

The Power To Reconsider Orders Under CPR 3.1(7)

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This article reviews the major developments of the general power of English courts to reconsider their orders under rule 3.1(7) of the Civil Procedure Rules 1998 (CPR). It shows that the Court of Appeal has been inconsistent in its approach to that rule, and that any attempt to provide general criteria for exercising that power fails to take into account the diversity of circumstances or the types of orders that may invoke the rule. The author proposes departing from the absolute prohibition on invoking CPR 3.1(7) to review orders on the merits and, instead, affording trial judges the discretion to reconsider on the merits procedural orders that were made to facilitate the trial.

1. INTRODUCTION

Prior to the enactment of the Civil Procedure Rules (CPR), no rule provided courts with a general power to reconsider their own orders. Therefore, unless a specific rule allowed for an order to be varied or revoked in a specific context, courts rarely exercised their inherent jurisdiction to reconsider orders made by the same court. The underlying principle has always been that the power to reconsider orders must not be used as a substitute for appeal and, accordingly, courts should not review their orders merely because they are argued to be wrong.¹

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¹ For example, the Court of Appeal decided in *Re Barrell Enterprises* [1972] 3 All ER 631; [1973] 1 WLR 19 (CA) 23–4 that, barring the most exceptional circumstances, oral judgments may not be reconsidered by the same court and that appeal is the alternative available to parties who are dissatisfied with a decision. See also AAS Zuckerman, *Civil Procedure: Principles of Practice* (2nd edn Sweet & Maxwell, London 2006) [22.32]–[22.39]; *Chanel Ltd v Fw Woolworth & Co Ltd* [1981] 1 WLR 485, 492–3; [1981] 1 All ER 745, 751; and *Robinson v Fernsby* [2003] EWCA Civ 1820; [2004] WTLR 257. A similar principle was adopted with regard to Civil Proceedings Orders, which may be made against vexatious litigants in accordance with the Senior Courts Act 1981. See *Attorney General v Covey* [2001] All ER (D) 222 (Feb); Times, 2 March 2001 (CA) [64].

The CPR codifies this inherent jurisdiction in rule 3.1(7), which provides the court with a general power to revisit any order made by that court under the CPR:

3.1(7) A power of the court under these Rules to make an order includes a power to vary or revoke the order.

Providing a power is one thing; how it is exercised is another. As we see, CPR 3.1(7) does not articulate the circumstances in which this power will ordinarily be exercised.² According to a literal reading, the rule seems to afford the court a very flexible power to reverse any order at any time and under any conditions, as the court sees fit. However, judicial discretion under CPR 3.1(7) is restricted by the general duty to give effect to the overriding objective (CPR 1.2). Furthermore, it should be borne in mind that CPR 3.1(7) is a residual rule that exists alongside many other rules that provide for a court to reconsider its own orders in specific contexts.³ For example, if an applicant, due to default on his part, did not participate (normally by making submissions and attending a hearing)⁴ in the proceedings that resulted in the order, he would then be required to satisfy certain conditions (to act promptly, establish prospects of success, and show good reasons for his failure to attend). Likewise, if the rules allow for an order to be made without notice, the prejudiced party is usually vested with a right to apply to have the order reconsidered afresh.⁵ Thus, despite the general nature of CPR 3.1(7) its exercise cannot be determined without reference to the nature of the order in question. Different contexts may entail different considerations.⁶ Applications to reconsider procedural orders may not be treated

² This silence is not necessarily undesirable, see text accompanying n 58.

³ For a list of such rules, see The White Book Service, *Civil Procedure* (Thomson, Sweet & Maxwell, 2009) Vol 1 [3.1.9] at pp 59–60.

⁴ In the absence of a hearing, a party may apply for relief without recourse to CPR 3.1(7). See CPR 23.8 in conjunction with CPR PD 23 para 11.12 and CPR 3.3(4) and (5). See also *Collier v Williams* [2006] EWCA Civ 20; [2006] 1 WLR 1945, [24]–[38], [119]. Cf *SCT Finance v Bolton* [2002] EWCA Civ 56; [2003] 3 All ER 434, [59].

⁵ See for example CPR Pt 13, 23.10 and 23.11.

⁶ The need to tie the application of CPR 3.1(7) to the specific context in which it is invoked was briefly noted at the White Book (n 3) [3.1.9] at p 57.

in the same way as applications to reconsider final orders, that is, orders disposing of the dispute altogether or implementing an operative part of a judgment. Even within the procedural realm, not all orders are the same. Reconsidering case management directions may entail different considerations than reconsidering orders allowing a joinder, granting a protective costs order, or setting aside a default judgment; and none of these are liable to be treated in the same way as freezing orders and other interim injunctions. Thus, in the light of the diversity of circumstances and kinds of orders in relation to which CPR 3.1(7) may be invoked, the criteria for its exercise would be best expressed in terms of flexible, specific, and adjustable guidelines, rather than general or exhaustive definitions.

However, as we shall presently see, courts have attempted to prescribe general criteria for the application of CPR 3.1(7) without sufficient attention to the dynamic context and the diversity of orders that may invoke the rule. In a number of cases both the Court of Appeal and the High Court have largely narrowed the scope of CPR 3.1(7). The main thrust of this jurisprudence revolves around the longstanding principle that the power to review orders must not be used as a substitute for appeal, a principle which is now clothed in the new vocabulary brought about by the CPR—that is, the imperative to further the overriding objective.⁷ This article challenges this conclusive principle, arguing that it fails to realise the potential of CPR 3.1(7) to further the overriding objective as a case management tool. It then suggests that a court should be able to exercise the power under CPR 3.1(7) to review its own previous orders on the merits, especially at the trial stage; this proposal applies only to orders made to facilitate the trial, whether regular case management directions or otherwise. This proposal is a modest one, as the Court of Appeal has implicitly acted in this fashion on at least two occasions, even as it paid lip service to the principle that CPR 3.1(7) must not usurp the appellate power.

⁷ See for example *Venus Wine and Spirit Merchants Plc v Kejrival* [2007] EWHC 1642 (QB); [2007] All ER (D) 02 (Jun) [20] (*Kejrival*); *Damage Control Plc v Benson* [2008] EWHC 1071 (Ch); [2008] All ER (D) 157 (Mar) [17], [23] (*Damage Control*).

