Institution: University of Oxford

Unit of Assessment: 20 - Law

Title of case study:

Improving the management of civil litigation, to improve access to justice

1. Summary of the impact

An extensive body of research by Adrian Zuckerman has resulted in a significant improvement in the management of civil trials in England and Wales, and therefore to an improvement in access to justice for litigants. Zuckerman made a sustained argument that litigants are entitled only to a *fair share* of court resources, and not to an excessive share. His critical defence of this view changed the courts' use of their powers under the Civil Procedure Rules 1998 (CPR), and persuaded the Civil Procedure Rules Committee to change the rules themselves, regarding sanctions for failure to comply with procedural rules and court orders. The result is an important move toward the approach that Zuckerman has advocated: that parties should not be allowed to depart from deadlines imposed by rules and court orders unless they could not reasonably have complied in time, or had good reasons for the default.

2. Underpinning research

The authoritative work on civil procedure, *Zuckerman on Civil Procedure: Principles of Practice* **[R1]** ('*Civil Procedure*'), provides a coherent and detailed account of litigation under the CPR system. It explains the purpose of the CPR, how the courts interpret and apply the CPR, the principles that govern the exercise of judicial discretion, and how judges ought to exercise their extensive case management powers.

Adrian Zuckerman, Professor of Civil Procedure at Oxford since 1973, argued that the CPR introduced a three-dimensional concept of civil justice, which required the court to deliver judgments that are not only *correct* but are also reached by a process that is *efficient* and *expeditious*. He showed that this new concept had far-reaching implications in practice, because the new commitment to efficiency calls for consistent enforcement of deadlines and other process requirements. In order to prevent litigants from protracting litigation unnecessarily, Zuckerman argued, the court should refuse to allow parties to depart from deadlines imposed by rules and court orders unless they could not reasonably have complied in time, or had good reasons for the default. It is all too tempting for judges, in their role in giving effect to the CPR, to conclude or to assume that they should do whatever it takes –and should inflict whatever delay or cost may result to the parties– in order to reach the true substantive determination of a claim. *Civil Procedure* explains the reasons against this approach: they lie both in the fact that a litigant has no right to a disproportionate share of the community's resources in the administration of civil justice, and also in the right of a party in civil litigation to be protected from abuse by an adverse party in the litigation process. *Civil Procedure* also argued in particular (para 4.145) that an application for extension of time made after the expiry of the limitation period should be treated with greater caution because "the claimant is effectively asking the court to disturb a defendant who is by now entitled to assume that his rights can no longer be disputed."

Having set out these principles in *Civil Procedure*, Zuckerman addressed their particular implementation in a series of articles in *Civil Justice Quarterly* **[R2-5],** criticising the judicial tendency to tolerate non-compliance with court orders. As one of the principal reasons for this unfortunate tendency Zuckerman identified the wording of CPR 3.9, which set out the considerations that the court must take into account when dealing with an application to obtain relief from sanctions imposed as a result of failure to comply with a rule, practice direction or court order.

3. References to the research (indicative maximum of six references)

[R1] Zuckerman AAS, *Zuckerman on Civil Procedure: Principles of Practice* (2nd edn, Sweet & Maxwell 2006 [f.p. 2003]) (esp. chap 4, 10).
[R2] Zuckerman, "Enforcing compliance with deadlines", (2004) 23 Civil Justice Quarterly 231.
[R3] Zuckerman, "Service of the Claim Form", (2005) 24 Civil Justice Quarterly 401.
[R4] Zuckerman, "Service of the Claim Form", (2006) 25 Civil Justice Quarterly 127.
[R5] Zuckerman, "New provisions for service – A great improvement threatened by discretion." (2009) 27 Civil Justice Quarterly 1.

4. Details of the impact (indicative maximum 750 words)

Zuckerman's research in civil procedure has had impact in three distinct ways:

(1) Zuckerman's argument was taken up and applied by the court in relation to service of the claim form in both *City & General (Holborn) Ltd v Structure Tone Ltd* [2009] **[C3]** and *Imperial Cancer Research Fund v Ove Arup & Partners Ltd* [2009] **[C4]**. In these cases, the Court of Appeal accepted the principle, advocated by Zuckerman, that even where an application for extension of time for service of the claim form has been made before the expiry of the deadline, permission should be granted only where there was good reason for not serving in time. These cases built on an earlier line of decisions relying on Zuckerman's research: (*Hashtroodi v Hancock* [2004] EWCA Civil 652, [17]; *Maggs v Marshall* [2005] EWHC 200 (QB); *Collier v Williams* [2006] EWCA Civ 20, [2007] 1 All ER 991, [85].

(2) Zuckerman's approach to applications for extension of time made after the expiry of the limitation period **[R2]** was adopted by the Court of Appeal in *Cecil v Bayat* [2011] **[C5]**. The court relies very extensively on Zuckerman's research at **[77]-[78],** and at **[94].** The matter is determined to be not only one of formalities or expectations, but of fundamental reasonableness:

> 'The matter goes further than that, because, whatever the expectations of a defendant who bears any relevant limitation period in mind, the fact is that an extension of time for service does effectively extend the period (primarily a matter of limitation) during which a claimant can do nothing to bring his litigation formally to the notice of his defendant. That larger point was the subject matter of another observation of Professor Zuckerman (at para 4.134): "The need for placing a time limit on service of the claim form is dictated by the need for finality in litigation and by the very existence of limitation periods. The period allowed for service seeks to ensure that the uncertainty of litigation is not unreasonably extended. (…)" **[C5, at 78]**

(3) The Civil Procedure Rules Committee revised the CPR in accordance with Zuckerman's argument in **[R1]**. The proposal that the court should give higher priority to the need to enforce rules and court orders was accepted in the Jackson Review of Civil Litigation Costs, Final Report, 2010 **[C1]**, and has been implemented in the revised CPR 3.9 with effect from 1 April 2013 **[C2]**.

