

Morris and others v Bank of America National Trust and others

COURT OF APPEAL, CIVIL DIVISION
MORRITT, BROOKE AND SEDLEY LJ
7, 8, 10, 14, 21 DECEMBER 1999

Practice – Chancery Division – Chancery Guide – Guidance on conduct of complex cases – Use of information technology.

(1) The conduct of complex Chancery actions will be informed by the guidance set out in the Chancery Guide which aims to provide additional practical information not already contained in the Civil Procedure Rules 1998 or the practice directions supplementing them. That guide contains a powerful message that the prolixity of the old pleading practices is to be a thing of the past. Although a party must set out full particulars of any allegation of fraud or dishonesty, and must also set out the facts which allegedly give rise to an inference of such conduct, that does not require or permit the recycling of pages of evidence. The manner in which evidence is to be adduced is a matter for the judge in the exercise of his case management powers, and in complex cases it is crucial that case management conferences or pre-trial reviews before the judge should be attended by the advocates who are expected to be instructed to appear at the trial, enabling them to discuss with the judge in a collaborative manner the ways in which the conduct of the trial may be made less burdensome if issues are handled in a particular way. Thus costs can sometimes be saved by identifying decisive issues, or potentially decisive issues, and ordering them to be tried first. Although not itself decisive in law of the whole case, the decision of one issue may enable the parties to settle the remainder of the dispute, and in such a case a preliminary issue may be appropriate. If that course is adopted, it must not be assumed that the Court of Appeal will be likely to entertain immediate appeals from a ruling on such an issue if it does not entirely determine the proceedings. Although any application for permission to appeal must be made within the prescribed period, the Court of Appeal may well decide to adjourn the application until after the final determination of the action and thereby preserve the appellant's right to appeal (see p 971 f to p 972 d and p 974 d, post).

(2) There is no reason why the judge should not be provided with material such as pleadings, skeleton arguments and statements of issues in electronic form, supported by hypertext or other links enabling him to move rapidly from the claimant's case to the defendant's case on a particular matter, or enabling him to take up a cross-reference to an earlier part of a document or to another document instantaneously. Nor is there any reason why further efforts should not be made to enable the judge to move rapidly by electronic means, in due course, from a skeleton argument to the case law or statutory material cited in that argument. Moreover, although the Royal Courts of Justice are not yet generally equipped to handle electronic communications between the parties to an action and a judge or his clerk, there is no reason why efforts should not be made, in consultation with court administrators, to see if such arrangements can be put in place to facilitate the handling of particularly heavy litigation. However, such guidance does not derogate from the guiding principle set out in the Chancery Guide,

- a namely that the use of information technology is acceptable only if it will save time or money and will not unfairly prejudice any party (see p 973 b to e h and p 974 b, post).

Cases referred to in judgment

- Armstrong v Strain* [1952] 1 All ER 139, [1952] 1 KB 232, CA.
British Airways Pension Trustees Ltd v Sir Robert McAlpine & Sons Ltd (1994) 45 ConLR 1, CA.
 b *Company No 005009 of 1987, Re a* (1988) 4 BCC 424.
Company (No 005685 of 1988), ex p Schwarcz, Re a (No 2) [1989] BCLC 427.
El Ajou v Dollar Land Holdings plc [1994] 2 All ER 685, CA.
Frognore Estates plc v Berger (1989) Times, 1 November.
Harrison (Saul D) & Sons plc, Re [1995] 1 BCLC 14, CA.
 c *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 All ER 918, [1995] 2 AC 500, [1995] 3 WLR 413, PC.
Three Rivers DC v Bank of England (30 July 1997, unreported), QBD.
Three Rivers DC v Bank of England (No 3) Note [1999] 4 All ER 800, [2000] 2 WLR 15, CA.
 d *Wenlock v Moloney* [1965] 2 All ER 871, [1965] 1 WLR 1238, CA.
Williams & Humbert Ltd v W & H Trade Marks (Jersey) Ltd, Rumasa SA v Multinvest (UK) Ltd [1986] 1 All ER 129, [1986] AC 368, [1986] 2 WLR 24, HL.
Woyka & Co v London and Northern Trading Co (1922) 10 Ll L Rep 110, CA.

Appeal

- e The defendants, Bank of America National Trust and Savings Association, Bank America Corp and Bank America International Financial Corp (BoA), appealed from the decision of Lloyd J on 23 October 1998 whereby he (i) dismissed their application, made pursuant to RSC Ord 18, r 19 and the inherent jurisdiction of the court, to strike out the proceedings brought against them by Christopher Morris, John Parry Richards, Stephen John Akers, Ralph Stephen Preece, Ian Wight, Michael Mackey and Michael Pilling as liquidators of Bank of Credit and Commerce International SA and Bank of Credit and Commerce International (Overseas) Ltd (BCCI), and (ii) dismissed their alternative application to strike out 191 specified paragraphs or sub-paragraphs of the points of claim for failure to comply with Ord 18, r 7. The facts are set out in the judgment of the court.

- g John Brisby QC, Christopher Harrison, Orlando Fraser (instructed by Rowe & Maw) for BoA.

Richard Sheldon QC, Robin Dicker, Fidelis Oditah (instructed by Lovell White Durrant) for the liquidators.

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Cur adv vult

21 December 1999. The following judgment of the court was delivered.

MORRITT LJ.

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Introduction

1. In *Williams & Humbert Ltd v W & H Trade Marks (Jersey) Ltd, Rumasa SA v Multinvest (UK) Ltd* [1986] 1 All ER 129 at 139, [1986] AC 368 at 435–436 Lord Templeman, with whom the other members of the appellate committee agreed, said:

'... if an application to strike out involves a prolonged and serious argument the judge should, as a general rule, decline to proceed with the argument unless he not only harbours doubts about the soundness of the pleading but, in addition, is satisfied that striking out will obviate the necessity for a trial or will substantially reduce the burden of preparing for trial or the burden of the trial itself.'

2. On 25 February 1998 the liquidators of Bank of Credit and Commerce International SA and Bank of Credit and Commerce International (Overseas) Ltd (collectively BCCI) instituted proceedings against Bank of America National Trust and Savings Association and two associated companies (BoA) seeking declarations pursuant to s 213 of the Insolvency Act 1986 that BoA was knowingly party to the carrying on of the business of BCCI with intent to defraud its creditors, the creditors of other persons or for other fraudulent purposes. The liquidators seek orders that BoA make good the deficiency of BCCI with regard to creditors of \$US6bn. The points of claim run to 228 paragraphs extending over 150 pages.

3. On 2 April 1998 BoA applied for an order striking out the proceedings pursuant to RSC Ord 18, r 19 and the inherent jurisdiction of the court on the grounds that the points of claim do not disclose a reasonable cause of action, are scandalous, frivolous and vexatious and an abuse of the process of the court. In the alternative BoA sought an order striking out 191 specified paragraphs or sub-paragraphs of the points of claim for failure to comply with Ord 18, r 7. The application was listed for hearing before Lloyd J over 15 days in October 1998. In their written argument submitted in advance of the hearing pursuant to the directions of Lloyd J the liquidators contended by reference to the speech of Lord Templeman in the *Williams & Humbert Ltd* case, which we have quoted, that the application to strike out the proceedings should be dismissed on the basis of a preliminary review only.

