

<sup>20</sup> See in particular the Common Law Procedure Act 1852, s 222, which, with its other provisions, was intended to ensure that common law procedure would operate consistently with determining cases according to the parties' 'substantive right(s)' rather than upon 'captious objections [that were] quite immaterial to the merits of the case and of no prejudice to the opposite party...': First Report of Her Majesty's Commissioners into the Process, Practice and System of Pleading in the Superior Courts of Common Law (HMSO) at 21–22.

<sup>21</sup> *Second Report of the Common Law Commissioners into the Practice and Proceedings of the Superior Courts of Common Law* (House of Commons 1830) Appendix B 46 & 56–57. See further, Sorabji (n 15); the pre-1873 superior common law courts (Common Pleas, King's/Queen's Bench, Exchequer) were as committed, in theory at least if not always in practice, to the principle that claims should be decided on their 'real merits'; Stephen, *Pleading in Civil Actions*, (3rd edn Saunders & Benning 1835) at 271; Tubbs, *The Common Law Mind: Medieval and Early Modern Conceptions* (John Hopkins University Press 2000) at 23. The same was true of the Court of Chancery, which, in its terms, was committed to the achievement of 'substantial justice between the parties': Story, *Commentaries on Equity Jurisprudence as Administered in England and America*, (4th edn, Little Brown & Co 1886) at 41ff; *First Report of the Common Law Commissioners into the Practice and Proceedings of the Superior Courts of Common Law* (House of Commons 1829) at 465.

<sup>22</sup> The First Report of the Royal Commission to inquire into the Operation and Constitution of the High Court of Chancery, Courts of Common Law, Central Criminal Court, High Court of Admiralty, and other Courts in England, and into the Operation and Effect of the Present Separation and Division

Commissioners did not specify such an aim as an explicit overriding objective. Nor did the Judicature Act 1873. In all likelihood such an explicit commitment was never considered to be necessary innovation, it being obvious that the *raison d'être* of the civil courts and civil procedure was to secure substantive justice's achievement.

Irrespective of the lack of an explicit overriding objective in the RSC, a series of nineteenth century House of Lords and Court of Appeal decisions,<sup>23</sup> handed down in the years which followed the RSC's introduction, embedded beyond the shadow of a doubt that it was to operate consistently with, as Edmund-Davies LJ would later describe it, in *Associated Leisure v. Associated Newspapers* (1970),<sup>24</sup> an 'all-embracing principle', to which 'all other considerations must be subordinate'. That all-embracing principle was the achievement of substantive justice in each claim. As Bramwell LJ – the progenitor of the early line of authority which embedded this all-embracing principle as an implicit overriding objective – put it in *Collins v. The Vestry of Paddington* (1879), the individual RSC rules were only 'intended to ensure that the courts were able to do justice between the parties; ... to bring out the result that the litigant succeeds according to the goodness of his cause and not according to the blunders of his adversary.'<sup>25</sup> The courts were to approach their operation with a view to securing substantive justice's achievement: to ensure as Bramwell LJ went on to put it, that when litigants succeeded they did so only 'according to the goodness of his cause'.<sup>26</sup> No longer would claims fail on technical or formalistic grounds, as they had under the previous common law procedure.<sup>27</sup> The RSC was to operate to ensure claims were determined on their substantive merits only.

---

of Jurisdiction between the Courts (No 4130; 1868–1869) at 24 in the context of appellate reform; also see *Ibid.* at 11–25.