Lord Justice Jackson's Review commented as follows on Zuckerman's criticism of the flawed enforcement of case management timetables **[C1,** pp.386-387**]**:

> "2.1 … Professor Adrian Zuckerman presented a paper on litigation management. Professor Zuckerman argued that the courts must deliver judgments within a reasonable time and at reasonable cost. The courts, like the National Health Service, are a public service. Their function is to adjudicate disputes with available resources. Court users are only entitled to their fair share of court resources. At the moment judges, following the

precept of CPR 3.8, 3.9 and 3.10 are far too indulgent to litigants in default. This causes not only delay but also unproductive waste of court resources in dealing with the effects of litigant failure to meet deadlines. It is only in truly extreme circumstances that the courts will strike out a party which is in default. Such extreme circumstances are exemplified by Marine Rescue Technologies Ltd v Burchill [2007] EWHC 1976 (Ch). After reviewing the tortuous history of that case Professor Zuckerman stated:

"By no stretch of the imagination can this be considered an efficient use of court resources, nor was it fair to other litigants waiting in the queue, nor did it provide effective protection to the defendant from being unnecessarily subjected to 6 years of futile litigation… The main responsibility for this state of affairs must be accepted by the Court of Appeal. The Court of Appeal has steadfastly declined to develop a coherent policy for enforcing compliance with rules and case management directions. Its refusal to provide leadership in this regard is nowhere more apparent than in relation to its interpretation of CPR 3.9."

2.2 A little later Professor Zuckerman stated:

"Even more corrosive of good management practice is the Court of Appeal's inability to speak with one voice. The understanding of the overriding objective varies greatly amongst its judges, with some judges still holding the view that their only duty is to decide cases according to the facts and the law, no matter how long it takes and how much it costs. Management standards will not improve unless the Court of Appeal is willing to provide leadership. To do so it would have to revise its approach to the enforcement of compliance with case management directions and therefore to the operation of CPR 3.9. It would have to adopt a policy that gives practical expression to the need to ensure that court resources are properly utilised. This means, amongst others, that a litigant who has failed to take advantage of the opportunity of prosecuting his case will not get another opportunity, unless he has been prevented from doing so by circumstances beyond his control."

2.3 Professor Zuckerman in his oral address (though he did not touch on this in his paper) commended the approach which is canvassed as one possible way forward in PR paragraph 43.4.21. He concluded by arguing that the civil justice system like all other public services must be adequately managed, so as to deliver a satisfactory service. He added:

"The management task that the court is expected to discharge is relatively uncomplicated: to ensure that case management directions are implemented as laid down, unless a change of circumstances demands otherwise. But this simple task requires the court to abandon its almost religious attachment to the one dimensional understanding of justice and accept that doing justice means more than delivering a judgment on the merits; that time and the use of resources are just as significant imperatives of justice."

2.4 Unsurprisingly Professor Zuckerman's presentation provoked a measure of disagreement and lively discussion. One speaker made the point that if the court sets an unrealistic timetable, as sometimes happens, that encourages a culture of noncompliance. In a vote at the end of this discussion 32 people agreed with Professor Zuckerman's thesis, 14 disagreed and there were 22 abstentions." **[C1]**

Zuckerman's argument, summarized above by Lord Justice Jackson, ultimately persuaded the Rules Committee that "courts at all levels have become too tolerant of delays and non-compliance with orders. In so doing, they have lost sight of the damage which the culture of delay and non-compliance is inflicting upon the civil justice system. The balance therefore needs to be redressed." **[C1, p.397]**. Relying expressly and directly on Zuckerman's work, the Review therefore recommended:

> "86 The courts should be less tolerant than hitherto of unjustified delays and breaches of orders. This change of emphasis should be signalled by amendment of CPR rule 3.9." **[C1, p.469]** .

This recommendation was soon taken up in practice. The 2010 Report, accepting and relying on the evidence in Zuckerman's research, persuaded the Rules Committee to revise CPR 3.9 with effect from 1 April 2013. The revised CPR **[C2]** now states:

> "(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need-
> (a) for litigation to be conducted efficiently and at proportionate cost; and
> (b) to enforce compliance with rules, practice directions and orders."

This amendment gave legal authority to the argument of Zuckerman's research, and restored the binding force of case management rules and court orders. The result was to reduce a litigant's opportunity to inflict delay and cost on another party and on the system. The impact of the research means significantly improved access to judgment for civil litigants throughout England and Wales.

5. Sources to corroborate the impact (indicative maximum of 10 references)

[C1] Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report* (2010)

[C2] Amendment of CPR 3.9 -Rupert Jackson's note to the Rule Committee re Rule 3.9 (second draft) [June 2011]

[C3] *City & General (Holborn) Ltd v Structure Tone Ltd*, 18 August 2009, Queen's Bench Division (Technology & Construction Court) EWHC 2139 (TCC), [27]

[C4] *Imperial Cancer Research Fund v Ove Arup & Partners Ltd*, 23 June 2009, Queen's Bench Division (Technology & Construction Court) EWHC 1453 (TCC), [9]

[C5] *Cecil v Bayat* Court of Appeal (Civil Division), [2011] EWCA Civ 135, 18 February 2011 EWCA Civ 135, [77]-[78], [94]