4. After at least two days' reading and three days' hearing that is what Lloyd J did. In dismissing the application Lloyd J did not in terms refer to the *Williams & Humbert Ltd* case. He quoted from the judgment of Knox J in *Re a Company No 005009 of 1987* (1988) 4 BCC 424 at 431 to the effect that to avoid embarrassment to the trial judge he should not give his reasons for concluding that the claim was not obviously unsustainable and continued:

'With the benefit of that wise guidance, which seems to me to be even more apposite in the present case, since the striking out application has not been fully opened to me and even less fully responded to, I propose to say no more than that, while I can see from [counsel for BoA's] powerful submissions why Bank of America takes exception, in particular to some of the ways in which the case against it is sought to be made, it is clear to me that [counsel's] attempt to demonstrate that the [liquidators'] case is obviously unsustainable, involves the court undertaking an exercise which it is not proper that the court should enter upon.'

BoA contends that the judge was wrong. In brief their contentions are that the judge (a) did not consider the first of the conditions to which Lord Templeman referred, namely whether he, the judge, harboured doubts about the soundness of the points of claim, but, if he did, (b) he should have realised that there were serious objections to the points of claim such that it was his duty to hear the application fully and to a conclusion.

- a 5. Lloyd J then considered the alternative contention that 191 specified paragraphs of the points of claim should be struck out for failure to comply with Ord 18, r 7. In that respect he accepted that it was not easy to devise an appropriate pleading in such a case as this and refused to strike out any of the specified paragraphs or sub-paragraphs. BoA contends that the judge was wrong in that respect also.
- b 6. Accordingly on this appeal of BoA from the order of Lloyd J made on 23 October 1998 the issues for our determination are (1) whether Lloyd J applied the correct principles in dismissing the application to strike out without a full hearing on its merits and, if so, (2) whether he correctly applied such principles and, in any event, (3) whether he should have struck out any, and if so which, of the 191 specified paragraphs or sub-paragraphs of the points of claim. We will
- c consider those issues in that order in due course. But before doing so it is necessary to describe in some detail the background to the application as alleged in the points of claim.

Background

- d 7. Bank of Credit and Commerce International SA (SA) was incorporated in Luxembourg in 1972. Bank of Credit and Commerce International (Overseas) Ltd (Overseas) was incorporated in the Cayman Islands in 1975. Both were formed to carry on the business of banking and were duly authorised in the jurisdictions of their respective incorporation. The former but not the latter was also authorised to carry on the business of banking in the United Kingdom. In
- e 1976 both of them became subsidiaries of BCCI Holdings (Luxembourg) SA (Holdings). The moving spirit behind BCCI was Mr Agha Hasan Abedi. The businesses of SA and Overseas were both similar and intermingled. As is notorious the group collapsed in 1991 and all three companies are now in compulsory winding up in at least one jurisdiction (paras 3-15 of the points of
- f claim).
8. Mr Abedi was also concerned with International Credit and Investment Co Ltd, a company incorporated in Liechtenstein in 1973, the successor to its business, International Credit and Investment Co Overseas Ltd, a company incorporated in the Cayman Islands in 1976 and the latter's holding company ICIC Holdings Ltd which was also incorporated in the Cayman Islands in 1977.
- g Unless it is necessary to distinguish between them we will refer to these companies generically as 'ICIC'. The liquidators assert that ICIC was controlled by BCCI and directed by Mr Abedi and other persons acting under his direction. It is alleged that ICIC was used by BCCI to hold shares in BCCI and as a vehicle for the purchase by BCCI of its own shares from BoA (paras 16-20 of the points
- h of claim).
9. In paras 27 and 28 the liquidators set out the fraud in the conduct of the business of BCCI on which they rely and the causes of the insolvency and collapse of BCCI which they allege. The latter includes the artificial inflation of the group's capital by the acquisition of its own shares through nominees and the
- i declaration and capitalisation of stock dividends out of fictitious profits. Paragraphs 29 to 33 deal with the initial capital of BCCI on its formation. Paragraphs 34 to 80 deal with the subsequent apparent, but as alleged fictitious, increases in capital. For present purposes it is sufficient to record that SA was formed pursuant to a memorandum of understanding dated 5 June 1972 which recorded that BoA would subscribe for 25% of the initial share capital of \$2.5m and the management group would assume full responsibility for providing the

balance. Of the balance of 75%, 60% would be subscribed by two named shareholders who would grant options over those shares to the management group. In the event the balance of 75% was subscribed by a number of individuals resident in the Middle East referred to in the points of claim as 'the Middle Eastern Investors'. They granted options and powers of attorney to Mr Abedi as required by the memorandum of understanding. The liquidators allege that the acquisition of such shares by the Middle Eastern Investors or some of them were funded by 'non-performing and evergreen' loans from BCCI which 'were not intended to be repaid by the Middle Eastern Investors'. By June 1980, as alleged by the liquidators, the only real capital SA or Holdings had was \$4.8m provided by BoA; the rest of the reported capital was fraudulently misstated. a b

10. In addition to being a major shareholder BoA also provided banking facilities to BCCI. As either a member in or banker to BCCI BoA carried out a number of audit and credit examinations of BCCI between 1974 and 1977. Details of these and other examinations or investigations into the affairs of BCCI are contained in paras 81 to 125 of the points of claim. In general terms they recorded the increasing concern of BoA as to its involvement with BCCI. For present purposes it is only necessary to refer to a few of them. They are a memorandum dated 8 March 1977 (the March 1977 memorandum) indicating in some detail the continuing concern of BoA as to the imprudent banking practices of BCCI (para 102); a confidential report dated 23 September 1977 to a senior officer of BoA written by Mr Frank Winfield (the Winfield report) (para 104); a letter from Mr Poort and Mr Trueblood, who had been concerned in the credit examination of BCCI for 1977 carried out between 3 October and 25 November 1977, to the vice-president of BoA credit examination department dated 12 December 1977 (the Poort and Trueblood letter) accompanying the 1977 credit examination report and the report, dated February 1978, of Mr Vaez, an examiner with BoA's regulatory body, OCC, following a review of some of BoA's files (the OCC memorandum). c d e f

11. In paras 126 to 158 the liquidators describe what is called the divestiture. This is the process whereby BoA disposed of its shareholding in BCCI. There are a number of material features to which we should refer. The background to the divestiture was the resolution of the executive council of BoA passed on 30 November 1977 to divest from BCCI and to begin the reduction of its credit lines with a view to disengaging from BCCI in due course and the contents of the Poort and Trueblood letter with the credit examination report into BCCI for 1977 sent to the senior officers of BoA on 12 December 1977. The letter had reiterated the problems of BCCI including inadequate reserves, unsatisfactory accounting records, incomplete credit files and loan collection difficulties. Eleven days later, on 23 December 1977 BoA entered into an agreement with ICIC whereby ICIC would buy the BoA's shares in BCCI for a minimum price of \$32.4m over a three-year period from 1978 to 1980. The agreement contained no express provision whereby BoA would lend to ICIC the money necessary to complete the purchase. The liquidators allege that it was in fact so agreed or understood at the time. The agreement was completed by purchases over the years 1978 to 1980 and they were in fact funded by BoA pursuant to three separate loan agreements with ICIC made in June 1978, 1979 and 1980. The liquidators allege that, contrary to the various press releases and statements made by BoA at the time, the reason for the divestiture was the concern of BoA as to the banking practices of BCCI and the substantial effect of the arrangement was the repurchase by BCCI of those of its shares then held by BoA. The liquidators also allege that the ostensible loan g h j

a to ICIC was repaid by BCCI by the transfer of funds to BoA's branch office in Bahrain.