<sup>23</sup> *Tildesley v. Harper* (1878) 10 Ch. 393, 396 (Bramwell LJ) and 397 (Thesiger LJ); *Collins v. The Vestry of Paddington* (1879 – 1880) LR 5 QBD 368, 380 (Bramwell LJ); *Clarapede & Co v. Commercial Union Association* (1883) 32 WR 262; *Cropper v. Smith* (1883) 32 WR 262, 263; *Smith & Hancock v. Cropper* (1884–1885) LR 10 App Cas 249, 259; *Atwood v. Chichester* (1877) LR 3 QBD 722, 744; *Steward v. North Metropolitan Tramways Company* 16 QBD 556; *Saunders v. Pawley* (1885) 14 QBD 234; *Kurtz v. Spence* [1887] LR 36 Ch. 770, 773–774; *Australian Steam Navigation Company, Owners of S.S. 'Victoria' v. William Howard Smith & Sons, Owners of S.S. 'Keilawarra'* (1889) LR 14 App Cas 318, 320; *Indigo Company v. Ogilvy* [1891] 2 Ch. 31; *Shoe Machinery Company v. Cutlan* [1896] 1 Ch. 108. This line of authority, originating in *Tildesley*, has since been repudiated: see *Beachley Property Limited v. Edgar* (CA, 21 June 1996 unreported) at [6], *Adoko v. Jemal* (CA 22 June 1999 unreported) at [7], *UCB Corporate Services Ltd (formerly UCB Bank Plc) v. Halifax (SW) Ltd* [1999] CPLR 691, *Charlesworth v. Relay Road Ltd & Others* [2000] 1 WLR 230, *Purdy v. Cambrian* [2000] CP Rep 67, *Arrow Nominees Inc v. Blackledge & Others* [2000] CP Rep 59, *Daniels v. Thompson* [2004] EWCA Civ 307; [2004] PNLR 33.

<sup>24</sup> [1970] 2 QB 450, 457.

<sup>25</sup> *Collins v. The Vestry of Paddington* (1879–80) LR 5 QBD 368, 380 (Bramwell LJ).

<sup>26</sup> *Ibid.* The court could properly take decisions which frustrated this implicit overriding objective. It could do so though in limited circumstances where a party had through its own conduct justified such a decision: see *Tildesley v. Harper* (1878) 10 Ch. 393, 396, CA, and its ultimate product, *Birkett v. James* [1978] AC 297.

<sup>27</sup> cf. *Ward v. The Mayor and Town Council of Sheffield* (1887) 19 QBD 22, 29.

The RSC may have operated according to such an implicit overriding objective, but that was not the case in three other common law jurisdictions, each of which incorporated explicit overriding objectives into procedural rules prior to the Woolf reforms effected such a change in England and Wales.

First, since 1938, rule 1 of the Rules of Civil Procedure for the United States Districts Courts (USDCR) has contained an overriding objective. This states that: *These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.*<sup>28</sup> Secondly, in 1987, rule 2 of the South Australia Supreme Court Rules introduced a similar provision into its civil procedure. It states that: *These Rules are made for the purpose of establishing orderly procedures for the conduct of litigation in the Court and of promoting the just and efficient determination of such litigation. They are not intended to defeat a proper claim or defence of a litigant who is genuinely endeavouring to comply with the procedures of the Court, and are to be interpreted and applied with the above purpose in view.*<sup>29</sup> Finally, in 1990, rule 1.04(1) of the Rules of Civil Procedure for the Ontario (Canada) Superior Court of Justice and Court of Appeal introduced its own much more concise version into its civil procedure. It states: *These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.*<sup>30</sup>

Several things are apparent from these three explicit overriding objectives. First and most importantly, each sets out a commitment to the achievement of substantive justice. This is the aim of the three sets of procedural rules and they are to be interpreted consistently with the facilitation of its achievement. This commitment is most obvious in respect of both the South Australia and Ontario rules. It is perhaps not so clear in respect of the Rules of Civil Procedure for the United States Districts Courts, which simply refers to the just determination of actions. It is apparent though that just determination is synonymous with the achievement of substantive justice or justice on the merits.<sup>31</sup> Each, therefore, makes explicit what was implicit within the (English) RSC: that the civil process is guided by an overarching commitment to achieve substantive justice.