The development of the CPR 3.1(7) jurisprudence can be broadly divided into three landmark cases which mark three important stages. **Section 2** discusses the seminal case of *Lloyds Investment (Scandinavia) Limited v Christen Ager-Hanssen* (2003) (*'Lloyds Investment'*)⁸ in which the High Court gave a non-exhaustive description of two situations in which CPR 3.1(7) may be exercised: when (1) the circumstances have changed since the order was made, or (2) the court was misled in the previous proceedings as to the factual basis of the order. **Section 3** discusses the case of *Collier v Williams* (2006)⁹ in which the Court of Appeal stated that this pair of situations was in fact an exhaustive list. The Court's reasoning in that decision is challenged and, furthermore, it is shown that, in two subsequent cases, the Court of Appeal did not treat the *Lloyds Investment* situations as exhaustive, and used CPR 3.1(7) to review orders on the merits. **Section 4** discusses the recent case of *Greg Anthony Roulf v North West Strategic Health Authority* (2009) (*'Roulf'*),¹⁰ taking issue with the Court of Appeal's finding that *Collier v Williams* and *Lloyds Investment* could apply to case management orders, while defending its exclusion of final orders from the scope of CPR 3.1(7). **Section 5** develops a proposal whereby courts might invoke CPR 3.1(7) to review their orders on the merits when they found it necessary to further the overriding objective. The proposal is specified as being more persuasive with regard to trial judges than procedural judges, and confined to procedural orders that are trial-related. Concluding remarks follow in **section 6**.

2. LLOYDS INVESTMENT v AGER-HANSEN: PATTEN J'S GUIDELINES

⁸ [2003] EWHC 1740 (Ch); [2003] All ER (D) 258 (Jul).

⁹ *Collier v Williams* (n 4).

¹⁰ [2009] EWCA Civ 444; [2009] All ER (D) 173 (May).

The general principle underlying the exercise of CPR 3.1(7) was spelt out on the first occasions in which the rule was discussed. In *SCT Finance v Bolton* (2002) the Court of Appeal seemed to concur with the notion that CPR 3.1(7) must not be construed as conferring a power allowing any court at any time ‘simply to reverse itself if it happens to change its mind’.¹¹ Likewise, the High Court observed in *Paragon v Pender* (2003) that the exercise of CPR 3.1(7) should be exceptional and ‘should not generally be used as a back door appeal’.¹² However, these were only general statements; a more detailed account of CPR 3.1(7) was given in *Lloyds Investment*, which came to be the foundation upon which later decisions would build.

The defendant in *Lloyds Investment* applied to the High Court to reconsider an order that imposed a heavy payment into court as a condition for setting aside a default judgment against him. He argued that the order was wrong and disproportionate and that it had not been preceded by an adequate assessment of his ability to satisfy the imposed condition. The defendant further argued that the claimant had misled the court on the previous occasion with regard to the value of assets already subject to freezing orders, and that the claimant had deployed such orders as a tactic, to diminish his ability to comply with the pecuniary condition.¹³ In dismissing these arguments, Patten J reiterated the principle that it is not open to him as a judge exercising ‘a parallel jurisdiction in the same division of the High Court to entertain what would in effect be an appeal from that order’.¹⁴ The commitment to this principle is underlined by the fact that Patten J refused to reconsider the order even though he doubted that the order was proportionate, or that the court had adequately examined the defendant’s ability to satisfy

¹¹ N 4 at [58] (per Waller LJ in relation to Neuberger J’s unnamed decision).

¹² [2003] EWHC 2834 (Ch); [2003] All ER (D) 346 (Nov) [74].

¹³ *Lloyds Investment* (n 8) [2].

¹⁴ *Ibid* [7]. See also *R+V Versicherung v Risk Insurance* [2007] EWHC 79 (Comm); [2007] All ER (D) 260 (Jan) [27].

the pecuniary condition.¹⁵ Furthermore, Patten J indicated that the information pertinent to the effect of the freezing orders on the defendant's ability to satisfy the pecuniary condition and the correct value of the frozen assets had been known to the applicant at the original hearing. Because he had chosen not to bring this information to the court's attention on that occasion the applicant was now estopped from doing so under CPR 3.1(7). In discussing this rule—and here is the crucial part of this decision—Patten J articulates the kind of circumstances in which this rule should be exercised:

[CPR 3.1(7)] is not confined to *purely* procedural orders ... Although this is *not intended to be an exhaustive definition* of the circumstances in which the power under CPR Part 3.1(7) is exercisable, it seems to me that, *for the High Court to revisit one of its earlier orders, the Applicant must either show some material change of circumstances or that the judge who made the earlier order was misled in some way, whether innocently or otherwise, as to the correct factual position before him.* The latter type of case would include, for example, a case of material non-disclosure on an application for an injunction. If all that is sought is a reconsideration of the order on the basis of the same material, then that can only be done, in my judgment, in the context of an appeal. Similarly it is not, I think, open to a party to the earlier application to seek in effect to re-argue that application by relying on submissions and evidence which were available to him at the time of the earlier hearing, but which, for whatever reason, he or his legal representatives chose not to employ.¹⁶

Two aspects of this decision deserve particular attention. First, the scope of the rule was left largely undetermined. Patten J only makes a general remark that CPR 3.1(7) is not confined to 'purely procedural orders' without spelling out the meaning of that phrase. One way to interpret it is to say that CPR 3.1(7) is not confined to regular case management directions (these being the 'purely procedural orders') and thus applies also to procedural orders dealing with matters other than case management, such as costs or joinder of parties, for example (perhaps also including some forms of interim injunctions). Under this interpretation nothing is said about the application of CPR 3.1(7) to final or substantive orders. An alternative interpretation of the phrase 'purely procedural' would be to take Patten J as saying that CPR 3.1(7) is not confined to

¹⁵ *Lloyds Investment* (n 8) [7].

¹⁶ *Ibid* [7]. Except where otherwise noted, emphasis in quotations is added by author.

(purely) procedural orders, be they case management-related or otherwise (which do not involve substantive rights), and thus may also apply to procedural orders that involve substantive rights of the parties. Included in the latter category would be orders freezing one's assets, or orders disposing of a case on procedural grounds without trial, as when a default judgment is granted, or, perhaps, a settlement is approved.¹⁷ These classifications are revisited in section 6.