b 12. A summary of the liquidators' case on fraudulent trading, divided into Case I and Case II, and BoA's participation in both cases is contained in paras 159 to 166. Case I covers the period between 1977 and 1983, Case II covers the entire period from the time of incorporation to 1991. For the purposes of this appeal it is only necessary to note the allegations made in relation to Case I. It is alleged in para 159.3 that:

c 'Between 1977 and 1983 the business of BCCI SA was carried on with intent to defraud its creditors and depositors and/or the creditors of any other person and/or for a fraudulent purpose, namely to mislead its regulators as follows ...

d 159.3 The Middle Eastern Investors or some of them were nominees for Abedi (who was in turn a nominee for BCCI). The shares in BCCI Holdings registered in the names of the Middle Eastern Investors or some of them were funded by non-performing and evergreen loans booked in BCCI SA (which loans were not intended to be repaid) and therefore did not represent real capital. Further or alternatively, by recording shares in their names when they or some of them were BCCI nominees, BCCI thereby misrepresented to the regulators, its depositors and creditors, the amount of its capital and the identity of the beneficial owner of its shares.'

e The alleged participation of BoA, ignoring for present purposes the separate corporate bodies, was selling the shares in BCCI, lending the repurchase price ostensibly to ICIC but in reality to BCCI and receiving repayments thereof from BCCI.

f 13. In paras 167 to 172 the liquidators deal with the knowledge they allege BoA to have had concerning Case I. In para 169 it is alleged:

'In entering into the divestiture agreement and/or in receiving the divestiture payments [BoA] knew or was recklessly indifferent or deliberately blind to the fact that ...

g 169.4 BCCI Holdings and/or BCCI SA was largely capitalising itself in that it owned 70% of its issued share capital alternatively owned at least 50% thereof by December 1977 by reason of the facts that:

h 169.4.1 The Middle Eastern Investors or some of them were nominees for Abedi (who in turn was a nominee for BCCI) and the shares registered in their names were funded by non performing and evergreen loans provided by the BCCI Group (which loans were not intended to be repaid) ...

j 169.4.2 ICIC which ... owned 70% of the issued share capital of BCCI Holdings, (a) was not a separate operating entity from BCCI; (b) had no self-generated earnings and derived almost all its income from dividends which it received from BCCI most of which dividends were stock; (c) was controlled and funded by BCCI Group; (d) was used by BCCI as a vehicle to hold shares in BCCI ...'

Paragraph 170 indicates what the liquidators will rely on in support of the allegations of knowledge contained in para 169. Paragraph 170.4 sets out in 14 sub-paragraphs, to which we will refer later, the matters relied on in support of the allegation that BoA knew that BCCI was capitalising itself through the

Middle Eastern Investors or some of them. Paragraph 170.5 does the same in relation to the allegation of knowledge that: a

'(a) ICIC Overseas was not a separate operating entity from BCCI; (b) had no self-generated earnings and derived almost all its income from dividends which it received from BCCI most of which dividends were stock; (c) was controlled and funded by the BCCI Group; (d) was used by BCCI as a vehicle to hold its own shares [and to buy back the BoA Group's shares in BCCI; (e) could not fund out of its own resources (or those of BCCI's management) payment for shares in BCCI which it held or the subordinated loans which it gave to BCCI Holdings or BCCI SA [or the purchase price for the BoA Group's shares in BCCI which it purportedly bought or the repayment of the divestiture loans from BoA] and as a result (i) the real purchaser of [BoA's] shares in BCCI Holdings was BCCI SA and/or BCCI Holdings; (ii) the real borrower of the divestiture loans was BCCI SA; (iii) the repayment of the divestiture loans would be effected by BCCI SA (as was in fact the case) and (iv) accordingly the divestiture would inevitably exacerbate BCCI SA's underlying capital ...' b c

There follow 29 paragraphs or sub-paragraphs to some of which we will refer later. d

14. In paras 173 to 186 the liquidators set out the detail of their Case II consisting of misrepresentations as to ownership and inflation of capital and earnings, the secret acquisition of control of foreign institutions, non-performing loans and bribes. The alleged knowledge of BoA is set out in detail in para 187 which contains 58 paragraphs or sub-paragraphs. In paras 189 to 226 the liquidators set out further matters on which they rely as constituting the further knowing participation of BoA in the fraudulent activities of BCCI after 1978. These include the allegation that notwithstanding the resolution of the executive council of BoA passed on 30 November 1997 BoA in fact increased its credit lines to BCCI. The conclusion, expressed in para 228, is that BoA is liable to contribute to the assets of BCCI the amount of the deficiency with regard to its creditors estimated to be at least \$6bn. e f

The hearing before Lloyd J

15. As we have already indicated the written argument submitted by the liquidators in response to the directions of Lloyd J given on 28 June 1998 referred in terms to the court's reluctance to permit lengthy interlocutory applications and specific reference was made to the *Williams & Humbert Ltd* case and the statement of Lord Templeman which I have already quoted. In response to a request from the judge a written argument in reply to that point alone was submitted by BoA. We were told that before the hearing Lloyd J had spent two days reading the papers. The hearing commenced on 19 October 1998. After some discussion how to proceed counsel for BoA suggested, and the judge agreed, that counsel should deal with one major issue in some depth so that the judge might form a view 'at least in relation to that issue whether there is the necessary potential for success'. Counsel's chosen topic consisted of the allegations made in paras 169.4.1, 169.4.2 (to the extent quoted above), 170.4 and 170.5 to the effect that BoA knew that the Middle Eastern Investors or some of them were nominees for BCCI and that the shares in their names were funded wholly or partly by loans from BCCI and that ICIC was controlled and funded by BCCI. The transcript of the argument shows quite clearly that the judge had well g h j

a in mind that the argument at that stage was 'on a particular topic with a view to satisfying me that it is appropriate that I should enter into this entire exercise at all' and that 'I have to form the view that I am doubtful about the pleading. I think that that is the phrase' and that—

b 'if I allow you [counsel] to proceed but come to a conclusion in a day or so, or whenever, that really you are going nowhere, I can then, as it were, Frogmore you (see *Frogmore Estates plc v Berger* (1989) Times, 1 November) [sc dismiss the application to strike out the points of claim without further argument].'

c 16. Lloyd J then heard counsel for the liquidators not on the substance of the Middle Eastern Investors and ICIC issues but on what was described as the Frogmore point. In reply counsel for BoA emphasised that the issue was whether he had satisfied the judge not only about the unsoundness of the pleading but also that he was likely to get somewhere on the limited but major allegation on which he had addressed the judge.

d Did the judge apply the correct principles?

e 17. In his judgment, which was not reserved, the judge set out the background to the application before him. He described the submission of counsel for the liquidators and that he had been referred by him to the judgment of Browne-Wilkinson V-C in *Frogmore Estates plc v Berger* (1989) Times, 1 November 'and to other decisions in which the practice of lengthy interlocutory hearings at an early stage of proceedings on pleading and procedural matters has been deprecated'. He then referred to *Wenlock v Moloney* [1965] 2 All ER 871, [1965] 1 WLR 1238, *Re Saul D Harrison & Sons plc* [1995] 1 BCLC 14, *Re a Company* (No 005685 of 1988), *ex p Schwarcz* (No 2) [1989] BCLC 427 and *Three Rivers DC v Bank of England* (30 July 1997, unreported). But he did not in terms refer to the *Williams & Humbert Ltd* case. In the course of his discussion of the considerations to which he should have regard he said:

g 'The fact is that the investigation which [counsel] invites me to undertake would amount to a minute examination of the documents in the case which, on his case, might well constitute the whole of the evidence on this aspect of the case, and thus constitute the sort of mini-trial which the Court of Appeal has ruled to be improper.'