Secondly, each of the three non-English codes, mentioned above, specifies a procedural obligation: civil process is to operate so that substantive justice is achieved as expeditiously and inexpensively as possible. In this they echo what was an implicit feature of the (English) RSC's implicit overriding objective. Litigation expense and delay, if excessive or unnecessary, can undermine substantive justice's achievement.<sup>32</sup>

<sup>28</sup> <<http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/CV2009.pdf>> last accessed 7 December 2010.

<sup>29</sup> <[www.courts.sa.gov.au/lawyers/sc\\_rules/1987/rules102.rtf](http://www.courts.sa.gov.au/lawyers/sc_rules/1987/rules102.rtf)> last accessed 7 December 2010.

<sup>30</sup> <<http://www.canlii.org/en/on/laws/regu/rro-1990-reg-194/latest/rro-1990-reg-194.html>> last accessed 7 December 2010.

<sup>31</sup> *Mahler v. Drake*, 43 FRD 1, 3 & n.8 (DSC 1967); Solum, 'Procedural Justice' (2004) 78 Southern California L Rev 181, 244.

<sup>32</sup> E.g., Bentham *Principles of Judicial Procedure, with the outlines of a Procedure Code*, in Bowring (ed) (n 14) vol 2, at 17–30. The commitment to economy and efficiency might not have been

A commitment to substantive justice's achievement must necessarily, therefore, imply a commitment to ensuring that the litigation process is neither too expensive nor too prolonged. While this commitment was implicit within the RSC's overriding objective, it was explicitly acknowledged from the early nineteenth century onwards in various English civil justice reforms. As the 1932 Hanworth Committee explained, its reform aim was to ensure that civil process was better able to achieve substantive justice at 'greater despatch' and 'greater economy'.<sup>33</sup> The 1932 report was not unique in making this call to arms; it simply repeated what had on numerous occasions been said before<sup>34</sup> and would be repeated throughout the twentieth century.<sup>35</sup> These statements spell out what was implicit in the RSC's overriding objective and explicit in the three common law overriding objectives.

Thirdly, the South Australia rule makes clear that substantive justice's achievement is not to be frustrated by a failure by parties to ensure that it is achieved economically and efficiently. It makes explicit a feature of the RSC's implicit commitment to substantive justice's achievement, that, as Bowen LJ put it in *Cropper v. Smith* (1884), 'Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy.'<sup>36</sup> This point may not have been explicit in either the USDCR or the Ontario rule but it is clearly equally relevant to them, notwithstanding that silence. It is thus inconceivable that rules of court operating (as the Ontario rules state) to 'secure the just, most expeditious and least expensive determination of every civil proceeding on its merits' should be regarded as existing for the sake of disciplining litigants and their representatives. The same point must apply, *mutatis mutandis*, in regard of the USDCR.

The Overriding Objective's three explicit common law predecessors thus had three things in common with each other and with the RSC's implicit overriding objective: first, an overarching, paramount commitment to substantive justice's achievement. In this they make explicit what the RSC's overriding objective maintained as implicit; secondly, a commitment to litigation efficiency and economy, where they were facilitative of substantive justice's achievement; and finally, a commitment to the principle that procedure was simply the means to effect substantive justice and could

---

set out within the RSC, but it was on more than one occasion specified as the reason for reform in reforming Acts of Parliament e.g., Common Law Procedure Act 1852, preamble; Court of Chancery Act 1852, preamble.

<sup>33</sup> *Report of the Hanworth Committee on the Business of the Courts* (Cmd 4265, 1936) at 3.

<sup>34</sup> 1829 Report (n 21) at 7.

<sup>35</sup> *First Interim Reports of the Committee on Supreme Court Practice and Procedure* (Cmd 7764, 1951) at 4, which was to approach reform in order to reduce '... the cost of litigation and securing greater efficiency and expedition in the despatch of business'; *Report of the Review Body on Civil Justice* (Cm 394, 1988) at 1–2.