The second significant aspect of the decision in *Lloyds Investment* relates to the guidelines themselves and their interpretation. In principle, Patten J envisages two situations in which CPR 3.1(7) could be exercised when (1) the circumstances have materially changed since the order was made, or (b) the court was misled, innocently or otherwise, as to the factual basis of the order.¹⁸ These offer only general guidance, without distinguishing among the various types of orders which may be subject to CPR 3.1(7). It is clear that Patten J, in proffering the two situations above, did not consider them exhaustive and did not posit them as a comprehensive description of the circumstances that might give rise to the exercise of CPR 3.1(7). Nonetheless, as this article is concerned with the proper standard for CPR 3.1(7), two points must be made concerning the implications of these guidelines—especially when, as will be seen in section 3, the Court of Appeal would treat them as the only circumstances in which CPR 3.1(7) may be exercised.

2.1 CPR 3.1(7) and Procedural Integrity

¹⁷ For example, in *Roult* (n 10) [19] the Court of Appeal considered interim injunctions as 'non-procedural' orders).

¹⁸ For a description of the scope of these two situations, see *Simms v Carr* [2008] EWHC 1030 (Ch) [45]–[46].

The first remark dwells on the situation described by Patten J where the judge was ‘misled in some way, whether innocently or otherwise, as to the correct factual position before him’. The phrase ‘misled ... innocently or otherwise’ suggests that the applicant must show that the order was made as a result of a misrepresentation of the facts *by a party*. A party may mislead the court by producing either false evidence or evidence selectively presented that, while not factually incorrect, is so incomplete as to be misleading. Thus, if the court merely drew a mistaken inference from evidence that was not found, upon application under CPR 3.1(7), to be false or materially incomplete, then CPR 3.1(7) should not be exercised and the general principle applies (that is, wrong decisions for which the parties cannot be held responsible should be resolved by appeal and not by reconsideration). The second remark is that, much like applications to reconsider orders in other contexts,¹⁹ an application to reconsider orders under CPR 3.1(7) cannot be allowed, according to Patten J, if the change of circumstances was foreseen or foreseeable before the order was made, or if the correct or complete facts were known to the applicant at the time, so that the propagation of misinformation could have been prevented.²⁰ In such cases the concerned litigant would have to bring this information before the court before the order was made; otherwise he would be estopped from doing so later under CPR 3.1(7).

This view can be challenged. When the applicant upon reasonable enquiry could *not* have anticipated the change of circumstances or prevented the court from being misinformed, the legitimacy of exercising CPR 3.1(7) may not be difficult to establish. However, when the applicant *could* have found out the correct or complete evidence upon reasonable enquiry,

¹⁹ See for example *Kalniets v Latvia* [2009] EWHC 534 (Admin) [15] as regards s 27(4)(a) and 29(4) of the Extradition Act 2003; *S v S* [2002] EWHC 223 (Fam); [2003] Fam 1, in relation to an ancillary relief made by consent in matrimonial cases (this case was also discussed by the Court of Appeal in *Roult* (n 10) at [12]–[13]). For the pre-CPR period see: *Chanel v Woolworth* (n 1) 492–3, 751 (consent order).

²⁰ Note that when courts spoke of an argument or evidence that ‘could have been made or adduced’, or ‘was available’ to a party, in the context of CPR 3.1(7), they did not explain whether they mean de facto or de jure: available or could have been adduced because the party was aware of the argument/evidence or because he could have found that out. See, for example, *Halton International (Holdings) Sarl v Guernroy Ltd* [2007] EWHC 2773 (Ch) [136]; *Lloyds Investment* (n 8) [13], [15].

competing considerations come into play. The state [DN: not sure what this means] interest that militates against exercising CPR 3.1(7) in such instances is a straightforward one, namely, to create an incentive for parties to make every effort possible to explore all the relevant facts and legal grounds within the original proceedings. This is a matter of conserving judicial resources, consistent with the efficient administration of justice. In addition to discouraging multiple applications in relation to the same matter, it could reduce the risk of litigants abusing CPR 3.1(7). Notwithstanding this economic consideration, however, the court is also duty bound to preserve its integrity and rectify orders which are based on false facts, independent of the applicant's interest in the matter and irrespective of his failure to assist the court in avoiding that situation in the first place. As the integrity of a court is essential to its legitimacy and authority, a court should not be prevented from preserving the integrity of its decisions and proceedings by an absolute prohibition.²¹ One might argue that the integrity of a court is not undermined if it acted faithfully and was unknowingly misled in the first instance; however, this court cannot be excused if it knowingly upholds an order that it has come to realise was based on false or materially incomplete facts. This rationale applies, perhaps less forcefully, even to cases where the applicant was already aware of the relevant information on the first occasion—cases which Patten J expressly excluded from the scope of CPR 3.1(7).²² The existence of the appeal option is not an adequate safeguard because the court of first instance is directly obliged to protect its integrity, especially given that parties may decide not proceed to appeal, or that the cost of appeal may be significantly higher than the cost of application under CPR 3.1(7).

This argument becomes more compelling when the need to preserve judicial integrity can be reconciled with the need to conserve resources. To this end, the rules on costs offer various

²¹ In the context of varying judgments before they have been perfected, Zuckerman observes: 'After all, a judge who is persuaded that his judgment is wrong will hardly insist on letting it stand as it is' (Zuckerman (n 1) [22.33]).

²² Some support for this argument, in relation to changed circumstances, might be found in *Gore v Geax* (see text accompanying nn 34–9).

ways to create incentives for parties to investigate a matter adequately prior to making an application, whether by imposing adverse costs on the negligent party, by depriving him of recovery of his costs in the case, or by assessing costs on an indemnity basis. In this regard, CPR 44.3 provides the court with the discretion to take into account the conduct of the parties and the manner in which they pursued their litigation; thus, any misuse of CPR 3.1(7) may be taken into account. Moreover, the concern that the exercise of CPR 3.1(7) as proposed would create a risk of abuse by parties might also be combated by using the power under CPR 3.11 to impose Civil Restraint Orders on parties who make two unmeritorious applications. As the Court of Appeal has already noted, ‘it is not necessary to deny court jurisdiction to entertain an application ... in order to prevent repeat applications’ by unsuccessful applicants. The solution, it says, lies in the proper exercise of the discretion given to courts.²³ Accordingly, all things considered, the court should be at liberty to exercise CPR 3.1(7) if it becomes aware that it has made an order based upon false or significantly incomplete facts, irrespective of whether or not the applicant could have presented the correct or complete facts on the original occasion.²⁴

²³ *Collier v Williams* (n 4) [37]. It would be arbitrary and impractical to restrict the proposed exercise of CPR 3.1(7) to the court’s initiative. It is arbitrary because the court is duty bound to preserve its integrity irrespective of whether it is upon an application or on its own initiative. It is also impractical because the court would normally need to be alerted to the misinformation or the changed circumstances.