And, by reference to the judgment of Knox J in *Re a Company No 005009 of 1987* (1988) 4 BCC 424:

h '... the court has to get some way into the hearing before being able, realistically, to form a view on the question of whether or not a particular claim is unsustainable.'

And:

i '... given the size of the litigation and the gravity of the issue I thought it right to allow [counsel for BoA] to address me in full as I have mentioned on one aspect of the case, even on a preliminary basis, with full submissions from him on that one aspect on an illustrative basis.'

18. The conclusion of Lloyd J is contained in the passage from his judgment we have already quoted in para 4 above. BoA submits that the judge did not apply the correct test, as explained by Lord Templeman in the *Williams &*

Humbert Ltd case. BoA relies on the circumstances that the judge did not refer to that case by name nor did he state whether 'he harbour[ed] doubts about the soundness of the pleading'. Instead he quoted from the judgments of the Court of Appeal in *Wenlock's* case as to the impropriety of conducting a mini-trial on a striking-out application and referred to them on several occasions. By contrast he described the points made by counsel for BoA as justifying 'a rather critical approach by the court to the points of claim and to its prospects of success'.

19. We do not accept this submission for a number of reasons. First, although it is true that the judge did not refer in his judgment to the *Williams & Humbert Ltd* case, it is inconceivable that he was unaware of the principles thereby established. Not only had he been addressed on the principles as established in that case but he himself referred on several occasions to the *Frogmore Estates plc* case. In his judgment in that case Browne-Wilkinson V-C not only quoted the relevant passage from the speech of Lord Templeman but summarised the relevant principles as:

'If it [the strike out application] is to be entertained, the defendants have to demonstrate to me, first, that their application is likely to succeed; and, second, that it will either be decisive or appreciably simplify the eventual trial.'

Later he observed that the burden on a defendant to satisfy those tests is a heavy one.

20. Second, if the judge was not applying the relevant principles because he was ignoring the need for the defendant to satisfy the court that the strike-out application was likely to succeed why did he invite and permit counsel for BoA to address him on 'a particular topic with a view to satisfying me that it is appropriate that I should enter into this entire exercise at all'? It would have been obvious, without hearing those submissions, that the second condition for entertaining the application was satisfied. Indeed it is equally obvious, from his own interventions, that the judge fully appreciated that that was the reason for hearing them.

21. Third, if Lloyd J was considering only the second condition why did he refer to the judgment of Knox J in *Re a Company No 005009 of 1987* with regard to avoiding embarrassment to the trial judge? Such embarrassment could only be caused by giving reasons in respect of the first condition not the second.

22. We have no doubt that Lloyd J sought to apply the correct test. We suspect that he did not refer to the *Williams & Humbert Ltd* case because he considered it to be fundamentally different because no attempt had been made in that case to strike out the whole claim. It is unnecessary to consider whether that was a sufficient reason not to refer to the statement of Lord Templeman because the relevant principles were accurately set out in the *Frogmore Estates plc* case.

Did the judge apply the relevant principles correctly?

23. At this stage it is convenient to refer to the terms of s 213 of the Insolvency Act 1986. So far as relevant it provides:

'(1) If in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose, the following has effect.

- a (2) The court, on the application of the liquidator may declare that any persons who were knowingly parties to the carrying on of the business in the manner above-mentioned are to be liable to make such contributions (if any) to the company's assets as the court thinks proper.'

b It is not, for the purposes of the application, in dispute that the business of BCCI was so carried on and that BoA was party thereto in the respects alleged. BoA contends that the allegation that it was 'knowingly' such a party is bound to fail so that, as it is an essential element in the cause of action, the claim of the liquidators should be struck out. The contention is advanced on two bases; first, that though the points of claim formally allege the requisite knowledge the particulars given in support of the allegation are incapable of giving rise to such an inference; second, even if the particulars are capable of leading to such an inference a consideration of the underlying documents relied on shows that no court could conclude that BoA had the knowledge alleged. The first basis relies on Ord 18, r 19(1)(a), the second on Ord 18, r 19(1)(b),(c) and (d) and the inherent jurisdiction of the court. It is common ground that as those were the provisions on which Lloyd J determined the matter we should judge the correctness or otherwise of his decision by reference to the same provisions notwithstanding that they have now been overtaken by the Civil Procedure Rules. It is to be noted, however, that if we allow the appeal and remit the matter to the judge for a full hearing the new not the old rules would apply.

- e 24. It is obvious that this application to strike out the points of claim would, in the words of Lord Templeman, 'involve a prolonged and serious argument'. It is equally obvious that if they were struck out an unusually long and expensive trial would be obviated. Thus the general rule to the effect that the court will not entertain such a strike-out application as this will apply unless BoA establishes that its application, if heard to a conclusion, has some prospect of success. As the judge gave no reasons for his conclusion that BoA had failed to demonstrate that its application to strike out had some prospect of success we have to reach a conclusion on that question ourselves.

- g 25. It is common ground for the purposes of the appeal that 'knowingly' includes wilful blindness or reckless indifference and that to succeed on a claim under s 213 of the 1986 Act it is necessary to show that the defendant acted dishonestly. Until clarified in the course of argument the legal basis for the alleged knowledge of BoA was obscure. Counsel for the liquidators explained that their case on knowledge arises at three levels. The first is that Mr Armacost and other senior executives of BoA had the requisite knowledge and with such knowledge acted dishonestly in making the divestiture arrangements. The second level is to the effect that, given the knowledge Mr Armacost and the other senior executives actually did have if they did not actually have the further knowledge alleged then they recklessly ignored it. The third and more controversial level is that there should be attributed to BoA the relevant knowledge of all its senior executives; the knowledge so attributed should be aggregated and the aggregate of such attributed knowledge constitutes the corporate knowledge of BoA. On that footing, it is submitted, the actions of BoA regarding the divestiture were dishonest. In relation to attribution of knowledge the liquidators will, we were told, rely on *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 All ER 918, [1995] 2 AC 500 and *El Ajou v Dollar Land Holdings plc* [1994] 2 All ER 685 at 703-704. Counsel for BoA submitted that the third level was inconsistent with the decision of this court in *Armstrong v Strain*

[1952] 1 All 139, [1952] 1 KB 232. Counsel for the liquidators suggested that that decision may require qualification by reference to the dictum of Atkin LJ in *Woyka & Co v London and Northern Trading Co* (1922) 10 Ll L Rep 110 at 117. The first two levels give rise to pure questions of fact. The third also gives rise to questions of law which we cannot resolve on this appeal. Given the number of separate matters relied on as constituting, at each of three different levels, the alleged knowledge, the burden on BoA is very considerable. It has to demonstrate that an inference of the relevant knowledge could not be drawn at any of the three levels from any one of the individual matters relied or from any combination of any two or more of them. With his customary thoroughness and ability counsel for BoA sought to do just that.