<sup>36</sup> (1884) 26 Ch. 700, 710–711; cf *Tildesley v. Harper* (1878) 10 Ch. 393, 397, CA, (Thesiger LJ), 'The object of these rules is to obtain a correct issue between the parties, and when an error has been made it is not intended that the party making the mistake should be mulcted in the loss of the trial.' See also the remark by Bramwell LJ, *ibid.*, concerning the need for proportionality between procedural default and procedural sanctions.

not, generally, be relied on as a basis to deny its achievement. Procedural non-compliance could not, for instance, frustrate its achievement, even if such non-compliance gave rise to unnecessary expense or delay.

If Lord Woolf's Overriding Objective was influenced by its RSC and common law predecessors, it is reasonable to assume that it would exhibit these three features. It does not. In the final section I outline why it can be seen not to contain these features and why it represents a fundamental, Copernican, revolution in civil justice.

### 3. The Overriding Objective: A New Paradigm of Justice

There are two possible ways to interpret the Overriding Objective. First, it could be read as saying no more than its predecessors, that is, it is the encapsulation of a commitment to achieve substantive justice economically and efficiently. In other words it simply makes explicit the RSC's implicit overriding objective through the addition of an explicit commitment to the CPR to ensure that substantive justice was achieved economically and efficiently. This could be defined as the traditionalist interpretation. Secondly, it could be read as establishing an entirely different goal for the civil process than the achievement of substantive justice as efficiently and economically as possible. This could be called the Copernican (or Kuhnian) interpretation, in the sense that it represents a paradigm shift away from the long-established traditional concept of the civil justice system's aim towards a radically different one.<sup>37</sup> It could thus be read as a rejection of the traditionalist interpretation and its view that the Overriding Objective simply makes explicit that which was implicit to the RSC.

There is some basis for arguing in favour of the traditional approach. At the very outset Woolf describes the Overriding Objective, then called the general objective, in traditionalist terms, which are remarkable for their similarity to the Ontario overriding objective and the USDCR: 'The general objective is to do justice but to achieve it by means which minimise cost and delay.'<sup>38</sup> Equally, in a pre-CPR case, Millett LJ explained, with Woolf's approval, in *Mortgage Corporation v. Shandoe* (1996), that 'the overriding principle is that justice must be done.'<sup>39</sup> What counts is that substantive justice must be done, and commitments to the minimisation of cost and delay are collateral to that consideration.<sup>40</sup> The same point has been reiterated in *The White Book's* commentary on the Overriding Objective over many editions: '... the overriding consideration must be the doing of justice in the individual case and the appli-

<sup>37</sup> Kuhn, *The Structure of Scientific Revolutions*, (3rd edn, The University of Chicago Press 1996) at 66ff.

<sup>38</sup> Woolf (1995) (n 3) at 214–215.

<sup>39</sup> (CA 26 November 1996) [30]; *Walsh v. Missledine* [2000] CP Rep 74 at [82].

<sup>40</sup> See for instance, May, 'The ALI/UNIDROIT Rules of Transnational Civil Procedure in the Perspective of the New England and Welsh Rules' in Andenas, Andrews & Nazzini, *The Future of Transnational Civil Litigation*, (British Institute of International and Comparative Law 2004) at 45; *Sayers v. Clarke-Walker* [2002] 1 WLR 3095 [25]; Sorabji, 'B v. B: Forwards or Backwards for the Overriding Objective' (2005) 24 CJQ 414.

cation of the several aspects of the Overriding Objective as particularised in r.1.1(2) is subject to that consideration.<sup>41</sup> Economy – CPR 1.1(2)(b), (c) & (e) – and efficiency – CPR 1.1(2)(d) – then are subject to the primary consideration of doing justice – (CPR 1.1(1)),<sup>42</sup> as the Overriding Objective’s common law predecessors would have it.