²⁴ In *Kejriwal* (n 7) the High Court refused to revoke a restraint injunction despite the fact that the court was misled in the with-notice hearing in which the order was made, because the order would have been made even upon the correct facts. Underhill J finds, however, that it is open to the court to revoke an order under CPR 3.1(7) even if it were warranted in law, on punitive grounds. To do so, culpability and deliberate misstatements of known facts need be established, and negligence or misjudgements would not suffice. This decision, which relates to misinformation in a with-notice hearing, is inspired by the already existing jurisdiction to discharge injunctions in cases of material non-disclosure at the without-notice hearing. Arguably, Zuckerman’s criticism of discharging an order that is warranted in law as a disproportionate sanction ((n 1) at [10.12]–[10.19]) may apply even more forcefully to CPR 3.1(7) when exercised in relation to a with-notice hearing. Here the prejudiced party normally has the opportunity to comprehensively enquire into the facts and reveal the non-disclosure or the misinformation before the order is made. Moreover, punitive grounds are not normally relied on to deny litigants their procedural rights. For example, courts do not normally refuse to allow expert evidence, to order the joinder of litigants, to strike down a statement of case, or to dispose of a case summarily, for punitive reasons, insofar as these orders are warranted in law. Professor Zuckerman has even levelled criticism at even the use of the terminology of ‘sanctions’ in reference to the procedural consequences of non-compliance ((n 1) [10.12]–[10.19]).

3. COLLIER v WILLIAMS

After *Lloyds Investment* comes *Collier v Williams* as another benchmark in the development of the CPR 3.1(7) jurisprudence. In this case, the Court of Appeal dealt with questions relating to service of claim forms, among which one is relevant to our enquiry: does a judge have jurisdiction to reconsider a previous decision to refuse—on paper only—a without notice application to extend the time for service? While such jurisdiction was examined on different grounds, the possibility of recourse to CPR 3.1(7) was also discussed.²⁵ Quoting Patten J's guidelines in *Lloyds Investment*, the Court of Appeal (Dyson LJ) writes as follows:

We endorse that approach. We agree that the power given by CPR 3.1(7) cannot be used simply as an equivalent to an appeal against an order with which the applicant is dissatisfied. *The circumstances outlined by Patten J are the only ones* in which the power to revoke or vary an order already made should be exercised under 3.1(7).²⁶

This endorsement is puzzling. By characterizing the circumstances outlined by Patten J as exhaustive, the Court of Appeal does not really 'endorse that approach' as it claims to do. The Court of Appeal does not explain why the description of these circumstances should now, as a matter of principle, be regarded as exhaustive, when Patten J himself specified that it was not.²⁷ Moreover, in a subsequent passage, when the Court of Appeal came to examine the applicability of CPR 3.1(7) to the specific circumstances of the case, it prescribed a significantly different test from the one it had endorsed a couple of passages earlier:

... it is a wrong exercise ... where there has been no material change of circumstances since the earlier order was made and/or *no material is brought to the*

²⁵ *Collier v Williams* (n 4) [29]–[37].

²⁶ *Ibid* [39]–[40].

²⁷ As a result, the High Court was not always clear about whether Patten J's list was exhaustive or not; see *Damage Control* (n 7) [19], [25]; *Halton* (n 20) [136]; *Kejriwal* (n 7) [17]; *R+V Versicherung* (n 14) [26]–[27]; *Business Environment Bow Lane Limited v Deannwater Estates Limited* [2009] EWHC 2014 (Ch); [2009] All ER (D) 363 (Jul) [39]–[40]; Cf *Simms v Carr* (n 18) [44].

*attention of the second court which was not brought to the attention of the first ... In short, therefore, the jurisdiction to vary or revoke an order under CPR 3.1(7) should not normally be exercised unless the applicant is able to place material before the court, whether in the form of evidence or argument, which was not placed before the court on the earlier occasion.*²⁸

According to this passage all that is required to invoke CPR 3.1(7) is merely to show that there is some evidence, or some argument, that was ‘not placed before the court on the earlier occasion’. This test is more flexible than Patten J’s guidelines which explicitly precluded evidence or arguments that were available to the applicant but were not raised on the first occasion.²⁹ This difference between this passage and Patten J’s guidelines must not be dismissed as a matter of semantics. Not only has it been noticed by the Court of Appeal in two subsequent cases, discussed below, but it also arguably reflects the difference in the types of orders discussed in the two cases (setting aside a default judgment in *Lloyds Investment* versus extending the amount of time for service in *Collier v Williams*). It seems that the closer the order comes to dealing with case management matters (service as opposed to default judgment), the more relaxed are the criteria for exercising CPR 3.1(7). This becomes more apparent in two subsequent cases where the Court of Appeal exercised CPR 3.1(7) to review orders on the merits. First is the defamation case of *Edwards v Golding* (2007).³⁰ The High Court Master ordered the joinder of a person as an additional defendant despite an obvious limitation problem. This order was later revoked by a High Court judge, based on CPR 3.1(7), on the grounds that the Master had clearly mistaken a point of law and thus had lacked jurisdiction to make the order in question. Neither had the factual circumstances changed nor had the court on the earlier occasion been misled as to the factual basis; accordingly, the case would have been dismissed had Patten J’s circumstances been taken as exhaustive. In upholding this decision, Buxton LJ recognised the difference between the

²⁸ *Collier v Williams* (n 4) [120].

²⁹ See citation to n 16.