26. In our view he did not succeed. We do not propose to address counsel's detailed arguments on each of the matters relied on in support of the allegation of knowledge of the limited issues on which the judge permitted argument. It is unnecessary to do so.

27. First we consider that BoA's reliance on Ord 18, r 19(1)(b),(c) and (d) and the inherent jurisdiction of the court in a case such as this is misplaced. In *Wenlock's case* [1965] 2 All ER 871, [1965] 1 WLR 1238 it was conceded that the statement of claim did disclose a cause of action. The defendant argued before the master that notwithstanding the adequacy of the pleading the action was bound to fail because the plaintiff would be unable to prove the necessary facts. After a lengthy hearing the master struck out the action; the judge dismissed the plaintiff's appeal. But the Court of Appeal deprecated the process whereby the function of the trial judge had been usurped in an action in which the facts were in dispute. Danckwerts LJ said:

"There is no doubt that the inherent power of the court remains; but this summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action. To do that, is to usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power." (See [1965] 2 All ER 871 at 874, [1965] 1 WLR 1238 at 1244.)

What was stated in that case in relation to the inherent jurisdiction of the court is equally applicable to the jurisdiction to strike out a pleading on the grounds set out in Ord 18, r 19(1)(b) to (d).

28. BoA sought to avoid the consequences of that decision by two means. The first was to limit, by reference to the decision of this court in *Re Saul D Harrison & Sons plc* [1995] 1 BCLC 14, the application of the decision in *Wenlock's case* to cases in which the issues of fact are as to primary facts, not the inferences to be drawn from them. The second was to point out, correctly, that all the documents referred to in the relevant passages in the points of claim had been provided to the liquidators by BoA pursuant to the order of Robert Walker J.

29. We do not accept either of those contentions. *Re Saul D Harrison & Sons plc* concerned a petition to wind up the company on the just and equitable ground or for an order under s 459 that the respondents should buy the petitioners' shares. The petition alleged a number of matters in respect of which it was alleged that the affairs of the company had been conducted in a manner unfairly

a prejudicial to the petitioner. The respondent applied to strike out the petition on the grounds that it was an abuse of the process of the court. The response of the petitioner was to rely on the decision of this court in *Wenlock's* case and that part of the judgment of Danckwerts LJ to which we have referred. It is true that after referring to the judgment of Danckwerts LJ Hoffmann LJ said:

b 'I entirely accept that the court cannot ordinarily resolve disputes of fact on affidavit ... In this case, however, the primary facts concerning the company's history and financial performance are not in any serious dispute. The question is whether those facts could arguably support an inference that the directors had abused their powers.' (See *Re Saul D Harrison & Sons plc* [1995] 1 BCLC 14 at 21.)

c But, as Neill LJ observed (at 32), each case must depend on its facts. And the primary facts in that case (see at 22) were contained in the accounts of the company as to which there was no dispute. Waite LJ agreed with both judgments. We do not regard the decision of the court in that case as confining the application of *Wenlock's* case to cases in which the disputed facts are primary
d whatever the nature of the dispute with regard to facts which are secondary. In any event if such a classification has any use in this field we would regard the existence of knowledge of a fact to be inferred from primary facts as itself a primary fact.

e 30. Second, the fact that the liquidators' case is pleaded by reference to the documents disclosed by BoA pursuant to the order of Robert Walker J does not exclude the possibility of other evidence at the trial. First there are the liquidators' own documents or documents obtained from other sources. This is not pure Micawberism as counsel for BoA submitted. Officers of BoA have been
f deposited in proceedings in the United States. Those documents and the information they contain are suggestive of the existence of other documents relevant to the issues on which counsel for BoA was allowed to address Lloyd J as well as many others. Then there are answers to interrogatories. The ability of the liquidators to administer interrogatories in a case such as this cannot be
g disregarded. The affidavit of Mr Akers, one of the liquidators, sworn on 3 July 1998, shows that there are many individuals who may have first-hand knowledge of the issues which arise and who are available to give oral evidence. Finally it cannot be assumed in a case such as this that BoA will call no evidence, if only to explain the context in which some of the documents were written; if they do then the liquidators will have the right to cross-examine them.

h 31. We regard the attempt to persuade the court to strike out this claim on the basis of evidence as an extreme example of the abuse of the inherent jurisdiction to which Danckwerts LJ referred in *Wenlock's* case. It is suggested that to take this view is inconsistent with what the court did in *Re a Company* (No 005685 of 1988),
i *ex p Schwarcz* (No 2) [1989] BCLC 427 and *Three Rivers DC v Bank of England* (No 3) Note [1999] 4 All ER 800, [2000] 2 WLR 15. In the former Peter Gibson J struck out a petition seeking an order under s 459 of the Companies Act 1985. The hearing before him lasted for eight days. The judge referred to both *Wenlock's* case and the *Williams & Humbert Ltd* case. He emphasised the enormous quantity of evidence before him. Though the matter was undoubtedly complicated he reached the clear conclusion that the petition was an abuse and struck it out. In the course of his judgment Peter Gibson J referred (at 436-437) to the submission made to him to the effect that the grounds for relief under s 459 were so wide that

petitions seeking relief thereunder should go to trial and only rarely be struck out before trial. He rejected this submission on the ground that the very width of the section required the court to exercise control at an early stage so that it was not used as an instrument of oppression. The same considerations were relevant in *Re Saul D Harrison & Sons plc*. We do not think that the greater readiness of the court to embark on a lengthy and detailed strike-out application in the case of s 459 petitions and similar applications should be used to undermine the salutary principle illustrated in *Wenlock's* case. In the *Three Rivers DC* case the Court of Appeal upheld the decision of Clarke J to strike out a complicated claim for damages for misfeasance in a public office made against the Bank of England for authorising BCCI to carry on the business of banking. In that case all the evidence then available to the plaintiff was before the court because all the facts had been investigated by Bingham LJ as he then was. (See *Inquiry into the Supervision of the Bank of Credit and Commerce International* (the Bingham Report) published by the House of Commons 22 October 1992.) Obviously the fact of a recent inquiry is a material distinction. The Court of Appeal considered that the 'somewhat rigid position [of the Court of Appeal in *Wenlock's* case] was however modified by the House of Lords in *Williams and Humbert Ltd. v. W. & H. Trade Marks (Jersey) Ltd. ...*' (see per Hirst LJ [2000] 2 WLR 15 at 86.) The House of Lords has given leave for a further appeal. In those circumstances we express no view whether Clarke J was right to strike out that action. We merely observe that however relaxed the position may now be this case appears to us to be a paradigm of what the Court of Appeal in *Wenlock's* case found to be objectionable.