*The White Book*’s comment however fails to take account of the differences which exist between the Overriding Objective and its predecessors. In the first instance, it is incorrect – and is simply a fiction – to suggest that it maintains a singular commitment to the achievement of substantive justice. Substantive justice is, unlike the RSC’s implicit and its common law predecessor’s explicit aim, not its aim. Nor is it, as Zuckerman has consistently argued, one aim amongst two other equal aims; those being the aims of economy and efficiency.<sup>43</sup> The first point to make is that Woolf understood the Overriding Objective to capture civil justice’s purpose; it gave expression to what it meant to refer to justice.<sup>44</sup> That purpose was no longer, as under the RSC and in respect of the common law overriding objectives, to achieve substantive justice. The Overriding Objective, the purpose of which was to encapsulate the essence of civil justice, went beyond securing substantive justice and instead embodied an equal commitment to both substantive and procedural justice.<sup>45</sup> The first point of departure from the common law overriding objectives is this change of aim.

This can be understood in a number of ways. The most significant though is that in rendering the two forms of justice equal, and giving expression to them in the Overriding Objective of dealing with cases justly, Woolf went beyond the common law and RSC system’s relationship between substantive justice’s achievement and economy and efficiency. Under that former system, the fundamental benefit of economy and efficiency was to increase access to justice by ensuring that no more than necessary litigation cost and time was expended on achieving substantive justice. As May LJ attractively noted, procedural economy facilitates truth’s achievement.<sup>46</sup>

---

<sup>41</sup> See for instance, Waller LJ (ed), *Civil Procedure 2007*, vol 1 (Sweet & Maxwell 2007) (*The White Book 2007*) para. 1.3.3; *The White Book 2009*, vol 2, para. 11.8.

<sup>42</sup> *Biguzzi v. Rank Leisure* [1999] 1 WLR 1926, 1932; *Swain v. Hillman* [2000] 1 All ER 91.

<sup>43</sup> E.g., Zuckerman, ‘Interlocutory Remedies in Quest of Procedural Fairness’ (1993) 56 MLR 325; Zuckerman, ‘Quality and Economy in Civil Procedure: The Case for Commuting Correct Judgments for Timely Judgments’ (1994) 14 OJLS 353; Zuckerman, ‘Dismissal for Delay – The Emergence of a New Philosophy of Procedure’ (1998) 17 CJQ 223; Zuckerman, ‘A Colossal Wreck – THE BCCI – Three Rivers Litigation’ (2006) 25 CJQ 287; Zuckerman, ‘Civil Litigation: A Public Service for the Enforcement of Civil Rights’ (2007) 26 CJQ 1. The essential problem with Zuckerman’s account is not that it understands the overriding objective as a radical break from the past, which to a degree, it rightly does, but rather that it is predicated on a category mistake, in that it treats substantive justice, economy, and efficiency as ends that can validly be contrasted with each other, when in truth economy and efficiency are and can only ever be means to an end. Ends and means cannot logically be contrasted with each other as Zuckerman’s account requires: see Sorabji (n 15) at 222ff.

<sup>44</sup> Woolf (1996) (n 3) at 3; CPR 1.1 distilled what he regarded as ‘being the purpose of civil justice’.

<sup>45</sup> Woolf (1995) (n 3) at 216.

<sup>46</sup> May, ‘The ALI/UNIDROIT Rules of Transnational Civil Procedure in the Perspective of the New English and Welsh Rules’, in Andenas, Andrews and Nazzini, *The Future of Transnational Civil Litigation* (British Institute of International and Comparative Law) (2004) at 44–45.

Delay, as noted earlier, is the enemy of justice. It erodes evidence and undermines the efficacy of enforcement.<sup>47</sup> Cost is equally the enemy of justice because it acts as a barrier to entry to the justice system, while increasing the prospect of discontinuance and unsatisfactory settlement.<sup>48</sup> Economy and efficiency ensure, on the one hand, that justice' achievement is not undermined by excessive cost and delay; and, on the other hand, they ensure that sufficient time and cost are expended in securing its achievement. The common law's (pre-CPR) implicit overriding objectives sees economy and efficiency as objectives which seek to ensure that no more than necessary litigation cost and time are spent on substantive justice's achievement.