³⁰ [2007] EWCA Civ 416.

two passages in *Collier v Williams*, as described above, and observed that the basis of that decision was that

[t]here must be additional material before the court in the form of evidence or, possibly, argument. I would reserve the issue of whether additional argument in itself is enough to attract the jurisdiction of rule 3.1(7), but the general thrust of *Collier* is that the case before the court before which rule 3.1(7) is moved must be essentially different from one of simple error that could be righted on appeal.³¹

The fact that Buxton LJ contemplated the possibility of reviewing orders merely on the grounds that there were arguments that had not been raised before implies that he did not consider the difference between the two passages in *Collier v Williams* to be merely semantic. Furthermore, while stating that he is leaving open the question of whether an additional argument may of itself suffice as basis for invoking the power under CPR 3.1(7), Buxton LJ upheld a decision that did exactly that: it revoked an order based solely on an ‘additional argument’ of lack of jurisdiction which had not been raised before the Master when the order was made. In fact, a close examination of the circumstances of *Edwards v Golding* reveals that the Court of Appeal approved an appeal-like decision of the High Court Judge to reconsider the merits of the Master’s order under CPR 3.1(7). Here is what the High Court decision in that case provides:

The Master's mistake ... is fundamental. Given that the limitation period had clearly expired, the order is one which he had no jurisdiction to make, whether in the form which it intended to make, or at all. In these unusual circumstances, it seems to me that this is a case which does come within CPR 3.1(7).³²

Such a decision clearly exhibits an appeal-like pattern of reasoning which cannot be disguised by recourse to a ‘lack of jurisdiction’ argument, as the Court of Appeal tried to do by stressing that the decision of the High Court did not usurp the power of the Court of Appeal but

³¹ *Ibid* [24].

³² *Ibid* [25].

rather corrected ‘a fundamental procedural error’.³³ The fact that a court made a clear mistake on a point of law does not necessarily mean that the court exceeded its jurisdiction. Otherwise, every erroneous decision, or, at least, every *clearly* erroneous decision, could be described as lacking jurisdiction. One may devise paradigmatic cases where it is possible to draw a clear line between a jurisdiction mistakenly exercised and lack of jurisdiction. For example, a court might err in exercising its jurisdiction to adjourn a hearing, or admit specific evidence, without exceeding its jurisdiction, whereas, if it orders that a case be determined based on magic or the toss of a coin, it is likely to be acting outside its jurisdiction. But aside from these examples, this distinction is too vague to be useful, as *Edwards v Golding* exemplifies: it is unclear why ordering a joinder of a party while misconceiving the limitation restriction is a decision made without jurisdiction and not one that is merely wrong.

The need to depart from the absolute prohibition against exercising CPR 3.1(7) to review orders on the merits in the context of case management can be more clearly shown in the other case of *WL Gore & Associates GmbH v Geox SpA* (2008) (*Gore v Geox*).³⁴ Here the Court of Appeal reversed the High Court’s refusal to reconsider on the merits an order that approved the parties’ agreement on case management directions. The applicant, a group of companies, sought to advance the trial dates because it perceived that the agreed trial timetable would result in adverse commercial consequences. The High Court dismissed this application because it considered that *Collier v Williams* had determined Patten J’s two circumstances (neither of which captured the application before it) to be exhaustive.³⁵ On appeal Lord Neuberger considered the fact that the applicant had apparently failed to adequately appreciate the commercial consequences of a delayed determination of the case, and that it could or probably should have

³³ *Ibid* [26].

³⁴ *WL Gore & Associates GmbH v Spa* [2008] EWCA Civ 622 (unreported).

³⁵ *Ibid* [8]–[9].

enquired into these consequences before agreeing to the time table.³⁶ However, Lord Neuberger stressed that the consent order was not a binding contract between the parties but merely an agreement on procedure and, therefore, the court should remain free to review its merits in order to promote a speedy trial.³⁷ According to Lord Neuberger, it is imperative to observe case management directions and to refrain from varying them according to another court's caprice; at the same time, a court should 'retain a degree of flexibility and control over its own procedures, especially on matters such as a speedy trial'.³⁸ To support his decision, he dwelt upon precisely the caveat put forward by Patten J, that his examples should not be considered exhaustive. Lord Neuberger also leveraged the described difference between the two passages in *Collier v Williams* to legitimise reconsidering the order in question under CPR 3.1(7) merely on the basis of evidence or arguments which were 'not before the court at the time of the consent order being made', even if they could have been found out and raised by the applicant at an earlier stage.³⁹

What emerges from this analysis is that the Court of Appeal has not adhered to the principle that CPR 3.1(7) cannot be invoked to review orders on the merits. This prohibition was eroded in *Edwards v Golding* because the order, although not a typical case management direction, was nonetheless case-management related, whereas in *Gore v Geox* that prohibition was more readily abandoned because the nature of the order fell clearly into the category of case management. Although the facts in *Edwards v Golding* and *Gore v Geox* were not captured by either of Patten J's categories, CPR 3.1(7) was exercised to achieve a just result. Thus, the attempt to articulate a single general and fixed principle, or a set of exhaustive circumstances for all cases, appears unsustainable. This line of argument is further pursued in the following section.

³⁶ *Ibid* [19].

³⁷ *Ibid* [14].

³⁸ *Ibid* [17].

³⁹ *Ibid* [15].

4. THE ROULT CASE: ONE STEP IN THE RIGHT DIRECTION

The decision in *Greg Anthony Roulton v North West Strategic Health Authority* (2009) marks another important development of the jurisprudence of CPR 3.1(7).⁴⁰ The Court of Appeal was called upon to determine whether it is possible to reconsider an order approving a settlement in a personal injury case based on CPR 3.1(7). Unlike the other cases discussed up till now, which involved procedural orders of one type or another, this case involves a final order which disposed of part of the substantive dispute.⁴¹

The facts of *Roulton* were straightforward. The claimant suffered from a severe birth injury which rendered him largely dependent upon care. The defendant admitted liability and the case proceeded to trial to determine the damages. In the meantime the parties engaged in an elaborate negotiation process which resulted in an agreement. It was agreed to move the claimant from his parents' house to a Local Authority Group Home which was, from a professional point of view, better suited to his needs. Accordingly, the parties calculated damages based on the assumption that Roulton would reside in the Group Home rather than private accommodation, and these calculations were submitted to the court, which made an order accordingly. While the costs of future damages were to be calculated later on, it was established that this would be done on the same basis, namely on the assumption that the claimant would be staying in the Group Home. However, a short time after moving to the Group Home, the claimant was removed by his

⁴⁰ *Roulton* (n 10).