32. However, the proper application of *Wenlock's* case could not dispose of the application in so far as it is alleged that the points of claim do not allege facts from which the alleged knowledge could be inferred. On such an application the issue must be determined by reference to the allegations made in the points of claim and no evidence is admissible (see Ord 18, r 19(2)). As much of the documentary evidence is pleaded as a fact from which knowledge may be inferred the distinction between a mini-trial which the proper application of *Wenlock's* case deprecates and an application to strike out on the ground contained in Ord 18, r 19(1)(a) is blurred. Accordingly it is necessary on this part of the case to consider, on the basis of the submissions made by counsel for BoA, whether the court 'harbours doubts about the soundness of the pleading' or whether BoA has demonstrated that their application to strike out 'is likely to succeed'.

33. Third, we consider that the court could infer the requisite knowledge from one or more of the matters relied on in the points of claim. In selecting only some of the matters so relied on we must not be taken as rejecting any possibility that the others could found such an inference for it is not necessary for us to go that far on this appeal.

34. The knowledge alleged (see para 169.4.1) is that BoA knew on and after 23 December 1977 that BCCI had capitalised itself in that, amongst other methods, some of the Middle Eastern Investors were nominees for Abedi (who was in turn a nominee for BCCI) through shares registered in their names but funded by non-performing loans from BCCI which were not intended to be repaid. Since the hearing before Lloyd J the particulars have been supplemented by the addition of what are now paras 170.4.1 and .2.

35. Paragraphs 170.4.3 to .5 allege that after 1972, to the knowledge of BoA, Abedi held options over the shares of and powers of attorney from the Middle Eastern Investors. Paragraphs 170.4.6 to .10 allege that the Middle Eastern

a Investors did not exercise the rights shareholders would normally be expected to exercise so that Abedi had control of their shares. Paragraph 170.4.11 alleges that BoA's group's internal auditors and credit examiners found that the Middle Eastern Investors were borrowers of substantial 'insider' loans, many of which were evergreen and showing no activity whatever. Paragraphs 170.4.12 to .14 refer to the March memorandum, the Winfield memorandum and the Poort and Trueblood letter. Each of these documents shows clearly that by December 1977

b BoA did not trust Mr Abedi. In the March 1977 memorandum the author stated in terms that 'the ownership control of 70% of BCCI is in the hands of the same individual, Mr Agha Hasan Abedi'. In the Winfield memorandum Mr Winfield wrote that:

c 'Through Powers of Attorney, Mr Abedi controls the voting rights of ... BCCI stock ... including the shares ... held by ... various Middle East shareholders. How many of these Middle East shareholders are Abedi's nominees we do not know.'

In the Poort and Trueblood letter the authors stated that the 70% holding in

d BCCI not owned by BoA, thereby including those held by the Middle Eastern Investors, was owned by ICIC. ICIC was itself controlled by Mr Abedi. In our view the court could draw the inference from all those facts that the Middle Eastern Investors were nominees for Abedi, who was in turn a nominee for BCCI, of shares in BCCI acquired with loans from BCCI which it was not intended should be repaid and that BoA knew those facts. Accordingly we reject

e the submission that the inference of knowledge could not be drawn in relation to the Middle Eastern Investors.

36. The other issue arises in respect of the comparable allegation of self-capitalisation made with regard to the shareholding of ICIC contained in para 169.4.2, as particularised in para 170.5. The principal issue is whether BoA knew

f in December 1977 that ICIC was controlled and funded by BCCI. Extensive particulars of the allegation are given in para 170.5.1 to .13. This is all against the background that Mr Abedi controlled both BCCI and ICIC and was not trusted by BoA. On 6 May 1977 Mr Pearce wrote to Mr Abraham, a senior officer of BoA, in response to a request, which was not before us, for corporate information concerning ICIC. He gave the names of the registered shareholders and observed

g that:

'As you will see BCCI does not appear on the share register, and it would seem therefore that at least one or more of the shareholders of record must be acting in a nominee capacity.'

h It is said that the reference to BCCI is a mistake for ICIC Holdings Ltd. That may be so but, as it stands, the letter supports the pleaded allegation; the explanation of it is a matter for evidence at the trial. Likewise in the draft of a letter from Abedi to Mr LaMarche, a senior officer in BoA, written in June 1978 Mr Abedi referred to Mr LaMarche 'knowing the position of ICIC as you did'. This phrase

j was omitted from the letter as dated 15 June 1978 and sent; its omission does not necessarily indicate that the original statement was untrue but it does prompt a number of further questions. The particulars indicate substantial and regular borrowing by ICIC from BCCI of which BoA knew. The Winfield memorandum, the Poort and Trueblood letter and the OCC memorandum indicate in clear terms that ICIC was funded by BCCI. It may be, as counsel for

BoA submitted, that these and other indications of knowledge on the part of BoA can be explained. But the explanations are matters for evidence at the trial, not affidavits sworn on information and belief on a strike-out application. a

37. For all these reasons we do not harbour doubts as to the soundness of the points of claim. We do not consider that BoA has demonstrated on the topic of its choice that its application to strike out the points of claim is likely to succeed. The submissions for the liquidators sought to extend the argument into matters other than those on which the judge heard argument from counsel for BoA. We do not rest our decision on the merits of the liquidators' case on those other matters but we did not see anything in them such as to give rise to concerns as to the soundness of the points of claim. It follows that the general rule to which Lord Templeman referred applies. In our view, the judge was right to dismiss the application to strike out the points of claim when and in the circumstances he did. Accordingly we would dismiss the appeal against his order dismissing the application to strike out. b

Should the judge have struck out the specified paragraphs or any of them for failure to comply with RSC Ord 18, r 7? c

38. So far as relevant Ord 18, r 7 provides: d

(1) ... every pleading must contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies ... but not the evidence by which those facts are to be proved ...

(2) ... the effect of any document ... referred to in the pleading must, if material, be briefly stated, and the precise words of the document ... shall not be stated, except in so far as those words are themselves material.' e

The provisions of Ord 18, r 12 require that:

(1) ... every pleading must contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing, (a) particulars of any ... fraud ... (b) where a party pleading alleges any condition of the mind of any person, whether ... fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies ... f

(4) Where a party alleges as a fact that a person had knowledge or notice of some fact, matter or thing, then ... the Court may, on such terms as it thinks just, order that party to serve on any other party—(a) where he alleges knowledge, particulars of the facts on which he relies ... g

39. The feature common to each of the 191 paragraphs of which complaint is made is that it contains a quotation from a document. The quotation is often a part of an internal document disclosed by BoA pursuant to the order of Robert Walker J. For BoA it is contended that this method of pleading is not only a breach of Ord 18, r 7 but embarrassing in that it is unclear what the allegation is: is it the truth of the words quoted, the fact that they were written by the author of the document, the fact that BoA had in its possession the document in which the words appeared or some other and if so what fact? h

40. When the matter came before Lloyd J he was told that, notwithstanding the problems to which we have referred, points of defence would shortly be available. Since he gave judgment they have been served. Those responsible for drafting the defence have dealt with the matter by themselves quoting selected j

a passages from documents. Thus, there is joined what was called 'the Battle of the Quotes'. It is suggested by BoA that if the pleadings remain in their present form the claim will be unredeemable by any future case management and virtually untriable.