Lord Woolf's Overriding Objective, by enunciating an equal commitment to procedural justice and substantive justice, goes beyond this traditional view of the importance of achieving economy and efficiency. In a recent lecture, Lord Neuberger MR explained the difference effected by this balance:

*Very many different types of cost can be said to be necessary to bring or defend a claim. They are costs which are incurred, as Woolf would have put it, to ensure the achievement of substantive justice. They are necessary to enable the court to decide cases on their merits. But such necessary costs are, as we all should well know by now, balanced now by an equal commitment to what Woolf described as procedural justice; that is to a fair, just and properly accessible justice system for all litigants. Procedural justice thus goes beyond the immediate concerns of individual litigants: it goes beyond what is necessary to achieve a decision on the merits in any individual case. In this way it is outward looking while necessity is inward looking.*<sup>49</sup>

In being outward-looking rather than inward-looking, as necessary costs are, the Overriding Objective's commitment to this balance between substantive and procedural justice commits the CPR to only permitting individual litigants to expend proportionate costs and proportionate time in the course of litigation.

Here arises the crucial difference between Lord Woolf's Overriding Objective and its common law predecessors. The latter involve a commitment to ensuring substantive justice's achievement in each individual case. Woolf's balanced Overriding Objective does not for, as Lord Neuberger MR put it, it goes beyond the immediate concerns of individual litigants. It goes beyond the aim of securing substantive justice for them at no more than necessary cost, and thus departs from the traditional approach adopted by foreign common law jurisdictions. Lord Woolf's Overriding Objective contains that aim, clearly. But the commitment to procedural justice, through introducing a commitment to ensuring that no more than proportionate costs can be

---

<sup>47</sup> E.g., justice delayed is justice denied, as attributed to Gladstone, cited in *Gohman v. City of St. Bernard* (1924) 111 Ohio St 726, 737; Report of the Royal Commission on Assizes and Quarter Sessions, (Command Paper 4153, 1969) at 131;

<sup>48</sup> Woolf (1995) (n 3) at 2–18 and 199.

<sup>49</sup> Neuberger, *A New Approach to Justice: From Woolf to Jackson* (Hong Kong, unpublished) (2010), at [20].

expended on litigation, does two things: first, it shifts the justice system's focus from each individual case to a global assessment of the rights of all litigants to have effective access to justice; secondly, it provides a clear justification for denying in its entirety or abridging partially the prospect of achieving substantive justice in any one case where to bring about its achievement would be detrimental to the ability of other litigants to secure a fair opportunity to seek substantive justice. In other words, Lord Woolf's Overriding Objective, unlike both its common law predecessors and the RSC before it, is 'intended to strike the balance between substantive justice in the individual case and procedural justice for all.'<sup>50</sup> As Waller LJ put it (in a pre-CPR case) in *Worldwide Corporation* (1998):<sup>51</sup>

... the courts are concerned to do justice to all litigants, and that it may be necessary to take decisions vis-à-vis one litigant who may, despite all the opportunity he or his advisers have had to plead his case properly, feel some sense of personal injustice, for the sake of doing justice both to his opponent and to other litigants ... The court is concerned with doing justice, but justice to all litigants, and thus where a last minute amendment is sought with the consequences indicated, the onus will be a heavy one on the amending party to show the strength of the new case and why justice both to him, his opponent and other litigants, requires him to be able to pursue it.