⁴¹ Prior to *Roulton*, courts had often stressed the quality of CPR 3.1(7) as not being confined to procedural orders. See the White Book (n 3) [3.1.9] at pp 56–7, 60; *Lloyds Investment* (n 8) [7]. See also how the words 'orders' and 'judgment' were used interchangeably in *Stewart v Engel* [2000] 1 WLR 2268; [2000] 3 All ER 518 (CA) and *Robinson v Fernsby* (n 1). One judge had relied on CPR 3.1(7) in relation to possession orders, *Pender* (n 12) [74]. That said, one could still discern some hesitance regarding the application of CPR 3.1(7) to final judgments following a trial on the merits; e.g. *R+V Versicherung* (n 14) [26]. Cf *Nelson v Clearsprings (Management) Ltd* [2006] EWCA Civ 1252; [2007] 1 WLR 962, [48] which was less assertive on this question.

parents, who found it to be unsuitable for their son. Accordingly, the claimant filed a revised schedule that calculated the damages on the basis of private accommodation, and argued that the court was authorized to vary the consent order based on CPR 3.1(7).⁴² Citing *Lloyds Investment*, the claimant argued that the situation fell within Patten J's category of 'material change of circumstances' and that the order should be reconsidered because 'it has been followed by an unforeseen event which destroys the assumptions on which it was made'. That event was the claimant's parents having identified the Group Home setting, once he had resided there for a period of time, as arguably unsuitable to his needs.⁴³ The Court of Appeal did not consider whether the facts of the case fit into Patten J's guidelines, or whether the alleged change of circumstances was foreseeable. It considered the guidelines as relating only to case management orders, holding that orders that dispose of the substantive claim (or part of the claim) fall completely outside the scope of CPR 3.1(7) and can only be challenged on appeal. Moreover, the Court of Appeal refrained from articulating any exhaustive general criteria for the application of CPR 3.1(7). In a quite long passage, Hughes LJ explains:

[Patten J's] general approach was approved by this court, in the context of case management decisions, in Collier v Williams. I agree that in its terms the rule is not expressly confined to procedural orders. Like Patten J ... I would not attempt any exhaustive classification of the circumstances in which it may be proper to invoke it ... It may well be that, in the context of case management decisions, the grounds for invoking the rule will generally fall into one or other of the two categories of (i) erroneous information at the time of the original order or (ii) subsequent event destroying the basis on which it was made. The exigencies of case management may well call for a variation in planning from time to time in the light of developments. There may possibly be examples of non-procedural but continuing orders which may call for revocation or variation as they continue—an interlocutory injunction may be one. But it does not follow that wherever one or other of the two assertions mentioned (erroneous information and subsequent event) can be made, then any party can return to the trial judge and ask him to re-open any decision. In particular, it does not follow, I have no doubt, where the judge's order is a final one disposing of

⁴² *Roult* (n 10) [1]–[8].

⁴³ *Ibid* [10].

*the case, whether in whole or in part. And it especially does not apply where the order is founded upon a settlement agreed between the parties ...*⁴⁴

This decision is important because, unlike *Collier v Williams* and *Lloyds Investment*, it explicitly acknowledges the need to set out different tests for the exercise of CPR 3.1(7), depending on the nature of the order being challenged. Furthermore, the exclusion of final orders from the scope of CPR 3.1(7), whether resulting from a settlement or a trial, is significant in that it safeguards the principle of finality, which means that, after a certain point, a decision becomes generally insusceptible to arguments of changed circumstances or newly discovered information. The only way to challenge a final order is by means of appeal (or, in cases of fraud, by commencing a separate action). Exercising CPR 3.1(7) to alter final dispositions in the light of later findings or circumstances would have rendered a fundamental change of procedure from the Rules of the Supreme Court (RSC), one which Lord Woolf never contemplated, whereas the application of CPR 3.1(7) to procedural orders does not violate the principle of finality because procedural orders are by their very nature instrumental and subordinate in relation to the process of determining substantive rights. The principle of finality comes into play primarily in relation to the disposition of the substantive dispute and is less influential with regard to procedural orders (finality of litigation would be undermined only if the re-litigation of procedural matters were excessive and served to unnecessarily protract the disposition of the case). Hence, CPR 3.1(7) can be understood to a certain extent as reflecting acknowledgement of the dynamic nature of the procedural process and its need for flexibility to better fulfil its function, namely to facilitate the resolution of a substantive dispute. This understanding is also more faithful to the terms of CPR 3.1(7) which refer to ‘orders’ and not to ‘orders or judgments’, as other rules do.⁴⁵ It is also more faithful to Lord Woolf’s perception of his proposed procedural code which takes

⁴⁴ *Roult* (n 10) [15].

⁴⁵ The White Book (n 3) explains that the distinction between ‘judgment’ and ‘order’ may still be important in some contexts even if it has lost much of its relevance under the CPR: [3.1.9] at p 57; and [40.1.1]. See also Zuckerman (n 1) 22.2–22.5.

judicial control over the proceedings as its hallmark. The location of CPR 3.1(7) under CPR Pt 3, ‘The Court’s Case Management Powers’, and under rule 3.1, ‘The Court’s General Powers of Management’, illuminates the nature of this power as primarily a management tool, part of the new case management regime that was conceived by Lord Woolf, rather than a vehicle for altering final judgments.

In conclusion, therefore, the exclusion of final orders or judgments from the scope of CPR 3.1(7) has a sound basis, as defended herein. Thus, *Roult* significantly advances the understanding of CPR 3.1(7). But there remain some unresolved questions attached to CPR 3.1(7), and a more coherent framework for its operation is still required. Specifically, while *Roult* suggests the application of *Lloyds Investment* to case management orders, this can be called into question if one bears in mind that *Lloyds Investment* itself involved an order to set aside a default judgment, of which it is difficult to say, as the Court in *Roult* said, that the ‘exigencies of case management may well call for a variation in planning from time to time in the light of developments’.⁴⁶

5. REVIEWING ORDERS ON THE MERITS

It should be permissible to exercise CPR 3.1(7) to review orders on the merits, subject to two qualifications. One is that this is justified only in relation to procedural orders which are made to

⁴⁶ Furthermore, the Practice Directions for the multi-track and fast-track cases provide a specific instruction for varying directions, which differs from Patten J’s guidelines. These PDs prescribe a short period of time (14 days) in which parties may apply to revise directions and they allow only one ground for such an application, namely, a material change of circumstances, thus excluding any other situation including misinformation. See CPR PD 29 paras 6.2(2), 6.3(1), 6.4, and CPR PD 28 para 4. Cf CPR PD 29 para 3.4 which allows the court to vary directions at any hearing. Notwithstanding CPR PD para 6.3(1) which talks about ‘direction or other order made by the court’, CPR PD 29 para 6.1 restricts the applicability of this arrangement to directions only (so does CPR PD 28 para 4.1). The White Book seems to suggest that the PDs apply to orders other than case management: n 3 [3.1.9] at p 60.