b 41. Lloyd J rejected the contentions of BoA. He noted that there were instances in the points of claim where the precise words used are material but that in most other cases the precise words are material only to identify the part of the document relied on. The judge recorded the submission of counsel for the liquidators that the quotations were also justifiable as particulars of knowledge which could be ordered under Ord 18, r 12(4) and had been provided in anticipation of the inevitable request. The judge then said:

c 'It seems to me that on the central question as regards the legitimacy or otherwise of quotations [counsel for the liquidators'], is a fair analysis of the position. I accept his submission that it is by no means easy to devise an appropriate pleading in a case such as this and, indeed, there is no criticism of the overall plan of the pleading. Given the reasonable need that the pleader has perceived to refer to the Bank of America documents, it seems to me that the technique used, is not, in principle, objectionable. [Counsel for BoA] says that it does produce a wholesale breach of Ord 18, r 7 and is one which could be followed in every case, and would, therefore, drive a coach and horses through that rule. He has referred to emphasis, both in the 1995 Practice Direction (see Practice Direction (civil litigation: case management) [1995] 1 WLR 262) and in Lord Woolf's final report, to the need to adhere to the rules of pleading in the interests of brevity. That I accept. But in relation to a case of fraudulent trading in which other events over a period of 19 years are relevant, it seems to me that the matter cannot be dealt with shortly, and that the need for a considerable degree of particularisation would put the pleading in such a case in an exceptional category, whatever technique is used.

f Moreover, it is only in a very few cases that it would be necessary or appropriate to refer to documents by way of the material facts in support of allegations of dishonesty. It is difficult to imagine many other types of case in which it could be necessary or appropriate to refer to documents, and thereby fall into the error that [counsel for BoA] submits that this pleading suffers from, of breach of Ord 18, r 7. But in the light of my acceptance of [counsel for the liquidators'] proposition, I do not propose to accede to [counsel for BoA's] application to strike out either the whole or any of the specified paragraphs in the points of claim.

g 42. In their notice of appeal BoA contended that the judge, having accepted that there was a wholesale breach of Ord 18, r 7, was wrong to hold that there were grounds to justify it. In our view that submission involves a misreading of the judge's judgment. We do not think that he did find that there had been such a wholesale breach. We read the words 'That I accept' as a reference to the need to adhere to the rules of pleading in the interests of brevity not the preceding submission of counsel. If BoA were right then the later reference to 'the error ... of a breach of Ord 18 r.7' would have identified it by reference to the judge's own conclusion, not the submission of counsel for BoA.

j 43. It was submitted that if the judge did not find that there had been a wholesale breach of Ord 18, r 7 then he was wrong. We do not think that he was.

The rule recognises that there will be cases where the precise words of the document will themselves be material. We do not think that such cases are limited to defamation and misrepresentation. Nor do we see why in exceptional cases, such as this, it should be impermissible to refer to the actual words used as an identification of the part of the document relied on either as an admission or, in anticipation of an inevitable request, as a fact relied on for the inference of knowledge. Order 18, r 12(1) and (4) does not forbid the pleader to give particulars of knowledge in his pleading; it entitles him to defer doing so unless and until the court orders otherwise. An admission contained in a document is a fact to be relied on notwithstanding that it is also the evidence by which it is to be proved.

44. Even if the judge had concluded that the use of quotations was objectionable he would not have been bound to strike out the whole or the offending part of the points of claim. As Saville LJ pointed out in *British Airways Pension Trustees Ltd v Sir Robert McAlpine & Sons Ltd* (1994) 45 ConLR 1 at 5:

'Pleadings are not a game to be played at the expense of the litigants, nor an end in themselves, but a means to the end, and that end is to give each party a fair hearing. Each case must of course be looked at in the light of its own subject matter and circumstances.'

The judge would have had a discretion under the old rules and we have one under the new whether or not to strike out the whole or part of the points of claim. It would not have been right for the judge under the old rules to exercise the discretion to strike out as the remedy, by way of case management, for using quotations rather than a more conventional method for the allegation of material facts. Given the overriding objective of the new rules it could not be right for this court to do so even if we concluded that the use of quotations in this case was objectionable.

45. Accordingly we dismiss the appeal from para 3 of the order of the judge made pursuant to the application of BoA.

General observations

46. In the course of the hearing counsel for BoA thought fit to cast aspersions on the professional competence and, indeed, integrity of the signatory to the liquidators' pleadings going well beyond what may be considered the normal, if unhelpful, language of hostile litigation. In one instance the allegation was withdrawn. But in others it was not. The complaint was that the pleader and all those with whom he consulted had lost all objectivity and given their support to 'an improper pleading'. The allegations having been publicly made and persisted in it is appropriate that we should state equally publicly that we consider them to be without foundation. Few pleadings are incapable of improvement. In a case such as this the conventional methods may not be the best to adopt. But the potential for improvement and the use of exceptional methods in an exceptional case are not enough to justify the allegations made.

47. We also wish to make some observations as to the future conduct of this claim. Notwithstanding our decision on this appeal, in our judgment this action now requires firm proactive judicial direction. What form that direction takes must be a matter for the judge, after hearing representations from the parties. He will now, however, be able to operate within the CPR regime which will make his task less onerous than it would have been before 26 April 1999.

a 48. First and foremost, he will have the duty of seeking to give effect to the overriding objective in CPR 1.1(1) (see CPR 1.2(a)). Although the amount of money involved in this action is huge, the case is very important, the issues very complex and both parties appear to have very substantial resources at their command (see CPR 1.1(2)(c)), the judge is nevertheless under a duty to ensure, so far as practicable, that it is dealt with expeditiously and fairly, and that while allotting to it an appropriate share of the court's resources he must also take into account the need to allot resources to other cases (see CPR 1.1(2)(d) and (e)). This is important when one party is contending that the action will take three to six months to try, while the other is saying that it will take at least 12 months. The time and skill of an experienced Chancery judge are scarce resources, and every effort must be made to achieve the first of these time estimates.

c 49. In performing his duty to ensure that the case is dealt with not only fairly but also expeditiously, the judge will be helped by the fact that the parties themselves are now required to help the court to further the overriding objective (see CPR 1.3). This requires a sea-change in practitioners' approaches to litigation of this kind. The fact that the litigation between the parties may be accurately described as hostile emphasises the need for the co-operation of their representatives in assisting the court which it is their duty to provide, not absolution from it.

d 50. Because the regime created by the Civil Procedure Rules is so new, we believe it may be useful to say something about the task of a judge in a case of this complexity. Under the old rules, the requirements for pleadings were fairly prescriptive. The mischief which the new rules have been created to combat is very clearly set out by Lord Woolf in Ch 20 of his interim report on *Access to Justice* (June 1995), and we need not repeat it here.