This leads to the third aspect of the common law overriding objectives: that procedure does not exist to discipline or trip up litigants; that breaches of procedural rules should not, generally, result in claims being dismissed prior to a judgment on the merits.<sup>52</sup> Where a singular commitment to substantive justice's achievement is in place this is clearly correct. Where, however, the aim of procedure goes beyond the immediate concerns of individual litigants procedural non-compliance, and the expenditure of disproportionate costs and time in such cases, can be visited by more stringent consequences. As Ralph Gibson LJ in *Vinos v. Marks & Spencer plc* (2001) put it: 'Justice to the defendant and to the interests of other litigants may require that a claimant who ignores time limits prescribed by the rules forfeits the right to have his claim tried.'<sup>53</sup> Rules can be used to discipline litigants, where that discipline is of benefit to other litigants.<sup>54</sup> This approach ensures that no more than

---

<sup>50</sup> Neuberger, *A New Approach to Justice: From Woolf to Jackson* (Hong Kong, unpublished) (2010), at [21]; Sorabji (n 15) at 238–318.

<sup>51</sup> (CA 2 December 1998) at [19] (cited in [2000] 1 WLR 230, 236–7); and see these post-1996 cases: *Beachley Property Limited v. Edgar* (CA, 21 June 1996 unreported) at [6], *Adoko v. Jemal* (CA 22 June 1999 unreported) at [7], *UCB Corporate Services Ltd (formerly UCB Bank Plc) v. Halifax (SW) Ltd* [1999] CPLR 691, *Charlesworth v. Relay Road Ltd & Others* [2000] 1 WLR 230, *Purdy v. Cambran* [2000] CP Rep 67, *Arrow Nominees Inc v. Blackledge & Others* [2000] CP Rep 59, *Daniels v. Thompson* [2004] EWCA Civ 307; [2004] PNLR 33.

<sup>52</sup> *Cropper v. Smith* (n 23) at 710–11 (Bowen LJ).

<sup>53</sup> [2001] 3 All ER 784, at [26].

<sup>54</sup> Cf. Sorabji (n 15) at 316; Neuberger, *A New Approach to Justice: From Woolf to Jackson* (Hong Kong, unpublished) (2010), at [17] 'In an extreme case, substantive justice might be denied in its

proportionate resources are expended on each claim so that all litigants are able to obtain effective access to justice. It recognises that within the justice system the courts can only provide a finite set of resources for distribution amongst all litigants. The courts are entitled to adopt this strategy because the Overriding Objective, specifically CPR 1.1(2)(e), requires the court to consider the effect of its decisions not only on the immediate litigants before it but on all litigants, each of whom has an equal right to receive fair access to justice.

In this way the Overriding Objective does not simply permit, it in fact *requires* the court to take an approach which would be entirely unjustified in the common law jurisdictions and under the RSC. It does so because through importing a commitment to procedural justice into the Overriding Objective as substantive justice's equal, Woolf ensured that the new CPR system would not be tied to the single objective of achieving substantive justice in any individual case. Instead the new system is concerned to ensure fair access to a justice system for all; fair access to a system which seeks to ensure that all litigants have a fair opportunity to gain reasonable access to a system supported by limited resources: and so the Overriding Objective aims to 'preserve access to justice for all users of the [justice] system'.<sup>55</sup>

#### 4. Conclusion

Even from this relatively brief discussion of the Overriding Objective, it will be apparent that Lord Woolf's journey to Birmingham's New Street station saw the birth of a novel principle of civil justice. It had little in common with its common law predecessors, and even less in common with the preceding High Court procedure in England ('the RSC'). Unlike those pre-CPR foreign overriding objectives, or the implicit overriding objective of the RSC, Lord Woolf's Overriding Objective, set out in CPR 1.1, has three main features:

- (1) it does not contain a singular commitment substantive justice's achievement; on the contrary it contains an equal commitment to both substantive and procedural justice;
- (2) it does not treat economy and efficiency as means for securing substantive justice through the legal process; instead it regards economy and efficiency