facilitate the trial. This definition is broad enough to include not only typical case management directions, such as timetables or argument skeletons, but also orders such as disclosure, joinder of parties, amendment of statements of case, service, expert evidence, and any other trial-related order.⁴⁷ But this definition is also not too broad to include every interim injunction, or orders concerning cost assessment, default or summary judgments, and striking out orders, all of which are procedural orders that do not purport to facilitate the trial. The classification of a given order under one of these two categories may be disputed,⁴⁸ but a general distinction between trial-related orders and others is valid and has arguably useful implications for CPR 3.1(7). The second qualification is that the justification for exercising CPR 3.1(7) as a quasi-appeal is stronger with regard to trial judges but it is still influential in relation to procedural judges. Considered as a whole, this proposal can be justified on different grounds.

5.1 *The Nature of the English Judiciary*

English courts do not have a ‘docket’ system and therefore cases are not dealt with by the same judge from beginning to end. Normally, all the procedural matters arising in relation to a given case are dealt with by procedural judges and the CPR allows for different procedural judges to be involved in the same case.⁴⁹ Under such a system, the objection to an appeal-like exercise of CPR

⁴⁷ The White Book (n 3) points out that ‘case management’ is not a term of art which is restricted to case management directions, timetables being the classical example, and it may include other procedural orders such as the joinder of parties ([3.1.9], at p 60).

⁴⁸ For example, some interim injunctions may qualify as trial-related, e.g. if they purport to preserve evidence. Furthermore, it could be said that an order approving a settlement may be considered as substantive and/or procedural as an order giving a default judgment or refraining from setting a default judgment. Both orders determine substantive rights on procedural grounds.

⁴⁹ CPR 2.4 provides that the powers under the CPR can be exercised by any judge, district judge or Master of the same court in relation to proceedings in the High Court, and any judge or district judge in the county courts. CPR PD 29 para 6.3(4)(a) instructs that an application to vary or revoke case management directions may usually be heard either by the same judge who gave them or by another judge of the same level. CPR PD

3.1(7) might be understandable at the pre-trial stage. To the extent that different applications are entertained by different judges, there is no advantage in allowing first instance judges to review on the merits orders made by their colleagues. And it may be that such a prohibition aims at preventing applicants from taking advantage of such a system by making the same application before different judges. However, these reasons cease to apply at the trial stage. When the trial begins or when a trial judge is assigned to the case, the trial judge becomes solely responsible and accountable for the outcome of the process. Therefore, it becomes important to free trial judges from any restrictions that might be created by orders previously made by the procedural judges, even where there has been no significant change in the circumstances or misinformation. Furthermore, as the case proceeds, the trial judge develops a particular familiarity with the needs of the trial and becomes the person best placed (ideally, even in relation to the appellate judge) to decide what is required for the efficient and effective disposal of the case.

5.2 *CPR 29.9 and 28.7*

The primacy of the trial judge is expressed by the very existence of CPR 29.9 and 28.7 (concerning multi-track and fast-track cases, respectively) which identically provide: ‘Unless the trial judge otherwise directs, the trial will be conducted in accordance with any order previously made’.⁵⁰ These rules are typically understood as merely vesting the trial judge with the same power he already has under CPR 3.1(7) or, as some have also maintained, as referring mainly to

29 (Multi-Track Cases) para 10 nominates the procedural judges who shall deal with case management. CPR PD 2B (Allocation of Cases to Levels of Judiciary) para 6.2 allows different Masters to deal with the same case.

⁵⁰ For small cases, see CPR 27.7. Yet most directions are standard and given without hearing the parties (CPR 27.4 and CPR PD 27 Appendices B and C). Furthermore, large parts of the CPR do not apply to small cases (CPR 27.2(1)), and given their nature small cases are less likely to involve important procedural matters.

timetables.⁵¹ These common understandings are mistaken; were they correct, they would render CPR 29.9 and 28.7 redundant. The power to fix and vary timetables is already provided for in other provisions and Practice Directions (e.g. CPR 29.2, 29.5, and 29.8, and PD para 10.3 for the multi-track; 28.2, 28.4, and 28.6, and PD para 8.3 for the fast-track). As a matter of principle, we should aspire to choose the interpretation that ascribes the best possible meaning to our laws. Therefore, to avoid the conclusion that CPR 29.9 and 28.7 are redundant we should understand their function as concentrating the power under CPR 3.1(7) *exclusively* in the *trial judges* once the trial starts. And this function can best be explained in reference to the advantage of the trial judges over others.

The distinction between the pre-trial and trial stages for the purposes of CPR 3.1(7) has been discussed only once, by the High Court in *Damage Control plc v Benson* (2008) (*Damage Control*).⁵² An application for permission to adduce expert evidence was dismissed at the pre-trial stage on the grounds that the application was too late and the evidence unnecessary. At the beginning of the trial another identical application was made and dismissed, this time on the grounds that there had been no material change in the circumstances since the order was made, nor any other exceptional circumstances.⁵³ The High Court rejected the argument that different standards should be adopted for the pre-trial and trial stages, and held that the fact that the reconsideration was being sought at the trial stage should not temper the criteria for exercising the power to reconsider orders.⁵⁴ The Court observed that CPR 29.9 should be interpreted in the same way as CPR 3.1(7) and therefore be subject to the authority of *Collier v Williams*.⁵⁵ However,

⁵¹ In Zuckerman's book CPR 28.7 and 29.9 seem only to instruct that the trial should be conducted according to the timetable fixed at the pre-trial stage: Zuckerman (n 1) [21.14]–[21.15].

⁵² N 7.

⁵³ *Ibid* [11].

⁵⁴ *Ibid* [21]–[23].

⁵⁵ *Ibid* [23].

this decision calls into question the reason for the existence of CPR 29.9 if all that the rule does is to vest the trial judge with the same power he already has under CPR 3.1(7). Clearly, CPR 29.9 cannot be described as a specific arrangement which excludes the authority of the omnibus rule of 3.1(7) because both CPR 3.1(7) and 29.9 are expressed in equally general terms. Therefore, the only way to make sense of the distinction between the two rules is to say that CPR 3.1(7) is concerned with conferring the *power* to reconsider orders while CPR 29.9 is only concerned with the institutional aspect, i.e. in concentrating that power exclusively in the hands of the trial judge.