e 51. In the primary legislation which heralded the way to the recent reforms, Parliament provided that instead of providing for any matter themselves, civil procedure rules might refer to provisions made or to be made by practice directions (see Civil Procedure Act 1997, s 1(2) and Sch 1, para 6). As a result, the old prescriptive regime for pleadings contained in Ord 18 has been replaced in the Civil Procedure Rules by much simpler language (see CPR Pt 16). The Practice Direction supplementing that part contains a small amount of additional guidance. In practice, in the absence of a regime for specialist proceedings prescribed by CPR Pt 49, the conduct of a Chancery action as complex as this will be informed by the guidance set out in the Chancery Guide, the aim of which is to 'provide additional practical information not already contained in the new Rules or the Practice Directions supplementing them' (see Ch 3, para 3.1). In particular, Ch 4, para 4.5 of the guide contains a powerful message that the prolixity of the old pleading practices is to be a thing of the past. Where fraud or dishonesty is alleged, a party must set out full particulars of any such allegation and, where any inference of fraud or dishonesty is alleged, the facts on the basis of which the inference is alleged (see CPR 16.4(1)(e), Pt 16 PD, para 10.2(1) and (5)). This does not require, or permit, the recycling of pages and pages of evidence. How evidence is to be adduced will be a matter for the judge in the exercise of his case management powers.

j 52. Chapter 5 of the Chancery Guide is concerned with this very topic. It is unnecessary to write its contents into this judgment. What is crucial in a case of this complexity is that the advocates who are expected to be instructed to appear at the trial should attend case management conferences or pre-trial reviews before the judge so that they can discuss with him in a collaborative manner the

ways in which the conduct of the trial might be made less burdensome if issues are handled in a particular way. Paragraph 5.7 is of great importance in this context: a

'Costs can sometimes be saved by identifying decisive issues, or potentially decisive issues, and ordering that they are tried first. The decision of one issue, although not itself decisive in law of the whole case, may enable the parties to settle the remainder of the dispute. In such cases a preliminary issue may be appropriate.' b

53. If this course is adopted, it must not be assumed that this court will be likely to entertain immediate appeals from a ruling by a judge on such an issue if it does not entirely determine the proceedings. Such a ruling is described as an interlocutory order in para 2.12 of the Court of Appeal Practice Direction (see Practice Note (Court of Appeal: procedure) [1999] 2 All ER 490). Although any application for permission to appeal must be made within the prescribed period, the Court of Appeal may well decide to adjourn the application until after the action has been finally determined and preserve the appellant's right to appeal in this way (see para 2.12.2). c

54. Chapter 14 of the Chancery Guide, which is entitled 'USE OF INFORMATION TECHNOLOGY', is also of particular importance in relation to the conduct of an action of this complexity. The amended points of claim cover 150 A4 pages. Although there are only 228 paragraphs, a number of them are sub-divided and sub-sub-divided. Paragraph 159, for instance, has 17 sub-paragraphs and covers four pages. Paragraph 170 (with six sub-paragraphs, most of them spawning sub-sub-paragraphs) covers nearly 13 pages. It is rivalled by para 187, which covers 12. Paragraph 188 covers only six, but has no less than 28 sub-paragraphs. The points of defence is a somewhat slimmer document, containing only 93 pages, with 436 paragraphs and fewer sub-paragraphs. No use is made of headers or footers to make it easier for a judge to find his way round these massive pleadings. It is he who is under a duty to control the case, and it is the duty of the parties and their representatives to help him. d

55. Modern word-processing software also makes the task of presenting complex interlocking material in readily accessible form much easier than it was 10 or 15 years ago. All too often in the past the parties' solicitors have deployed their IT know-how and resources to the preparation of their own case. Great strides forward are now being made by some firms in enabling counsel and expert witnesses to obtain remote access to their firm's database where all the imaged documents in the action are kept and sorted. The challenge of the next ten years lies in working out collaboratively the means by which the immense power of IT can be harnessed to assist judges in their management of these massive cases. Although within the next 12 months every full-time judge who wants one will have been supplied with a modern personal computer and given basic training in its use, in an action of this size a judge will be heavily dependent on the parties to facilitate his task and to provide him with any additional help and IT know-how he will need if he is to be fully in control of the case. e

56. Paragraph 14.3 of the Chancery Guide describes the scene when the guide was revised earlier this year. It says, for example: f

'A number of specific applications of information technology have been well worked out since the last edition of the Chancery Guide. The use of fax, the provision of skeleton arguments on disk, and daily transcripts on disk g

a (with or without appropriate software) have become commonplace. Taking evidence by video link has become more common, and the available technology has improved considerably. There is still little experience of the intensive use of information technology in the ordinary course of the trial by, for example, providing documents as images to be displayed.'

b 57. Chapter 14 of the guide contains useful practical advice about the way to handle some of these matters in a court context. Practitioners need to be aware, however, that this is a very fast-moving scene. The judges' new personal computers have been furnished to a specification which should enable them to manage the documentation in a case of this scale more easily. In this context part of the information provided in para 14.6 of the guide is already out of date. There is no reason why the judge should not be provided with material in electronic form, such as pleadings, skeleton arguments and statements of issues, supported by hypertext (or other) links enabling him to move rapidly from what the claimant says about a matter to what a defendant says about a matter, or enabling him to take up a cross-reference to an earlier part of a document (or to another document) instantaneously. There is also no reason why more efforts should not be made to enable the judge to move rapidly by electronic means, in due course, from a skeleton argument to the case law or statutory material cited in the skeleton argument.

c 58. Although the Royal Courts of Justice are not yet generally equipped to handle electronic communications between the parties to an action and a judge or his clerk, there is no reason why efforts should not be made, in consultation with court administrators, to see if such arrangements can be put in place to facilitate the handling of particularly heavy litigation, like the present action.

d 59. Chapter 21 of Lord Woolf MR's final report on *Access to Justice* (July 1996) set the framework within which the possibilities of developments of this kind are now being pursued. He wrote in para 1:

f 'The additional information I have received ... has strengthened my conviction that sensible investment in appropriate technology is fundamental to the future of our civil justice system. IT will not only assist in streamlining and improving our existing systems and processes; it is also likely, in due course, itself to be a catalyst for radical change as well.'

g In para 6 of that chapter he described some of the possible applications of IT in heavy cases which had been identified in the mid-1990s when he was gathering materials for his report. Things have moved on very fast since then, particularly in countries like the United States and Australia, and the Civil Procedure Rules now provide the enabling framework within which the benefits of advanced IT applications may be made available to judges in cases of this size.

h 60. Needless to say, nothing in this part of this judgment should be taken in any way to derogate from the guiding principle set out in para 14.2 of the Chancery Guide: 'Use of IT is acceptable only if no party to the case will be unfairly prejudiced and its use will save time or money.'

j 61. In conclusion, we do not wish to be prescriptive about the form the judge's directions might take. Counsel for the liquidators told us that the liquidators had already prepared their own draft proposals for the judge, and nothing would be gained by our interfering with that process. It will, however, be as obvious to the judge as it is to us, that the liquidators' case in relation to the knowledge and dishonesty attributed to BoA requires clearer definition than is available in the

present pleading. On this central issue BoA is entitled to understand much more clearly the case they have to meet. It may be that once this particular issue has been properly defined, it would provide scope for an early ruling by the judge on the relevant principles of law to be applied, but this is very much a matter for him. *a*

Conclusion

62. For all these reasons we dismiss the appeal and direct both parties to apply to Lloyd J, as the judge assigned to try this case, for directions as to its future conduct. *b*

Appeal dismissed.

Caroline Stomberg Barrister. *c*

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