---

entirety, as pointed out by Lord Hoffmann in *Sutradhar v. Natural Environment Research Council* and, previously by the Court of Appeal, in *Flaxman-Binns v. Lincolnshire County Council*. In the [*Flaxman-Binns*] case Lord Phillips MR, when considering whether to allow an appeal which would have enabled the appellant to resuscitate a long delayed and stayed claim, said that the question was "... whether the overriding objective of dealing with this case justly calls for us to bring these proceedings to an end ...". In *Sutradhar*, proportionality required the claim to be brought to an end prior to a substantive judgment, whereas in *Flaxman-Binns*, the claim was allowed to continue. In both cases the court considered whether proportionality not simply as between the parties but as between the parties and other litigants' and the justice system as a whole necessitated it to give effect to a limit on the commitment to substantive justice's achievement.'

<sup>55</sup> Woolf (1995) (n 3) at 28.

- as principles which place a limit on the civil process' commitment to securing substantive justice; and
- (3) it requires a rigorous approach by courts to litigants who fail to comply with procedural obligations, and who thus fail to make proper use of a fair process provided so that they can pursue substantive justice.

In each of these three ways the Overriding Objective is fundamentally different from the commitments which have guided civil procedure both here in the past and abroad. In each of these ways, the Overriding Objective establishes a new paradigm of justice; one committed to proportionate justice – the balance of substantive and procedural justice – rather than to substantive justice alone.<sup>56</sup> Thus Lord Woolf devised the basis for a Copernican revolution in civil justice – one which marked a fundamental and 'important shift in judicial philosophy' away 'from the traditional philosophy that previously dominated the administration of justice' towards one where truth was balanced against a genuine requirement to ensure that each claim would only be allotted 'an appropriate share of the court's resources ... taking into account the need to allot resources to other cases'.<sup>57</sup> As discussed here, this appears to have been Lord Woolf's quite original discovery, on the train ride from London to Birmingham in 1995. Whether his procedural insight has been properly implemented, or even fully recognised, is however an open question.

---

<sup>56</sup> As recognised in Canada through the reform of Ontario's overriding objective to incorporate a commitment to proportionality: see Rule 1.04(1) of the Rules of Civil Procedure for the Ontario (Canada) Superior Court of Justice and Court of Appeal (RRO 1990 Reg 194) <<http://www.canlii.org/en/on/laws/regu/rro-1990-reg-194/latest/rro-1990-reg-194.html>> accessed 7 December 2010, which now reads 'In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding'. Cf. Ontario's Civil Justice Reform Project: Summary of Findings & Recommendations (Attorney General's Office 2007), <<http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/>>.last accessed 7 December 2010. Proportionality has however been rejected in Hong Kong, in that its recent reforms accept the Kuhnian interpretation of the overriding objective set out here whilst rejecting its implementation in its rules: see *Civil Justice Reform Final Report* (Chief Justice's Working Party on Civil Justice Reform, Hong Kong Special Administrative Region, People's Republic of China) (2004) at 46–49 <<http://www.civiljustice.gov.hk>> last accessed 7 December 2010. The United States may well be about to embark on the road to reform, which may possibly see the Federal Rules' overriding objective recast in 'Woolf' terms, as a recent reform study has recommended the introduction of a commitment to proportionality in US civil procedure: see Institute for the Advancement of the American Legal System, *21st Century Civil Justice System – A Roadmap for Reform* (2010) at 5–15; and see *21st Century Civil Justice System – A Roadmap for Reform Pilot Project Rules* (2010) 2 (draft rule one). It is noteworthy though that its commitment to proportionality is inward-looking only and is not, as Woolf's is, outward-looking. Cf. Sorabji (n 15) at 240 ff and Neuberger, *A New Approach to Justice: From Woolf to Jackson* (Hong Kong, unpublished) (2010), at [9] ff.

<sup>57</sup> *Three Rivers District Council and Others v. Governor and Company of the Bank of England (No 3)(Three Rivers)* [2003] 2 AC 1, at [106] and [153].