If this is correct, we are bound to conclude that CPR 29.9 and 28.7 express an acknowledgment of the advantage of concentrating all the procedural and managerial aspects of the trial in one judge. Put differently, by denying other judges a parallel power, these rules aim at utilising the advantageous position of the trial judge for deciding on the most efficient and effective ways to conduct the trial. To maximise this utility, we should allow a margin of freedom, even if narrow, for the trial judge to review orders on the merits, thus enabling him to adjust previously made orders to his own view of how the trial should proceed.

5.3 *Case Management*

The Court of Appeal observed in *Roult* that the exigency of case management orders may require a prompt decision. The exigency of the trial is of course more pressing. Consider a modified version of *Damage Control*: assume that the procedural judge allowed the applicant to adduce expert evidence although it was pertinent only to a tangential point, and that the respondent applied later on to the trial judge instead of appealing against that decision at the pre-trial stage. Should the trial judge be *completely* prohibited from reviewing the order which he anticipates causing unnecessary delay and additional costs while contributing only little to the final decision?

The answer should be, at the very least, ‘not always’. The thrust of the Lord Woolf Reform was to encourage judges to take an active role in managing cases.⁵⁶ Good case management, especially at trial, requires flexibility, and flexibility may sometimes require the judge to change previous orders as the case goes along.⁵⁷ In fact, flexibility of case management was signified as the hallmark of the multi-track (CPR PD 29 para 3.2(2)).

Moreover, it is arguable that viewing CPR 3.1(7) as a case management rule better explains the fact that it does not stipulate the criteria for its exercise. As mentioned earlier, we should always prefer an interpretation that makes our laws coherent to one that makes them inconsistent. Therefore, this silence should be attributed to the discretionary nature of this rule the exercise of which is so tight with the particular circumstances that it was presumably considered impractical and undesirable to articulate any general criteria beyond the general duty to further the overriding objective. Unless we see it that way, we are bound to conclude that the silence of CPR 3.1(7) with regard to the criteria for its application is a failure of the drafter, a vice rather than a virtue. This silence would also be contrary to Lord Woolf’s vision of a code of rules that is self-contained and straightforward, thus reducing the dependence of litigants on case law.⁵⁸

Lastly, the translation of the advantageous position of the trial judge into a power to review orders on the merits is reinforced by the longstanding principle that, as a rule, the appellate court should not interfere in the discretionary decisions made by first instance judges unless the latter misguided themselves in a point of law. This principle likewise reflects an acknowledgment that first instance judges should be allowed some freedom in managing their

⁵⁶ Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (London, HMSO 1995) 52–3.

⁵⁷ Furthermore, reviewing orders by trial judges is advantageous time-wise to an appeal. Professor Zuckerman (n 1, [22.42]) also recognises the need for CPR 3.1(7) to be flexible.

⁵⁸ Lord Woolf (n 56) 120. See also *Collier v Williams* (n 4) [1].

cases. Because the proposal offered herein is limited to procedural orders that are generally discretionary, it may be unjust to leave the unsuccessful party to an appellate court that will be less willing to examine the merits of a given order.

5.4 *The Overriding Objective*

Ideally, a standard for the exercise of CPR 3.1(7) should strike a balance between two competing sets of considerations. On the one hand, a rule which puts no or few constraints on the re-litigating of procedural matters would significantly delay the conclusion of cases and increase their costs. This would in turn undermine the efficiency of the enforcement of rights and the rule of law. Furthermore, if decisions were too easily challenged or reversed, it would undermine the legitimacy of the judiciary and the authority of its decisions.⁵⁹ Moreover, the frequent revision of procedural decisions may not necessarily be useful in terms contributing to the correctness of final judgments. On the other hand, denying any power to reconsider orders made in the course of litigation would be equally undesirable. As we have seen, under certain circumstances orders may need to be reconsidered in order to enhance the prospects of a correct final judgment or to ensure more economical and expeditious proceedings. The current case law does not strike the correct balance between these competing considerations because it adheres for the most part to an absolute rule that prevents the court from reviewing its own decisions on the merits.

6. CONCLUDING REMARKS

⁵⁹ The power to err is also an essential part of the authoritative nature of any power. See J Raz, *The Morality of Freedom* (Clarendon Press, Oxford 1986) 159.

This article has discussed the jurisprudence of CPR 3.1(7) and underscored its inconsistency. Furthermore, it has argued that CPR 3.1(7) should be seen as a potential tool for good case management, broadly defined, to which a certain degree of flexibility is essential. Therefore, trial judges should be allowed to review previously made trial-related orders insofar as this is required to further the overriding objective. That said, the rationales underlying this argument may also be relevant to procedural judges, especially when a court adopts the sensible practice of assigning a single procedural judge to a particular case. However, these rationales do not apply to procedural orders that are not trial-related, such as freezing orders, certain cost orders, and others. An elaborate discussion of the nature of each such order and its implication for the exercise of CPR 3.1(7) would be outside the scope of this article, but the circumstances outlined in *Lloyds Investment* may well serve as useful guidelines for exercising such a power in certain contexts, as long as they are not taken as strictly binding or exclusive.

An immediate objection to the proposal advanced in this article would be that it would allow parties a ‘second bite of the cherry’, create a disincentive for parties to deploy all their efforts to succeed in a single hearing, and add to the costs of the proceedings.⁶⁰ However, the proposed interpretation of CPR 3.1(7) does not grant a second bite at all. It merely affords judges the discretion to reconsider orders when they deem it necessary, a discretion which they lack at present. Furthermore, the sting is taken out of this objection by the alternative methods, recounted herein, which are available to courts to deal with unjustified applications. In any event, the risk of abuse is not unique to CPR 3.1(7); it exists with regard to any power under the CPR. Parties who submit frivolous 3.1(7) applications might presumably have applied (with equal frivolity) for permission to appeal in the absence of CPR 3.1(7).

⁶⁰ As Brooke LJ pointed out in a different context: ‘[t]here is a public interest in discouraging a party who makes an unsuccessful interim application from making a subsequent application for the same relief, based on material which was not, but could have been, deployed in support of the first application’: *Woodhouse v Consignia plc* [2002] EWCA Civ 275 [55].